



Tax Insights

18 July 2023

Support services rendered on continuous basis not satisfying make-available test, hence not taxable in India – Delhi bench of the Tribunal

In brief

The taxpayer, a UK company, earned service revenue from its Indian associated enterprise (AE) for rendering management support services. The Delhi bench of the Income-tax Appellate Tribunal (Tribunal)¹ was of the view that the said services are not taxable as fees for technical services (FTS) under the beneficial provisions of the India-UK Double Taxation Avoidance Agreement (DTAA) as the make-available test is not satisfied. The Tribunal concludes this by observing the nature of services and the fact that such services are rendered on a continuous basis. These aspects establish that the recipient was not made available any technical knowledge enabling it to perform such services on its own in the future.

In detail

Facts

- The taxpayer is a non-resident company, with its registered office in the UK. It is engaged in the business of providing SMS messaging solutions through cloud-based technology to global customers.
- During the year in dispute, the taxpayer provided centralised services in the nature of financial, sales, legal and technical support services to its AE in India.
- The assessment of the taxpayer was completed by taxing such management support service income in India on the premise that it is in nature of FTS. It further concluded that such services make available technical knowledge, skill, experience, etc. and are thus taxable as per article 13(4)(c) of the India-UK DTAA.

Revenue's contentions

- The support services rendered by the taxpayer are enduring in nature.
- Employees of the AE are capable and expected to use the knowledge gained from such services in its business. Therefore, the taxpayer has made available the knowledge and know-how. Accordingly, such service revenue is taxable in India even under the India-UK DTAA.

¹ ITA No. 820/Del/2022

Tribunal's ruling

- On perusal of the agreement, email correspondences and other documents, the Tribunal observes the following.
 - Services offered by the taxpayer included maintaining invoice records, sending collection reminders, reviewing legal agreements, providing technical support to the AE's customers, etc.
 - The taxpayer rendered services from the UK, and they were delivered through email to the AE.
 - The services were provided year after year on a continuous basis. This indicates that the service recipient cannot perform such services independently.
- According to the Tribunal even if the services are covered under the definition of FTS under the domestic provisions of the Income-tax Act, 1961 the same would not be covered under the ambit of FTS as per article 13(4) of the India-UK DTAA. Moreover, the taxpayer does not make available any technical knowledge, experience, skill, know-how, etc. that enables the service recipient to apply and use such knowledge on its own.
- The Tribunal relies on previous rulings in this context to conclude that the taxpayer may use technical knowledge to render services, and the recipient may also derive the benefit of such service; however, these services would be taxable in India only if technical knowledge is made available.
- Accordingly, the Tribunal deletes the addition to the total income made in case of the taxpayer.

The takeaways

Centralisation of administrative and support services is very common amongst corporate groups. This ruling reaffirms the position that unless the make-available test is satisfied, such services would not be taxable as FTS considering the narrower definition available under most DTAA's. Therefore, it becomes imperative to demonstrate this aspect. The service agreement, in most cases, is worded in a very macro manner or is completely exhaustive; in either case, the nature of actual services rendered is not ascertainable. It thus becomes imperative to substantiate the nature of services rendered through, for example, sample email correspondences to establish that the services do not make available any technical knowledge or skill. The continuous rendition of service also goes to supplement (though not conclusively) this aspect that the service recipient is not capable of performing such services independently and, thus, services are not made available.

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