Fee for training to hotel staff related to general management and access to computerised systems is not FTS

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In brief

The Mumbai bench of the Income-tax Appellate Tribunal (Tribunal), in a recent ruling [1]held that consideration received by a Dutch company (part of a global hotel chain group) to provide training services, and access to computerised reservation systems (CRS), property management systems (PMS) and other systems to Indian hotels, did not qualify as fees for technical services (FTS) under Article 12 of India-Netherlands Double Taxation Avoidance Agreement (tax treaty).

In detail

Facts

- The taxpayer was a tax resident of Netherland, and was a part of a global hotel chain group.
- The taxpayer for a consideration entered into training and computer systems agreements (TCSA) with two Indian hotels to conduct training programs, and provide access to the CRS, PMS and other systems.
- The taxpayer filed a return of income and declared its total income as NIL.

Issues before the Tribunal

- Whether the amounts received by the taxpayer from the Indian hotels under TCSA were in the nature of reimbursement of expenses, and hence not taxable in India?
- Whether the training services were taxable as FTS under the provision of the Income-tax Act, 1961 (the Act) and the India-Netherlands tax treaty?
- Whether the amounts received by the taxpayer from the Indian hotel for providing access to international centralised reservation facilities, ancillary and subsidiary to the enjoyment of the right to use the brand name were taxable as FTS under the provisions of the Act and the India-Netherlands tax treaty?

Taxpayer's contentions

- The training services were in the nature of core training programs for management level personnel and such managerial/ leadership training did not fall within the nature of technical services.
- In case the services was to be taxed as FTS under Article 12(5)(a) of the India-Netherlands tax treaty, the onus to prove that the services indeed "make available" the transfer of technical knowledge to the Indian hotels was on the tax officer (TO).
- The taxpayer was not the owner of brand or trademark for which any royalty was received by it, and hence, the training programs were rendered in the ordinary course of its business and was not ancillary or subsidiary to the payment of royalty.
- The services of providing access to CRS, PMS and

[1] ITA No 7159 /Mum/2012

other systems were in the nature of standard facilities and were not in *lieu* of any tailor made services.

- The taxpayer was not in receipt of any royalty, and thus, allowing access to CRS, PMS and Other Systems cannot be characterised as ancillary and subsidiary to the enjoyment of right, property or information.
- The consideration received from Indian hotels was business receipts, which in the absence of a permanent establishment (PE), was not taxable in India as per Article 7 of the India-Netherlands tax treaty.

Revenue's contentions

- The Indian hotels had entered into a royalty agreement with the group company of the taxpayer for use of the brand name. The TCSA was an integral part of that royalty agreement, and both the agreements were complementary to each other. The, provision of services under the TCSA was ancillary and subsidiary to the royalty agreement, and hence taxable as FTS as per the India-Netherlands tax treaty.
- Providing access to CRS, PMS and other systems was ancillary and subsidiary to the enjoyment of the right to use the brand name, and hence taxable as FTS.

Tribunal's ruling

- The Tribunal observed that the taxpayer had only provided certain core-training programs for management level personnel, and the training services were in the nature of general managerial/ leadership training, and not in the nature of technical services.
- Further, the Tribunal observed that the services involved did not "make available" any transfer of technology.
- The Tribunal relied on the Bangalore bench Tribunal's ruling,[2] to hold that the onus to substantiate that the services "make available" the transfer of technical knowledge was on the TO.
- The Tribunal observed that for a consideration to be "ancillary and subsidiary" to the application of enjoyment of any such right, property or information, it presupposes receipt by the taxpayer of a consideration towards royalty.
- Since the taxpayer was not the owner of any brand or trademark and no royalty was received by the taxpayer, the training services could not be brought within the ambit of "ancillary and subsidiary" services.
- Further, the Tribunal observed that the access to such systems provided to the Indian hotels were common facilities provided to the members of the entire chain of group hotels across the world, and were not tailor made services to suit the specific requirements of the Indian hotels. Thus, relying on various judgements[3] it held that the above could not be construed as "technical services."
- The taxpayer did not receive any royalty as provided in Article 12(4) of the India-Netherlands tax treaty. Considering the aforesaid, the consideration received by the taxpayer from the Indian hotels for providing access to the systems could not be brought within the ambit of "ancillary and subsidiary" services as per Article 12(5)(a) of the India-Netherlands tax treaty.
- Therefore, to summarise, the Tribunal held that rendering training services and providing access to systems could not be taxable as FTS under the India-Netherlands tax treaty.

The takeaways

- The ruling reinforces the principle that training programs for management level personnel, which are in the nature of general managerial/ leadership training are not in the nature of technical services.
- This ruling affirms the view that access to standard/ common facilities provided to the members of group hotels, which are not tailor made as per the specifications, cannot be construed as "technical services."
- The Tribunal emphasised the requirement of receipt of royalty by the taxpayer itself, for the services to be brought within the ambit of services that are "ancillary and subsidiary to the application or enjoyment of the right, property or information for the purpose of FTS definition under the Tax Treaty.

Let's talk

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

[2] ITO *v.* Veeda Clinic Research Private. Limited.[(2013) (144 ITD 297) (Bangalore Tribunal)]

[3] DIT *v.* Sheraton International Inc.[(2009) (313 ITR 267)(Delhi HC)]
CIT *v.* Kotak Securities Ltd. [(2016) (383 ITR 1)(SC)]
DIT *v.* A.P Moller Maersk A S [(2017) (392 ITR 186) (SC)]

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