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ITAT Rules Management Support Services Rendered by Assessee Not Taxable as FTS; License and Service Agreement Independent of Each Other

Facts

The assessee was a non-resident limited liability company incorporated under the laws of Singapore and was a tax resident of Singapore. It had two Associated Enterprises (AEs) in India, being, Global India School Education Services Ltd. ('GISES') and GIIS K 12 Education Pvt. Ltd. The assessee had entered into two separate Licensing Intellectual Property (IP) agreements with the Indian AEs, which comprised of licensing of GIIS brand name, proprietary IT system and such services. Additionally, the assessee had entered into one more agreement with GISES only for providing intra group services, such as, legal, finance, accounting etc. to streamline business processes, ensure compliance and promote cost-efficiencies and so forth. Under the Licensing IP Agreement, the assessee had been granted the license for access to trade names and "My GIIS" portal to the Indian AEs. Under the said agreement, the assessee also provided intellectual property rights and proprietary specialized software.

In accordance with the terms with Licensing IP Agreement, the assessee received license fee of INR. 5,38,42,826 from both the Indian AEs, treated as royalty income and offered to tax in the assessment year. The assessee also earned revenue of INR 6,43,50,748 from GISES towards provision of management support services. However, the assessee did not offer this amount to tax in India as it was in the nature of business income and in the absence of PE was not taxable.

During the assessment proceedings, the Assessing Officer (AO) held that not only the nature of services rendered was managerial, technical, and consultancy services, but such services were ancillary and subsidiary to the use or right to use of brand name, and other intellectual property rights. Thus, he held that the fee received would qualify as Fees for Technical Services (FTS) under Article 12(4)(a) of India – Singapore Double Taxation Avoidance Agreement (DTAA). Consequently, the AO framed the draft assessment order against which objections were raised by assessee before the Dispute Resolution Panel (DRP). However, the DRP dismissed the same, resulting in the passing of the final assessment order.

Therefore, the matter reached before the Tribunal for adjudication.

Ruling

The Hon'ble Tribunal ruled in favor of the assessee. It opined that upon a critical analysis of both the agreements it is evident that the services rendered under the service agreement were unconnected to the License Agreement. It was further observed that though some of the marketing activities under the service agreement may have resulted in sustaining the trademark or brand name, however, that by itself was not enough to conclude that the service rendered under the service agreement were ancillary and subsidiary to the use or right to use of trademark or brand name software.

Additionally, the assessee had entered into service agreement with only one of the AEs, whereas no such agreement had been executed with the other AE in India. Thus, the Tribunal noted that logical conclusion would be that there was no connection between the license agreement and service agreement.

Source: Tribunal Delhi, in Global Schools Holdings Pte. Ltd. Singapore vs. ACIT (Int tax) ITA No. 2311/Del/2022 dated November 21, 2023.

ITAT Rules TDS Not Deductible on Notional Profit Attributed to LG Korea's PE; Assessee Not Expected to do Impossible Act

Facts

The assessee was a resident corporate entity engaged in trading, assembly, manufacturing, marketing and sales of electronics and home appliances and was a wholly owned subsidiary of L.G. Electronics, Korea.

On 24.06.2010, a survey operation under section 133A of the Act was conducted in the business premises of the assessee to verify the compliance with Tax Deducted at Source (TDS) provision wherein certain papers and documents were impounded. Based on statements recorded from certain expatriate employees, the AO formed a belief that LG Korea and other associated companies had a business connection and Permanent Establishment (PE) in India. As such, he held that the income derived by the parent company and other group entities was taxable as business income in India and accordingly, the assessee was liable to deduct tax at source in terms of section 195(1) of the Act while making payments to them. Since, the assessee had failed to deducted tax at source on such payments, the AO initiated proceedings under section 201 of the Act holding the assessee as an assessee in default.

The assessee preferred Writ Applications before the Hon'ble Allahabad High Court. While disposing of the said Writ Applications, the Hon'ble High Court set aside the orders passed by the AO, by holding them to have been passed in violation of Rules of Natural Justice. The Hon'ble High Court further directed that the AO may issue fresh show-cause notice to the assessee and decide the issue after providing all the materials to the assessee. Resultantly, the AO issued fresh show-cause notices under section 201 on 12.07.2011, to which the assessee submitted its reply on 17.08.2011.

It was after almost four years, the AO issued another show-cause notice on 09.01.2015, in response to which the assessee filed a detailed reply objecting to the initiation of proceedings, firstly as being barred by limitation and thereafter on merits. The objections of the assessee, however, did not find favour with the AO and ultimately, he passed orders under section 201(1)/201(1A) of the Act for assessment years 2005-06 to 2010-11, holding the assessee as an assessee in default.

