



SATURDAY INTERNATIONAL TAX GYAN !!!

#taxmadeeasy

SITG No. 200

Commissioner of Income-tax,(IT)

v.

Hireright Ltd.

Undertaking services in relation to background checks of employees or verification of testimonials cannot be considered as FTS under Income tax act or DTAA

06.04.2024



Facts of the Case

- ❖ The assessee, a tax resident of UK, was engaged in business of undertaking employment background checks and verification of testimonials for various clients in India, it does not have a PE in India and, hence, it has opted to be governed by the provisions of the India-UK DTAA being more beneficial to the assessee.
- ❖ As per the said agreement the assessee's role is restricted to verification of the information concerning various candidates proposed to be hired by its clients (viz. educational qualifications, past employment details etc.) and providing the clients the relevant facts captured by the assessee during the course of validation.
- ❖ It is also evident that the assessee physically verifies the information/data in relation for screening services.
- ❖ The assessee does not provide any advice/analysis/recommendation on hiring of the employees by its client and does not assume any responsibility with regard to hiring decisions taken by its clients on the basis the assessee's report.
- ❖ The lower authorities observed that the fees so generated from that exercise would fall within the ambit of 'fee for technical services' or 'Royalties' in terms of Article 13 .

Assessee's Contention

- ❖ Assessee role is restricted to verification of the information concerning various candidates proposed to be hired by the client and provide the clients with various facts captured by it during the course of validation.
- ❖ Details of facts captured by assessee is either from data available in public domain or sometimes it is obtained telephonically from the previous employers of the candidates and in some cases, even the records of the courts/public authorities.
- ❖ Assessee does not provide any advice/analysis/recommendation on hiring of the employees and does not assume any responsibility with regard to hiring decisions taken by its clients.
- ❖ Information collected by the assessee is not protected by any copyright but its circulation is regulated under the UK and other local laws.
- ❖ Thus, as per assessee the information provided or report made by assessee is generated information available in public domain or they are either facts and does not include any nature of self generated data which could be copyrighted and such services does not include any technical skill or does not require consultancy hence the service could not be covered under FTS or Royalty.

Revenue's Contention

- ❖ According to the Assessing Officer, the reports provided by the assessee were protected by copyright laws and, therefore, the use of such reports by the clients would result in use of copyright chargeable to tax as royalty.
- ❖ Further, assessee maintained a database or had taken such database under licence from its owner and the consideration received by the assessee was for allowing the use of database to its clients and was chargeable to tax as royalty and that the services provided by the assessee were ancillary to the alleged 'royalties' and, therefore, also taxable as FTS.

Legal provisions

Definition of Royalty and fees for technical services as per Article 13 of DTAA,

3. For the purposes of this Article, the term "royalties" 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 cinematography films or work on films, 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; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

Legal provisions

4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received ; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received ; or

(c) 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 report provided by assessee to its clients cannot be copyrighted as it does not fulfil the requirements enlisted under section 13(1)(a) of the Indian Copyright Act, 1957. Also, none of the rights as mentioned in Section 14(a) of the Indian Copyright Act, 1957 have been rested with the client by the assessee while rendering its services.
- ❖ It is a fact on record that the information obtained by the assessee from various sources is in the nature of factual data about the prospective candidates proposed to be hired by the clients. In our view this information is not an information which involves imparting of any kind of commercial experience, skill or expertise.
- ❖ Further, the services rendered by the assessee do not involve any technical skill/knowledge or consultancy or make available any technical knowledge, experience, skill, know-how or processes to the clients.
- ❖ In our considered opinion, the mere undertaking of background checks of an employee or the verification of testimonials cannot possibly be recognised as entailing the use of any technical knowledge, experience or skill as provided under Article 13(4) of the India-UK DTAA. Thus, such service is neither Royalty nor Fees for technical service.

Our Comments

- ❖ There are various which provides such screening service to it's clients to run background check of the prospective employees and to conduct a verification. Hence, considering the nature of such service it could be said that such service does not involve any component of consultancy in nature of technical or managerial and also it is not a copyrighted material.
- ❖ However, what would happen if the service of background check also involves taking some initial round of interview of the employee for the company. Will it tantamount to fees for technical service? As taking interview needs some technical knowledge.
- ❖ Also, what if such screening or interview service is being provided using Artificial intelligence (AI)? Will it tantamount to royalty as it involves use of copyrighted computer software?

Section/Article	Section 9 and Article 13
DTAA/Country	India UK
Court	Delhi High Court
Date of decision	26.02.2024

Note: Case law name in **Red**- in favor of the revenue, **Green**-In favor of the Assessee, **Orange** = Partial



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