SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 171

Total Sports & Entertainment India (P.) Ltd.
Vs
ITO (IT) (TDS)

Any right cannot be considered as Royalty. For royalty it should fall within specific category of definition as per DTAA

16.09.2023

Jain Shrimal & co.

[2023] 152 taxmann.com 598 (Mumbai- Trib.) [27.03.2023]

Facts of the Case

- The assessee is a company registered and incorporated in India. It is a wholly owned subsidiary of Total Sports Asia (TSA) Ltd, Cayman Island, who is a holding company having 11 subsidiaries around the world including the assessee and the Total Sports Asia, Malaysia.

- It is engaged in the business of seeking and endorsing sponsorship deals for athletes and carrying on the business of rights sponsorships for any sports and entertainment-related accessories, including jerseys, and arranging sports and entertainment-related tours in India and abroad.

- TSA, Cayman Island distributes the advertising and other rights acquired by them through TSA, Malaysia. Hence, TSA Malaysia entered into 2 agreements with the assessee, clearly defining the advertising rights as follows-
  a) Logo Rights,
  b) Advertising Privileges,
  c) Promotion Activities Rights, and
  d) Rights to complimentary Tickets.

- While remitting such amount, the assessee did not deduct any tax u/s 195(1) of the act and the assessee didn't seek any certificate u/s 195(2). The assessee reasoned that the income of the non-resident accrued and arose from the events outside India, hence not taxable.

- The A.O. did not agree with the submissions of the assessee and held that the assessee has made payment to a non-resident TSA Malaysia, therefore the assessee was treated as 'assessee in default' u/s 201.

Revenue's Contention

- The Revenue submits that there is no commercial expediency in introducing TSA Malaysia between TSA Cayman Island and the assessee, when the advertising rights were required to be transferred to the assessee and thus TSA Malaysia is only a conduit to claim the benefit of India-Malaysia DTAA.

- Since, affairs were arranged only to take benefit of DTAA between India-Malaysia, therefore Article 28 (Limitation of benefits) is applicable. Even if we accept that TSA group is mainly operating through Malaysia and the control and management of the business is through Malaysia, then also there is no commercial sense for routing the transaction through Cayman Island company.

- Therefore, the revenue has placed reliance upon Article 28 of India-Malaysia DTAA to deny the benefit of the treaty to the assessee.

- However, on further appeal, the CIT(A) bifurcated the payment in the ratio of 60:40, with respect to Category A and B.

Category A includes the payment of logo, advertisement, and display of contents, which shall not form part of 'Royalty' either u/s 9(1)(vi) or under the provisions of DTAA.

Category B includes the payment made for use of name 'Official Partners' or 'Official Advertisers', providing links on the website of assessee and use of various items for promoting products shall form under the ambit of 'copyright of literary work' and 'trademark' as per the treaty, hence it shall be taxable as per the act or the treaty.

Assessee's Contention

The assessee in response to the Ld. A.O., submitted the following-

- The Malaysian office is the H.O. where all the senior management team members are located. The rights obtained by TSA Cayman Island as the parent company are routed through TSA Malaysia, because of the fact that the Malaysian office is well equipped with sufficient teams of staff, and is run effectively under the directions of CEO, CFO, and COO.
- The rights acquired by TSA Cayman Islands are sublicensed to TSA Malaysia, however all sublicensed agreements entered into by TSA Malaysia are not necessarily only with the client in India, which has been the practice from the last many years.
- Taking inference from the turnover details, the assessee submitted that the revenues are much higher than the revenue earned by TSA Malaysia out of the remittance made by the assessee, which proves that the assessee and others in the TSA group have bona fide business activities and the transaction giving rise to remittance is in the normal course of business.
- The assessee also filed the chart of the date of incorporation of all the group entities, which proves that the assessee was incorporated much later (i.e., 07.07.2004) from the incorporation of TSA Cayman Island (i.e., in 10.07.2000) and TSA Malaysia (i.e., in 22.11.1999). This also means that the Malaysian company was existing much prior to TSA Cayman Island.

Legal Provisions

According to **Article 28 (Limitation of Benefits)** of India- Malaysia DTAA,

1. The provisions of this Agreement shall in no case prevent a Contracting State from the application of the provisions of its domestic law and measures concerning tax avoidance or evasion, whether or not described as such.
2. A resident of a Contracting State shall not be entitled to the benefits of this Agreement if its affairs were arranged in such a manner as if it was the main purpose or one of the main purposes to take the benefits of this Agreement.
3. The case of legal entities not having bona fide business activities shall be covered by the provisions of this Article.

