Payment received from Freight/Logistic Support Service cannot be treated as Royalty under IT Act, 1961

The Income Tax Appellate Tribunal, New Delhi (**"the Tribunal"**) in the case of ***M/s. Expeditors International Washington, Inc. v. ACIT (ITA No. 1464/Del/2022)*** dated October 31, 2022 held that payment received in India for providing logistics support services cannot be treated as royalty under Section 9(1)(vi) or fees for technical services under section 9(1)(vii) of the Income Tax Act, 1961 (**"the IT Act"**).

Facts:

M/s. Expeditors International Washington, Inc. (**"the Appellant"**) is a non-resident corporate entity incorporated in the United States of America ("**USA**"), having headquarters in Seattle, Washington. The Appellant is a global logistics service provider, carrying operations in various segments, such as airfreight, ocean freight and ocean services, vendor consolidation, cargo insurance, purchase order management and customized logistics information.

The Appellant declared Rs. 76,39,17,441/- as income for the financial year 2017-18 in the return of income filed on November 13, 2018.

In course of Assessment, the Assessing Officer (**"the AO"**) noticed an amount of Rs. 5,68,73,38,333/- was received by the Appellant from India towards sale of logistics services which was not included in taxable income by the Appellant. AO issued a draft assessment, against which the Appellant submitted reasons.

Appellant was of the view since the services were provided from outside India, hence not taxable in India.

The AO did not agree with submission of the Appellant and was of the view that the amount received by the Appellant was in the nature of Fee for Technical Service ("**FTS**")/Fee for

Included Services("**FIS**") under Section 9(1)(vii) of the The IT Act and Article 12(5) of India-USA Double Taxation Avoidance Agreement (**"the DTAA Treaty"**). Therefore, liable to be tax in India.

The second issue was regarding reimbursement of global account management charges amounting to Rs. 6,22,40,433/- which were not added by the Appellant while computing the taxable income as per the IT Act.

The AO was of the view since the global account managers are instructing and coaching local account teams throughout the tenure of the project. The nature of the services performed by global account manager results in transferring of technical-know-how and skills for which global account manager has received payments and hence, the amount received is in the nature of FTS/FIS and therefore, the same is taxable in India both under the IT Act and the DTAA Treaty.

The third issue was regarding reimbursement of lease line charges amounting to Rs. 1,46,54,597/- which were not added by the Appellant while computing the taxable income as per the IT Act.

The AO was of the view that such lease line charges fall under the meaning of 'process' and hence is in the nature of royalty under Section 9(1)(vi) of the IT Act read with Article 12 of the DTAA Treaty. Therefore, liable to be tax in India.

Further, the AO was of the view, since the payment are of the nature of royalty, the Appellant was required to deduct tax at source (**"TDS"**). Since, TDS was not deducted, therefore, Appellant was not allowed to claim expense of the said amount under Section 40(a)(i) of the IT Act.

Subsequently, the AO issued a draft assessment order by adding the abovementioned amounts to the income of the Appellant.

The Appellant raised objection regarding additions of amount to be taxable income before Dispute Resolution Panel (**"DRP"**). However, DRP upheld the additions by relying on their previous decisions in Appellant's own case in preceding Assessment years. The AO passed the final assessment order under Section 143(3) of the IT Act in pursuance of the directions of the DRP (**"the Impugned Order"**) and added the abovementioned amount to the income of the Appellant.

Aggrieved by the impugned Order, the Appellant filed an appeal to the Tribunal.

Issues:

1. Whether the logistics services which are provided from outside India can be charged to tax in India?
2. Whether the reimbursement of global account management charges can be charged to tax in India?
3. Whether the reimbursement of lease line charges are in the nature of royalty and liable to be tax in India?

Held:

The Tribunal held that:

- For the issue related to logistics services, the Tribunal in the Appellant own case, for the Assessment year 2010-11 to 2015-16 and 2017-18, has held that logistics services cannot be treated as FTS/FIS either in The IT Act or the DTAA Treaty. Since, there is no change in factual or legal position in the present case the Tribunal followed its own judgement in Appellant's case for preceding Assessment years and deleted the addition made by AO of Rs. 5,68,73,38,333/-.
- For the issue related to reimbursement of global account management charges the Tribunal held that the issue was covered by decision of Tribunal in number of decisions

in preceding Assessment Year. Due to similarity in facts and legal position the Tribunal respectfully followed the decision of Co-ordinate benches and deleted the additions made by the AO of Rs. 6,22,40,433/-.

- For the issue related to reimbursement of lease line charges. The Tribunal held that the issue has been decided in favor of the Appellant in Assessment Year 2011-12 to 2015-16 and 2017-18, the Tribunal relied on the ITA No. 1904/Del/2017 & Others dated January 05, 2022 where it was held that lease line charges are not in nature of royalty and not liable to be taxable in India. The Tribunal deleted the additions made by the AO of Rs. 1,46,5,597/-.
- Further, the Tribunal held that since the payment was not in the nature of the royalty, the said amount cannot be disallowed under Section 40 (a)(i) of the I.T Act.

Relevant Provisions:

Section 9(1)(vi) and Section 9(1)(vii) of the IT Act

(1) The following incomes shall be deemed to accrue or arise in India :-

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).

(vii) income by way of fees for technical services payable by-

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Section 40(a)(i) of the IT Act

Notwithstanding anything to the contrary in sections 30 to 1[38], the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",-

(a) in the case of any assessee-

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,-

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid 22[on or before the due date specified in sub-section (1) of section 139

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purposes of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the payee referred to in the said proviso;

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