KPMG

#KPMG josh

TAX FLASH NEWS

11 March 2020

Payments to foreign attorneys for rendering services in the field of IPRs are FTS under Section 9(1)(vii) of the Income-tax Act

Background

Recently, the Kolkata Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Sri Subhatosh Majumder[1] (the taxpayer) dealt with the taxability of services in the field of Intellectual Property Rights (IPRs) rendered by foreign attorneys to the Indian taxpayer[2].

In the instant case, the taxpayer is a Patent Attorney. The taxpayer[3] paid fees in respect of professional services rendered by foreign attorneys in the field of specialised services in IPRs. The Assessing Officer (AO) observed that the payments made by the taxpayer to the foreign attorneys were in connection with profession carried on by him in India. Therefore, such payments would fall within the definition of FTS[4]. However, since the taxpayer had failed to deduct tax at source on such payment[5], the AO disallowed the same[6].

Tribunal's decision

The Tribunal observed that in the present case admittedly payments were made to foreign attorneys who were professionally qualified to render legal services. Under the relevant Patent/IP laws, the applicant or attorney representing him was required to comply with the technical formalities as well as legal procedures contained in relevant laws, rules and regulations of the countries where the patent/IPR was sought to be registered. Having knowledge, experience and expertise in the specialised field of IP laws was an essential pre-requisite for rendering the services.

Further the foreign attorneys not only advised the taxpayer in preparing the documentation necessary for submission of applications but also represented the applicants before the Patent/IP authorities and provided clarifications and explanations necessary for grant of registration.

The Tribunal relied on the Supreme Court's decision in the case of GVK Industries Ltd[7] and observed that the contractual terms between the taxpayer and his client nowhere prescribed that the client would be reimbursing the costs and expenses incurred by the taxpayer while discharging his obligations under the terms of engagement. Foreign attorneys performed the services at the behest of the taxpayer for which the requisite invoices were raised and these were paid by him. Prior to making the remittances to the foreign attorneys, the taxpayer had filed certificates with his banker in the prescribed Form 15CB certified by a Chartered Accountant. In the said certificate, these payments were characterised as fees for professional services.

The services of the foreign attorneys were not engaged by the taxpayer's clients in whose favour the patents or IPRs were registered in foreign countries. Instead the services were engaged by the taxpayer while in discharge of his professional obligations in India. As such, the source of income in connection with which the services of foreign attorneys were used, was located in India. Merely because the Patents or IPs registered in foreign countries granted protection to the Indian clients within the foreign territories, it did not create any 'source of income' for such clients outside India. Therefore, the payments made to the foreign

[1] ACIT v. Sri Subhatosh Majumder (ITA No. 2006/Kol/2017, AY 2011-12) – Taxsutra.com
[2] Under the Income-tax Act, 1961 (the Act)
[3] During the Assessment Year 2011-12
[4] Under Section 9(1)(vii)(b) read with Explanation 2 of the Act
[5] Under Section 195 of the Act
[6] Under Section 40(a)(i) of the Act

[7] GVK Industries Ltd v. ITO [2015] 54 taxmann.com 347 (SC)

attorneys do not fall within the exception of FTS taxability under the Act[8]. The decisions[9] relied on by the taxpayer were distinguishable on the facts of the present case.

The payments made to foreign associates or foreign attorneys came within the ambit of FTS taxability provisions[10] and deemed to accrue or arise in India. Thus, the taxpayer had obligation to deduct tax at source under the provisions of the Act.

With respect to the alternative contention of the taxpayer of the taxability of FTS under a tax treaty, the Tribunal directed the tax authorities to examine whether the payments were non-taxable in India because of the beneficial provisions of the tax treaty with respective countries.

