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SITG No. 238

Tungsten Network Ltd
vs
DCIT

Payment for cloud-based and digital service providers will be covered under definition of "technical services" and are taxable on the basis of source rule and utilization of services.

28.12.2024

ITA Nos. 2237 & 2238/Del/2024 [18-12-2024]

Jain Shrimal & Co.

Facts of the Case

- The assessee M/s. Tungsten Network Ltd., a foreign company recipients for tax purposes in the UK, provided license for converting raw data into e-form for Genpact India Pvt. Ltd.

- Assessee's Hungarian PE entered into a Master Services Agreement with Genpact International Inc., an US Company. The Master Service Agreement granted the assessee the authority to assign or sub-contract the powers and obligations of the agreement to any affiliate of Genpact.

- This license enables the generation of e-invoices for a specific customer of Genpact India.

- Final orders were considering it as "fees for technical services" taxable at 10% under the Act and the India-UK DTAA.

- Being aggrieved, assessee preferred appeal.

Assessee's Contention

- Assessee contented that the Assessing Officer (AO) and the Dispute Resolution Panel (DRP) without considering the evidence and submissions erred in holding that the business receipts received by assessee is taxable as FTS under Income Tax Act, 1961 as well as India – UK DTAA which is against the principle of law and agreements are liable to be quashed.

- Assessee has not carried any business activity in India. Hence, AO & DRP erred in ignoring the exclusion clause of section 9(1)(vii)(b) of the Act.

- The income of assessee from business activities with PE and Associate Enterprise cannot be considered to be in India. The income of assessee from business is protected under DTAA and hence not taxable in India.

Revenue's Contention

- Revenue submitted that payments were made by Genpact India Pvt. Ltd., implying income originated in India as per Section 9(1)(vii) of the income tax act.

- Since assessee (Tungsten Network Ltd.) is a non-resident having income sourced in India, is liable for tax in India.

- Revenue highlighted the cloud-based nature of the services, categorizing them as technical services requiring taxation under both the Act and DTAA.

- The Apex Court held that terms managerial, technical and consultancy are not defined anywhere in the Income-tax Act, 1961. In the absence of definition under Income tax Act, the common and general meaning of these terms should be taken into consideration. For simplicity, any services that involves technology is a technical service.**[GVK Industries Ltd. [2015] 371 ITR 453 (SC)].**

Legal provisions

Section 5(2) of the Act:

Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Legal provisions

Section 9(1)(vii)of the Act:

Income by way of fees for technical services payable by—

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in 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 fees are payable in respect of services utilised in 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

Legal provisions

Article 13 of India-UK DTAA:

For the purposes 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

Legal provisions

Article 13 of India-UK DTAA:

The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid :

a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(*a*) of this Article;
b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;
c) for teaching in or by educational institutions ;
d) for services for the private use of the individual or individuals making the payment ; or
e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 15 (Independent personal services) of this Convention.

Ruling

- Payments received by Tungsten Network Ltd. were taxable as "fees for technical services" under both domestic law and the DTAA.
- The exclusion clause under Section 9(1)(vii)(b) was inapplicable, as services were utilized within India, satisfying the source rule.
- No PE was established, but income derived from services fulfilled the FTS criteria due to technical elements and software utilization.
- In the result, appeals for both AY 2016-17 and AY 2017-18 were dismissed.

Our Comments

- In our humble understanding considering the facts mentioned in the judgement it seems that Genpact India had received a software license from assessee to convert physical invoice into e-invoice and accordingly it should have been covered under definition of Royalty instead of fees for technical service.

- As per various case laws a service is covered under fees for technical service if the service is technical in nature and involves any human element. If the service is based on machine and automatic it cannot be considered as fees for technical service.

- Further, considering the facts the taxability could be saved if the facts were similar to the landmark judgement of Hon'ble Supreme court in case of Engineering Analysis where software service was not considered as Royalty if there is no transfer of right to use copyright or any intellectual property

Section/Article	Section 5(2) & 9(1)(vii) of the Income-tax Act, 1961 and article13 of DTAA
DTAA/Country	India UK DTAA
Court	ITAT of Delhi
Date of decision	18-12-2024

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

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