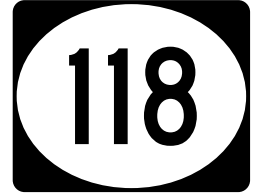


SATURDAY INTERNATIONAL TAX GYAN !!!

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NTT Asia Pacific Holdings Pte Ltd.

V/s

Assistant Commissioner of Income-tax, Circle 2(1)(2)

Enrichment of service recipient/Addition to his capabilities sans transfer of skill/technology will not satisfy “make available” clause, and hence is not taxable as FTS under DTAA

[2022] 141 taxmann.com 137 (Mumbai - Trib.)

Date: 10.09.2022

Fact of the Case

- ❖ The assessee is a company incorporated in the Republic of Singapore and entitled to receive benefits from India-Singapore DTAA.
- ❖ During the previous year, the entity received a sum from its Indian associated enterprise by the name of Dimensions Data India Pvt Ltd, for rendering certain business support services, and recovered certain expenses said to be on the cost-to-cost basis.
- ❖ Nature of services rendered include Inputs on company policy related matters, Legal Support for corporate and compliance matters, Information Technology related assistance, Support with sales activities and others.
- ❖ A.O. contends that assessee is providing managerial, technical and consultancy services to its associated enterprise and revenue earned from the same will be taxable as fees for technical services.

Assessee's Contention

❖ Assessee contends that:

- ❑ Income earned by way of management fees is not fees for technical services and is not taxable. The Appellant did not make available any technical knowledge etc. to Dimension Data India Private Limited (DD India') and hence it could not be taxed as FTS under Article 12 of the DTAA.
- ❑ In Appellant's own case for AY 2014-15 wherein after relying on its orders for earlier years, it was held that the management fee was not in the nature of fees for technical services but business profits which could not be taxed in the absence of a permanent establishment.

Revenue's Contention

- ❖ A.O. contends that assessee is providing assistance in respect of each and every aspect of corporate governance: from policy related matters to corporate communication and brand management, from managing human resources to providing support to manage finances, assisting in respect of legal/ corporate compliances and business development, development of solutions, and IT related matters etc.
- ❖ Therefore assessee is providing managerial, technical and consultancy services to its associated enterprise and revenue earned from the same will be taxable as fees for technical services.

Legal provisions related to Income Tax Act, 1961

As per **Section 9(1)(vi)(b) of Income Tax Act, 1961** – income by way of royalty payable by 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

As per **Section 9(1)(vii)(b) of Income Tax Act, 1961** - income by way of fees for technical services payable by a person who is a resident, except where the fees are payable in respect of services utilized in 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.

Legal Provisions related to DTAA

Article 12(4) of India-Singapore Tax Treaty :-

The term "**fees for technical services**" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services :

- (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or
- (b) **make available** technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or
- (c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

What is MAKE AVAILABLE clause?

- ❖ Technical knowledge, experience, skill, know how or processes is said to be made available to the recipient when it can apply the technical knowledge, experience, skill, know how or processes independently **by itself without the aid of the service provider**.
- ❖ Unless the recipient of the services, by virtue of rendition of services by the assessee, is enabled to provide the same services without recourse to the service provider, the services cannot be said to have made available the recipient of services.
- ❖ It is not a question of enriching "the service recipient, making him wiser to face similar challenges in future on his own and acquiring the skills to deal with these issues", but the test is whether the rendition of these services per se enables the recipient to provide the similar services, without recourse to the service provider, in future. An incidental benefit or enrichment which may add to the capabilities is not sufficient; the critical **factor triggering the taxability in the source jurisdiction under "Make Available clause" is the transfer of skills.**

RULING

- ❖ The nature of services was explained in detail, and it was highlighted that there is no transfer of technology or skill, in the process of rendition of these services, which is necessary for taxability in India.
- ❖ The submissions were made by the assessee in support of the contention that as long as the provisions of the Indo- Singapore tax treaty are more favourable to the assessee, the provisions of the Income Tax Act cannot be invoked at all, and that, in terms of the requirements of Article 12(4) of the Indo Singapore tax treaty, the fees for technical services can only be taxed in the source jurisdiction only when, inter alia, these services “make available technical knowledge, experience, skill, know-how or process”.
- ❖ It is not a question of enriching "the service recipient, making him wiser to face similar challenges in future on his own and acquiring the skills to deal with these issues", but the test is whether the rendition of these services per se enables the recipient to provide the similar services, without recourse to the service provider, in future. An incidental benefit or enrichment which may add to the capabilities is not sufficient; the critical **factor triggering** the taxability in the source jurisdiction under "**Make Available clause**" is the **transfer of skills**.

OUR COMMENTS

- ❖ Make available clause is an important clause when deciding on taxability of fees for technical service.
- ❖ In case of DTAA having FTS “without make available” clause income falling within the definition of FTS will be taxable in source country whether or not the technical knowledge is transferred to the service recipient.
- ❖ However in case of DTAA having FTS with “make available clause”, such technical service will be taxable only when the conditions as mentioned above of make available are fully satisfied i.e. the knowledge is fully transferred and if the conditions are not satisfied then such income will be taxable in source country if the service provider has PE in source country as per article 7 of DTAA.

| | |
|-------------------------|--|
| Section/Article | Article 7 & 12 of DTAA and section 9 of Income Tax Act |
| DTAA/Country | India - USA |
| Court | Delhi - Trib. |
| Date of decision | 05.07.2022 |

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



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