INTERNATIONAL TAXATION
Case Law Update

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A. HIGH COURT

1 *SFDC Ireland Ltd. vs. CIT [(2024) 160 taxmann.com 328 (Delhi)]*

Where assessee, an Irish company, entered into a reseller agreement with an Indian company for sale of its products in India and made application under section 197 to receive payments thereunder with Nil or low TDS, it was held that order denying Nil or lower TDS certificate to assessee was to be quashed and set aside, since technical assistance and training provided by assessee to its Indian counterpart did not bear characteristics of conferral of specialised or exclusive technical service

Facts

i. Assessee, a tax resident of Republic of Ireland entered into reseller agreement with SDFC India for sale of its products in India and made application under section 197 to receive payments thereunder with Nil or low TDS.

ii. Revenue passed order under section 197 determining TDS rate at 10 per cent on entire estimated receipts of ₹ 518.21 crores on the ground that assessee was not selling standard off-the-shelf and non-customized downloadable software and that it was in fact offering a comprehensive service experience or solution with help of technology embedded in software, hence, remittances so received were liable to be taxed as fee for technical services within meaning of section 9(1)(vii) read along with article 12 of India-Ireland DTAA.

iii. Aggrieved, the assessee filed a writ petition before the Hon'ble High Court.

Decision

i. It was observed that SDFC India was appointed as non-exclusive reseller without any technology transfer.

ii. Further, technical assistance and training imparted to SDFC India did not appear to bear characteristics of a conferral of specialised or exclusive technical service and did not constitute either core or foundational basis of consideration which was received by assessee and there was no transmission of specialised knowledge or skill.

iii. Imparting training or educating a person with respect to functionality and

attributes of a software or application did not amount to rendering of technical service under DTAA. Impugned order did not proceed on basis of any material or evidence which may have indicated that moneys remitted to assessee could be said to constitute consideration for technical services.

iv. Therefore, impugned order denying Nil or lower TDS certificate to assessee was to be quashed and set aside, with liberty to Revenue to examine issue in light of above observations.

2 *Shell India Markets (P.) Ltd. vs. Union of India [(2024) 160 taxmann.com 175 (HC - Bombay)]*

It was held that where assessee had entered into Cost Contribution Agreement (CCA) with SIPCL for provision of General Business Support Services (BSS) and AAR ruled that nature of General BSS was of consultancy services and thus it was technical service within meaning of article 13 of the India-UK DTAA, since list of services in General BSS showed that it related to managerial services and not involving anything of a technical nature, services availed could not be said to be technical service and article 13 was wholly inapplicable

Facts

i. Assessee, an Indian company, had network of retail fuel stations in India - SIPCL, a group company incorporated in UK was in business of providing consultancy services. Assessee had entered into Cost Contribution Agreement (CCA) with SIPCL for provision of General Business Support Services (BSS).

ii. Assessee construed the said BSS as management support services of advisory nature and approached AAR for determination of tax liability of payments made by assessee to SIPCL

iii. AAR ruled that nature of General BSS, viewed as such, was of consultancy services and since while providing General BSS, SIPCL worked closely with employees of assessee and supported/ advised them, it was clear that General BSS was made available to assessee and thus it was technical service within meaning of article 13 of the India-UK DTAA and, thus, payment received by assessee was chargeable to tax in India.

iv. Aggrieved, the assessee approached the Hon'ble High Court.

Decision

i. It was held that list of services in General BSS showed that it related to managerial services and did not involve anything of a technical nature. Thus, services availed could not be said to be technical service and article 13 was wholly inapplicable.

ii. The AAR had interpreted requirements to be satisfied for 'make available' based on its own general notion of said term without appreciating applicable law on subject and also reached an erroneous conclusion that services availed were technical services.

iii. Thus, the AAR's order suffered from legal infirmity and was to be set aside.

iv. However, without expressing any opinion, the Hon'ble HC made it clear that the Department was at liberty to take necessary steps as available to it in

law including as to whether the subject will be covered under Article 7 of the DTAA.

