SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 181

Amazon Web Services, Inc.

v.

ACIT (International Taxation)

Standard and Automated service provider by the online service provider cannot be covered under FTS

25.11.2023

Jain Shrimal & Co.

[2023] 153 taxmann.com 45 (Delhi - Trib.)[01-08-2023]

Facts of the Case

- The assessee, is a **foreign company and a tax resident of the USA, which provides 'standard and automated'** cloud computing services/ AWS services to its customers around the globe.

- The customers are required to **enter into a standard contract** electronically with the assessee. In this reference, the department received the information that the assessee had received an amount of Rs. 30,94,81,489 from M/s Snapdeal Private Limited without deduction of TDS u/s 195.

- Foreign remittance was made for **'Hosting and Bandwidth Charges'**, however **no tax has been withheld** on such remittance even though it falls under the purview of royalty as per section 9(1)(vi) of the act and as per India- USA DTAA.

- **Neither TDS was deducted nor the assessee filed ITR** for the relevant A.Y.s, and accordingly **notice u/s 148 was issued** to the assessee on 31st March, 2021 in response to which the **assessee filed its ITR** for both the A.Y.s 2014-15 and 2016-17 on 28th April, 2021, declaring income NIL.

- Thereafter, **statutory notices** were issued to the assessee to which the assessee furnished responses time to time, and sometime later SCN was issued and served upon the assessee.

Assessee's Contention

- The Ld. AR submitted that the c**loud computing services provided by the assessee are merely standard and automated services**, which are publicly available online to anyone, from where customers can choose the services they need and what they need.

- Therefore, the assessee was only granted **access to use the various standard AWS services delivered online** to its customers. It only granted a **non-exclusive and non-transferable license** to access the standard automated services offered by the assessee. The source code of the license would never be shared with the customers.

- The customers **do not receive any exclusive or commercial right to use the copyrights or other intellectual property** involved in AWS services but only receive a right to access and use the AWS services themselves. Therefore, the consideration paid to the assessee would not be regarded as a consideration against the right to use any copyright.

- With regards to the issue of taxability of the receipts from rendering cloud services as royalty, the **impugned issue is covered in favor of the assessee by the decision of the Delhi Tribunal in the case of Microsoft Regional Sales Pte. Ltd.** which was affirmed by the Hon'ble Delhi High Court in the case of **CIT v. MOL Corporation 99/2023 dated 16.02.2023 (Del.)**

- The same view with regards to not treating such receipts as FTS was affirmed by the Pune Tribunal in the case of **ITO v. Sunguard Availability Services LLP ITA No. 258/Pun/2021 dated 28.11.2022** and by the Mumbai tribunal in the case of **Rackspace, US Inc. v. DCIT (2020) 113 taxmann.com 382 (Mum).**

Revenue's Contention

- The assessee is providing highly technical services and support to its customers and also **'make available'** technology and thus the impugned receipts are taxable as FTS under the act and FIS under Article 12 of India- USA DTAA.

- The service offerings of the assessee also cover AWS Marks that cover **trademarks, service marks, service or trade names, logos, and other designations of AWS.** The trademark use guidelines provide the customers with permission to use the AWS Marks in connection with the use of services or in connection with software products designed to be used with the services.

- Accordingly, the **assessee is providing its copyright and trademarks to its customers for commercial exploitation and sharing information** concerning industrial, commercial or scientific experience with customers which qualify as royalty under the provisions of the act and also under India- USA DTAA.

Relevant Provisions

Section-9(1)(vi) (Income deemed to accrue or arise in India)

(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 :

Provided that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April, 1976, and the agreement is approved by the Central Government :

Provided further that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum payment made by a person, who is a resident, for the transfer of all or any rights (including the granting of a licence) in respect of computer software supplied by a non-resident manufacturer along with a computer or computer-based equipment under any scheme approved under the Policy on Computer Software Export, Software Development and Training, 1986 of the Government of India.

Relevant Provisions

Article- 12 (3) (India- USA DTAA)

The term "royalties" as used in this Article means :

(a.) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; and

payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

Article- 12 (4) (India- USA DTAA)

"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.

Ruling

Hon’ble Tribunal while passing judgment considered the various case laws relied upon by the assessee in the proceedings which were passed by co-ordinate benches and held as under:

- We are in agreement with the submission of the Ld. AR that the impugned issue is similar to the **case of M/s Sunguard Availability Services LLP and Rackspace, US Inc.**, where the Pune Tribunal held that rendering cloud computing services cannot be held liable to tax in India as FIS/ FTS. The **receipts from such services do not fall within the purview of ‘FIS’ under Article 12(4)(b)** of the India- USA DTAA, and also **do not satisfy the ‘make available’ clause.**

- On pursual of the contract agreement and other guidelines, it is clearly evident that the **perquisites for the impugned receipts to be treated as royalty income as per Article 12 of India- USA DTAA are not met** as the customer does not receive any right to use the copyright or other IP involved in AWS Services

- Further, as per Trademark guidelines, the **customer has been granted a limited, non-exclusive, revocable, non-transferable right to use AWS marks only** to the limited extent for identification of the customer who is using AWS services for their computing needs.

Our Comments

- It is a well-established principle that in relation to any service that is **standard and automated and does not require any human intervention**, same could not fall under the category of FTS, as it is a well-settled principle by virtue of various case laws that for a **service to be covered under FTS, physical intervention is mandatory.**

- Wherever in DTAA, the **'make available'** clause is present it needs to be checked whether the technical knowledge in relation to such software has been made available or transferred or not.

- In general parlance, where there is an agreement for such software, the user only gets to use the software, and hence such users cannot access the source code nor can they modify the same. Hence only the use of the software cannot be considered to satisfy the 'make available' clause and **income earned through it cannot be considered as 'royalty' income.**

Section/Article	Section 195
DTAA/Country	Article 12 of India- USA DTAA
Court	Delhi Tribunal
Date of decision	01.08.2023

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