

What's New

Tax Insights



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Receipts from ILP and consortium membership are not taxable as FIS, as neither the technical services are provided nor made available; Receipts from sponsorship assignments are taxed as FIS as technology is made available through specific research – Mumbai bench of the Tribunal

In brief

The Mumbai bench of the Income-tax Appellate Tribunal (Tribunal)¹ concluded that for a receipt to be covered within the ambit of fees for included services (FIS) as defined under Article 12 of the India-USA double taxation avoidance agreement (DTAA) read with the Memorandum of Understanding to the DTAA, the taxpayer's services must not only be of technical nature, but must also make available technical knowledge, experience, skill, know-how, etc. to the recipient of such technical services.

In light of the above, Tribunal was of the view that receipts from –

- Industrial Liaison Programme (ILP) under which access to public documents and reports were given; and
- Consortium Membership which are merely co-ordination fees are not taxable as FIS because the taxpayer has neither provided nor made available technical services.

Moreover, the Tribunal confirms the inclusion of receipts from customised sponsorship assignments as FIS because the taxpayer made the technology available to the sponsor by undertaking specific research, allowing the sponsor to derive an enduring benefit from the same.

In detail

Facts

- The taxpayer, a resident of USA, is an educational institution incorporated as a non-profit organisation. It is primarily engaged in imparting of knowledge in science, technology, and related areas; teaching services; and industry-specific research.
- During the year under consideration, the taxpayer has earned the following receipts from India:

¹ ITA No.607/Mum/2022

- **ILP membership fees**

The taxpayer has organised a few ILPs, dedicated to creating and strengthening mutually beneficial relationships between the taxpayer and corporations worldwide. An Industrial Liaison Officer (ILO) is assigned to ILP members as a primary contact who understands the industry. The ILO provides ILP members access to discussion papers, information, and reports on technical topics and emerging technologies that relate to the members' interests. These research and reports are not undertaken specifically for the members; they are already available in public domain but are provided in a streamlined manner by identifying the relevant reports or papers.

- **Sponsorship assignment fees**

The taxpayer has also earned receipts from a sponsorship assignment programme in which industry players can participate to sponsor research on a non-profit basis in the areas of interest; they may also sponsor any research that is already undertaken. The programme uses budgeted funds to pay for direct and indirect costs associated with the research project, and the sponsor reimburses the expenses incurred. The taxpayer applies its knowledge in conducting the research projects and then updates the sponsor periodically about the research's progress and direction.

- **Coordination or consortium membership**

In addition, the taxpayer has received consortium arrangement fees. The taxpayer acts as a coordinator between all consortium members and provides access to a group of other members focused on a common agenda. As a host, the taxpayer is responsible to provide vendor neutral architecture, help manage the overall direction of the research performed by the consortium members and help provide access to and disseminate consortium research to its members.

- The taxpayer filed its return of income in India, adopting a position that the aforementioned fees from the ILP, sponsorship assignment programme, and coordination or consortium membership are not taxable under the India-USA DTAA.
- The taxpayer's case was selected for assessment proceedings. The Tax Officer (TO) opined that the aforementioned receipts are taxable as FIS under Article 12(4) of the India-USA DTAA. The TO made additions for all three mentioned fees while passing the assessment order, which was confirmed by the Dispute Resolution Panel (DRP).

Taxpayer's contentions

Taxability of fees received by the taxpayer under the ILP

- The ILP programme is designed to introduce corporates to the faculty members and researchers and their projects outside India. Therefore, no technical services are being rendered to the corporates.
- The taxpayer contended that it has not delivered any customised reports or technical plan to the participants on application of the emerging technologies under the ILP programme. Thus, the ILP programme does not result in imparting or making available any information concerning technical, industrial, or scientific knowledge, experience, or skill to the participants.
- Considering the above, the taxpayer argued that the receipts under the ILP programme should not qualify as FIS under the India-USA DTAA.

Taxability of fees received by the taxpayer under the scholarship assignment programme

- The taxpayer primarily undertakes research in the areas of science and technology. The taxpayer applies its knowledge in performing the research and reports the research's progress and direction to the sponsor.
- The taxpayer also contended that any funding received from a sponsor is an offset of expenses, not a source of income. Therefore, sponsored research agreements cannot and do not generate a profit.
- The taxpayer argued that the agreement entered into with the sponsor may have a desired outcome, but the results were unknown at the time of the agreement. In this regard, the taxpayer relied on the ruling of

the Ahmadabad bench of the Tribunal in the case of Oil and Natural Gas Corporation². Thus, the taxpayer contended that services provided by it would not qualify as FIS as per the India-USA DTAA.

