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CHARTERED ACCOUNTANTS

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INTERNATIONAL TAX REVIEW

JUNE 2022

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Receipts from access to a news and information database 'Factiva' is not taxable as Royalty as per India UK DTAA.

Facts

Assessee, a company incorporated in the United Kingdom (UK) is engaged in the business of providing global business news and information services to organizations worldwide by employing content delivery tools and services through a suite of products and services under the name Factiva. By virtue of a distribution agreement, the assessee granted rights to distribute the Factiva product in the Indian market to its group company, Dow Jones Consulting India Pvt. Ltd. (DJCIPL) on a principle to principle basis. During the year under assessment, the assessee received an amount from DJCIPL on account of distribution of its products by DJCIPL. The assessee claimed that the amount received by it from DJCIPL is in the nature of business income under Double Taxation Avoidance Agreement (DTAA) between India and the UK. Further, the assessee submitted that it does not have any Permanent Establishment (PE) in India and as such income attributable to the consideration received from DJCIPL in India is not liable to tax in India. However, declining the contentions raised by the assessee, the Assessing Officer (AO) in its draft assessment order proceeded to hold that payment made by DJCIPL to the assessee was taxable as royalty under section 9(1)(vi) of the Act read with section 13(3)(a) of India-UK DTAA as the payment is for the use of copyright in literary work, use of information concerning commercial, scientific knowledge, experience and skill and use or right to use equipment or process and thereby sought to tax as the royalty under the Act as well as the treaty. The Assessee carried the matter before Dispute Resolution Panel (DRP), who upheld the order passed by the AO to the extent that the amount received by the assessee towards payment for Factiva product is in the nature of royalty as per Article 13 of India-UK DTAA. Aggreived, the assessee filed an appeal before Income Tax Appellate Tribunal (Tribunal).

Ruling

Tribunal observed that the amount received by the Assessee was for providing use of database specifically by not giving any copyright and that transaction was to grant the right to distribute Factiva in the Indian markets to its group company DJCIPL on a principle-to-principle basis. Tribunal placed reliance on the decision of the coordinate bench in Dow Jones & Company Inc.,which is a group company of the Assessee (135 taxmann.com 270), decision of the Authority of Advanced Ruling (AAR) in the case of Dun and Bradstreet Espana SA, ((2005) 272 ITR 9), and confirmed by Bombay High Court cited as (2011) (338 ITR 95) and coordinate bench ruling in American Chemical Society, (106 taxmann.com 253), and held that only those payments which allow payers to use/acquire a right to use a copyright in literary, artistic or scientific work are commissioned under the definition of 'royalty'. In the instant case, the assessee used to collect information available in the public domain viz. newspaper and news wires from all over the world by collaborating with the news publishers and other sources and collates such relevant publicly available news/information, then create a systematic database of news articles and other information in relation to search term, as actual public appears on the screen. Tribunal opined that as per Article 13 of India-UK DTAA, only payment made for use or right to use copyright of literary, artistic or scientific work is is defined as royalty, in the instant case, payment received by the

assessee is not for any information qua industrial scientific or commercial experience rather it is merely for the use of database and not for the use or right to use any equipment as the subscriber and DJCIPL has no access, right or control of any manner whatsoever offer with respect to the data storage devises or the server maintained by the assessee to update its database.

Tribunal rejected findings of the DRP that Factiva product was a sector specific specialized knowledge portal as the Assessee employed a dedicated team of 100 specialists to collate and update the data on daily basis and as such falls within the ambit of use of copyright as well as information concerning industrial scientific or commercial experience. Further, rebutting the claim of DRP with respect to Factiva Product, Tribunal mentioned that the database prepared by the assessee does not have any copyright or intellectual copyright with the Assessee and the customer only gets the right to search, view and display information and therefore deleted the adjustment.

Further, Tribunal rejected Revenue's contention that DJCIPL constituted Assessee's Agency PE and thus the receipts can be taxed as business profits under Article 7, stated that there was not even an iota of material on record to prove this fact. Held that the payment received by the assessee is not taxable in India as the revenue failed to prove the presence of a permanent establishment (PE) of the Assessee in India.

Source: Tribunal Mumbai in M/s. Factiva Ltd. v. Dy. Commissioner of Income-Tax (International Tax), dated May 31, 2022, vide ITA No. 6455/Mumbai/2018.

