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'MANAGEMENT FEES' CONSTITUTES 'BUSINESS INCOME' IN THE ABSENCE OF SPECIFIC FTS PROVISION IN THE RELEVANT TAX TREATY

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The Bengaluru bench of the Income-tax Appellate Tribunal (ITAT) *vide* order dated 28 February 2019, held that consideration received by non-resident entity from an Indian company for performing management services cannot be taxed as 'fees for technical services' (FTS) in the absence of a specific provision for taxing FTS in the relevant tax treaty (India – UAE tax treaty in the instant case) (Ruling).

Background

In the instant case, the taxpayer was a non-resident company incorporated in the UAE engaged in providing management services in areas of general management, strategic marketing, business development, financial management and provision of industry specific content (Management Services). For the relevant financial year (FY 2013-14), the taxpayer rendered certain Management Services to an Indian entity and received fees in consideration for such services (Fees), which qualifies as FTS.

According to the taxpayer, since there was no specific clause for taxing FTS in the India – UAE tax treaty, the same qualified as its 'business profits' which could have been taxable in India only if the taxpayer had a permanent establishment (PE) in India. Further, since the taxpayer was of the view that it did not have a PE in India, it claimed the Fees as exempt and filed a 'nil' return of income in India. On the contrary, despite there being no specific clause for taxing FTS under the India – UAE tax treaty, the assessing officer (AO) assessed the Fees as taxable in India under the provisions of domestic tax law. Being aggrieved by this, the taxpayer approached the Dispute Resolution Panel (DRP) – an alternate forum (under the Indian income-tax law) to the first appellate authority [which is CIT(A)]. The DRP confirmed the order of the AO. Being aggrieved by the same, the taxpayer filed an appeal with the ITAT.

The ITAT ruled that since there was no specific clause for taxing FTS in the India – UAE tax treaty, the Fees (which was in the nature of FTS) would qualify as 'business income' and hence, the same would not be taxable in India unless the taxpayer had a PE in India. With respect to the PE aspect, the ITAT remanded the matter back to the AO for a fresh adjudication to examine and enquire whether there is any PE in India.

Comment

This is a welcome ruling by the ITAT in the context of international taxation jurisprudence in India. This is because the principles enunciated in this Ruling will be useful (not just with respect to FTS) to evaluate the taxability of those payments

(received by non-residents from Indian entities) which do not find a specific mention in the relevant tax treaty.

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