Taxability of the coordination and consortium membership receipts of the taxpayer

- The taxpayer acts as a host that plays the role of an administrator and coordinator between the consortium members. The consortium is led by a host who helps drive the direction of the consortium's research and manages access to that research. It only provides a common platform for the members to come together to accomplish the consortium goals under its overall direction as a coordinator.
- The taxpayer contended that these services would not be chargeable to tax as FIS, as they are merely coordination services.

Tribunal's ruling

Taxability of various fees received by the taxpayer as FIS

- The Tribunal has observed that the consideration received by the taxpayer for services rendered under various agreements will be construed as FIS only if the services were covered within the ambit and scope of FIS under the India-US DTAA. Moreover, the Tribunal has observed that, to attract the liability to pay tax under the head FIS, the services should not only be of technical nature but also make available technical knowledge, experience, skill, know-how, etc. to the recipient of such technical services.
- In other words, technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology. The fact that provision of the service may require technical input by the person providing the service does not, per se, mean that technical knowledge, skills, etc. are made available to the person purchasing the service.
- Considering the above, the Tribunal has analysed all three categories of receipts as below.
- **ILP membership fees**
 - Given the vast resources available to external users, the taxpayer assists the subscribers based on their interests or needs. The Tribunal observes that the ILP programme is akin to a trade exhibition, whereby corporates are introduced to the faculty members and researchers as well as their projects. This helps the corporates identify specific types of research that would potentially impact their strategic plans.
 - Based on the various agreements the taxpayer has entered into with the subscribers, the Tribunal observes that, since the taxpayer merely introduces the corporates to its faculty and showcases the research projects undertaken by them, it neither renders any technical services to the corporates nor makes available any technical knowledge, experience, or skill.
 - The Tribunal thus concludes that receipts under the head ILP cannot be reckoned as FIS as per Article 12 of the India-US DTAA.
- **Sponsorship assignment fees**
 - The Tribunal has observed regarding sponsorship assignment fees that the taxpayer undertakes specific research projects for its sponsors and provides them research reports. This enables the sponsors to apply the underlying technology and intellectual property in their specific projects, further enabling them to derive enduring benefit from the said research.
 - The Tribunal also rejected the reliance placed by the taxpayer on the ruling of the Ahmedabad bench of the Tribunal in the case of Oil and Natural Gas Corporation². The Tribunal distinguished the case on facts to note that in the Oil and Natural Gas Corporation's case², the underlying technology was not passed, which is not the case in the instant matter.
 - The Tribunal has also analysed the intellectual property clause and joint intellectual property agreement the taxpayer has entered into with its sponsor. The Tribunal notes that the above clearly stipulates that

² Oil and Natural Gas Corporation v. ITO [ITA Nos. 1881-1882/ Ah d/ 2019]

the sponsor will receive the intellectual property, establishing that technical knowledge has been made available to the sponsor.

- Based on the above facts, the Tribunal has disregarded the taxpayer's contention that the services rendered should not be considered as FIS. It concluded that the receipts under the sponsorship assignment would qualify as FIS under Article 12 of the India-USA DTAA.

- **Coordination and consortium membership fees**

- For the coordination and consortium membership fees, the Tribunal has analysed various agreements. It observes that the taxpayer merely acts as a host wherein it has the responsibility to help manage the overall direction of the research performed by consortium members. Therefore, the income cannot be said to be received on account of FIS.
- Considering the above, the Tribunal observes that the taxpayer does not undertake any research, nor does it describe any method or process involved in carrying out such research; its role is to merely act as a coordinator between all consortium members.
- The Tribunal opines that the taxpayer only provides administrative support to the members; thus, it does not render any technical services to the corporate members. Accordingly, it cannot be said that the taxpayer makes available any technical knowledge, etc. Thus, the receipts are not FIS in nature as per Article 12 of the India-USA DTAA.

The takeaways

While deciding on FIS, the Tribunal thoroughly reviewed the scope of FIS under the applicable DTAA. The Tribunal has determined that where a DTAA contains a make-available clause, the mere provision of technical service is insufficient to classify such service as FIS. The service should also make available technical knowledge, experience, skill, know-how, etc. to the recipient of such technical services. The ruling further notes that services that simply provide streamline access to a publicly available database are not considered FIS.

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