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SITG No. 174

BMC Software Asia Pacific Pte Ltd.
Vs
ACIT (IT)

Amount received by an assessee for sale of software and its support services will not be taxable as Royalty or FTS under DTAA

07.10.2023

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[2022] 140 taxmann.com 328 (Pune - Trib.)[15-07-2022]

Facts of the Case

- The assessee is an Singapore based company, engaged in selling software licenses and IT support services in relation thereto to end users.

- During the assessment year 2018-19, assessee earned Rs. 67.94 crores from sale of software services and Rs. 41.06 crores from rendering of support and maintenance service of software licensed.

- During the assessment year 2018-19, assessee was filed it's return of income declaring nil total income.

- During the assessment proceedings, the Assessing officer assessed that assessee earned income of Rs. 109 Crores from the sale of software licenses and support services which was not offered to tax in India.

Assessee's Contention

- During the assessment year 2018-19, Income earned from sale of software licenses will not be subject to tax as no copyright for use of software was provided by assessee to its customers.

- If consideration is received for allowing to use or right to use the copyright then it fall under the royalty. However, in the instant case, assessee did not transfer copyright of software to its customers and hence it will not fall under the ambit of royalty income and para 3 of Article 12 of respective DTAA.

- The assessee provided the IT support services but did no provide/ transfer any technical knowledge to it's customers, which can be used by them in future without assistance of the assessee. Hence, assessee was not satisfying make available clause as mentioned in clause (b) of para 4 of Article 12 of DTAA and accordingly it does not become Fees for technical services.

Revenue's Contention

The revenue in response to the assessee's ; submitted the following :

- The Assessing officer contended that receipt by assessee on account of software license sold to buyers covered under article 12(3) of DTAA as Royalty and receipt from IT support services for making available technical know to the software buyers covered under clause (a) and (b) of article 12(4) of DTAA.

- However, DRP in it's order mentioned that the sale of software would not be covered under the definition of Royalty as per the judgement of Hon'ble Supreme court in case of Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT [2021] 125 taxmann.com 42/281 Taxman 19/432 ITR 471.

- Further, DRP held that income from sale of support services would be covered under the definition of FTS as per DTAA and accordingly Assessing Officer in the final order made the income from support services chargeable to tax under clause (a) and (b) of para 4 of Article 12 of DTAA.

Legal Provisions

According to **Article 12,** of India –Singapore DTAA,

"ARTICLE 12 – Royalties and Fees for Technical Services. Para 3 of DTAA

1. The term “royalties“ means payments of any kind received as a consideration for the use of, or the right to use:

a) any copyright of a literary, artistic or scientific work, including cinematograph film, any patent, trade mark, design, model plan, secret formula or process for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information ;
b) any industrial, commercial or scientific equipment, other than profit derived from lease of ships and aircraft used in transportation or use, maintenance or rental or containers in related with such transportation.

Fees for technical service is defined in Para 4 of Article 12 of DTAA as under:

1. The term "fees for technical services “ means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature if such services :

a) ancillary and subsidiary to the application or enjoyment of the right, for which amount received as Royalties.
b) make available technical knowledge, experience, skill, know-how or processes, which enables the person to apply such services therein.
c) 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.

Ruling

- While discussing the services being provided to customer it can be said that the services are technical services as a person replying to the customer need to have a technical knowledge to solve their queries. However whether the condition of make available as required under clause (b) of Para 4 of Article 12 is satisfied or not that needs to be seen.

- Hon’ble Tribunal referred to the judgement of Hon'ble Karnataka High Court in case of CIT v. De Beers India Mineral (P.) Ltd. [2012] 21 taxmann.com 214/208 Taxman 406/346 ITR 467 where it was held that the condition of the expression make available gets satisfied if the payer of the services is able to utilize the acquired knowledge or knowhow at his own in future without the aid of the service provider.

- It is perceptible that assessee did not make available any technical knowledge, experience or skill to its customers to apply in future.

- Thus, considering the above facts that both the services provided by assessee are separate as per DTAA and assessee has not provided or transferred any technical know how to assessee, the addition made by AO to the income of assessee stands deleted.

Our Comments

- While checking taxability of foreign service or chargeability of an agreement entered with foreign person we need to check taxability of each separate transaction and service because taxation of non-resident is based on the nature of transaction or service as is evident from Income Tax Act and DTAA as well.

- Thus while determining taxability we need to separate each transaction based on the nature of service and then determine taxability.

BMC Software Asia Pacific Pte Ltd.

In A.Y. 2018-19, assessee earned Rs. 67.94 Crores from sale of software license

In A.Y. 2018-19 , assessee earned Rs. 41.06 Crores from sale of IT Support services

Text Resident of Singapore

Assessee filed Nil return of income of A.Y. 2018-19

AO as well as DRP contended that services being provided by assessee is in the nature of FTS and would be covered within the definition of Clause (a) and (b) of para 4 of Article 12 of DTAA

The tribunal held that assessee did not make available any technical knowledge, experience or skills to customers to apply in future. so, the condition of make available as required under clause (b) of para 4 of Article 12 is not satisfied. However the assessee has not provided any technical know how to the customers then the addition made by AO as well as DRP stands deleted

ITAT Judgement

Section/Article	Article 12 of DTAA
DTAA/Country	India- Singapore DTAA
Court	Pune Tribunal
Date of decision	15.07.2022

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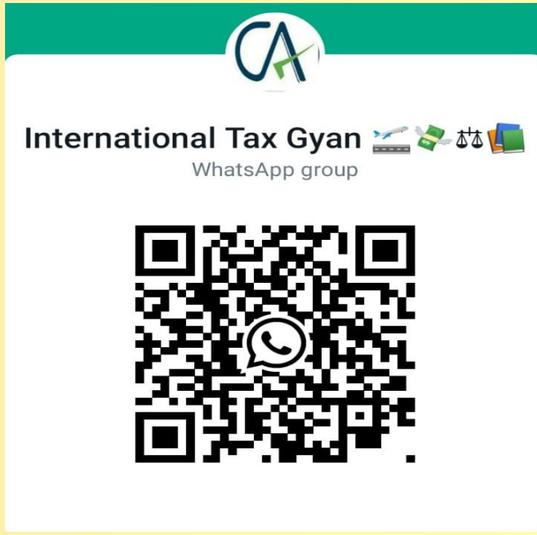

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