

  
Tax Insights

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**Delhi High Court upholds taxability of fees for branding and management services under Article 12 of India-US DTAA in the hands of US company, being 'beneficial owner' of the income in absence of back-to-back arrangement with holding company****In brief**

The Delhi High Court<sup>1</sup> has upheld the order of the Delhi bench of the Income-tax Appellate Tribunal (Tribunal). The court has confirmed that fees received by a taxpayer incorporated in the United States (US) upon rendering branding and management services to its Indian counterpart are taxable at the rate of 15% on a gross basis as fees for included services (FIS) under Article 12 of the India-US Double Taxation Avoidance Agreement (DTAA). In the absence of any substantial question of law, the Tribunal's ruling has been upheld.

The High Court has observed that once it is held that there is no back-to-back arrangement and the taxpayer has dominion and control over the fees it has received, the taxpayer is entitled to the status of beneficial ownership; consequently, the provisions of Article 12 of the India-US DTAA gets triggered.

**In detail****Facts**

- The taxpayer is a company incorporated under the US laws.
- During assessment year 2015–16, the taxpayer rendered branding and management services to its associate Indian entity.
- The taxpayer offered the service income to tax at the rate of 15% (gross basis) as FIS in terms of Article 12 of the India-US DTAA.
- During the assessment proceedings, the tax officer (TO) noted that the taxpayer had an agreement with its holding company. Under this agreement, the fee the taxpayer had received from the Indian entity is transferred to its holding company on a back-to-back basis. Accordingly, the TO taxed the receipts at the rate of 25% on a gross basis under the domestic law; the TO held the taxpayer as only a recipient and not the beneficial owner of said fees entitled to the DTAA benefits.
- On first appeal, the Commissioner of Income-tax (Appeals) [CIT(A)] considered the explanations the

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<sup>1</sup> ITA 530/2022

taxpayer had provided and the email communications between the group entities. The CIT(A) concluded that the taxpayer is a beneficial owner of the fees it has received from the Indian entity, and there is no back-to-back arrangement between the taxpayer and its holding company. In doing so, it made the following observations regarding the taxpayer and the transaction in question:

- The taxpayer, being one of the group companies, has a place of management in the US to provide global headquarter services. It is a separate legal entity within the group, with a specific set of roles and responsibilities.
- The transaction in question is part of a case of cost pooling, where various group companies deliver services of different nature that are of mutual benefit to the group entities.
- On perusal of the emails exchanged between the taxpayer and the Indian entity shows that the taxpayer plays a meaningful role in the delivery of services to the Indian entity.
- A beneficial owner is someone who, besides being a legal owner, has 'dominion and control' over the property. That is, they are the owner of a property who hold it for their own benefit and not as an agent, trustee or nominee for some other person, and they have the right to deal with the property as their own.
- Based on the facts, it can be said that this is not a case where the taxpayer is a conduit company. In fact, the taxpayer is a beneficial owner of the fees, entitling it to the DTAA benefits.

### High Court's decision

- The High Court, considering the findings of the CIT(A) observed that:
  - a) Where there was no back-to back arrangement between the taxpayer and its holding company; and
  - b) The taxpayer, playing the role of a service provider after procuring the same from other group companies, had dominion over the fees received by it.

The taxpayer was entitled to the status of beneficial owner of the fees received from the Indian entity and was entitled to the benefit under Article 12 of the India-US DTAA.

- The High Court has noted that the Tribunal had sustained the order of the CIT(A). Since no substantial question of law had arisen in the appeal filed before the High Court, it was dismissed.

### The takeaways

This is a welcome decision by the High Court. The High Court has upheld the findings of the lower appellate authorities, according to which, the taxpayer is not merely a conduit company having back-to-back arrangements with other entities within the group. Therefore, demonstrating with appropriate evidence and explanations how the intermediary company has played the role of a service provider would also be one of the critical factors to justify that the intermediary company is the beneficial owner of the fees it has received.

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