INTERNATIONAL TAXATION
Case Law Update

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A. SUPREME COURT

1 *CIT. vs. Ad2pro Media Solutions (P.) Ltd. [(2024) 158 taxmann.com 432 (SC)]*

SLP dismissed against order passed by High Court holding that where assessee-company made payments to US Company for marketing services and scope of work was to generate customer leads using/subscribing customer data base, market research, analysis, and online research data and that service provider had not made available any technical knowledge, experience, knowhow, process to develop and transfer technical plan or technical design - in view of admitted fact that services were utilized in USA, payments so made could not be considered as royalty or FTS and hence, no TDS was required to be deducted

Facts

i. Assessee was a private limited company engaged in business of providing graphic design solutions for advertising and marketing communications. It had remitted huge amounts to US based company for marketing services without deduction of TDS.

ii. The AO held that assessee had utilized services of US Company even in negotiations with customers and in finalizing contracts, and that the same could not have been done without sharing technical knowledge, knowhow, processes or experience, hence, payment was taxable in India as FTS.

iii. The Hon'ble Tribunal allowed assessee's appeal holding that payments made could not be considered as royalty or FTS and hence, no TDS was required to be deducted as the US Company did not have any PE in India – Further, it noted that scope of work was to generate customer leads using/subscribing customer data base, market research, analysis, and online research data and that the service provider had not made available any technical knowledge, experience, knowhow, process to develop and transfer technical plan or technical design.

iv. The Hon'ble High Court held that in view of admitted fact that services were utilized in USA, findings returned by Tribunal did not call for any interference.

v. Aggrieved, the Revenue filed SLP before the Hon'ble Apex Court.

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Decision

i. The Hon'ble SC dismissed the SLP by following ***Commissioner of Income Tax, International Taxation vs. AD2PRO Media Solutions Pvt. Ltd. in SLP (C) Dy. No. 45802/2023 dated 8-12-2023.***

B. HIGH COURT

2 *Hyatt International-Southwest Asia Ltd. vs. ADIT [(2024) 158 taxmann.com 136 (HC - Delhi)]*

Where assessee, a resident of UAE, had entered into Strategic Oversight Services Agreements (SOSA) with AHL India in respect of a hotel located in India for providing strategic planning services and know-how, since fee received by assessee was not for use of or right to use any process or for information of commercial or scientific experience, the same was not royalty under article 12 of DTAA but was taxable as business income as the assessee had a fixed place PE in India through which it carried on its business

Facts

i. The assessee, a tax resident of the UAE had entered into two Strategic Oversight Services Agreements (SOSA) with Asian Hotels Ltd., India in respect of the Hotel (the hotel located at Delhi - Hyatt Regency) whereby, the assessee provided strategic planning services and know-how to ensure that the hotel was developed and operated as an efficient and highly quality international full-service hotel.

ii. The AO held that the assessee had a PE in terms of article 5(2) of the DTAA. According to the AO, the Assessee had inter alia a fixed place of business at its disposal throughout the year in the premises of the Hotel, including the Chambers of the Managing Director and other expatriates who were continually present. It was clear that the premises were available to the Assessee for the entire duration. And, that it had carried out its activities for performing its obligations under the SOSA from the said premises. The AO disregarded the audited financial statement (on global basis), which disclosed that the assessee had declared losses and arbitrarily adopted 25% of the gross receipts as taxable income attributable to assessees's alleged PE in India. Further, he also held that the payment received under the SOSA was royalty under the DTAA.

iii. The Hon'ble Tribunal upheld the orders of the AO. However, w.r.t determination of profit it held the same may be computed in accordance with the provisions of Section 44DA and Article 12 of DTAA and that the assessee be given an opportunity of submitting the working of apportionment of revenue, losses etc. on financial year basis with respect to the work done in entirety by furnishing the global profits earned by the assesse, so that the profits attributable to the work done by the PE could be determined judiciously.

iv. Aggrieved, the assessee filed an appeal before the Hon'ble High Court.

Decision

i. The Hon'ble High Court noted that it was apparent from the plain reading of the SOSA that the assessee was required to render services in the area of strategic planning, maintaining the

Hyatt Operating Standards and covering all aspects of the operation of the Hotel. Further, the assessee had an overarching role in the management of the Hotel albeit at the policy level, with further right to oversee its implementation to ensure that the hotel was operated as an upscale hotel commensurate with the standards of the Hyatt chain of hotels - Hyatt Operating Standards. It was also amply clear that the policies and procedures framed by the assessee (the implementation which it had to oversee) covered every aspect of the management of the Hotel.

ii. It noted that that the assessee was not required to manage day-to-day operations of the hotel which were required to be managed by Hyatt India (an Indian Company affiliated to the assessee).

iii. Additionally, in terms of the SOSA, the assessee had also agreed to provide the owner and other employees of the hotel, proprietary, written knowledge, skills, experience, operational and management information and associated technologies related to operation of international, luxury full service hotels, which the assessee and its affiliates had developed over a period of time. This was described under the SOSA as 'know-how'. However, the terms of SOSA also made it clear that the provisions of the Know-How would be "in furtherance of the oversight and strategic planning services to be provided for the benefit of the Hotel".

iv. In consideration of the host of services to be provided in terms of the SOSA, the assessee would be entitled to fee (strategic fee as well as incentive fee) as set out in SOSA. It was clear that the said fee was not a consideration for use of or the right to use any process or for information of commercial or scientific experience. The fees payable was in consideration of providing the services as set out in SOSA.

