INTERNATIONAL TAXATION

Case Law Update

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Tribunal

1 ***Salesforce.com Singapore Pte vs. DCIT (International Taxation) [2022] 137 taxmann.com 3 (Del - Trib.)***

Subscription fees received from Indian subscribers by Singapore-based co. for its CRM portal services- not 'royalty' u/s. 9(1)(vi) or Article 12 of DTAA

Facts

i) The assessee, a company incorporated in Singapore and a tax resident of Singapore was a leading provider of comprehensive Customer Relationship Management (CRM) services to its customers through its website i.e. Salesforce.com. The assessee did not have a place of business in India.

ii) The services rendered by the assessee helped the clients in generating reports and summaries of the data which were fed into the salesforce database by the client itself. Clients would input, store and retrieve their proprietary data on Salesforce.com through the CRM application software portal. The assessee's database provided access for the client's own use to generate the report, basis the information fed in by the client in the desired format. The access to the assessee's database as well as the payment for subscription fees by the client was for a limited duration.

iii) The AO held that the assessee had been providing services in the form of web services and made available to users over the web through the right to use the equipment and software and therefore the subscription fees were covered under the definition of royalty, both under Section 9(1)(vi) of the I.T Act, 1961 as well as under Article 12 of India-Singapore DTAA, which was also confirmed by CIT(A).

iv) Aggrieved, the assessee filed appeal before the Hon'ble Tribunal.

Decision

i) The Tribunal observed that, the assessee provided web-based online access to its customer's data hosted on servers

located in data centres maintained by the assessee outside India & that the assessee did not have any data centres in India. Hence the assessee could not be considered to have a fixed place of business in India.

ii) Further, the assessee neither had a place of management in India nor had any equipment or personnel in India which fact had also been accepted by the ld. CIT(A) in his order.

iii) Therefore, in the absence of granting any control to customers over the equipment belonging to the assessee, the allegation of the AO that the amount so received would constitute 'Royalty' was not acceptable. Further, the assessee did not provide any information concerning the industrial, commercial, or scientific experience. The assessee only processed the proprietary data of the customers and provided the result in form of desired reports etc. On this count also, it could not be said that consideration for CRM services was in the nature of royalty.

iv) Further, the assessee did not provide any information concerning industrial, commercial or scientific experience but only processed proprietary data of customers and provided results in desired formats. Since the services had been rendered dehors imparting of knowledge or transfer of any knowledge, experience or skill, then such services would not fall within the ambit of Article 12 of the treaty.

v) The Tribunal held that by granting access to the information forming part of the database, the assessee neither shared its own experience, technique or methodology employed in evolving databases with the users nor imparted any information relating to them. The Tribunal thus, concluded that the income earned by the assessee from the Indian customers with respect to the subscription fees for CRM could not be taxed as royalty as per section 9(1)(vi) as well as Article 12(3) of the treaty.

2 *Russell Reynolds Associates Inc vs. DCIT (International taxation) [2022] 137 taxmann.com 443 (Del - Trib.)*

Reimbursement received by US co from Indian associate for an orientation program for new recruits of the latter, not taxable as FIS under Indo US DTAA. Managerial (support) services could not be taxed under Article 12(4)(b) of the India-US DTAA even if allegedly the said services were ancillary and subsidiary to the application or enjoyment of the right, property or information for which a royalty payment was received

Facts

i) The Assessee a US company was engaged in the business of providing human resources advisory services to its clients, recruiting and retaining senior-level executives and further assisting them in mitigating the risks associated with senior-level appointments. It also provided management support services to its group companies.

ii) The assessee filed its Income-tax return declaring income being royalty income received from Russell Reynolds Associates India Private Limited ('RRAIPL') in terms

of 'Licensing Agreement' for use of Intellectual Property Rights ('IPRs') like trademarks/trade names and 'Information Technology Licensing Agreement' for use of databases, etc. as per Article 12(3) of the India- USA DTAA.

iii) The AO assessed the income inter alia adding to income the amount received for support services as per 'Services Agreement" and reimbursement of expenses as per 'Cost Reimbursement Agreement" as Fees for Included Services ('FIS') under Article 12(4)(b) of India-USA DTAA (hereinafter also referred as 'the Treaty') by holding that such services met the condition of "make available" of technical knowledge, experience, skill, know-how, etc.

iv) In regard to the Support services as per the 'Services Agreement', the Ld. CIT(A) upheld the contention of the assessee that the said services did not meet the condition of "make available" in Article 12(4)(b) of India-USA DTAA but upheld the said addition as FIS under Article 12(4)(a) of the treaty by alleging that the said services were ancillary and subsidiary to the application and enjoyment of the right in Article 12(3) of the treaty. In regard to reimbursement of actual training expenses as per the "Cost Reimbursement Agreement", Ld. CIT(A) confirmed the assessment order by holding that it met the requirement of "make available" under Article 12(4)(b) of the treaty.

v) Aggrieved, the assessee preferred to appeal to the Hon'ble Tribunal.

Decision

a) W.r.t Reimbursement received for an orientation program for new recruits

i) The Hon'ble Tribunal held that the learned CIT(A)had failed to appreciate that this training was not part of the main contract of licensing agreement for royalty and there was no corresponding recital in the licensing agreement, which required the Indian Associates and the assessee to enter into any agreement for providing the training.

ii) The assessee provided relevant training and workshops to newly recruited consultants who joined the Indian Associate and the purpose of this training was not to provide any specific technical training or share any technical knowledge, experience, skills, know-how or processes; neither by way of training, there was any transfer of any technical plan or technical design.

iii) The training could not strictly be even called managerial or leadership training so as to enhance any productivity or profits but was more of an orientation program at the time of induction of the new recruit.

iv) Merely because the training program was of a boarding nature, that could not change the nature of the program to fall in the purview of services, for which consideration should be FIS. Rather the consideration was in the form of reimbursement of expenses on the actual basis of constituents like travelling, food, boarding and lodging of consultants employed by Indian Counterpart.

v) Thus, the findings of the Learned CIT(A) deserved to be reversed

b) W.r.t services arising out of service agreement

vi) With regards to services arising out of the Service Agreement, the Tribunal observed that the learned CIT(A) primarily relied upon the memorandum to the India US Treaty along with an example to reach the conclusion that the consideration received for support services was in the nature of fee for included services to be categorised within paragraph 4(a) of the India US Treaty reproduced below:

> "4. For purposes of this article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:
>
> a. are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or
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> b. make available technical knowledge, experience, skill, know-how or processes, consist of the development and transfer of a technical plan or technical design."

vii) The Tribunal held that the bare perusal and patent interpretation of para 4 of Article 12 of 'The Treaty' made it explicit that it is only in regard to "rendering any technical or consultancy services" a finding can be given that they are ancillary and subsidiary for the purpose of para 4(a). Learned CIT(A) had fallen in error in distinguishing para 4(a) and para 4(b) in a manner that as for para 4(a) there is no requirement that the services should be of the nature of technical or consultancy and only receipt of Royalty as per para 3 of the Treaty, makes para 4(a) applicable. There was no categorical finding of the Ld CIT(A) that the support services were in the nature of consultancy or technical services. Rather it observed in Para 5.5.3 " In fact, the receipts from services clearly indicate that the same cover a large spectrum of the area and would necessarily qualify as managerial services.". The Tribunal concluded that as managerial services were not mentioned in Article 12 of the Treaty, so certainly by classifying the receipts to be from managerial services and then including them in FTS, on basis of sub-clause 4(a) of Article 12, the Ld. CIT(A) had committed an error.

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