SATURDAY INTERNATIONAL TAX GYAN !!!
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Salesforce.com Singapore Pte. Vs. Deputy Director of Income Tax (International taxation)[1]

Subscription fees paid for processing of data without having the control of equipment or transfer of knowledge will not be considered as Royalty under Income Tax Act or DTAA.

Facts:

- Assessee is a foreign company and the tax resident of Singapore.
- Assessee is providing Customer Relation Management (CRM) services to the client by generating reports and summaries based on the proprietary information fed into the Assessee's database by the client itself and charged subscription fees to access its database.

Assessee's contention:

- The assessee stated that access provided by them to its customer are hosted through servers located in **data-center** maintained **outside India**.
- It was also stated that the assessee **does not provide any knowledge**, or transfer of any knowledge, experience or skill.
- Assessee also held that **all the equipment is totally under control of assessee** and are present outside India and **none of their client has a physical access** which means they are only using the services provided by assessee.

Revenue's contention:

- The Assessing Officer held that assessee entered into an agreement where the **services were provided in the form of web services over a network**.
- By this way **clients** do not get ownership rights but they **got the right to use the software** of the assessee.
- Assessing Officer thus stated that this would be covered in the definition of **royalty** both under **section 9(1)(vi)** and **India-Singapore DTAA.**

[1] [2022] 137 taxmann.com 3 (Delhi - Trib.)

Ruling:

- Let's first understand the meaning of royalty under **Article 12 of India-Singapore DTAA:**
  - The term "**royalties**" as used in this Article means payments of any kind received as a **consideration for the use of, or the right to use:**
    a) **any copyright** of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning

    b) industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information;
    c) any industrial, commercial or scientific equipment, other than payments derived by an enterprise.

- **Section 9(1)(vi)** of Income Tax Act states that the income received in the form of royalty shall be deemed to accrue or arise in India if income by way of royalty payable by—
  a) the **Government**; or
  b) a person who is a **resident**, except where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or
  c) a person who is a **non-resident**, where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India.

- It was held that the assessee provides **web based online access** to its customers which are hosted by servers located **in data-center outside India.** Since the assessee has no data center located in India, it cannot be considered to have a fixed place of business India along with this **neither management is taking place nor the place of management is in India** and nor any of personnel of the assessee stays in India. Thus, allegations of AO considering these activities as royalty is unacceptable.

- Also, the assessee does not provide any information concerning industrial, commercial and scientific experience and neither it has imparted any knowledge or skill. Thus, these activities shall neither considered as royalty nor should fall under the ambit of Article 12 of India-Singapore DTAA.

- Under the agreement entered between assessee and its clients, the **customers do not have any right to access the process used** by the assessee and assessee too does not have any right to use the data of the subscriber except in the case of master subscription.

- Since all the equipment and machines used in the process are not located in India and customers of the assessee does not have any physical access to that equipment it can be compiled that the **customers are only using the service provided by the assessee**.

- Therefore, on the basis of above mentioned points the subscription fees received by the assessee does **not fall within the ambit of royalty** under section 9(1)(vi) nor under article 12 of the respective DTAA. The Assessing Officer is accordingly directed to delete the impugned addition.

Our comments:

- It is important to note here that the subscription fees has been charged for a service or data and not the software. Since the process of generating the data is not being shared with the customer it will not be covered under definition of royalty.

- Thus, we need to check whether the transaction being done with the company is a transaction for using software or taking service and in such case the agreement being entered between both the parties plays a very important role.

Section	**Article 12 and clause 7 of Protocol**
DTAA/Country	**India- France**
Court	**Delhi**
Date of Decision	**28.07.2016**

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

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Thank you