v. Indisputably, in terms of the SOSA, the assessee had agreed to provide access. However, such access was only incidental to the services agreed to be provided by the assessee. The obligation to grant access to information, knowledge and software was solely to certain information, written knowledge, skill and experience in furtherance of the service provided by the assessee under SOSA and for operating the Hotel. Merely because the extensive services rendered by the assessee in terms of the SOSA also included access to written knowledge, processes, and commercial information in furtherance of the services, could not lead to the conclusion that the fee received by the assessee was in the nature of royalty as defined under article 12 of the DTAA. It relied upon the co-ordinate bench's judgement in ***DIT vs. Sheraton International Inc. – ITA No 2160/2020***.

vi. Thus, the Hon'ble Tribunal held that the consideration received by the assessee in terms of SOSA could not be termed as Royalty under Article 12 of the DTAA and the same was clearly in the nature of business income.

vii. The Hon'ble HC held that it was apparent from the plain reading of the SOSA that the assessee exercised control in respect of all activities at

the hotel, inter alia, by framing the policies to be followed by the hotel in respect of each and every activity, and by further exercising apposite control to ensure that the said policies were duly implemented. The assessee's affiliate (Hyatt India), was placed in control of the day to day operations of the hotel in terms of the ROSA.

viii. The assessee had the discretion to send its employees at its will without concurrence of either Hyatt India or the owner. This clearly indicated that the assessee exercised control over the premises of the hotel for the purposes of its business. Thus, the condition that a fixed place (Hotel Premises) was at the disposal of the assessee for carrying on its business, was duly satisfied. It relied upon the judgement of the Hon'ble Supreme Court in ***Formula One World Championship (2018) 13 SCC 294***.

ix. W.r.t the contention of the Assessee that even if it was assumed that the Assessee had a PE in India, there was no question of attributing any amount as income chargeable to tax under the Act to its PE, as it had incurred a loss on an entity level (global basis), it accepted that, the said issue was covered in favour of the Assessee by a decision of the Coordinate Bench of this Court in ***Commissioner of Income Tax (International Taxation)-2 vs. M/s Nokia Solutions and Networks OY3 [(2023) 455 ITR 157]***. However, since it had some reservations regarding the said view, it directed that this order be placed before the Acting Chief Justice for referring the said question to a Larger Bench.

3 ***CIT (IT) vs. DXC Technology Services (P.) Ltd. [(2024) 158 taxmann.com 431 (HC - Delhi)]***

The Hon'ble HC by relying on the Hon'ble SC's judgement in *Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT (432 ITR 471)* upheld the order of the Hon'ble Tribunal holding that amount received by assessee-company from various entities on account of sale/supply of software could not be treated as royalty within meaning of article 12(3) of India-Singapore DTAA as assessee had not transferred copyright it had *qua* subject software.

4 ***LGE & C-NCC [[(2023) TS-510-HC-2014(AP)-TP (HC Delhi)]***

The Hon'ble Andhra Pradesh HC dismissed Revenue's appeal against Hon'ble Tribunal's order holding that TPO was not empowered to hold international transaction as sham.

C. TRIBUNAL

6 ***EXL Service.Com INC v. ADIT [(2023) 157 taxmann.com 678 (Delhi Tribunal)]***

In the facts of the case, the Hon'ble Tribunal held that the assessee neither had a) a fixed place PE nor b) Agency PE by holding that a) Fixed place of business should satisfy "power of disposition" test to qualify as PE under Article 5(1) and 'core business' of foreign enterprise should be conducted through place of business which means that there should be a nexus between place of business and carrying on of business

b) Agency PE is constituted where a person, other than an agent of an independent status, is acting on behalf of a US enterprise in India and such person has authority to conclude contracts on behalf of the US enterprise and such authority habitually secures orders in India wholly or almost wholly for foreign enterprise

Facts

i. Assessee, a US company, was engaged in developing and deploying business process outsourcing solutions. It entered into a service agreement with Exl India under which Exl India provided internet voice based customer care services and backroom operation services to customers of assessee and in consideration of these services, Exl India invoiced assessee at pre-determined hourly rates and assessee raised invoice on end-customers.

ii. The AO held that assessee had PE in India as entire activity for performance of contract was undertaken in India and assessee retained substantial revenue by performance of contract from Indian set up and facilities in India were at disposal of assessee as it was not required to take formal consent of Indian set up before entering a contract with customers. Further, the common CEO of the assessee & EXL India had concluded contracts (meaning thereby that there was an authority to conclude contracts resulting into Agency PE). Consequently, the AO held that the income of the assessee was taxable in India.

iii. The order of the AO was confirmed. Aggrieved, the assessee filed an appeal before the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal held that no part of business premises of Exl India had been available to assessee for its use and AO had not placed any material on record to show that assessee had a right to use any part of business premises of Exl India to carry on its own business activities. Exl India was merely doing a work contract awarded to it by assessee and core activities such as key management functions, development of strategy, identifying new business areas, etc. were managed by assessee outside India. Consequently, the Hon'ble Tribunal relying on the judgement of the Hon'ble SC in ***E-funds IT Solution [99 ITR 34 (SC)***] held that the assessee did not have a fixed place PE in India.

ii. Secondly, since the CEO was not employed with Indian company but was under employment of assessee and Exl India had no authority to conclude any contract on behalf US enterpirse and all customers were based out of US and none of it was present in India. Consequently, relying on the judgement of the Hon'ble Supreme Court in the case of ***Morgan Stanley [292 ITR 416 (SC)***], the Hon'ble Tribunal concluded that the assessee did not have any dependant agent PE in India.

iii. Accordingly, the Hon'ble Tribunal decided the appeal in favour of the assessee.

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