‘Cannot tax unpaid fee for tech services’

An unpaid fee for technical services cannot be taxed even if the services have been availed by the Indian branch, according to a recent order by the Income Tax Appellate Tribunal. The ITAT further held that income cannot be considered remitted in a case in which the RBI approval had not been obtained. In the income-tax parlance "fees for technical services" is a consideration for the rendering of any managerial, technical or constancy services, but does not include consideration for any construction, assembly, mining or any like project.

In this case, the tax payer company Booz Allen Hamilton(India) is the Indian branch of the global consulting group. The taxpayer company availed certain technical services from overseas companies of Booz, located in Germany, Indonesia, South East Asia, Singapore and UK.

The Indian branch had incurred losses and therefore could not remit the fees for technical services (FTS) and therefore, never applied for necessary approval required under Foreign Exchange Regulation Act ('FERA') to remit FTS to Booz Overseas Companies. However, the income-tax department levied a tax on the FTS that was not paid to the non-resident companies.

The income-tax department argued that since the taxpayer company was following mercantile system of accounting, the FTS had accrued notwithstanding the non-receipt of the RBI approval. The department also pointed out that it was permissible to obtain RBI approval subsequently and cited the Supreme Court judgment in the case of LIC of India vs Escorts.

By not applying for permission from RBI to remit FTS to group entities overseas, the company was avoiding paying tax in India, the I-T department alleged. The main contention of the company was that since RBI's permission was not taken for remittance of the amount, amount payable to Booz's overseas companies could not be construed as income accrued to these overseas companies. The taxpayer company, represented by Sunil Lala, partner, KPMG, cited the orders of Bombay High Court in case of CIT v Kirloskar Tractor (231 ITR 849) and Dorr-Oliver BSE -0.85 % (India) v CIT (234 ITR 723).

Since the remittances had not been made, the same could not be taxed as FTS as per the specific language used in the relevant tax treaties, the taxpayer company argued.

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