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### Payment for satellite up-linking and telecasting programmes not royalty or fees for technical services

#### In brief

In a recent ruling, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal), in the case of Channel Guide India Ltd.[1] (the assessee), held that consideration for the facility of satellite up-linking and telecasting programmes cannot be treated as an income chargeable to tax in India in the hands of non-residents under sections 9(1)(vi) or 9(1)(vii) of the Income-tax Act, 1961 (the Act). Therefore, there was no requirement to withhold tax under section 195 of the Act and thus the provisions of section 40(a)(i) of the Act, under which such payment would be disallowed for not withholding tax, cannot be invoked.

#### Facts

- The assessee is a company incorporated in, and is a tax resident of, India.
- The assessee entered into an agreement with Shan Satellite Public Co Ltd (SSA) incorporated in, and is a tax resident of Thailand, for satellite up-linking and telecasting programmes. The sum charged for this was claimed by the assessee as an expenditure on account of broadcasting and telecasting. In addition, consultancy charges were also paid by the assessee to SSA.
- The assessing officer (AO) considered the payments made by the assessee to SSA as fees for consultancy charges within the meaning of fees for technical services (FTS) as defined in Explanation 2 of section 9(1)(vii) of the Act. The AO held that there was failure on the part of the assessee to withhold tax under

[1] Channel Guide India Ltd. *v.* ACIT [TS-662-ITAT-2012(Mum)]

section 195 of the Act from the payment made to SSA and thus the provisions of section 40(a)(i) of the Act were attracted.

- On appeal, the Commissioner of Income-tax (Appeal) (CIT(A)) upheld the AO's contentions. The CIT(A) held that the assessee company had availed a highly sophisticated technical service from SSA and the payment for availing such services was chargeable to tax under section 9(1)(viii) of the Act read with Explanation 2 thereto. The CIT(A) also held that the assessee could uplink or downlink the signals of its programmes for broadcast only by using the scientific equipment owned by SSA and the amount paid for such use was alternately chargeable to tax in India as royalty as per Article 12 of the Double Taxation Avoidance Agreement entered between India and Thailand (tax treaty).

## Issue

- Whether consideration for broadcasting and telecasting as well as consultancy charges constitute royalty or fees for technical services under the provisions of the Act and tax treaty with Thailand?

- If yes, whether the provisions of section 40(a)(i) of the Act are attracted for non-withholding of tax under section 195 of the Act?

## Assessee's contentions

- The payments made to SSA Thailand constituted business income earned by it and in the absence of a permanent establishment (PE) of SSA in India, this income was not chargeable to tax in India in accordance with Article 7 of tax treaty with Thailand.

- The assessee was neither in possession of the equipment nor had control over it. All the risks in relation to the equipment used in providing services were borne by SSA. Therefore, payments for digital channel service were not in the nature of payments for use of or right to use any industrial, scientific or commercial equipment and do not qualify as royalty. Nor can the payment be construed as payment for the provision of any industrial, commercial or scientific experience, since it does not involve imparting any technical know-how by SSA to the assessee.

- The assessee relied on the Tribunal decision in the assessee's own case where it was held that such payments were not in the nature of royalty or FTS. It also relied on the judgement of the Delhi High Court in the case of Asia Satellite Telecommunication Co. Ltd[2].

- The tax treaty with Thailand does not provide for specific articles dealing with taxation of FTS. Thus the taxability of such payments would be governed by Article 7 read with Article 5 of the tax treaty with Thailand. The decision of the Delhi High Court in the case of Tekniskil (Sendirian) Berhard[3] and the Special Bench decision of the Tribunal in the case of Siemens Aktiengesellschaft[4] were relied upon. Since SSA did not have a PE in India, these payments were not chargeable to tax in India.

- The decision of the Tribunal in the case of B4U International Holdings Ltd.[5] was relied on for the contention that retrospective amendment in the definition of royalty cannot be applied unless corresponding amendment is made in the relevant treaty.

