Professional services provided by German & Swiss Nationals from their respected countries not taxable in India

Summary – The Delhi ITAT in a recent case of Poddar Pigments Ltd., (the Assessee) held that Independent professional services in nature of independent scientific services rendered by German and Swiss nationals from their countries to assessee Indian company was taxable in Germany and Swiss confederation, respectively

Facts

- The assessee-company was engaged in the business of manufacturing of master batches and engineering plastic compounds. It had paid technical fees to a German individual resident Dr. Thiele towards consultancy charges, who was a scientist engaged in developing new products by applying different chemistry of raw material used by the assessee for production of master batches and carried out chemical test for new products. According to the assessee, said payment for professional services fell under article 14 section 9(l)(vii) was not applicable as Article 14 prevailed over the Act.
- The Assessing Officer rejected the contention of the assessee stating that payment had been made for production process training for technical research agreement for development and production of new products and for supervision of erection and commissioning of Henshel High intensity mixer machine. Therefore, he held that such payment fell under the category of 'fees for technical services' under section 9(1)(*vii*) as well as article 12. He rejected assessee's contention that article 14 would cover the above activities as the services did not fall under the independent scientific, literary, artistic, educational or teaching activities. He, therefore, held that the assessee should have deducted tax at the rate of 10 per cent of the above sum and therefore, disallowance under section 40(*a*)(*i*) read with section 195 was made.
- On appeal, the Commissioner (Appeals) confirmed the disallowance:
- On appeal

Held

- According to section 9(1)(*vii*), the above income is income by way of fees for technical services as same is consideration for technical or consultancy services. Therefore, according to section 5(2) read with section 9(1)(*vii*), the above services are chargeable to tax under the Act. This has also been confirmed in the case of the assessee for assessment year 2007-08 by the Tribunal that such sum is chargeable to tax under section 9(1)(*vii*). It is also not the claim of the assessee that it is not chargeable to tax as per provisions of the Income tax Act. Hence, there is no doubt about chargeability of such sum under the Act.
- Further, as the recipient of the income is a resident of Germany, the provision of DTAA between India and Germany applies to him and hence, he is entitled to the beneficial treatment, if available,

under DTAA. Therefore, it is necessary to examine the provisions of articles of DTAA entered into by India and Germany and how the impugned income is treated therein. Claim of the assessee is that such income falls under article 14.

- The facts show that recipient of Income (Theile) is an individual resident of Germany. He has provided the professional services, which are in the nature of scientific services. He does not have any fixed base in India or he has not stayed for 120 days or more in India. Further, there is no dispute that the agreement is between an individual residing in state of Germany. Article 14 provides that income derived by an individual being resident of Germany, from the performance of professional services or other independent activities shall be chargeable to tax only in Germany, if he does not have any fix base regularly available to him in India for performing his activities and he has not stayed in India for a period or period exceeding 120 days in the relevant previous year. It is not the case of the revenue that Thiele has any fix base in India or he stayed for 120 days or more in India. Professional services under article 14(2) includes 'independent scientific services' activities. The assessee had submitted the copy of the various trials conducted by Thiele and placed various exchange of emails between the assessee and Thiele to effect that same are for the trials conducted for the production of Cationic Dyable PET MBs. On looking at those emails, it is apparent that Thiele is providing 'independent scientific services' to the assessee. In view of this, the services rendered by Thiele are 'independent personal services' covered by article 14. Therefore, it is clear that same is governed by article 14. In the immediately preceding year claim of article 14 was rejected by the Tribunal for the only reason that assessee could not prove with evidence that the payments fall under the category of 'Independent personal services' as per article 14. Such is not the case for this year as already mentioned. Assessee has pointed out exhaustive details to show that services provided by recipient of consideration falls in the category of 'independent scientific services'. In view of the fact that assessee has established in this year with conclusive evidences which are not controverted by revenue, it is established that Thiele, has provided professional services in the nature of 'Independent Scientific services' covered under article 14.
- The revenue is holding that services of the Thiele are covered under article 12 pertaining to 'royalty and fees for Technical Services'.
- According to article 12 if the 'Fees for Technical services' is arising in India but paid to resident of Germany than such income may be taxed in Germany. However, if he is beneficial owner of FTS, then such income may also be taxed in India and according to the laws of India but not more than 10 per cent of the gross amount. In the present case, the characterization of income of Thiele is correctly made as 'Fees for Technical services' and he is the beneficial owner of such consideration. Therefore, if the Income falls under article 12, then it is chargeable to tax at the rate of 10 per cent in India. Further, if the income as per article 14 is arising out of the fix base in India and if the services provider stays for 120 days or more in India, then such income shall be chargeable as per attribution rules pertaining to the activities or base in India. As Thiele does not have any fixed base and does not satisfy the condition of the minimum stay in India, his income cannot be taxed in India

but in Germany only as per article 14. From the above general analysis, it is clear on plain reading that the income is chargeable to tax under article 14 as well as article 12. It is also an established rule of the Interpretation of Treaties that specific or special provision in treaty shall prevail over and take precedence over the general ones. In the present case, the provision of article 14 is more specific as it applies specifically to 'professional services' provided by the 'Individual resident', however, article 12 provides for residents of foreign countries, therefore, article 12 is broader in scope and general in nature compared to article 14. Further the meaning of the Term 'fees For technical services' in article 12(4) excludes only income covered under article 15 *i.e.* 'Dependent personal Services' and not income covered under article 14. Therefore, if there can be many instances of such incomes derived by the individuals which can be characterized as 'Fee For Technical services' may also be covered under article 12 as well as article 14. Only distinguishing feature is that article 12 is an omnibus provisions for such income whereas article 14 is a specific provisions related to individuals. Further article 14 is similar to article 7 the only difference being that article 7 applies to all the enterprises of the States whereas the article 14 applies to individual only who earn such income from source State. Therefore, article 14 is a more specific article applicable to the impugned income of the non-resident, same shall be applied and not the general provision of article 12.

- With respect to the claim of the assessee that the non-resident German individual has not 'made available' the 'Fees For Technical services' to the assessed, and hence same shall not be taxed under article 12 at all, article 12 does not have 'make Available' clause for 'Fees For Technical Services'. Further, as claimed by the assessee, on perusal of protocol to DTAA of India and Federal Republic of Germany, it does not contain any 'Most favoured nation' clause. Hence, this argument of the assessee is rejected.
- Further on identical issue it has been decided in case of the assessee for assessment year 2007-08 that income of the non-resident is chargeable to tax as per Act within the provision of section 9(1)(*vii*). Further, with respect to applicability of Article 14 the assessee has failed to demonstrate that the services rendered by Thiele are independent scientific services and therefore, it was held to be covered by article 12. The assessee has produced enough evidences in the form of literature, various reports of different states of various development activities and exchange of several emails which shows that the services provided by the German national is an independent scientific services. However, the Commissioner(Appeals) while deciding appeal of the assessee has simply followed the decision of the Tribunal for assessment year 2007-08, without looking into the various evidences submitted by the assessee. In view of this, the payment made by the assessee to Thiele was chargeable to tax under section 9(1)(*vii*) but by virtue of article 14 income was chargeable to tax only in Germany. Therefore, assessee was not required to withhold any tax under section 195.