



Dismantling and seaworthy packing of machinery is ‘contract of work’ and not ‘contract of service’ and therefore such services are not taxable as fees for technical services

Background

Recently, the Kolkata Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Emami Paper Mills Ltd.¹ (the taxpayer) held that dismantling and sea worthy packing of paper mill machinery is ‘contract of work’ and not ‘contract of service’ and therefore such services are not taxable as Fees for Technical Services (FTS).

Facts of the case

- The taxpayer had entered into an agreement/contract with a company namely POL-INOWEX SA of Poland for dismantling and seaworthy packing of paper mill machinery, and stuffing of all items into containers and loading the containers on trucks which was acquired by the taxpayer company from HolmensBruk AB, a company from Sweden.
- The taxpayer remitted the amount to a non-resident company of Poland without deducting taxes. A show cause notice under 201 of the Income-tax Act, 1961 was issued to the taxpayer.
- The Assessing officer held that the payments made to the non-residents for dismantling and sea worthy packing of paper mill machinery are payments made for FTS and are taxable under the Act, in view of the specific provisions of Section 5(2)(b) read with Section 9(1)(vii)(c) of the Act, as well as the provisions laid down under Article 13(4) of the India-Poland tax treaty.

- The Commissioner of Income-tax (Appeal) [CIT(A)] deleted the addition made by the AO.

Tribunal’s ruling

- There is a difference between ‘Contract of work and ‘Contract of service’. The two words convey different ideas. In the ‘Contract of work’ the activity is predominantly physical; it is tangible
- In the activity referred as ‘Contract of service’, the dominant feature of the activity is intellectual, or at least, mental.
- Certainly, ‘Contract of work’ also involves intellectual exercise to some extent. Even a gardener has to bestow sufficient care in doing his job; so is the case with a mason, carpenter or a builder. But the physical (tangible) aspect is more dominant than the intellectual aspect.
- In contrast, while rendering any kind of ‘service’, the intellectual aspect plays a dominant role.
- In the case under consideration, the scope of work mentioned in the agreement clearly explains that it is ‘contract of work’ to dismantle the machinery; therefore, it is not a ‘contract of service’. Dismantling of machinery does not require any technical services.
- Therefore, the payment by the taxpayer is not for technical services and the taxpayer was not liable to deduct tax at source.

¹ ITO v. Emami Paper Mills Ltd. ((ITA No.642/Kol /2016) - www.itatonline.org

Our comments

In the instant case, the Tribunal has provided a difference between the 'contract of work' and 'contract of service'. The Tribunal reiterated an important principle that in the 'contract of work', the activity is predominantly physical; it is tangible. However, in the 'contract of service', the dominant feature of the activity is intellectual, or at least, mental. The Tribunal observed that dismantling services are 'contract of work' which do not require any technical services. Thus, such services are not FTS in nature.

It is important to note that the definition of FTS in Section 9(1)(vii) of the Act specifically excludes consideration for any construction, assembly, mining or like projects undertaken by the recipient.



www.kpmg.com/in

Ahmedabad

Commerce House V, 9th Floor,
902 & 903, Near Vodafone House,
Corporate Road,
Prahlad Nagar,
Ahmedabad – 380 051
Tel: +91 79 4040 2200
Fax: +91 79 4040 2244

Bengaluru

Maruthi Info-Tech Centre
11-12/1, Inner Ring Road
Koramangala, Bangalore 560 071
Tel: +91 80 3980 6000
Fax: +91 80 3980 6999

Chandigarh

SCO 22-23 (1st Floor)
Sector 8C, Madhya Marg
Chandigarh 160 009
Tel: +91 172 393 5777/781
Fax: +91 172 393 5780

Chennai

No.10, Mahatma Gandhi Road
Nungambakkam
Chennai 600 034
Tel: +91 44 3914 5000
Fax: +91 44 3914 5999

Delhi

Building No.10, 8th Floor
DLF Cyber City, Phase II
Gurgaon, Haryana 122 002
Tel: +91 124 307 4000
Fax: +91 124 254 9101

Hyderabad

8-2-618/2
Reliance Humsafar, 4th Floor
Road No.11, Banjara Hills
Hyderabad 500 034
Tel: +91 40 3046 5000
Fax: +91 40 3046 5299

Kochi

Syama Business Center
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682019
Tel: +91 484 302 7000
Fax: +91 484 302 7001

Kolkata

Unit No. 603 – 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata 700 091
Tel: +91 33 44034000
Fax: +91 33 44034199

Mumbai

Lodha Excelus, Apollo Mills
N. M. Joshi Marg
Mahalaxmi, Mumbai 400 011
Tel: +91 22 3989 6000
Fax: +91 22 3983 6000

Noida

6th Floor, Tower A
Advant Navis Business Park
Plot No. 07, Sector 142
Noida Express Way
Noida 201 305
Tel: +91 0120 386 8000
Fax: +91 0120 386 8999

Pune

703, Godrej Castlemaine
Bund Garden
Pune 411 001
Tel: +91 20 3050 4000
Fax: +91 20 3050 4010

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The KPMG name and logo are registered trademarks or trademarks of KPMG International.

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.