INTERNATIONAL TAXATION

Case Law Update

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A. Tribunal

1 *NTT Asia Pacific Holdings Pte. Limited vs ACIT (International Taxation)- [(2022) 141 taxmann.com 137 (Mumbai - Tribunal)]*

Fees received by a Singapore Company for rendering business support service to its Indian AE was not taxable as FTS under India-Singapore DTAA - Enrichment of service recipient/Addition to his capabilities sans transfer of skill/technology, did not "Make available" technology etc. and a mere incidental benefit which would add to the capabilities of the said service recipient would not be sufficient - The critical factor triggering the taxability in the source jurisdiction under "Make Available clause" was the transfer of skills

Facts

i) During the assessment year 2017-18, the assessee, a Singapore based Company, received a fee of ₹ 121,94,85,623, from its Indian associated enterprise by the name of Dimensions Data India Private Ltd. for rendering business support services, and recovered certain expenses on a cost-to-cost basis.

ii) The nature of services so rendered were as follows:

i) Inputs on company policy related matters

ii) Services related to human resource functions

iii) Assistance with corporate communications and brand management.

iv) Services related to business development and business operations

v) Legal Support for corporate and compliance matters

vi) Services related to corporate and compliance matters

vii) Services related to development of solutions

viii) Services related to project management and consulting services.

ix) Information Technology related assistance

x) Support with sales activities

iii) The assessee did not offer the fees so received from the Indian entity to tax, on the short ground that the services rendered by the assessee to the Indian entity, did not amount to "making available" technology etc. in terms of Article 12 of the Indo Singapore tax treaty, and thus, was not taxable as FTS under the treaty (The said fees were not taxable as business income since the assessee did not have any PE in India).

iv) However, the Assessing Officer was not impressed with the submissions of the assessee and brought to tax the said receipts as fees for technical services under article 12(4) of the Indo-Singapore tax treaty contending that the assessee could not properly explain how the services did not make available technology etc. The AO further mentioned that as the Indian associate of the assessee had deducted TDS @ 10% while making the payment it was very clearly seen that the AE also considered the same as the income of the assessee. The DRP upheld the order of the AO.

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

Decision

i) The Hon'ble Tribunal noted that unless the recipient of the services, by virtue of rendition of services by the assessee, was enabled to provide the same services without recourse to the service provider, the services could not be said to have made available technology etc. to the recipient of services and a mere incidental advantage to the service recipient was not enough.

ii) The Hon'ble Tribunal further added that the main test was the transfer of technology which was not even the case of the Revenue in the said matter, what was highlighted was the incidental benefit received by the assessee.

iii) The Hon'ble Tribunal mentioned that "to fit into the terminology "making available", the technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end and the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. The said condition was not satisfied in the facts of the present case.

iv) The Hon'ble Tribunal further added that it was not a question of, as the learned DRP put it, enriching "the service recipient, making him wiser to face similar challenges in future on his own and acquiring the skills to deal with these issues", but the test was whether the rendition of these services per se enables the recipient to provide the similar services, without recourse to the service provider, in future. An incidental benefit or enrichment which may add to the capabilities was not sufficient; the critical factor triggering the taxability in the source jurisdiction was the transfer of skills.

v) The Hon'ble Tribunal thus concluded in the favour of the assessee by relying on the non-jurisdictional Hon'ble Karnataka High Court judgement in the case of ***CIT vs. De Beers India (P.) Ltd. [2012] 346 ITR 467/208 Taxman 406/21 taxmann.com 214*** as there was no other contradicting jurisdictional High Court judgement. It also placed reliance on ***Shell Global International Solutions BV vs. ITO [(2015) 64 taxmann.com 3 (Ahd)]***. Further, it held that once taxability fails in terms of the treaty provisions, there was no occasion to refer to the provisions of the Income Tax Act, 1961, ('the Act') as per Section 90(2) of the Act.

