

FTS should be taxable as per Article 7 in case there is no FTS clause in India-Philippines DTAA: ITAT

Summary – The Bangalore ITAT in a recent case of IBM India (P.) Ltd., (the Assessee) held that There being no provision in DTAA to tax fees for Technical Services, payment made by assessee to avail technical service of its AE, would be taxed as per article 7 but in absence of PE in India, said income was not chargeable to tax in India

Facts

- The assessee company (IBM - India) was engaged in the business of selling computers, software, besides rendering software development and information technology services and lease financing activities of its products. It was part of the IBM group that had entities across the world. IBM Group had policy of sending employees of its group in one country on deputation to another group in another country on assignment.
- IBM India required services of expatriate employees of the IBM overseas group entities for its business projects by IBM India and deducted tax at source under section 192 on the salary paid to the seconded employees. IBM India had to reimburse the salary cost of the expatriate employees to the concerned IBM overseas entity. At the time of making payment of such reimbursement, no taxes were deducted at source by IBM India in respect of reimbursements made to IBM Overseas companies as, according to IBM India, the same was in the nature of cost-to-cost reimbursements and no element of income was involved.
- The Assessing Officer Dy. Commissioner noted that IBM overseas entities continued to be the employer in respect of the deputed/assigned employees and continued to pay their salaries. That IBM India only reimbursed the salary costs of the concerned expatriate, deputed employee to the concerned IBM Overseas entity. Therefore, the sum reimbursed was not salary paid by IBM India to the expatriate employees but was FTS paid to the IBM Overseas entity which was taxable in India and, therefore, IBM India ought to have deducted tax at source on the reimbursement made to IBM overseas entity. He passed an order under section 201(1) and section 201(1A) holding that reimbursements made to IBM overseas companies would be covered under the definition of 'FTS' as per the provisions of section 9(1)(vii) and also as per the provisions of the Treaty and, consequently, treated IBM India as an 'assessee-in-default' under the provisions of section 201(1).
- The Commissioner (Appeals) confirmed said order.
- On appeal:

Held

- IBM Philippines received the monies in the course of their business and did not have PE in India and, therefore, the receipt in question cannot be brought to tax under article 7 of DTAA as well in the absence of the provision in the DTAA to tax Fees for Technical Services, the same would be taxed as per the Article 7 applicable for business profit and in the absence of PE in India, the said income is

not chargeable to tax in India. Consequently, there is no merit in the appeals by the revenue on this issue.