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Payments for BSS that are not technical in nature and do not satisfy ‘make available’ condition are not taxable as FTS under the India-UK DTAA – Bombay High Court

In brief

The Bombay High Court (High Court)¹ observed that the term ‘consultancy’ in Article 13 of the India-UK Double Taxation Avoidance Agreement (DTAA) relates to consultancy services that are technical in nature and make available technical, or any other, knowledge, experience, skill, know-how or processes. Accordingly, it held that business support services (BSS) availed by the taxpayer from its group company are not taxable as fees for technical services (FTS) under Article 13 of the India-UK DTAA. The High Court did not analyse the taxability of such services under Article 7 of the India-UK DTAA and left it open for the department to decide and take the necessary steps to open proceedings in this regard.

In detail

Facts

- The taxpayer is a company registered under the Companies Act, 1956, and is engaged in the business of operating chain of retail fuel stations in India.
- It entered into a Cost Contribution Agreement (CCA) dated 1 April 2009, with its group company, A Limited, based in the United Kingdom, for availing general BSS on a cost- to-cost basis, the share of which is determined using cost allocation keys as specified in the CCA.
- The list of services covered under the general BSS are as follows –
 - Management support
 - Development and provision of support and business tools
 - Provision of marketing support
 - Development, communication and audit of standards of performance
 - Promotion of professional competence
 - Information technology advice and services

¹ Writ Petition No. 10788 of 2012

- General financial advice and services
 - Taxation advice and services
 - Legal services
 - Employee relations and public affairs and media advice and services
 - HR advice and services
 - Contracting and procurement services
 - Other business support services
- To determine the obligation to deduct taxes on the aforesaid services, the taxpayer filed an application before the Authority for Advance Rulings (AAR), wherein the AAR, in its order dated 17 January 2012, opined that the payments made by the taxpayer for availing the general BSS under the CCA would constitute income in the hands of A Limited and is in the nature of FTS within the meaning of Article 13(4)(c) of the India-UK DTAA. Consequently, the taxpayer is required to deduct tax under section 195 of the Income-tax Act, 1961 (the Act). The AAR concluded this based on the following –
 - The services appearing in the CCA in a retail business are at the core of retail marketing and hence ‘advice’ tendered in taking a decision of commercial nature is a consultancy service.
 - The AAR further was of the view that the services are being made available to the taxpayer since, while providing the general BSS, A Limited works closely with the employees of the taxpayer and supports and advises them, because of which the taxpayer is able to use the know-how and intellectual property generated from the General BSS independent of the service provider.
 - Thereafter, the taxpayer filed a Special Leave Petition (SLP) in the Supreme Court. The Supreme Court observed that the AAR is a quasi-judicial authority, on par with a Tribunal, and accordingly, challenge to an AAR order is assailable in the High Court as well. Therefore, it permitted the taxpayer to withdraw the SLP and file a writ petition before the High Court.

High Court’s observations and decision

The analysis and conclusions drawn by the High Court are outlined below.

- **Whether the general BSS availed by the taxpayer is in the nature of FTS within the meaning of Article 13 of the India-UK DTAA**

The High Court applied the principle of *noscitur a sociis*, which mandates that the meaning of a word is to be judged by the words that accompany it. The High Court observed that the word ‘consultancy services’ mentioned in Article 13(4) of the India-UK DTAA follows ‘technical’ which is further followed by the phrase ‘which make available technical knowledge, experience, skill, know-how or processes, or consist of development and transfer of a technical plan or technical design.’ The High Court, in interpreting the term ‘technical’, placed reliance on the decision of the Madras High Court in the case of Skycell Communications Limited² and held that services availed by the taxpayer were not technical in nature and hence not covered by Article 13 of the India-UK DTAA.

- **Whether the general BSS satisfy the make available condition as per Article 13 of the India-UK DTAA**

The High Court disagreed with the AAR’s interpretation that since A Limited works closely with the employees of the taxpayer while providing General BSS, the taxpayer is able to use the know-how and intellectual property generated independent of the service provider and hence the services under the agreement are made available to the taxpayer. The High Court further held that had it been the case, there was no need to continue the CCA agreement, which is in effect till date (from the year 2009). For interpreting the words ‘make available’, the High Court referred to the decisions in the cases of De Beers India³ and Bio-Rad Laboratories⁴.

² Skycell Communications Limited and Anr. v. Deputy CIT and Ors. [(2001) 251 ITR 53 (Madras)]

³ CIT v. De Beers India Minerals (P) Limited [(2012) 346 ITR 467 (Karnataka)]

⁴ CIT v. Bio-Rad Laboratories (Singapore) Pte. Limited [(2023) 459 ITR 5 (Delhi)]

Considering the above, the High Court quashed and set aside the order of the AAR. However, it gave the department liberty to take the necessary steps as available in the law to determine whether the receipts could be covered under Article 7 (Business Profits) of the India-UK DTAA. It also mentioned that the time taken in the present proceedings be excluded for the purpose of limitation.

The takeaways

The judgment provides valuable insights into how the term 'consultancy' may be understood in the context of FTS as defined under the DTAA. Applying the principle of *noscitur a sociis*, the judgement clarified that 'consultancy' refers specifically to technical consultation rather than purely managerial advice. Moreover, the decision highlights the significance of satisfying the 'make available' criterion for classifying consultancy services as FTS under the DTAA.

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