2 *Deloitte Haskins & Sells LLP vs DCIT (IT)- [(2022) 141 taxmann.com 205 (Mumbai Tribunal)]*

TDS u/s 195 was not deductible on payments by Indian Deloitte LLPs to Deloitte Global Holdings Ltd (UK entity) for services relating to Global Brand, Global Communications and Global Technology/Knowledge Management as the said payments were not taxable as royalties u/s 13(3) of India-UK DTAA

Facts

i) The Appellants, Deloitte Touche Tohmatsu India LLP ("DTTI") and Deloitte Haskins & Sells LLP ("DHS"), limited liability partnership firms and a part of Deloitte network worldwide, rendered professional services to large domestic as well as multinational corporations.

ii) DTTL- also known as 'Global Network' of various member firms, was incorporated in and a tax resident of the United Kingdom. Deloitte Global Holding Services Ltd. ('Holdings'), a company limited by guarantee organized and existing under the laws of England and Wales was a special purpose vehicle created by Global Network to facilitate the attainment of objectives, inter alia, to further international alignment, cooperation, cohesion and professional standards of the highest quality among its Member Firms (such as DTTI).

iii) Deloitte Global Holdings performed various activities for the common benefit of its members. However, AOA of the Holdings did not permit it to perform any services for third-party clients and further also as per Article 15 of AOA, Holdings was not allowed to distribute dividends or any other amounts to its members except on winding up in the proportion of their contributions.

iv) Deloitte Global Holdings incurred expenses in the course of carrying out the above activities for the benefit of all members, which were recovered from members without any markup.

v) Further, the terms on which the activities were carried out by Holdings and the expenses recovered by it from its members were embodied in an agreement named as "Shared Services Agreement" entered into by the member firms (including Indian Deloitte LLPs) with Holdings vide agreement dated 1 August 2011.

vi) In Para 2.A.2 of the agreement, the parties acknowledged that Holdings did not have capacity to provide such

services and that it would instead, outsource these services to Deloitte Services [established with a view to facilitating fulfilment of those purposes and Deloitte Services intends to provide certain services to its members (including Holdings)]. Deloitte Services which in turn would provide such services to Holding Members (DTTI) Para 3.C stated that the parties acknowledged that the Holdings would always run on break-even.

vii) The Services provided under the Share Service Agreement were as under:

1. *Global AERS; Global FAS; Global Tax; Global Consulting*
2. *Global Clients, Global Services and Related Programs*
3. *Global Strategy; Research; Monitoring*
4. *Global Brand*
5. *Global Communications*
6. *Global Talent/Human Resources*
7. *Global Technology/Knowledge Management*
8. *Global Risk Management and Regulations*
9. *Global Office of General Counsel*
10. *Global Finance; Procurement*
11. *Global Corporate Responsibility*

viii) In continuance with the earlier years, the appellants had made an application for issuance of a certificate under Section 195(2) for remittance of amounts under the "Shared Services Agreement" to Holdings without deduction of tax at source, based on the earlier no deduction certificate issued by the respective Assessing Officer for similar payments for AY 2012-13 to AY 2016-17.

ix) However, the Assessing Officer for the years AY 2018-19 and AY 2019-20 held that payments

x) to the extent they were relatable to, (1) Global brand; (2) Global Communications; and (3) Global Technology/Knowledge Management, were in the nature of royalties, being payments for use of computer software/ literary work.

xi) Further, mainly relying on the precedent of EY Global Services Ltd. AAR No. 1043 of 2011 and a few more, the Assessing Officer held that the payments were liable for deduction of tax at source and worked out the withholding tax liability by applying a proportion of 3/10 to the total remittance of ₹ 95,49,00,000/-. Since 3 out of 10 services were held by him to be in the nature of royalty, the AO authorised the remittances after deduction of tax @ 3% on the overall remittances made by appellants to Holdings.

xii) The ld. CIT (A) upheld the action of the Assessing Officer on the conclusion that the payments were in the nature of Royalty by holding that the payments were made for information concerning commercial experience in terms of Article 13(3) of the India-UK DTAA.

xiii) Aggrieved, the Appellants filed an appeal before the Hon'ble Tribunal.

Decision

i) The Hon'ble Tribunal referred to the definition of 'Royalty' as provided in Article 13(3) of the India-UK DTAA, reproduced hereunder:

"3. For the purposes of this Article, the term "royalties" means:

(a) Payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

(b) Payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic."

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ii) The Hon'ble Tribunal then analysed all the 3 disputed services in light of the definition and scope of Article 13(3) of the India-UK DTAA.

iii) W.r.t to Global Brand, the Hon'ble Tribunal concluded that :

i. Holdings only performed various activities for its members and its guidance were only for internal use by the member firms. Hence, payment for such services could not be considered for information concerning industrial, scientific or commercial experience.

ii. There was no transfer of intellectual property by Holdings to the appellants and also there could not be a case of giving industrial, commercial or scientific equipment. Thus, the payments made for the global brand could not be treated as Royalty under Article 13(3) of India-UK DTAA.

iii. Another important thing was that the payment was also not for any use of trademark/patent provided by Holdings.