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

(vi) 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 utilised 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 utilised 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 :

Legal Provisions

According to **Article 12(3) and 12(4) (Royalties)** of India- Malaysia DTAA,

3. 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, any copyright of literary, artistic or scientific work including cinematograph films or films or tapes used for television or radio broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information (know-how) concerning industrial, commercial or scientific experience.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 15, as the case may be, shall apply.

Ruling

- The Hon’ble Tribunal held that advertising rights licensed by the assessee is only for publicity of the sponsor either by displaying the brand logo or trademark of the sponsor or displaying sponsor’s name as ‘official sponsor’ or attending the sponsor’s promotional activities.
- The Hon’ble Tribunal points out that the Hon’ble Delhi High Court in *DIT v. Sahara India Financial Corpn Ltd. [2010] 189 Taxman 102/321 ITR 459* decided the case in favor of the assessee which was related to the same issue of whether similar rights constitute Royalty under India-Canada DTAA.
- The definition of ‘Royalty’ in India-Malaysia DTAA is worded similarly to the provisions of India-Canada DTAA, therefore going with the decision of Hon’ble Delhi HC, the payment in respect of advertising rights does not fall under the ambit/ definition of Royalty as defined in Article 12(3) of India-Malaysia DTAA.
- Once the taxability fails in terms of the treaty provisions, there is no occasion to refer to the provisions of the act, since the provisions of the act pr DTAA, whichever is more beneficial to the assessee shall be applicable. Also, the revenue alleges such payment to be royalty, therefore there is no need to examine its taxability under any other provision of DTAA.
- Accordingly, the Hon’ble Tribunal directed the Ld. A.O. to delete the addition on account of the advertising package.

Our Comments

- Definition of Royalty as prescribed under DTAA is very specific and narrow and hence while dealing with any transaction to determine taxability we need to test the transaction within that definition itself and we cannot make the definition broad and cannot include all kinds of rights under the definition of royalty.

- While determining if DTAA benefit should be available for a transaction we need to check the substance of the company in that country. If the purpose of existence of the company is established and if the same is not just to take benefit of DTAA it cannot be said that the company has been established just to take benefit of DTAA. As in the present case assessee was having employees and senior management in Malaysia for decision making the substance of company was established and accordingly it cannot be denied the benefit of DTAA.

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2.) The Cayman company sub-licensed these rights to Malaysian subsidiary who subsequently sun-licensed the same to the assessee (TSA India). Against which, the assessee remitted such amount to Malaysian company without any deduction of tax u/s 195.

TSA India **(The Assessee)**- Wholly Owned Subsidiary of Cayman company

TSA Malaysia (Subsidiary of Cayman company)

TSA Cayman Island **(Parent Company)**

1.) The Cayman company received sponsorship rights for certain cricket tournaments from SL and West Indies Cricket Board

3.) The Ld. A.O. held that the consideration paid by the assessee would fall under the category of Royalty and also applied Article 28 of India-Malaysia DTAA to deny the benefit of the treaty to the assessee.

A.O.

The Hon'ble Tribunal held that payment for advertisement rights does not fall under the ambit of Royalty as per Article 12(3) of DTAA. It is because that only if the payment is in connection with the right to use or is by way of consideration for the right to use any of the categories mentioned in the Article, then only it can come under the ambit of "Royalty".

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In the present case, such transaction does not meet the above criteria, hence the appeal of the assessee is allowed and demand needs to be deleted.

Section/Article	Section 9(1)(vi) of Income Tax Act, Article 28 and 12(3) and 12(4) of DTAA
DTAA/Country	India- Malaysia DTAA
Court	Mumbai Tribunal
Date of decision	27.03.2023

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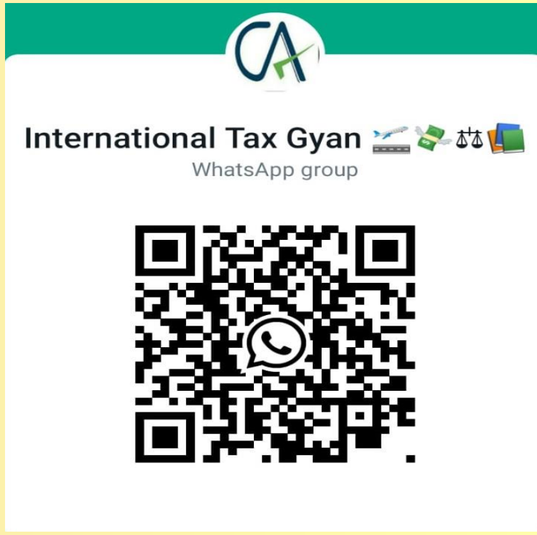

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