

SITG No.
161

**Commissioner of Income International Taxation
Vs
Alibaba.com Singapore E-Commerce (P.) Ltd.**

Where assessee is providing services which are standard services and are automated same cannot be considered as FTS and accordingly not taxable in India.

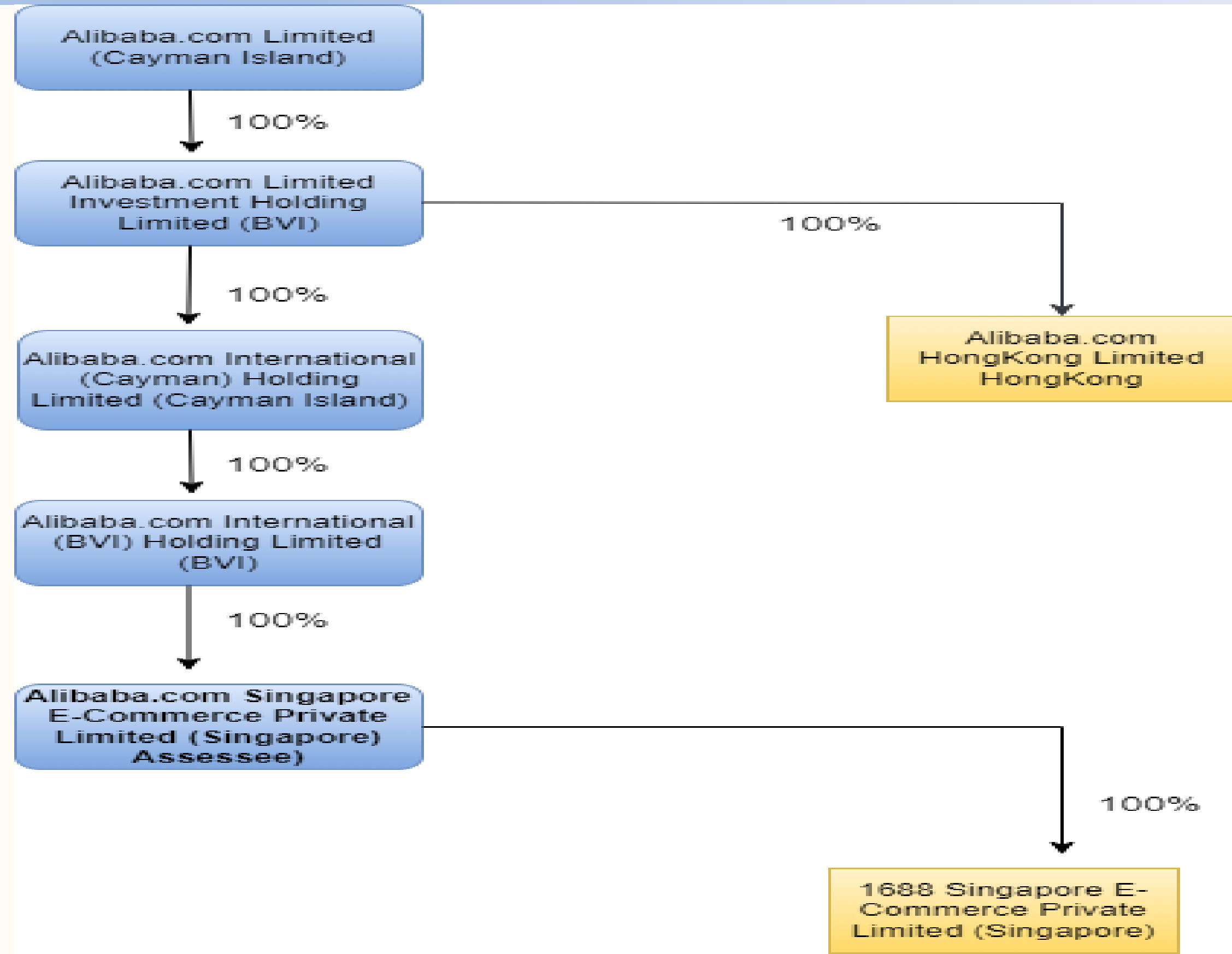
08.07.2023

Facts of the Case

- ❖ During A.Y. 2011-12, the assessee was a **non-resident company incorporated in Singapore** that was providing **web hosting services to Indian suppliers** to do online businesses through a global marketplace for which it charged subscription fees.
- ❖ The assessee was issued **Tax Residency Certificate (TRC)** by the Inland Revenue Authority of Singapore, and its residency was further established by a certificate of incorporation filed.
- ❖ The assessee was assessed in Singapore for all tax purposes which re-affirms that the **place of control and management** of the assessee was Singapore and not in India in any case.
- ❖ During scrutiny, AO observed that Alibaba.com services were provided by Alibaba Hong Kong, which was registered only in Hong Kong and hence AO considered that the **Singapore company had no ownership of such services** and accordingly rejected the relief claimed under India Singapore DTAA.
- ❖ The assessee had an agent in India – Infomedia, which **collected subscription payments** from Indian subscribers for the assessee. Infomedia had also entered into several collaborations with other partners like Assessee where it had no financial, managerial, or any type of participation in such collaborations whatsoever.
- ❖ The web hosting services provided by the assessee to the Indian subscribers were **merely for displaying or storing data of Indian subscribers**, and such services were limited to the provision of an E-commerce platform for advertising products or services in India.