3 *CIT vs. Hireright Ltd. [(2024) 161 taxmann.com 45 (HC - Delhi)]*

It was held that where assessee, a UK based company, was engaged in business of undertaking employment background checks and verification of testimonials for various clients, since mere undertaking of background checks of employees or verification of testimonials could not possibly be recognized as entailing use of any technical knowledge, experience or skill as provided under article 13(4),receipts of assessee from its clients in India could not be regarded as Royalties or fee for technical services under provisions of Article 13 of India-UK DTAA

Facts

i. The assessee, a tax resident of UK, was engaged in business of undertaking employment background checks and verification of testimonials for various clients in India.

ii. The lower authorities observed that the fees so generated from the above exercise would fall within the ambit of 'fee for technical services' in terms of Article 13.

iii. On appeal, the Tribunal held that none of the requisites under Article 13(3) of the India-UK DTAA were satisfied so as to qualify such receipts as 'royalty. What the assessee was providing to the clients in India was merely a report summarizing its findings with respect to the background check undertaken by the assessee which was primarily a factual data and could not per se qualify as literary or artistic or any other copyrightable work. Further, it held that the services rendered by the assessee did not involve any technical skill/knowledge or consultancy or make available any technical knowledge, experience, skill, know-how or processes to the clients and the role of the assessee was limited to validation of data provided by the candidate and to provide relevant facts captured during the course of validation and hence, the services could not be considered as FTS under Article 13(4) of theDTAA.

iv. Aggrieved by the order of the Hon'ble Tribunal, the Revenue filed an appeal before the Hon'ble High Court.

Decision

i. The Hon'ble High Court that the mere undertaking of background checks of an employee or the verification of testimonials could not possibly be recognized as entailing the use of any technical knowledge, experience or skill as provided under article 13(4) of the India-UK DTAA.

ii. The assessee was merely verifying disclosures which activity could not be recognized as being imbued with any technological characteristic. There was also a complete absence of a transfer of data or information which could be described as 'technical' as the word is commonly understood.

iii. In view of the aforesaid, the Hon'ble HC upheld the order of the Hon'ble Tribunal and dismissed the Revenue's appeal.

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4 ***PCIT vs. Radhashir Jewellery Co. (P.) Ltd. [(2024) 160 taxmann.com 760 (HC - Bombay)]***

It was held that where assessee-company was engaged in rendering research and technical services and had started its business in relevant financial year, it could not be compared with companies which were doing business for many years.

B. TRIBUNAL

5 ***Golden Agri Resources (India) (P.) Ltd. vs. ACIT [(2024) 161 taxmann.com 19 (Delhi Tribunal)]***

It was held that where assessee was engaged in trading of edible oils and it adopted 'other method' for benchmarking its international transaction of purchase of traded goods and TPO applied TNMM, since assessee had considered all market quotations available while maintaining transfer pricing report and market quotes were available on corresponding dates , other method had been rightly applied by assessee and ,thus, determination of arm's length price by assessee by adopting quotations from various brokerage houses/ associations/exchanges could not be faulted with.

6 ***Lupin Ltd. vs. DCIT [(2024) 160 taxmann.com 691 (Mumbai Tribunal)]***

It was held that where assessee issued a letter of comfort towards credit facilities sanctioned by bank to assessee's subsidiaries, since terms of letter of comfort given by bank to borrower created an obligation on the borrower that borrower would prepay loan in case assessee ceased to hold 51 per cent stake in borrower company, what assessee had given to bank towards loan facility granted to its subsidiary was only a letter of comfort and not a guarantee and therefore, adjustment made by TPO was to be deleted.

7 ***Bank of Nova Scotia vs. DCIT [(2024) 160 taxmann.com 177 (Mumbai Tribunal)]***

It was held that where Indian division of assessee-banking company, engaged in trading and finance of precious metals, imported bullion on consignment basis from its London branch which was sold through various product offerings, since LBMA (London Bullion Market Association) database did not capture volatility in market because these rates were published at two times of date, high and low rate published by KITCO & Reuters would be MAM for comparison while benchmarking international transactions of trading in bullion and silver.

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