Tribunal invokes MFN clause to bring the 'make available' condition into the India-Sweden tax treaty

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In brief

In a recent decision, the Pune bench of the Income-tax Appellate Tribunal (Tribunal) has held that management service fee received by Sandvik AB, (the 'taxpayer' or the 'Company' or 'SAB') from its group companies in India was not taxable in India as a 'fee for technical services' as the 'make available' condition was not satisfied. While doing so, the Tribunal referred to the protocol attached to the India-Sweden double taxation avoidance agreement (India-Sweden tax treaty) and invoked the most favoured nation (MFN) clause to import the 'make available' condition into the India-Sweden tax treaty.

While ruling the above, the Tribunal relied on the Delhi High Court (HC) ruling in the case of Maruti Udyog[4] and the Authority for Advance Ruling (AAR) ruling in the case of Poonavala Aviations[5] and held that the protocol appended to the tax treaties was an integral part of a tax treaty, and could be relied upon to understand the scope of taxation.

In detail

Facts

The taxpayer[1] was a tax resident of Sweden. During the year, the taxpayer received a management fee from its group companies for rendering commercial, management and marketing related support services.

The taxpayer filed its return of income stating that such receipts were not taxable in India. The taxpayer claimed that fees for technical services (FTS) under Article 12 of the India-Sweden tax treaty read with the protocol thereto enabled the invocation of the MFN clause. With reference to the MFN clause, a restricted definition of FTS under the India-Portuguese tax treaty could be imported into the India-Sweden tax treaty.

During the course of assessment, the tax officer (TO)/ dispute resolution panel (DRP) held that such receipts were taxable in India as FTS.

Issues before the Tribunal

Whether reference could be made to the India-Portugal tax treaty in view of the MFN clause appended to the India-Sweden tax treaty?

Whether the services rendered by the taxpayer satisfy the 'make available' condition to be taxed as FTS?

Revenue's contentions

- The Company had provided technical support and guidance to its Indian affiliate companies and accordingly, the services rendered were technical in nature, and not managerial services as claimed by the Company.
- The Company, while rendering these technical services, had satisfied the 'make available' condition. This conclusion was based on an interpretation that the words 'make available' were used in the treaty in the context that services in the nature of technical knowledge, experience,

[1] Sandvik AB *v.* Dy.DIT [2014] 52 taxmann.com 211 (Pune-Trib.)

skill, etc. were offered or made accessible to the other party and it never meant that the other party should be trained or made expert in such technical knowledge.

Taxpayer's contentions

- The management fee received by the Company was for rendering managerial services, which could not be categorised as a FTS, under Article 12 of India-Sweden tax treaty read with the protocol thereto.
- Even if the services were to be categorised as technical services, the same did not satisfy the 'make available' condition, which was a pre-requisite for the receipts to be taxed as FTS.
- For interpretation of 'make available', reliance was placed on Karnataka HC decision in the case of De Beers India Minerals Private Limited[2] and Pune Tribunal's decision in the case of Sandvik Australia Private Limited[3].

Tribunal's ruling

- The Tribunal held that reference to the India-Portugal tax treaty, which allowed a restricted definition of FTS, was valid in light of the MFN clause attached to the India-Sweden tax treaty.
  - A protocol is an integral part of the tax treaty and has the same binding force. The Tribunal placed reliance on the Delhi Tribunal decision in the case of Maruti Udyog Limited[4] and the AAR's order in the case of Poonavala Aviations[5].
  - In tax treaties, the MFN clause finds a place when countries were reluctant to forego their right to tax some elements of the income. An MFN clause can direct more favourable treatment available in other treaties only in regard to the same subject matter, the same category of matter, or the "same clause of the matter" (*sic*).
- Furthermore, the Tribunal stated that the expression 'making available' was important for deciding in which contracting state the amount received for rendering the services relating to the technical know-how was to be taxed. The expression 'make available' was used in the context of supplying or transferring technical knowledge or technology to another. It was different from the mere obligation of the person rendering the services by using their own technical knowledge in performance of the services. The technology would be considered as 'made available' when the person receiving the services was able to apply the technology by himself/ herself.
- The Tribunal relied on the decisions of its co-ordinate bench in the case of Sandvik Australia Private Limited[3] and Karnataka HC in case of De Beers India Minerals Private Limited[2].

The takeaways

- The ruling re-emphasises that a protocol appended to a tax treaty is an integral part of that tax treaty, and has the same binding force as any other clause.
- For the interpretation of the term 'make available', it has re-emphasised the fact that technical knowledge/ skill would be considered to have been made available only when the person receiving the services is able to apply the technology by themselves.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

Tax & Regulatory Services – Direct taxes

Shyamal Mukherjee, *Gurgaon*
+91-124 330 6536
shyamal.mukherjee@in.pwc.com

Ketan Dalal, *Mumbai*
+91-22 6689 1422
ketan.dalal@in.pwc.com

Rahul Garg, Gurgaon
+91-124 330 6515
rahul.garg@in.pwc.com

[2] CIT *v.* De Beers India Minerals Pvt Ltd [2012] 346 ITR 467 (Karnataka HC)
[3] Sandvik Australia Pty Ltd *v.* DyDIT [2013] 141 ITD 598 (Pune-Trib.)
[4] Maruti Udyog Ltd *v.* ADIT [2009] 34 SOT 480 (Delhi-Trib)
[5] Poonawalla Aviation Pvt Ltd., *In re* [2012] 343 ITR 202 (AAR-NewDelhi)

Our Offices

Ahmedabad

President Plaza
1st Floor Plot No 36
Opp Muktidham Derasar
Thaltej Cross Road, SG Highway
Ahmedabad, Gujarat 380054
+91-79 3091 7000

Bangalore

6th Floor
Millenia Tower 'D'
1 & 2, Murphy Road, Ulsoor,
Bangalore 560 008
Phone +91-80 4079 7000

Chennai

8th Floor
Prestige Palladium Bayan
129-140 Greams Road
Chennai 600 006
+91 44 4228 5000

Hyderabad

Plot no. 77/A, 8-2-624/A/1, 4th
Floor, Road No. 10, Banjara Hills,
Hyderabad – 500034,
Andhra Pradesh
Phone +91-40 44246000

Kolkata

56 & 57, Block DN.
Ground Floor, A- Wing
Sector - V, Salt Lake
Kolkata - 700 091, West Bengal
+91-033 2357 9101/
4400 1111

Mumbai

PwC House
Plot No. 18A,
Guru Nanak Road(Station Road),
Bandra (West), Mumbai - 400 050
+91-22 6689 1000

Gurgaon

Building No. 10, Tower - C
17th & 18th Floor,
DLF Cyber City, Gurgaon
Haryana -122002
+91-124 330 6000

Pune

7th Floor, Tower A - Wing 1,
Business Bay, Airport Road,
Yerwada, Pune – 411 006+91-20
4100 4444

For more information

Contact us at
pwctrs.knowledgemanagement@in.pwc.com

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