Group Structure Chart as presented before ITAT

The Group Structure Chart of Alibaba.com Group has been explained in the impugned order as under: -



Assessee's Contention

- ❖ The counsel of the assessee submitted that the **Alibaba website**, i.e., Alibaba.com, is commonly **used by the entire Alibaba Group** and services are being provided to suppliers of all countries including India, however excluding China, Hong Kong, and Macau.
- ❖ The counsel opines that the assessee has a very limited role confined to providing the **facility of posting and advertising or displaying information** about the product and services in the e-form. To support the argument, the counsel also filed a copy of screenshots of the site displayed.
- ❖ The counsel of the assessee clarified to the Hon'ble Tribunal, further to the Hon'ble High Court that Alibaba Hong Kong is **not the parent company** of the assessee as has been wrongly mentioned and presumed by the A.O. in the impugned assessment order. Further, the assessee has been **regularly filing its accounts with Singapore Corporate Law Authorities** and its ITR with Singapore Tax Authorities.
- ❖ The counsel **submits 3 points** in a nutshell and presents them to the Hon'ble High Court and leaves it to the wisdom of the Hon'ble Court to decide, which is as follows:
 - ✓ Alibaba.com Ltd. is the **owner of the IPR**, and the domain name Alibaba.com;
 - ✓ The website is **operated** by Alibaba Hong Kong;
 - ✓ The server is **located** in California USA.
 - ✓ Alibaba Singapore was an **independent company** providing such services to Indian suppliers.

Revenue's Contention

- ❖ The A.O. in the present case contends that the assessee is merely an **intermediary between the Indian subscribers and Alibaba.com Hong Kong Limited**, and accordingly **A.O. denied the benefit of the India-Singapore DTAA** to the assessee. On the same grounds, the A.O. **did not accept the Certificate of Incorporation** and the **Tax Residency Certificate (TRC)** issued to the assessee by the authorities in Singapore.
- ❖ The A.O. also held that the assessee had a **'business connection'** in India since its definition is an inclusive one by way of its agreement and transactions with Infomedia, an Indian Company, and therefore, the assessee's income was taxable in India as per Section 9(1)(i) of Income Tax Act.
- ❖ The counsel of A.O. submits that **Alibaba.com is the trademark of Alibaba.com Hong Kong** company as the website is registered in Hong Kong and not in Singapore. Further, the A.O. contended that the assessee has **not produced any document** to show that the website Alibaba.com belongs to a company based in Singapore and hence it is fair on part of revenue to believe that all the activities are carried out from Hong Kong by the assessee.
- ❖ The counsel of the revenue submitted that the A.O. noted the addresses of Alibaba entities and its place of global businesses from its designated website, which shows **that the assessee has an office in India**, however, there is no mention of its presence in Singapore at all whatsoever.

Revenue's Contention

- ❖ The A.O. on the issue of apportionment of income in the hands of the assessee contended that the revenue of the assessee is partly taxable as “**Royalty**”, partly as “**Fees for Technical Services**”, and partly as **business receipts**.
- ❖ The Revenue concluded that the assessee had **no presence in Singapore** and the entire management as well as the services provided to the Indian subscribers is through Alibaba Hong Kong and not at the behest of the assessee, i.e., Alibaba Singapore. Accordingly, the **assessee was denied the benefit of India Singapore DTAA** and since India has no DTAA with Hong Kong income would be **taxable** as per Income Tax Act.
- ❖ He further submitted that the assessee **does not have a PE** in terms of Articles 5(8a) and 5(8c) in the form of Infomedia, rather it would **constitute a dependent agent PE (DAPE)** of the assessee in India.

Legal Provisions

As per **Section 9(1)(i) of Income Tax Act**, the following incomes shall be deemed to accrue or arise in India:—

(i) all income accruing or arising, whether directly or indirectly, through or from any **business connection** in India, or through or from any property in India, or through or from any asset or source of income in India, or through the **transfer of a capital asset** situate in India.

Explanation 1—For the purposes of this clause—

(a) in the case of a business, other than the business having a business connection in India on account of **significant economic presence**, of which all the **operations are not carried out in India**, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is **reasonably attributable** to the operations carried out in India ;

(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations that are confined to the purchase of goods in India for the purpose of export ;

Explanation 2—For the removal of doubts, it is hereby declared that "**business connection**" shall include any business activity carried out through a person who, acting on behalf of the non-resident,—

Legal Provisions

As per **Article 4 of India-Singapore DTAA (Resident)**,

1. For the purpose of this agreement, the term "resident of a Contracting State" means any person who is a resident of a Contracting State in accordance with the taxation laws of that State.
2. Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows :
 - a. he shall be deemed to be a resident of the State in which he has a **permanent home available to him**; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and **economic relations are closer** (center of vital interests) ;
 - b. if the State in which he has his center of vital interests cannot be determined, or if he has **not a permanent home available** to him in either State, he shall be deemed to be a resident of the State in which he has a habitual abode ;
 - c. if he has a **habitual abode** in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national ;
 - d. if he is a **national of both States or of neither of them**, the competent authorities of the Contracting States shall settle the question by mutual agreement.
3. Where by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a **resident of the State in which its place of effective management is situated**.