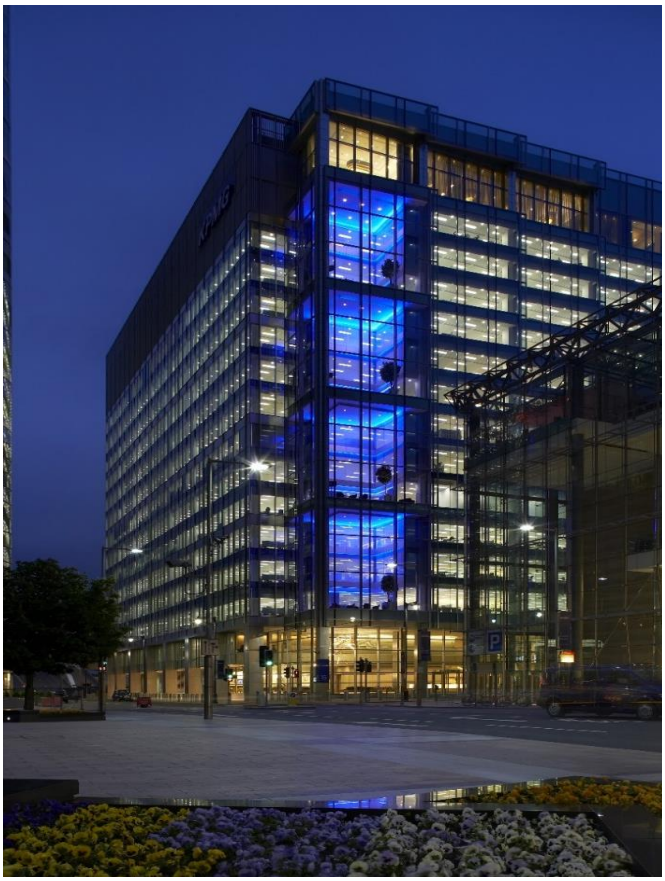
Our comments

The issue with respect to the source rule exclusion for technical services under the Act has been a matter of debate before the Courts. The source rule exclusion lays down the principle that income of the recipient is to be charged or chargeable in the country where the source of payment is located. The Supreme Court in the case of GVK Industries Ltd[11] while explaining the provisions of Section 9(1)(vii)(b) of the Act observed that the exception applies to a situation when fee is payable in respect of services utilised for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian taxpayer from a source outside India.

The Tribunal in various cases[12] have applied such source rule exclusion and held that FTS were utilised in a business carried on by the taxpayer outside India or for earning any income from any source outside India. Accordingly, the FTS does not deem to accrue or arise in India.

The Delhi High Court in the case of Havells India Ltd[13] observed that it was not the payer of income but the location of the manufacturing activity and concluding of the export contract from India that will determine the source of income. The taxpayer's case does not fall within the second exception provided in Section 9(1)(vii)(b) of the Act and the FTS paid was taxable under the Act. Subsequently, the Chennai Tribunal in the case of Alstom T & D India Ltd[14] observed that source of income was created at the moment when the export contracts were concluded in India. Even though the importer of the taxpayer's products is situated outside India, he was only the source of the monies received and he cannot be regarded as a source of income. In order to fall within the second exception provided in Section 9(1)(vii)(b), the source of the income, and not the receipt should be situated outside India and this condition is not satisfied in taxpayer's case.

In the present case, the Tribunal held that the payments made to foreign attorneys for rendering services in the field of IPRs are FTS and the payment does not fall within the exception carved out under Section 9(1)(vii)(b) of the Act.



[8] Under Section 9(1)(vii)(b) of the Act – source rule exclusion
[9] DIT v. Panalfa Auto electrik Ltd [2014] 49 taxmann.com 412 (Del), Credit Lyonnais v. ADIT - [2013] 35 taxmann.com 583 (Mum), Wipro Ltd v. ITO [2004] 1 SOT 758 (Bang), Ajappa Integrated Project Management Consultants (P.) Ltd. v. ACIT [2012] 24 taxmann.com 116 (Chen), Aqua Omega Services (P.) Ltd v. ACIT v. ACIT - [2013] 31 taxmann.com 179 (Chen)
[10] Section 9(1)(vii) of the Act
[11] GVK Industries Ltd. v. ITO [2015] 371 ITR 453 (SC)
[12] Aqua Omega Services (P.) Ltd. v. ACIT [2013] 31 taxmann.com 179 (Chen), ADIT v. DQ Entertainment (International) P. Ltd. [2014] 164 TTJ 84 (Hyd), Nissan Motor India (P.) Ltd. v. DCIT [2018] 92 taxmann.com 127 (Chen)
[13] CIT v. Havells India Ltd [2013] 352 ITR 376 (Del)
[14] DCIT v. Alstom T & D India Ltd [2016] 68 taxmann.com 336 (Chen)

home.kpmg/in

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

Bengaluru
Maruthi Info-Tech Centre
11-12/1, Inner Ring Road
Koramangala,
Bengaluru – 560 071.
Tel: +91 80 3980 6000

Chandigarh
SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai
KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Gurugram
Building No.10, 8th Floor,
DLF Cyber City, Phase II,
Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

Hyderabad
Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2,
Serilingampally Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur
Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road,
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi
Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682 019.
Tel: +91 484 302 5600

Kolkata
Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai
1st Floor, Lodha Excelus,
Apollo Mills,
N. M. Joshi Marg,
Mahalaxmi,
Mumbai – 400 011.
Tel: +91 22 3989 6000

Noida
Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune
9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara
Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada
Door No. 54-15-18E,
Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000