

CASE LAW UPDATE – SET-OFF OF BUSINESS LOSS OF PE WITH FTS INCOME

Indian Tax Tribunal in a recent decision¹ has laid down important principles with regard to set-off of business loss of Permanent Resident (PE) with Fees for Technical Services (FTS) earned in India.

BACKGROUND	<p>The taxpayer, Hyosung Corporation (or Head Office or HO) is a company incorporated under the laws of Republic of Korea. It has earned Fees for Technical Services (FTS) from service rendered to customer in India. It also had a Permanent Establishment (PE) in India for the purpose of offshore supply of goods. The said PE had incurred business loss during FY 2020-21.</p> <p>In the Income Tax Return (ITR) filed for FY 2020-21, the company set-off loss of PE from FTS income and offered tax on balance FTS income.</p>
ISSUE	<p>The tax officer rejected set-off of loss of PE from FTS income for two reasons –</p> <ol style="list-style-type: none"> 1. FTS income earned by HO cannot be attributed to PE in India and 2. Income of two practically separate entities (PE and HO) cannot be set off against each other.
DECISION	<p>The Tax Tribunal reversed the decision of tax officer for the following reasons –</p> <ol style="list-style-type: none"> 1. While Hyosung Corporation or the HO has two sources of income, i.e. (i) FTS and (ii) offshore supply to PE in India, both source of income is taxable in India as its business income and therefore, set-off is allowed within two sources of income. 2. Such set-off of loss is not restricted in section 115A of the Act which provides for specified rate of tax on FTS. 3. Such intra-head set-off of income and loss is also not restricted in Double Tax Avoidance Agreement (DTAA) entered between India and Korea.

[1] Hyosung Corporation vs ACIT, order dated 23.04.2025 in ITA No. 2943/Del/2023

KEY TAKEAWAYS

- Income of a foreign company may be categorized by different names such as royalty, FTS, etc. for the purpose of with-holding tax. However, such income is taxable under five heads of income and tax is charged only on net taxable income, thereby allowing set-off of loss.
- PE and HO are not two separate entities for the purpose of determining tax liability of HO as income of HO will include income/ loss of its PE.
- Foreign companies should thoroughly check their tax liability considering the benefits provided under the laws of India as well as applicable DTAA.

Queries?

If you have any queries about this article, please reach out to our experts:



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