On-call advisory services provided to Indian customers in trouble-shooting couldn't be treated FTS: ITAT

Summary – The Delhi ITAT in a recent case of Ciena Communications India (P.) Ltd, (the Assessee) held that where services provided by US based AE to assessee's customers were in nature of on-call advisory services in trouble-shooting and such services were provided remotely and no on-site support services was provided, revenue received by US AE from assessee was not taxable in India

Facts

- The assessee was providing services of Annual Maintenance Contract ('AMC') and installation, commissioning services for equipments supplied by its group entities to customers.
- It was observed that assessee made several payments to foreign companies, on which no TDS was deducted technical on call assistance charges paid to AE for technical on-call assistance support received.
- The Assessing Officer made disallowance of Rs. 8.10 crores for non-deduction of TDS under section 195, read with section 40(*a*)(*i*) on payment so made.
- On appeal, the Commissioner (Appeals) upheld addition made by the Assessing Officer.
- On appeal to the High Court:

Held

- The assessee is providing annual maintenance in respect of equipments manufactured by US AE. In respect of the same, assessee entered into an agreement with AE dated 1-4-2010, whereby technical on-call advisory services are obtained from AE, in case of problems of outrage, emergency, technical support or system compromised on the basis of priority of cases. Under the agreement, AE is required to provide support services in case of critical/emergency issues to customers of assessee, through call centres remotely. Assessee in view of such services rendered made payments to AE, on which no TDS was deducted, as according to assessee, there is no requirement of withholding tax on such payments. It has also been submitted that AE do not have a PE in India, and therefore is not taxable under India-US DTAA.
- The Assessing Officer made addition in view of amendment to section 40(*a*)(*i*), read with article 26 of India-US DTAA. The Assessing Officer also held that the services rendered by non-resident AE made available technical knowledge, experience or skill and know-how of the process.
- Section 9 provides instances of income under clause (*vii*) of sub-section (1) of that section envisages that income by way of 'fee for technical services' (FTS) payable by resident to a non-resident shall be deemed to accrue or arise in India. *Explanation* 2 to section 9(1)(*vii*) defines the term 'fee for technical services' as consideration for rendering of any 'managerial, technical or consultancy

services' but does not include consideration for construction, mining or any other similar project undertaken.

- Section 90(2) provides that where the provisions of a tax treaty are applicable to an assessee, then such assessee would be governed by either under provisions of the Act or the applicable tax treaty, whichever is more beneficial.
- AE is a company incorporated in US and accordingly, provisions of Agreement for Avoidance of Double Taxation (DTAA) between India and USA would apply in the instant case. Therefore, AE would be governed by provisions of the Act or India-US DTAA, whichever is more beneficial.
- Article 12 of the India-US treaty provides that 'Royalties and fee for included services' arising in India and paid to a resident of USA may be taxable in India at the rates specified in the said article.
- As per article 12(4) of India-US DTAA, fee for included services means, any consideration received in connection with rendering of technical or consultancy services: which are ancillary and subsidiary to application or enjoyment of right in any patent, trademark, design or model, plan or secret formula or process or on any information concerning industrial, commercial or scientific experience; or which make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or design.
- Provisions of India-US treaty provide for a restrictive meaning of 'fee for included services' *vis-a-vis* meaning of 'Fee for Technical Services' (FTS) under the Act, inasmuch as, only those technical/consultancy services which are ancillary and subsidiary to application/enjoyment of right, property or information or which 'make available' technical knowledge, skill, know how, process etc. would be liable to tax.
- Analysis of MOU to India-US DTAA, clarifies that in order to fall within ambit of article 12(4), mere rendering of services that involves technical knowledge, skill etc. would not be sufficient. It contemplates that the person utilizing such services should be able to make use of technical knowledge, skill etc., on his own, without help of service provider in future.
- Adverting to facts of case before us, service rendered by AE to assessee is as per agreement dated 1-4-10. According to the agreement, services provided by AE to assessee are in nature of assistance in troubleshooting, isolating the problem and diagnosing related trouble and alarms and equipment repair services wherein the equipments will be shipped to US by assessee as and when required. It has been agreed between the parties that AE would be providing such services remotely and no on-site support services would be provided to customers of assessee.
- It appears from the above description of services rendered by AE that there is use of technical knowledge and/or skill, utilised by AE qualifies as 'fee for technical services', as defined under *Explanation* 2 to section 9(*i*)(*vii*).
- As India has double taxation avoidance agreement with US, and article 12(4) of India-USA DTAA deals with 'fee for technical services', to determine taxability of income received by AE for services rendered in India, the services rendered should satisfy the requirements under article 12(4), which

requires technical knowledge, experience, skill etc., to be 'made available" to the recipient of such services.

- On a careful perusal of the agreement dated 1-4-2010 between AE and assessee, it appears that services rendered therein by AE does not satisfy the make available requirement as per article 12(4). In the facts of present case issue is, whether, services rendered by AE, on call, from remote place would not amount to providing technical services, to cover it within the ambit of *Explanation* 2 to section 9 (1)(*vii*).
- Thus, the revenue received by AE in view of services rendered to assessee's customer is not taxable in India as per article 12(4) of India US DTAA, applicability of section 195 is not possible. Therefore, section 40(*a*)(*i*) disallowance is uncalled for.