Against these orders passed the assessee preferred appeals before learned first appellate authority, inter alia, on the ground that the orders were barred by limitation. However, all the contentions of the assessee were dismissed, except the submission made with regard to attribution of profit to the PE only to the extent of 20% markup over 50% of the salary paid to expatriate employees.

Consequently, the demand raised for assessment years 2005-06 to 2011-12 under section 201(1)/201(1A) was arrived at INR. 12,36,44,260, while giving effect to the directions of learned first appellate authority.

Ruling

The Hon'ble Tribunal favored the assessee. It observed that the in the case of payee entities, the DRP held that out of all the non-resident group entities only LG Korea held a PE in India. Furthermore, it was perceived that the basis of attribution of profit to LG Korea was purely notional and the assessee had not made any direct payment to the LG Korea towards the salary cost of expatriate employees. Thus, the tribunal opined that no liability arose on the assessee to deduct tax on such notional payment.

Thus, it was held that when the basis of attribution of profit to the PE was a notional income, that too, based on a methodology adopted by DRP in case of payee, the assessee could not have been expected to perform an impossible act of computing TDS on a notional payment, a part of which, was to be attributed towards profit of PE of LG Korea. In support of its observations, the Tribunal relied on a case of similar nature adjudged by the Hon'ble Delhi High Court in Samsung India Electronics Pvt. Ltd. Vs. DCIT [2014] 364 ITR 103 (Del).

Source: Tribunal, Delhi, in M/s. LG Electronics India Ltd. vs. ITO (TDS), International Taxation vide ITA No. 7932/Del/2018 dated November 21, 2023.

ITAT Holds Revenue Failed to Establish Assessee as Paper Company; Cannot Dismiss the Valid TRC on Such Basis

Facts

The assessee was a non-resident corporate entity incorporated under the laws of Mauritius and a tax resident of Mauritius which held a valid Tax Residency Certificate (TRC) for the year under consideration.

It was observed by the AO that for the AY under dispute the assessee has filed a return of income on 29.09.2016 and such return was not subjected to scrutiny. Subsequently, information was received from Income Tax Officer, Ward-2(2)(1), International Taxation, New Delhi that an Indian company, M/s. Logix Soft-tel Pvt. Ltd., had remitted an amount of INR 162 crores to the assessee towards purchase of shares of M/s. Noida Cyber Park Pvt. Ltd. without withholding any tax.

The AO verified the records and found that the assessee had been continuously claiming loss in the past few assessment years. Accordingly, the AO reopened the assessment under section 147 of the Act. In response to the notice issued under section 148 of the Act, the assessee filed its return of income on 29.04.2021 declaring net long term capital loss of INR.33,34,167.

The AO found that the assessee had received total sum of INR. 407,32,20,235 towards sale of shares of four Indian companies. However, the assessee had claimed long term capital gain in return as it had computed the capital gain in respect of sale of shares by applying the provisions of first proviso to section 48 of the Act read with Rule 115A. As such the AO held that the assessee had not followed the provisions contained under section 112(1)(c)(iii) of the Act, which specifically debarred the benefits given under the second proviso to section 48 of the Act.

Consequently, the AO held that the assessee had net long-term capital gain of INR 141,28,52,811, which was taxable in India. Additionally, he also rejected assessee's claim of exemption under Article 13(4) of India – Mauritius DTAA reasoning that the assessee is a mere paper company created in Mauritius to avail treaty benefits. Accordingly, he framed the draft assessment order after allowing unabsorbed long-term capital loss pertaining to assessment year 2012-13, by adding back the net capital gain amounting to INR 122,42,10,688. The assessee raised objections before the DRP which dismissed these objections.

Ruling

The Hon'ble Tribunal ruled in favor of the assessee by partly allowing its appeals. The tribunal observed that in terms with its objects, the assessee had invested in shares of various Indian companies through Foreign Direct Investment (FDI). For the relevant year, the assessee had sold shares of four Indian companies, including the shares of Noida Cyber Park Pvt. Ltd.

Moreover, the tribunal held that the basis on which the lower assessing authorities denied the benefit of the DTAA to the assessee were unacceptable. It was noted that the assessee had submitted enough evidence to establish its residential status, including the valid TRC. The Tribunal relied on the CBDT Circular no. 789 dated 30.04.2000 as well as the ration laid by the Hon'ble Supreme Court in the case of Union of India vs. Azadi Bachao Andolan. Additionally, the tribunal held that in a recent decision of Hon'ble Jurisdictional High Court in case of Blackstone Capital Partners (Singapore) VI FDI Three PTE. Ltd., it had been held that once the assessee holds a valid TRC, the Departmental Authorities cannot go behind it to question residential status.

Therefore, the tribunal opined that the revenue had failed to establish any proof regarding the assessee being a paper company and allowed the assessee the benefit of the DTAA.

Source: Tribunal, Delhi, in CPI India Ltd. vs. ACIT vide ITA No. 382/Del/2023 dated November 21, 2023.

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