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SITG No. 164

Relx Inc.
Vs
Income-tax Officer (IT)

Fees for providing data base access without any technical assistance is not considered as Technical service but the business income

29.07.2023

Jain Shrimal & co

[2023] 152 taxmann.com 555 (Delhi- Trib.) [24-07-2023]

Facts of the Case

- ❖The assessee is a non-resident company and is a tax resident of the USA. It is engaged in the business of maintaining an online database pertaining to legal and law-related information, earned subscription fees from customers from different parts of the world, and resultantly India was no exception, where they provided access to the online database.

- ❖Assessee filed its ITR claiming that subscription fee received for providing access to database was in nature of business income and was not taxable in India as per provisions of India-USA DTAA since the entity did not have any fixed place of business in India or a PE in India.

- ❖The case was selected for scrutiny and during the assessment proceedings, statutory notice u/s 143(2) of the act was served upon the client. Subsequently, the notice u/s 142(1) was duly served upon the assesse as well along with the questionnaire, in response to which the assessee filed relevant details on the e-filing portal in due time.

- ❖On the basis of the submissions by the assessee, the Ld. A.O. completed the assessment u/s 143(3) of the act on a total income of Rs. 556,79,800. However, the Ld. CIT(A) exercised his powers u/s 263 of the act and canceled the said assessment order by citing it to be erroneous and prejudicial to the interest of revenue.

Assessee's Contention

❖The Appellant prays that the order passed u/s 263 is liable to be quashed since the Ld. CIT initiated proceedings, without appreciating that the Ld. A.O. passed the order after making the due enquiries and verification of records and hence the assesse prays that the said order is not in consonance with the law laid down by the act.

❖The Ld. Counsel argues that the Ld. CIT is making an addition to the subscription receipts by treating the amount received from its India customers as Fees for Technical Services (FTS) as per the provisions of the act without appreciating that there are no services at all. Even if the Ld. CIT is to be believed that there are services, then in such case as well, it is important to note that the services do not make available technical knowledge to the recipient and hence it is not taxable in India.

❖The Ld. Counsel contended that Section 263 can not be invoked for a mere change of opinion since-

i. Such Receipts will not qualify as FTS under Article 12(4) of India-USA DTAA since these are not technical services.

ii. Such services are standard facility only,

therefore, the services do not satisfy the criterion of "Make Available" conditions.

Assessee's Contention

❖The Ld. Counsel further submitted that in the case of its sister concern, i.e., Elsevier Information Systems GmBH which was in the same business, the receipts were classified as business receipts not taxable in India, and the Ld. A.O. accepted the submissions of the assesse in that case.

❖The Ld. Counsel also submitted that since the DTAA provisions were more beneficial to it, the assesse adopted the source rule under India-USA DTAA to decide the taxability of FTS.

Revenue's Contention

❖ According to the Revenue, the assessment order passed was done without conducting enquiry relevant to the facts and the taxability of the income, and hence it is prejudicial to the interest of revenue.

❖ The Ld. A.O. arrived at the conclusion that the income of the assesse is taxable as FTS under the provisions of Article 12(4) of India-USA DTAA and hence the Ld. CIT ordered the A.O. to revise the assessment order. He arrived on such conclusions after examining the merits of the case on the aspect of taxability of service income of the assesse.

❖ The LD. DR contended that the assesse is not just providing the standard facility, however, the online services provided by the assesse is to making available the highly specialised and technical content in the form of solutions, knowledge, experience, skill, know-how and processes. Hence such services should be covered under the provisions of Article 12(4) of India-USA DTAA and Section 9(1)(vii) of the act.

Legal Provisions

According to the **Section 9(1)(vii)** of Income Tax Act, 1961,

income by way of fees for technical services payable by—
(a) the Government ; or
(b) a person who is a resident, except where the fees are payable in respect of services utilised 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 ; or
(c) a person who is a non-resident, where the fees are payable in respect of services utilised in 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 :
Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.
Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries";

Legal Provisions

According to the provisions of Article 12(4) of India-USA DTAA:

For the purpose of this Article, “fees for included services” means payment of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of 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, or consist of the development and transfer of a technical plan or technical design.

Ruling

- The Hon'ble Tribunal held "We find that as the treaty provision unambiguously requires, it is only when the use is of the copyright that the taxability can be triggered in the source country. In the present case, the payment is for the use of copyrighted material rather than the use of copyright. The distinction between them is well explained by the Hon'ble Delhi HC in the case of *DIT vs. Nokia Networks OY [2013] 358 ITR 259/212 Taxman 68/25 taxmann.com 225*."

- The Hon'ble Tribunal held that in the present case, the assesse gets right to access the copyrighted material and there is no dispute about it. The Hon'ble Tribunal points out that during the hearing, the Ld. DR could not demonstrate as to how there was use of copyright. Hence, in our considered view it is a case of copyrighted material and therefore, the impugned payments can not be treated as royalty payments.

- Regarding the next issue of treating the subscription fee as FTS, the Hon'ble Tribunal further held that "it is evident that the assesse has collated data from various journals and articles and put them in a structured manner in the database to make it more user friendly and beneficial to the users who wants to access the database." Hence, the assesse has neither employed any technical person to provide any managerial or technical service nor there is any direct interaction between the user of the database and the Elsevier employees of the assesse.

Ruling

- The Hon'ble ITAT further explains that the assesse even does not alter or modify in any manner the articles collated and stored in the database. Therefore, in the aforesaid view of the matter, the subscription fee received cannot be considered as a fee for technical services as well.

- Taking inference from the order passed by the Hon'ble Tribunal in the matter of its sister concern Elsevier Information System GmBH, the Hon'ble tribunal in the present case, very categorically said that the Ld. A.O. has committed an error in making the additions, since the payment received by the assesse is in the nature of 'Business Profits' which can not be brought to tax in India in the absence of PE.

- Accordingly, the Hon'ble Tribunal decides the appeal in the favor of the assesse and consequently, the impugned order of the Ld. CIT is hereby vacated.

Our Comments

- The important point to note her in the case, is that the assesse **is not providing any research or research-based services**, instead it is only collating the data in the user-friendly manner where the content of the collated data remains the same, be it books, journals or articles in the electronic format which adds value to the users/ customers of the assessee. Hence, since no additional service is being provided it cannot be considered as Technical service.

- The second issue to be dealt in the present case is that the subscription fees received by the assesse from its customers have been declared to be in the nature of "Business Profits" and not in the nature of royalty or FTS/FIS as per provisions of India-USA DTAA and since assessee is not having PE in India same cannot be taxable in India.

Section/Article	Section 9(1)(vii) of Income Tax act.
DTAA/Country	Article 12(4) of India – USA DTAA
Court	ITAT Delhi Tribunal
Date of decision	24.07.2023

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