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Fee towards IT support services not taxable as royalty or fees for technical services under the India-Australia tax treaty

In brief

In the recent case of Sandvik Australia Pty. Ltd.[1], the Pune Income-tax Appellate Tribunal (the Tribunal) held that the receipts for rendering information technology (IT) support services to group companies in India are not taxable as royalty or fees for technical services (FTS) as per the provisions of Article 12 of the India-Australia Double Taxation Avoidance Agreement (the tax treaty).

Facts

- The appellant, Sandvik Australia Pty. Ltd. (the company or the assessee), is a tax resident of Australia.
- The assessee acts as a global IT support centre for the Asia-Pacific region and is responsible for providing the necessary IT support services for group companies in the Asia-Pacific region. The IT support is in the nature of helpdesk support, user administration, data storage, data processing and maintenance and control of the global IT infrastructure.
- The assessee received INR 10.77 million during financial year (FY) 2006-07, from its Indian associated enterprises for rendering such IT support services. The appellant filed its return of income for FY 2006-07 declaring nil income.
- The return of income was selected for scrutiny. The assessing officer (AO) passed a draft assessment order taxing the IT support fee of INR 10.77 million as FTS under the Income-tax Act, 1961 (the Act) and Clause 3(g) of Article 12 of the tax treaty.

[1] Sandvik Australia Pty. Ltd. *v.* DDIT [TS-46-ITAT-2013(Pune)]

- The Dispute Resolution Panel (DRP) confirmed the draft order and consequently a tax demand was raised.

- The assessee filed an appeal before the Tribunal.

Issue

- Whether the IT support fee is taxable as royalty or FTS in India under Article 12 of the tax treaty.

Assessee's contentions

- As per Clause 3(g) of Article 12 of the tax treaty, services rendered should make available technical knowledge, experience, skill, know-how to the recipient of the service to qualify as FTS. As IT support services do not satisfy the 'make available' test, they are not taxable in India.

- There is a difference between 'rendering the services' and 'to make available the services'. The former means services are rendered to give end results without imparting any technical know-how or knowledge. In case of the latter, the recipient of the services is enabled to make use of the technology.

- The assessee placed reliance on the following case laws to interpret the term 'make available':

  - De Beers India Minerals (P) Ltd.[2]

  - Guy Carpenter & Co. Ltd.[3]

- The assessee is rendering IT support services and not imparting any technical know-how or knowledge. The agreement between the assessee and the recipient companies needs to be read holistically and none of the clauses suggest that technical knowledge has been made available to the recipient companies.

Revenue's contentions

The revenue authorities laid emphasis on the recitals of the agreement between the assessee and the group companies, wherein it was mentioned that the assessee is willing to transfer knowledge as per the agreement. The revenue authorities argued that the assessee had not only rendered IT support services but also transferred the knowledge of the said services to the recipient party.

- The receipts are covered under provisions of royalty or FTS under the Act and the Clause 3(g) of Article 12 of the tax treaty.

Tribunal ruling

- The services consist of IT helpdesk support, back-up related services and networking-related services. By providing these services, the assessee has not imparted any technical know-how, skill, process or transferred technical plan or design.

- The operating clauses of the agreement do not suggest that the assessee has made available the required technical know-how to the recipient companies.

- The term 'make available' in the tax treaty is used in the context of supplying or transferring technical knowledge or technology to another. The technology will be considered as made available when the person receiving the services is able to apply the technology without further assistance from service provider. For interpreting the term 'make available', the Tribunal relied on the decision of the Karnataka High Court in the case of De Beers India Minerals Pvt. Ltd. (above).

- The assessee only provided back-up services and IT support services for solving the IT related problems of its Indian affiliates. Hence, services rendered by the assessee, although in the nature of technical services as per

[2] CIT & ITO *v.* De Beers India Minerals (P) Ltd. [2012] 72 DTR 82 (Karnataka)
[3] DIT *v.* Guy Carpenter & Co. Ltd. [2012] 346 ITR 504 (Delhi)

section 9(1)(vii) of the Act, are not covered by Clause 3(g) under Article 12 of the tax treaty.

Conclusion

Of late, the revenue authorities have been trying to tax all IT related receipts (including software and IT support payments) under royalty or FTS, especially after the retrospective amendments in the Act.

The Tribunal has discussed the concept of 'make available' used in tax treaties and applied the same in the context of IT support services. This ruling discusses the nature of IT support services at length and provides a good direction as to why the 'make available' test may not be satisfied in the case of IT support services.

This is a welcome ruling and is likely to provide a good defence to non-resident assessees grappling with the issue of taxability of similar IT support fee receipts, especially where the non-resident is from a tax jurisdiction with which India has signed a tax treaty having similar provisions ('make available clause') *vis-à-vis* tax incidence of royalty or FTS.

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