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A pre-requisite for taxability of interest under Article 7 of India Japan DTAA is presence of an effective connection with the PE.

Facts

The assessee is a corporate domiciled in Japan, and has various streams of income from India operations, income from PE in India, income from fee for technical services (FTS), income from shipping business and income from interest on suppliers' credit, apart from other incidental incomes. The interest on suppliers' credit is received by the assessee from its customer Tata Hitachi Construction Co Ltd on the sale of Excavator products, sold by the assessee company or one of its controlled entities. Such interest was offered to tax by the assessee at the rate of 10 percent in accordance with the provisions of Indian Japan DTAA. During scrutiny assessment proceedings, the AO observed that the Assessee admittedly has a PE in India and in terms of the provisions of DTAA, a concessional rate of gross basis taxation @10% should not be applicable. The plea of the assessee was that the interest income was earned by the assessee on suppliers' credit for funding purchase of Excavator products, which were sold by the assessee company or one of its controlled entities, and that this transaction had no connection whatsoever with the PE in India. The AO did not even analyze this plea in much detail but implicitly rejected it nevertheless by proceeding on the basis that since the assessee had a PE, the exclusion clause under Article 11(6) was triggered, and the assessee was no longer eligible for the concessional rate of gross basis taxation @ 10%. Aggrieved, the assessee carried the matter in appeal before the Commissioner of Income Tax Appeals (CIT(A)). CIT(A) held that the approach of revenue is inherently flawed and even if the interest income is connected with the Assessee's PE, it can only be brought to tax in India when it is directly

or indirectly attributable to the PE and concluded that the interest income in question is required to be taxed @10% in terms of the provisions of the Article 11(2) as there is no connection between the interest income and the PE. Aggrieved by such findings, revenue appealed before the Tribunal.

Ruling

Tribunal held that the connection per se of an income with the PE cannot always and inevitably lead to the attribution of such income in the hands of the PE, as attribution of an income to the PE is a degree higher than mere connection of an income with the PE. Further, Tribunal rejected the appeal of revenue on applicability of exclusionary provision of Article 11(6) by holding that it proceeds on an underlying assumption that the debt claim in respect of which interest is paid should be effectively connected with the PE for taxability under Article 7(1). Tribunal clarified that the Revenue did not establish that the PE played any role in the supplier credit extended to Indian customers which is the debt claim leading to the impugned interest income and no part of interest income, by any stretch of logic, can be said to be directly or indirectly attributable to the Indian PE of the Assessee. Tribunal reiterated that the onus of establishing the 'effective connection' between the debt claim with the PE is on the Revenue and the Assessee is only expected to reasonably comply with the requisitions for information to be made by the Revenue. Thus, Tribunal upholds CIT(A)'s order and clarifies that though Tribunal has traversed a different path vis-à-vis the path taken by the coordinate bench in Assessee's own case for the earlier year, the conclusion is same.

Source: Tribunal, Mumbai in Deputy Commissioner of Income Tax vs. Marubeni Corporation, Japan dated June 17, 2022, vide ITA No. 10/Mum/2022.

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Interpreting DRP Rules, Mumbai Tribunal holds that TPO is not empowered to file a rectification plea before the DRP Panel.

Facts

Assessee was awarded a contract by the Oil and Natural Gas Corporation (ONGC) for the supply of floating, production, storage and offloading (FPSO) vessels, and for providing, inter alia, operations and maintenance services. For the same, the assessee entered a bareboat charter party with its associated enterprise (AE) in Singapore. While the TPO/AO proposed an upward adjustment to the arm's length price (ALP) of such international transaction, the DRP, with detailed analysis in a very elaborate order, was of the considered view that the transaction of payment of hire/lease charges to the AE by the assessee is at arm's length and does thus not warrant any upward adjustment. Therefore, in the final assessment order, post DRP directions, no adjustment was made by the AO. However, pursuant to the order, the TPO moved a miscellaneous petition (petition) proposing rectification of various mistakes apparent on record in the order of the DRP. Vide the petition, TPO assailed the order of the DRP on various points ranging from selection of comparables for ALP determination, use of operating day rates for benchmarking, documentation submitted, use of most appropriate method (MAM) for benchmarking etc. Rejecting assessee's contention that only mistakes apparent from record can be rectified by the DRP and that directions of DRP are non-appealable to minimize litigation, and despite acknowledging that there was no mistake apparent from record, the DRP proceeded to dispose the rectification application and directed the TPO/AO to give effect to such directions. Aggrieved, the Assessee preferred an appeal before Tribunal.

