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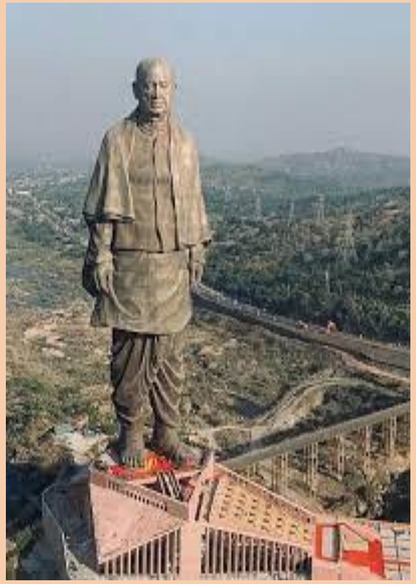
SITG No. 170



Michael Graves Design Group Inc.
Vs
DCIT (IT)

Providing drawing and design for a specific project does not itself involve transfer of know-how. Hence, not covered under FIS as per DTAA and not liable for tax in India

09.09.2023

Jain Shrimal & co.

ITA No. 7683/Del/2017

Facts of the Case

- The assessee is a non-resident corporate entity and a tax resident of the USA.
- The assessee provided architectural design, drawing, and master plan for the construction of the Statue of Unity to one of its clients (AOP) in India which was formed by Turner Project Management India Pvt. Ltd., Meinhardt India Pvt. Ltd., Michael Graves & Associates Inc.) under an agreement executed on 19.08.2013.
- For rendering such services to AOP, the assessee received consideration for A.Y. 2014-15 and A.Y. 2015-16 of Rs. 467,60,000 and Rs. 57,12,000. Therefore, the assessee filed its return of income for the corresponding years declaring their total income at Rs. Nil for both the underlying years.
- The A.O. issued an SCN seeking a response, as to why the assessee received consideration for the same but filed the ITR showing their NIL income
- The assessee filed its reply objecting to the proposed addition, however, the A.O. rejected its reply and made the addition to the total income of the assessee as per Article 12(4) of the treaty for those corresponding years and DRP upheld such order of A.O. and taxed such income as FIS as per Article 12(3) of India-USA DTAA.

Assessee's Contention

- Income of the assessee cannot be assessed as FIS as per the treaty since the services rendered by the assessee are project-specific which can never satisfy the requirements of the 'make available' clause as envisaged under Article 12(4)(b) of India-USA DTAA.
- Taking inference from the agreement between the assessee and the AOP, the Ld. Counsel submits that it is merely a conceptual design provided by the assessee from USA and does not lead to transfer of any technical design/ technology to AOP. Moreover, the technical designs are prepared by the EPC (Engineering, Procurement, and Construction) contractor and not the assessee.
- The job of the assessee was to provide the architectural design and master plan for the entire project which was done from USA and hence the fees received for doing such work was not taxable in India in the absence of PE in India. Hence, no part of technical design within the drawings provided to AOP by the assessee.
- By way of an additional ground before the tribunal, the Ld. Counsel submits that the income from FTS should be taxed @ 10% (plus surcharge and cess) as per the provisions of Section 115A of the act since it is more beneficial to the assessee as against the rate of tax @ 20% under the treaty (as applied by the Ld. A.O.).
- The know-how remain with the sub-contractor i.e., the service provider and not necessarily every transaction of architectural service will fall within the purview of Article 12(4)(b) of treaty, unless the make available clause is satisfied for provisions of such architectural service.

Revenue's Contention

Opposing the appeal and arguments presented by the Ld. Counsel of the assessee, the counsel for the Revenue, rejected the assessee's claim of non-application of the 'Make Available' clause on the following grounds:

- The Ld. A.O. believed that the agreement entered into by the assessee and the AOP with respect to the providing of services suggests that the services provided by the assessee are of a purely technical nature and it makes available the technology, the skill, the experience to the parties i.e., the members of the AOP.
- By drawing inferences from the MOU between India and the USA, the Ld. A.O. submits that the services provided by the assessee are in the nature of architectural services which falls within the scope of Article 12(4)(b) as the said service 'make available' the technology to the AOP.
- The Ld. DR referring to the observation made by DRP, submitted that since the ownership lies with the AOP, the AOP was free to use the designs and drawings provided by the assessee in whatever manner it desired.
- The Ld. A.O. distinguished with the decision relied on by the assessee in the case of Forum Homes (P) Ltd. and Gera Development (P.) Ltd. on the pretext of the reasoning that the IPR in these cases was with the service provider which is not the circumstance in the present case.

