



# SATURDAY INTERNATIONAL TAX GYAN !!!

## #taxmadeeasy

### SITG No. 222

Commissioner of Income-tax

v.

Ad2pro Media Solutions (P.) Ltd

Marketing services such as generating customer leads, using customer data base, market research and analysis in which technical knowledge is not shared can not be considered as royalty or FTS as per India-USA DTAA. SLP by revenue was rejected by Hon'ble SC.

07.09.2024



[2024] 158 taxmann.com 432 (SC)

Jain Shrimal & Co.

## Facts of the Case

- ❖ Assessee is a private limited company engaged in business of providing graphic design solutions for advertising and marketing communications to its customers.
- ❖ Assessee made payments to US Company for marketing services and scope of work was to generate customer leads using/subscribing customer data base, market research, analysis, and online research data. Such US company does not have PE in India.
- ❖ On verification of 15 CA data, it was observed that the assessee remitted huge amounts to US based company for **marketing services without deduction of TDS.**

## Assessee's Contention

- ❖ Revenue has erred in holding that the US Company has made available its technical knowledge, experience, skill, and thus the payment made to the US Company is taxable in India.
- ❖ Assessee further, contended that the services received by assessee was specifically for the customers which were situated outside India and accordingly such service received for export sales cannot be deemed to accrue or arise in India as per the exception wherein service is received to earn from source outside India.
- ❖ Also, assessee has just used the information received from its USA entity and actually there is no transfer of knowledge.

# Revenue's Contention

- ❖ Revenue is in view is that assessee utilizes the services of the US Company **even in the negotiations with customers and in finalizing contracts, and the same cannot be done without sharing technical knowledge, knowhow, processes or experience.**
- ❖ Payment was for use of **information concerning commercial experience** and falls under Article **12(3)** of India-USA DTAA.
- ❖ Payments made by assessee is FTS within the meaning of Explanation 2 to **section 9(1)(vii)** of the Act.

# Legal provisions

## Article 12 of India US DTAA :-

12(3) *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 :”*

12(4) *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.*

# Legal provisions

## Section 9(1)(vii) :-

*Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the **rendering of any managerial, technical or consultancy services** (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries.*

# Ruling

- ❖ While providing services, the US Company does not make available its technical knowledge, skill, knowhow, process or transfer of technical plan or design. Therefore, the view taken by the AO that negotiation with customers to finalise the contract without sharing the technical knowledge or knowhow is unreasonable.
- ❖ Hon'ble ITAT has noted that the scope of the work is to generate customer leads using/subscribing customer data base, market research, analysis, and online research data and rightly held that the **service provider has not made available any technical knowledge**, experience, knowhow, process or develop and transfer technical plan or technical design.
- ❖ In the case on hand, the **services have been rendered in USA. In contradistinction** in the case of GVK Industries Ltd. the **advice** of a Company called NRC8 was taken by GVK Industries Ltd.'s case **for financial structure and with its advice GVK Industries had approached Indian Financial Institutions** with IDBI Bank acting as lead financier for its Rupee loan requirement and for a part of its foreign currency. Thus the services were utilized in India.

# Ruling

- ❖ Therefore, in our considered opinion, the findings returned by the ITAT do not call for any interference and the substantial questions of law are answered in favour of the assessee.
- ❖ **SLP filed by revenue against the high court order was dismissed by hon'ble Supreme Court by holding that the scope of service provided by USA company only included market research, to generate customer leads, using customer database and services were used to generate business in USA. Hence, this will not be considered as royalty or FTS and no TDS is required to be deducted.**



## Our Comments

- ❖ Thus, considering the above judgement of Hon'ble Supreme court and High court it is clear that when services are being availed from non-residents it is very important to define the scope of work and where the services will be utilized because that will determine the taxability of such FTS income in India.
- ❖ Hence, keeping the agreement available for each year of service received is important to determine taxability.

<b>Section/Article</b>	Article 12, Section 9(vii)
<b>DTAA/Country</b>	India USA
<b>Court</b>	Supreme Court of India
<b>Date of decision</b>	08.01.2024

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



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