Ruling

Based on a careful reading of Rule 13 of the Income-tax (Dispute Resolution Panel) Rules, 2009 (DRP Rules) Tribunal held that the scheme of rule 13 does not visualize any rectification of mistake by the DRP on an application by the TPO. Tribunal clarified that the rectification powers, under rule 13, by the DRP can be exercised either suo moto, i.e., on its own by the DRP, on an application made by the eligible assessee or on an application made by the AO. Further, disregarding the nomenclature 'Miscellaneous Application' of the petition filed by the TPO, Tribunal held that irrespective of the nomenclature, it was unambiguously a petition seeking rectification of mistake as evident from the opening words in the first paragraph to the appeal effect. Tribunal dismissed the petition/ miscellaneous application/ rectification application on the ground that the scheme of Rule 13 does not visualize or permit a rectification application being entertained from a person other the assessee or the AO. Separately, reliance was placed on the decisions of Supreme Court (SC) in ITO Vs Volkart Brothers [(1971) 82ITR 50 (SC)], CIT Vs Reliance Telecom Limited [(2021) 133 taxmann.com 41 (SC)] and jurisdictional High Court (HC) ruling in CIT Vs Ramesh Electric & Trading Co. [(1993) 203 ITR 497 (Bom)]. Further, Tribunal stated that DRP had no occasion to pass the rectified order not only because the rectification proceedings were based on an application made by an authority which was not permitted to file such an application, but also because it was a common position that there was no mistake apparent in the original directions issued by the DRP. Thus, held that the revised directions of the DRP and the order giving effect passed by the AO were unsustainable in law and quashed.

Source: Tribunal, Mumbai in Shapoorji Pallonji Bumi Armada Pvt. Ltd. vs Assistant Commissioner of Income Tax, Circle 1(3)(1) dated June 27, 2022, vide ITA No. 1353/Mum/2021.

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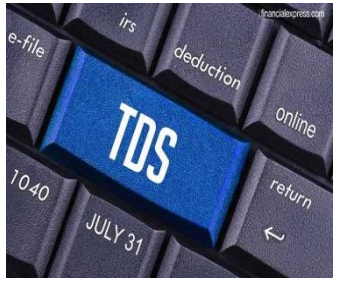
Service Fee paid to a non-resident intermediary for client introduction is not FTS, but regular business expenditure

Facts



During the assessment proceedings, AO observed that assessee incurred an expense under the head Consultancy fee on which no TDS was deducted at the time of making payment. In response thereto, assessee had submitted its arguments in the response, however the AO did not accept the contention of the assessee and made addition u/s 40(a)(ia) of the Act treating the same to be in the nature of FTS. Further, AO provided partial credit of TDS claimed by the assessee without giving any reason or basis for doing the same. The assessee submitted that the amount was paid for facilitating the sale of agricultural goods by way of introduction to a client i.e., Assam Company India Ltd. It was submitted by the Assessee that the aforesaid was a normal business payment that was covered within the scope of Article 7 read with Article 5 of DTAA between India and the United Kingdom (UK). The Assessee submitted that the foreign entity did not provide any 'managerial service' to the assessee company and merely on conjecture concept of fees of technical services has been introduced. It was submitted that services provided were akin to advisory services provided by the non-resident. The assessee submitted that all the relevant case laws cited on behalf of the assessee were arbitrarily distinguished. Ld. On appeal, CIT(A) affirmed the adjustment made by the AO. Aggrieved, Assessee preferred an appeal before Tribunal.

Ruling

Tribunal observed that there was no finding of the lower authorities as regards any inquiry made as to the nature of agreement between the Assessee and the foreign entity to find out if the foreign entity was

extending any technical know-how or expertise in the field of procurement of business or any other purpose, on a permanent basis. Thus, reversed CIT(A)'s findings that consultancy charges paid for introduction of client located and engaged in the business in India was in the nature of FTS, making Assessee liable to withholding tax. Tribunal relied on the jurisdictional rulings in Grup Ism [2015] 57 taxmann.com 450(Delhi)], Panalfa Autolectrick [2014 49 taxmann.com 412 (Delhi), and the coordinate bench ruling in Welspring Universal [2015] 56 taxmann.com 174 (Delhi-Trib.) to hold that the nature of transaction between the Assessee and the foreign entity was not of providing any technical service but was a payment in the nature of a normal business payment to an intermediary.