Legal Provisions

According to **Article 12(4)** of India- USA DTAA,

4. *For purposes of this Article, "fees for included services" means payments 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.*

According to **Section 115A(1)(b)** of the Income Tax Act,

(b) a non-resident (not being a company) or a foreign company, includes any income by way of royalty or fees for technical services other than income referred to in sub-section (1) of section 44DA received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian concern after the 31st day of March, 1976, and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy, then, subject to the provisions of sub-sections (1A) and (2), the income-tax payable shall be the aggregate of,—

Legal Provisions

(A) the amount of income-tax calculated on the income by way of royalty, if any, included in the total income, at the rate of 59[ten] per cent;
(B) the amount of income-tax calculated on the income by way of fees for technical services, if any, included in the total income, at the rate of 59[ten] per cent; and
(C) the amount of income-tax with which it would have been chargeable had its total income been reduced by the amount of income by way of royalty and fees for technical services.

Ruling

- The assessee provided only the conceptual design services for the appearance of the project and it was the EPC contractor who was responsible for the final design and the technical development. Therefore, the assessee only provided consultancy on aesthetic characteristics of the Statue which involved providing advisory to such design attributes without any regard to technical design.
- The Revenue missed an important fact that the designs, drawings, and lay-outs provided to AOP by the assessee are project-specific which are specifically made for the construction of the “Statue of Unity” and therefore even if the ownership of such drawings were transferred to the AOP, the same couldn’t be utilized for any other purpose by the AOP.
- The agreement between the assessee and the AOP clearly states that the clause of ownership clearly states that the sub-consultant’s (i.e., the assessee’s) working papers shall belong to sub-contractors.
- The contention of the revenue that architectural services are included within the scope of FIS as per MOU does not have any legs to stand because while providing architectural services neither any technical knowledge, skill, experience, or know-how was made available to AOP for utilizing them in future independently nor any developed drawing or design have been provided by the assessee which could be applied by the AOP independently. These were just the conceptual design services that were provided for a specific project.
- Accordingly, the appeals of the assessee for both the A.Y.s 2014-15 and 2015-16 were allowed.

Our Comments

- As per India- USA DTAA, the ‘Make Available’ clause means that while providing services, that are technical in nature, i.e., (FTS/ FIS), the provider of the services has equipped or passed on the technology or specified knowledge to the recipient of service in such manner that such recipient of service is capable enough to carry out such services independently or can apply such acquired knowledge by itself with no further requirements of the service provider to carry out such services.

- With reference to the present case, it is important to remember that giving working papers does not tantamount to make available the knowledge of such experts. This means working papers on a particular technology or service should not be regarded as a transfer of the expertise required to carry out such services of an identical nature in the future without the assistance of the service provider.

- We can consider the example of working papers used by the auditors in case of audit. The working papers prepared by the auditor during the audit of a client will not help the client to carry out such an audit by itself in future even if the auditor provides such papers to the client.

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The Assessee has provided architectural design, drawing and master plan for the construction of statue of unity in India to one of its client (AOP) in India.

Michael Graves Design Group Inc. **(The Assessee)**

AOP (India)

Statue of Unity

The Ld. A.O. issued Show Cause Notice (SCN) as to why the consideration received for services rendered by the assessee should not be treated as income from FIS since it is purely technical in nature and makes available the technology to AOP.

The Hon'ble Tribunal held that the services offered to AOP are project-specific in nature and the assessee provided the consultancy on aesthetic charaterstics without any regard to technical design.

Also, the architectural services provided does not contain any such technology, skill or experience which could be utilized in future, and nor any drawing or design provided by the assessee could be applied by the AOP in future independently.

A.O.

Section/Article	Section 115A of Income Tax Act, Article 12(4) of DTAA
DTAA/Country	India- USA DTAA
Court	Delhi Tribunal
Date of decision	18.07.2023

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