

SATURDAY INTERNATIONAL TAX GYAN !!! **#taxmadeeasy**

Inter Continental Hotels Group (Asia Pacific) (Pte.) Ltd. v. ACIT, Circle-2(1)(1), New Delhi¹

Agreement with Indian company for management support service, accounting etc. where no transfer of technology and 'make available' clause not satisfied, hence not taxable.

Facts:

- The assessee was a private company incorporated in Singapore and was a part of IHG. Its primary business was to franchise/license, operate and manage hotels operating under different hotel brands of IHG in the Asia Pacific (AP) region.
- The assessee being the regional headquarters for the Asia Pacific region, was the economical and beneficial owner of various hotel brands.
- During assessment year 2012-13, the assessee, amongst others, earned revenue from an Indian group company (IHG India) on account of management support costs. Based on the nature of services enumerated under the support service agreement with IHG India, the assessee provided operational support, accounting and legal support, information technology related services etc.

Assessee's contention:

- The assessee did not offer the aforesaid receipts to tax on the plea that the support services do not constitute FTS as envisaged under Article 12(4) of India-Singapore DTAA.
- The Assessee submitted that since the services were not ancillary or subsidiary to enjoyment of a right for which royalty is being received by the Assessee, therefore, such receipts cannot be taxed as FTS under Article 12(4)(a) of the India-Singapore tax treaty.

Revenue's contention:

- Revenue observed that it is evident from the plain reading of the nature of services provided by IHG India to third party owners that IHG first availed the knowledge set in respect of operational support, analytical & accounting support, and miscellaneous and delivered the same to third party. It is noted that while describing the services, the term "advise/advice" has been repeatedly used and the services are themselves called "support services". This itself indicates that while providing services, the employees of the assessee worked closely with the employees of the IHG India and supported/advised them. Thus, the transfer of knowledge and experience is inherent in this process which leads to "make available" of services.

¹ [2021] 133 taxmann.com 99 (Delhi - Trib.)

Ruling:

- During the course of proceedings it was observed that assessee had relied on the meaning of "make available" in the MOU in India-US DTAC. In this regard it was stated by the tribunal that **one can look into the Protocol attached to a treaty between two countries to find the meaning of an expression used in the treaty, but to refer to a treaty to which two countries are not parties, would not be appropriate.**
- **The Tribunal interpreted the expression "make available" that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilize the knowledge or know-how in future on his own.**
- In view of the services rendered, there is no doubt that the services rendered by the assessee were in the nature of managerial/technical/consultancy services.
- The operational support such as Providing advice, information and competitive expertise to local general CMH Hotel management on the operation of Hotels in accordance with brand standards, maintaining the qualification available with regard to the international hotel business and its management techniques and Coordinating the managerial plan and actions, advising local general CMH Hotel management on trends and changes in the hotel business in general and provide advice on the production of operating and capital budgets at the level of the CMH Hotels, which are consistent with the strategic plan can at best be the managerial consultancy service but not the services made available so that the recipient can use or replicate the such services received from the assessee. Similar view was taken with regard to accounting, training and manpower service.
- Hence, we hold that the provisions of the Article 12(4) could not be applied to the services rendered by the assessee in the strict sense of the provisions of DTAA..

Our comments:

- Thus, one needs to check whether "make available" clause is available in the respective DTAA or not. If no make available clause is present such services would be liable to tax in India.
- Further, one should also check protocol in respective DTAA of which the recipient is resident to check if "Most favored nation" clause is present in DTAA which can in turn provide benefit of make available clause if the DTAA which will be covered by such MFN clause have make available clause.

Section	Section 9 and Article 12
DTAA/Country	India- Singapore
Court	Delhi Tribunal
Date of Decision	24.09.2021

Note: Case law name in **Red**- in favour of the Revenue, **Green**- In favour of the Assessee, **Orange** = Partial.

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