



Tax Insights

11 July 2023

High Court dismisses Revenue's appeal affirming Tribunal's ruling on DTAA entitlement based on valid TRC and non-existence of business connection based on facts of case – Bombay High Court

In brief

The taxpayer, a non-resident company, earned subscription revenue from Indian subscribers for facilitating advertisement of their products and services on the group's web portal. The Bombay High Court¹ rejected the Revenue's appeal and affirmed the Income-tax Appellate Tribunal's (Tribunal) ruling which was based on categorical fact findings that the –

- Revenue does not have blanket powers to deny the access to the Double Taxation Avoidance Agreement (DTAA) when a valid tax residency certificate (TRC) is available.
- Activities performed by an agent in its ordinary course of business cannot constitute a dependent agency or business connection in India, and thereby, the business receipts are not taxable in India.
- Fees received for provision of a standard facility without any customisation or human intervention would not be taxable as fees for technical services (FTS).

In detail

Facts

- The taxpayer is a non-resident company incorporated under the laws of Singapore as evidenced from the Certificate of Incorporation (COI). It also holds a valid TRC.
- The ultimate parent company of the taxpayer, which is based in Caymen Islands, is the owner of the IPR, i.e. trademark, brand name and logo of the group. It is also the owner of the domain name of the website, which is used by all group entities. However, the website is operated by a Hong Kong-based group entity, and the server hosting the website is located in the USA.
- During the years in dispute, the taxpayer provided online business-to-business (B2B) services to worldwide subscribers including India. Under this service, the taxpayer provided access to the website for the subscribers to display information about their products and services in electronic form and earned subscription revenue.

¹ ITA No. 212 of 2018

- For rendering the said service, the taxpayer availed web hosting and related services from its Hong Kong-based group entity.
- The taxpayer also entered into a cooperation agreement with X Limited, an Indian entity, which provided customer support and after sales services. It also provided payment collection services from Indian subscribers.
- The taxpayer declared nil income in India by taking recourse to the India-Singapore DTAA.
- However, the assessment of the taxpayer was concluded by:
 - denying the DTAA benefits by opining that the taxpayer was merely acting as an intermediary between the Hong Kong entity and the Indian subscribers;
 - holding X Limited as dependent agent permanent establishment (PE) or business connection in India, and hence, by taxing 50% of the receipts from X Limited as business income.

High Court’s decision

Access to India-Singapore DTAA

- The High Court observes that the Tribunal examined various facts and documents to make the below specific factual findings:
 - The taxpayer is an independent entity and a tax resident of Singapore. To arrive at this conclusion, the Tribunal takes note of various aspects such as COI, TRC, group structure and operating model of the taxpayer, filing of annual accounts and tax returns in Singapore offering subscription revenues from all over the world including India, etc.
 - The Tribunal also observes that a TRC is a sufficient proof of tax residency, and it cannot be disregarded by the Revenue authorities without any allegation of tax fraud, etc.

Accordingly, the High Court holds the Tribunal was correct in providing DTAA access to the taxpayer.

Taxability as business income

- The High Court observes that the Tribunal made various factual findings as noted below with respect to the transactions of the taxpayer with Indian subscribers on the one hand and X Limited on the other hand.

Indian subscribers	X Limited
<ul style="list-style-type: none"> • Taxpayer performs the limited role of facilitation for the posting of advertisement or displaying of information about the products and services of the Indian subscribers on the web portal. • The taxpayer neither maintains a stock of products nor undertakes delivery or provides any services at the behest of the Indian subscribers. • The taxpayer does not receive money from the seller on behalf of the buyer or Indian subscriber. 	<ul style="list-style-type: none"> • X Limited did not provide services exclusively to the taxpayer. It provided such services to various other clients. • Taxpayer did not have financial, managerial or any such participation in X Limited. • Taxpayer paid service charges to X Limited for its services. • X Limited rendered the services to the taxpayer in its ordinary course of business.

- The High Court confirmed the Tribunal’s conclusion based on the above factual findings that the taxpayer does not have any business connection in India. The Tribunal also specifically concluded that X Limited is not a dependent agent of the taxpayer. Accordingly, the income received by the taxpayer from India is not taxable as business income under the Income-tax Act, 1961 (the Act).

Taxability as FTS

- The High Court noted that the Tribunal perused the facts and documents on record and categorically held the following.
 - The taxpayer merely provided an e-commerce platform where the information about various products and services of the Indian subscribers were displayed.
 - This is a provision of a standard facility and does not involve any human interface or intervention nor there is any customisation for any particular client.
 - Accordingly, it concluded that such service was not in the nature of any technical, managerial or consultancy service to be taxed as FTS under the Act.

Considering all of the above, the High Court concurs with the Tribunal's conclusion and dismissed the Revenue's appeal holding that there is no substantial question of law.

The takeaways

This decision reaffirms the position that DTAA benefits cannot be denied once there is a valid TRC. While TRC is a prerequisite, given the developments in the legal framework with the advent of Multilateral Instrument and evolution of tax disputes, supplementary facts such as the control and management of the taxable entity, economic ownership of the profits earned by such entities, etc. also assumes importance. This decision also fortifies that existence of a business connection or PE is a factual matter which mainly depends on the nature of business activity and the modus operandi of such businesses. Considering the ever-changing complex business models, documentation becomes extremely critical to substantiate such aspects.

About PwC

At PwC, our purpose is to build trust in society and solve important problems. We're a network of firms in 152 countries with over 328,000 people who are committed to delivering quality in assurance, advisory and tax services. Find out more and tell us what matters to you by visiting us at www.pwc.com.

PwC refers to the PwC network and/or one or more of its member firms, each of which is a separate legal entity. Please see www.pwc.com/structure for further details.

© 2023 PwC. All rights reserved.

Follow us on

[Facebook](#), [LinkedIn](#), [Twitter](#) and [YouTube](#).

pwc.in

In this document, "PwC" refers to PricewaterhouseCoopers Private Limited (a limited liability company in India having Corporate Identity Number or CIN : U74140WB1983PTC036093), which is a member firm of PricewaterhouseCoopers International Limited (PwCIL), each member firm of which is a separate legal entity.

©2023 PricewaterhouseCoopers Private Limited. All rights reserved.