Marketing and business development services do not pass the test of 'make available'

March 16, 2018

In brief

In a recent ruling,[1] the Mumbai bench of the Income-tax Appellate Tribunal (Tribunal) held that the fees paid to non-residents for marketing and business development services did not pass the test of 'make available'. Therefore, it could not be regarded as fees for technical services (FTS) as per Article 12 of the Double Taxation Avoidance Agreement (tax treaty) between India and Singapore.

In detail

Facts

- The taxpayer was an Indian company engaged in the business of providing predictive analytics for retail financial services, insurance, consumer packaged goods and telecommunications.
- The taxpayer had engaged its wholly owned subsidiary company in Singapore for providing marketing and business development services outside India. The services include providing general market information; conducting market studies and research; preparing market reports; providing assistance in identifying potential customers; establishing communication; assisting in developing marketing collateral for potential customers; conducting meetings, holding discussions with potential customers and assisting in the finalisation of the commercial terms with prospective customers.
- The tax officer (TO) issued a notice under section 148 of the Income-tax Act, 1961 (Act) alleging that the payment for the above referred services was for FTS and income had escaped by virtue of not making disallowance under section 40(a)(i) of the Act.
- The TO completed the assessment on the grounds that the fees paid for the above referred services was in the nature of consideration of 'managerial, technical or consultancy' and liable to tax both under the provisions of the Act and under the provisions of the tax treaty as FTS.
- On appeal, the Commissioner of Income-tax (Appeals) [CIT(A)] upheld the TO's order. Aggrieved by the CIT(A)'s order, the taxpayer appealed before the Tribunal.

Issue before the Tribunal

Whether the TO was correct in holding that the payment made to the non-resident towards marketing and business development services would not be covered under the category of FTS?

Taxpayer's contention

The marketing and business development services did not make available any technical knowledge, skill, etc., and accordingly, did not fall within the ambit of FTS under Article 12 of the tax treaty.

Revenue's contention

The Revenue contended that fees paid towards marketing and business development services was in the nature of

[1] ITA No. 3511/Mum/2015

FTS and the taxpayer failed to withhold tax on the same.

Tribunal's ruling

- The Tribunal observed that:
  - the services provided by the non-resident revealed that the non-resident supported the taxpayer in business development and the services were provided from Singapore;
  - the services envisaged in Article 12 of the tax treaty must involve a degree of skill and expertise on the part of the service provider and comprise administrative, technical or advisory work;
  - marketing services is an art rather than science, which depends wholly on the skill of the personnel engaged in rendering the marketing activities;
  - marketing services did not follow a common set of methods, but was rendered using various tactics and negotiation strategies, which was personal in nature;
  - the taxpayer could not independently perform these marketing services without recourse to the service provider.
- The Tribunal, considering the above findings, held that marketing and business development services did not fall under the category of 'managerial', 'technical' or 'consultancy' in nature, and moreover these services fail to satisfy the test of 'make available' as envisaged under Article 12 of the tax treaty between India and Singapore.
- Further, the Tribunal observed that the consideration received by the non-resident would be regarded as business income and not taxable in India as the non-resident did not have a permanent establishment in India. Hence, it was concluded that no tax was required to be withheld on the payment to the non-resident.

The takeaways

- This ruling is definitely a welcome decision in favour of the taxpayers. Merely as the services of marketing and business development of a non-resident were utilised in India, the same cannot be categorised as 'managerial', 'technical' or 'consultancy' services.
- This decision further strengthens the argument that the test of 'make available' contained in tax treaties is required to be satisfied for a payment to be characterised as FTS.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

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