Source: Tribunal, Delhi in SMR Automotive Systems India Ltd. vs DCIT, dated May 25, 2022, vide ITA. No. 6597/Del/2018

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Tribunal upheld that FTS paid to AE was not towards shareholder activity and upholds the aggregate benchmarking under TNMM.

Facts

The assessee is engaged in manufacture and sale of diverse products such as diesel and gasoline fuel injection systems, auto electrical, special purpose machines, packaging etc. During the year, assessee made a payment in the nature of technical service fee to its AE, Robert Bosch GmbH. The assessee aggregated the international transactions (including payment of technical service fee) under both the segments and applied the Transactional Net Margin Method (TNMM) as the most appropriate method (MAM) for evaluating the ALP of international transactions. This aggregation approach was consistently followed and the same has been accepted by the revenue in the past as well as for the subsequent year except for the year under consideration. During the assessment proceedings, the TPO held that said payment needs to be benchmarked separately and determined ALP thereof at 'nil' using Comparable Uncontrolled Price (CUP) method. In doing so, the TPO held that all payments to AEs are in some way related to manufacturing process for which payment is already being made as royalty and there is no plausible reason for making a separate payment of technical service fee. The TPO rejected the submission of the assessee that these payments are independent of and not covered in the Technical Collaboration Agreement (TCA). The technical assistance contemplated in TCA relates to handing over of manufacturing data and advice concerning manufacturing problems whereas the technical service fees paid are for various engineering services, testing and sorting charges, inspection charges etc., which are not dealt under the TCA. It was also stated by the TPO that the technical service fee is in the nature of stewardship activities since the holding company is a stakeholder in the business of the assessee and hence does not require to be charged by the AE to the assessee. On appeal, the CIT(A) confirmed the action of the TPO. The CIT(A)concluded that the technical services rendered by the AE clearly fall within the scope of the TCA and hence separate payment is not warranted. The CIT(A) also held that the services rendered are part of shareholder of stewardship activity for which no separate payment is required. Aggrieved, the assessee filed an appeal before Tribunal.

Ruling

Tribunal observed that as per the TCA, AE granted nonexclusive, non-transferable right to the assessee to use contract patents as well as data and experiences entrusted to assessee for manufacture of the contract

products and its sale in the manufacturing territory. Further, the nature of the technical fee payment is towards inspection, engineering services, calibration etc. and such services do not represent manufacturing data and advise concerning manufacturing problems. Thus, held that these services are not covered by the TCA and are rather provided as per various agreements separately entered into between the assessee and AE. Further, the Tribunal noted that the TPO/CIT(A) have not properly appreciated evidence in the form of purchase orders, invoices, agreements, email communications etc. evidencing the rendering of services by AE and receipt thereof by the assessee. Basis such observations, TPO/ CIT(A) erroneously held that the technical services for which payments are made are already covered by the TCA and hence no separate payment is warranted. Tribunal opined that there is no prohibition in law to make separate payments to AEs for different services under separate agreements. Further, the scope and nature of technical services for which payment is made is different from the nature of technical assistance under the TCA, thereby rejected TPO/CIT(A)'s finding that the technical service fee payments are towards shareholder or stewardship activities. In relation to the benchmarking, Tribunal held that the technical services for which payment was made were related to the main activity of manufacture and distribution by the assessee, and hence being closely linked to other international transactions, all transactions were rightly benchmarked on an aggregate basis using TNMM as MAM. Further, TPO accepted TNMM for earlier years and no difference in facts was shown for the year under consideration, placed reliance on Bombay HC decision in Vishay Components India P. Ltd (ITA No. 1643/2016) in this respect. Further Tribunal noted that TPO had not shown any comparable transaction under CUP method. Tribunal clarified that Revenue did not dispute assessee's submission before the CIT(A) that service tax was paid in India on the technical service fee and AE filed Form 3CEB, return of income in India offering to tax the entire technical service fee and the same was assessed and accepted by the tax authorities. Accordingly, Tribunal deleted the TP addition.

Source: Tribunal, Bangalore in Bosch Limited v. DCIT (LTU), dated May 19, 2022, vide I.T.A. No. 1581/Bang/2014.

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