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SITG No. 215

AAPC Singapore Pte. Ltd.

v.

ACIT, International Taxation.

Receipts from reservation fees, marketing fees and loyalty programme could not be brought to tax in India as Royalty income under India Singapore DTAA.

20.07.2024

[2024] 164 taxmann.com 302 (Delhi - Trib.)

Jain Shrimal & Co.

Facts of the Case

- Assessee, a Singapore based company, was engaged in the business of sub-licensing the brand names to third party hotels in India. The assessee filed its return of income declaring certain amounts received towards franchise, license fee etc., as royalty income.

- Further, certain fees received towards training imparting training in relation to central reservation, integral property management system, information technology related services etc., were offered to tax as FTS.

- However, the fee received towards reservation services, marketing services and loyalty programme receipts were not offered to tax in India pleading that they were neither in the nature of royalty nor FTS.

Assessee's Contention

- Assessee contended that the service agreement under question is same as that was examined by the co-ordinate bench in assessee's own case in AY 2015-16 and accordingly same should not be considered as Royalty or Fees for technical service.

- Assessee contended that to be considered as Royalty the service should be in the nature of enjoyment of any right to use of any trademark whereas in the current agreement there is transfer of right to use any trademark or intellectual property. Further, this could not be considered under article 12(4)(a) as the services are under separate agreement and is not ancillary to the use of any trademark or intellectual property.

- Further, the service does not satisfy the 'make available' clause and accordingly same cannot be considered as fees for technical service under the DTAA.

Revenue's Contention

- Revenue contented that both the services provided (i.e. brand name and training for reservation) were composite in nature and fees received by the assessee was ancillary to such service and accordingly would be considered as royalty and should be taxed accordingly.

- It further contended that the services being offered are ancillary to each other and they have just made 2 agreements to save it from taxation. However, both the services are linked with each other.

Legal Provisions

Section 9(1)(vi) of Income tax act is as under:

- Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for

  (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;
  (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;
  (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;
  (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;
  (iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;
  (v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting; or
  (vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).

Legal Provisions

Article 12 of India-USA/Canada DTAA:

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.

Ruling

- Hon'ble tribunal following the judgement of co-ordinate bench in assessee's own case for AY 2015-16 held that the services provided by assessee under the master service agreement is neither royalty service or neither fees for included/ technical service as the service is not ancillary to the enjoyment of rights or trademark as assessee is not the owner of trademark and neither the services being provided are ancillary to such trademark or intellectual property.

- Further, the assessee is not fulfilling the 'make available' clause and accordingly such service would fall under the category of business income and since assessee does not have PE in India which has been accepted by ld. AO such income will not be taxable in India as FTS also.

Our Comments

- Considering the above judgement it can be said that the above services have not been considered as FTS because ‘make available’ clause is not getting satisfied. However, same is not taken out of FTS under the Income tax act.

- Accordingly if any of the DTAA does not have ‘make available’ clause then in such case the services would be considered as fees for technical service and taxed accordingly.

Section/Article	Section 9 and Article 12
DTAA/Country	India - Singapore
Court	Delhi Tribunal
Date of decision	02.07.2024

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

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