iv) W.r.t to the payments for global activities in Global communications, the Hon'ble Tribunal held that :

i. Holdings distributed the publications and reports for Indian Deloitte LLPs and supported global public relations, thought leadership initiatives, events, guidance, common standards, guidelines, organising internal events, etc so that there was an alignment of all the member firms for internal and external communication.

ii. It gave guidance about media communication, distribution of newsletters, external and internal distribution.

iii. Thus, these activities could not be reckoned for providing

industrial, commercial or scientific equipment to the appellants and, was therefore, outside the nature and scope of Royalty as defined in Article 13(3) of the India-UK DTAA.

v) Lastly w.r.t the taxability of services mentioned in the Global Technology/ Global Management, the Hon'ble Tribunal concluded that:

i. Global network acquired certain technology products from vendors and provided them to the member firms and also provided security advice to all the member firms for which it also developed certain database, systems and websites that was used by all the members of the network.

ii. The above service was purely for the internal purpose and not for any commercial exploitation, nor any scientific equipment was given to the appellants by Holdings.

iii. Hence it could not be held as Royalty under Article 13(3) of the India-UK DTAA.

vi) The Hon'ble Tribunal observed that the Assessing Officer had heavily relied upon the same judgment of AAR in the case of EY Global Services Ltd., which now stood reversed by the Hon'ble Delhi High Court. Thus, the payments made to Holdings were not taxable as Royalty under Article 13(3) of the India-UK DTAA.

vii) W.r.t assessee's submission that no tax was liable to be deducted u/s 195 from payments made to Holdings applying the Principle of Mutuality, the Hon'ble Tribunal concluded that the principle of mutuality could not be examined in proceedings u/s 195 and also that the principle of mutuality had to be seen in the hands of the recipient, i.e. entity which was receiving the payment and not in the hands of the payer, which was the appellant here.

3 *Torrecid India Private Limited vs. ACIT- [TS-467-ITAT-2022 (Mum)-TP]*

Where the assessee imported finished goods from AE and sold it to third party without any value addition, Resale Price method should be adopted as the most appropriate method, notwithstanding that the assessee, apart from the trading activity was also engaged in manufacturing for which separate segmental data was available

Facts

i) The assessee, a subsidiary of a foreign company was engaged in trading as well as manufacturing activities. It had imported from its AEs finished goods for trading purposes as well as raw materials for its manufacturing activity.

ii) The assessee benchmarked international transaction of import of finished goods from its AE and adopted the resale price method (RPM) as MAM taking the profit level indicator of gross profit/ sales. Since the margin of the assessee i.e. 15.35% was higher than the average margin of 3rd parties i.e. 14.60%, it claimed that the import of finished goods transaction to be at arm's length.

iii) The TPO combined the transactions of import of raw material as well as

the import of finished goods took the assessee as a tested party & computed the entity level margin of the assessee at (-) 8.26% by adopting TNMM as MAM. Since the average margin of comparables was 14.60%, TPO made the consequent adjustment w.r.t import of finished goods and import of raw materials.

iv) The learned DRP held that the assessee was engaged in two separate business activities i.e. trading and manufacturing, which could not be clubbed for the purpose of benchmarking. Further, the DRP rejected the application of entity level TNMM & instead, adopted segmental TNMM for benchmarking import of finished goods as well as for import of raw materials consequent to which there was no addition w.r.t to import of raw materials. However, this resulted in addition on account of import of finished goods.

v) Though the DRP noted that gross profit could be arrived at for the transaction of import of finished goods, it rejected the assessee's reliance on the decision of ***Income-tax Officer vs. L'Oreal India (P.)-TS-376-HC-2014(Bom)-TP Ltd*** for accepting RPM as MAM on the alleged ground that L'oreal was engaged only in trading activities unlike the assessee who was engaged in both trading as well as manufacturing activity.

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

Decision

i) The Tribunal noted that the learned DRP had acknowledged that the activities of trading and manufacturing could not be clubbed together for benchmarking purposes & that gross profit margin from import of finished goods was also available.

ii) The Tribunal appreciated the assessee's submission that the in the case of L'oreal (supra), the assessee therein was also engaged in manufacturing as well as trading activities (having segmental accounts) and that the decision of the Tribunal therein to adopt RPM as MAM was also affirmed by jurisdictional HC.

iii) The Tribunal thus concluded that where the assessee imported finished goods and sold them to third party without any value addition, resale price method should be adopted as the most appropriate method.

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"The more we come out and do good to others, the more our hearts will be purified, and God will be in them."

— *Swami Vivekananda*