- Alternately, the assessee also contended that if it is considered a case of disallowance under section 40(a)(i) of the Act, once it is established that the non-withholding was for a *bona fide* reason, no such disallowance can be made as held by the Bombay High Court in the case of Kotak Mahindra Finance Ltd[6].

## Revenue's contentions

- The issue has been examined by the Tribunal in the case of the recipient by

[2] Asia Satellite Telecommunications Co. *v.* DIT [2011] 332 ITR 340 (Del)
[3] Tekniskil (Sendirian) Berhard *v.* CIT [1996] 222 ITR 551 (AAR)
[4] Siemens Aktiengesellschaft *v.* ITO [1987] 22 ITD 87 (Mum)
[5] B4U International Holdings Ltd. *v.* DCIT [TS-362-ITAT-2012(Mum)]
[6] CIT *v.*Kotak Mahindra Finance Ltd. [2004] 265 ITR 119 (Mum)

relying on the distinct decision of Asia Satellite Telecommunication Co. Ltd. (above). Emphasising on the procedure for monitoring the performance of uplinking or downlinking, the revenue department submitted that the benefits or services availed by the assessee were not possible without control of the transponder being with the assessee. The expression process used in section 9(1)(vi) of the Act has now been defined retrospectively by inserting Explanation 6.

- No such propositions were propounded in any of the decisions cited by the assessee that in the absence of any clause in the tax treaty with Thailand dealing with FTS, it is to be treated as business profits.

- The revenue department contended that the arguments put forth in the present appeal were not made before the Tribunal in the case of B4U International Holdings Ltd (above).

- In the absence of the FTS clause in the tax treaty with Thailand, the case gets covered by Article 22 of the tax treaty with Thailand as other income. The decision of the Authority for Advance Rulings in the case of XYZ[7] was relied on.

## Tribunal observations and ruling

- Relying on the decision of the Delhi High Court in the case of Asia Satellite Telecommunication Co. Ltd. (above), wherein it was conclusively held that while providing transmission services to its customers, the control of the satellite or the transponder always remains with the satellite operator and the customers are merely given access to the transponder capacity. Since the customer does not utilise the process or equipment involved in its operations, the charges paid cannot be treated as royalty. It was held that the amount received by SSA is not royalty under section 9(1)(vi) of the Act. It also held that it is not in the nature of FTS under section 9(1)(vii) of the Act.

- The payment for the provision of the facility constitutes business income of SSA and when it is not in the nature of royalty or FTS, it is covered by Article 7 of the tax treaty with Thailand. Thus, there is no need to take recourse to Article 22 of the tax treaty with Thailand which covers only the items of income not covered expressly by any other article of the tax treaty with Thailand.

- The decisions of the Supreme Court in the case of Krishnaswamy S.PD and Another[8] and Sterling Abrasive Ltd[9] (Ahmedabad Tribunal) were relied upon where emphasis was placed on the legal maxim *lex non cogit ad impossiblia* meaning that the law cannot possibly compel a person to do something which is impossible to perform.

- The consideration paid by the assessee was not taxable in India in the hands of SSA either under section 9(1)(vi) or section 9(1)(vii) of the Act as per the legal provisions prevalent at the time. Thus, it was held that the assessee was not liable to deduct tax at source from the amount paid to SSA and no disallowance of the amount can be made by invoking the provisions of section 40(a)(i) of the Act in the hands of assessee.

## PwC observations

The Tribunal has reiterated the position held by the Delhi High Court and addressed the main issue that fees for broadcasting and telecasting fee would not be royalty under section 9(1)(vi) of the Act even after the retrospective amendment in the Act. The Tribunal has observed that the assessee cannot be held liable to deduct tax at source relying on subsequent amendments made in the Act with retrospective effect. This decision comes as a relief for assessees facing disallowance on account of non-withholding of taxes by relying on provisions of the Act prevalent at the relevant time.

[7] XYZ, *In re* [TS-188-AAR-2012]

[8] Krishnaswamy S.PD and Another *v.* UOI and Ors. [2006] 281 ITR 305 (SC)
[9] Sterling Abrasive Ltd *v.* ACIT [2011] 140 TTJ 68 (Ahmd – Tribunal)

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