Ruling

The Hon'ble High Court of Bombay upheld the notings and decision of Hon'ble ITAT in its entirety as the **appeal was based on question of fact and not question of law**. The decision of Hon'ble ITAT is as follows:

- ❖ The Hon'ble Tribunal reached the conclusion that it **cannot be held that the assessee is either a non-existent entity or some kind of conduit of Alibaba Hong Kong** which is not even the parent company. Hence, Alibaba.com Hong Kong is a separate entity from the assessee.
- ❖ The ITAT concluded that since the income of subscription is shown by the assessee in the Singapore income tax return these facts go to show that the **assessee alone is the economic owner** of the subscription it received from Indian subscribers and it **receives the revenue in its own right** and not on behalf of Alibaba Hong Kong.
- ❖ The ITAT took note of the notice of assessment issued by the Singapore Tax Authorities and reached the conclusion that not only the assessee is assessed in Singapore but the **place of control and management of the assessee is also in Singapore**.
- ❖ The ITAT held that Alibaba Hong Kong has absolutely **no connection or contract with the Indian subscribers** or assessee's customers in India and consequently the contractual rights, privileges, and liabilities of the assessee under the agreement with the Indian subscribers wholly lie with the assessee.

Ruling

- ❖ The ITAT also held that the **TRC is sufficient to determine the proof of residency** and the income tax authorities cannot ignore the valid TRC issued by the govt. authority of the other contracting state, i.e., Singapore.
- ❖ The Hon'ble Tribunal also held that the assessee has a limited role as its role is **confined to facilitating the posting of the advertisement or displaying of the information** about the products and services in the e-form into the portal. The services being provided were automated and standard service and hence could not be considered FTS.
- ❖ The ITAT relied upon **Circular 7 of 2003 dated May 09, 2003**, issued by CBDT which clarified that the term “business connection” would not include the cases of business activities being carried out through any **independent agent** acting in the ordinary course of its business.
- ❖ Hon'ble ITAT also held that the judgment of the Hon'ble Supreme Court in the case of *Vodafone International Holdings BV vs. UOI (2012) 341 ITR 1* only observed that the tax residency certificate **does not prevent tax authorities to enquire into possible tax fraud** and did not state that Tax residency certificate is to be rejected.
- ❖ The ITAT also concluded that the activities of Infomedia under the “**Co-operation Agreement**” with the assessee are in the **ordinary course of business** and in no way it is dedicated wholly or almost wholly to the assessee as Infomedia was providing similar service to many other businesses. The Hon'ble Tribunal further stated that Infomedia is not a **dependent agent** of the assessee.

Our Comments

- ❖ Assessee should be careful before **displaying addresses of its place of business** on its website as it could lead to a belief by AO that Assessee has a business connection in India.

- ❖ It is important to note here is that how the assessee can **prove their residency to the authorities**. To answer that question, the following are the documents mentioned below with the help of which an assessee can prove their residency:
 -
 - ✓ Tax Residency Certificate (TRC)
 - ✓ Certificate of Incorporation
 - ✓ In the case of an individual, he/ she can also provide the **no. of days of stay** in the particular country, which shall be enough to prove the tax residency.

- ❖ Here in the present case, the DRP rejected the A.O.'s argument regarding the **issue of taxability under Royalty** as the case in hand was related to A.Y. 2011-12.

The amendment in the definition of “**Royalty**” came into effect from the A.Y. 2012-13, therefore, if the similar facts of a different case relating to the A.Y. 2012-13 or of a later period would have come into light before the DRP, then the decision of DRP or of any Tribunal would have been different from the decision of the case in hand.

#taxinpic

Assessee has TRC of Singapore, as it is a tax resident of Singapore



Alibaba.com Singapore (Assessee)

Providing a global trade market place to do online business for which assessee charged a subscription fees



Indian Suppliers

- 1. Infomedia provided payment collection services to the assessee and collected subscription fees on behalf of the assessee from the Indian subscribers.
- 2. Assessee paid remuneration to Infomedia for providing such payment collection services.

Assessee took such web hosting services from Alibaba.com Hong Kong to distribute to its users



Alibaba.com Hong Kong Ltd. (Hong Kong)

Infomedia collected the subscription fees from Indian suppliers on behalf of the assessee



Infomedia, an Indian Company

The Tribunal stated that TRC is sufficient to determine the proof of residency. Also, the assessee only provided all the services to its Indian customers were automated services and hence it can not be termed as FTS.

Section/Article	9 of the Income Tax Act, Article 4 of DTAA
DTAA/Country	Article 4, 5 and 12 of India – Singapore DTAA
Court	High Court of Bombay
Date of decision	16.06.2023



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