

TAX FLASH NEWS

30 July 2020



Payment for infrastructure and data centre services is not taxable as royalty under the India-Singapore tax treaty. Further management service fees and referral fees are not taxable as FTS

Recently, the Mumbai Bench of Income-tax Appellate Tribunal (the Tribunal) in the case of Edenred Pte Ltd.¹ (the taxpayer) dealt with the taxability of Infrastructure Data Centre (IDC) charges, management consultancy services and referral services. The Tribunal held that receipts on account of IDC services are not taxable as royalty either under the Income-tax Act, 1961 or under the India-Singapore tax treaty (the tax treaty). Further, the Tribunal held that the management consultancy services and the referral fees are not taxable as Fees for Technical Services (FTS) since 'make available' conditions under the tax treaty were not fulfilled.

Facts of the case

The taxpayer is a foreign company engaged in the business of providing services relating to developing, marketing and implementing incentive-based strategies and technologies to build loyalty and to reward long-term relationships through the utilisation of internet, wireless technology and offline solutions to its clients. The taxpayer's key offering ranges from pure consulting to all aspects of communication development and implementation including sourcing of loyalty rewards and their fulfillment for its clients. Additionally, the taxpayer is also engaged in providing IDC services, management consultancy services and referral services for regional customers to its Indian group companies.

During the Assessment Year 2011-12, the taxpayer entered into IDC agreements with its Indian group companies and received revenues from them. Under

the IDC agreement, the taxpayer essentially provides IT infrastructure management and mailbox/website hosting services to its Indian group companies and these IDC services were performed by the taxpayer's personnel in Singapore. Indian group companies directly remit IDC service payments towards taxpayer's bank account in Singapore.

Further, the taxpayer received management fee from Indian group company by virtue of Management Agreement. The services provided under the 'Management Agreement' broadly include consultancy services to support the sales activities of Indian group company, legal services, financial advisory services, human resource assistance, etc. The taxpayer also received fees for referral services from Indian group company by virtue of agreement entered into its global clients who are interested in availing customer relationship.

The Assessing Officer (AO) held that the IDC charges were taxable as royalty under the Act as well as under the tax treaty. The management services were taxable as FTS and the referral fees were taxable as royalty. The Dispute Resolution Panel (DRP) upheld the order of the AO.

Tribunal's decision

Taxability of IDC charges

Websites/applications/software hosted by the Indian group companies on the data centre in Singapore were web ordering application, corporate website, websites created for customers of taxpayer's Indian entities while making a loyalty program for them. A perusal of the documents filed before the lower authorities indicates that the taxpayer had an infrastructure data centre, not

¹ Edenred Pte Ltd. v. DCIT (ITA No. 1718/Mum/2014) – Taxsutra.com
Note – There are various issues dealt by the Tribunal in this decision. However, this flash news deals with the issue of taxability of Infrastructure Data Centre services, Management Consultancy services and Referral services

information centre at Singapore. The Indian group companies neither access nor use CPU of the taxpayer. No Content Delivery Network (CDN) system was provided under the IDC agreement and no such use/access was allowed. The taxpayer does not maintain any such central data. Further, IDC was not capable of information analytics, data management. The taxpayer only provides IDC service by using its hardware/security devices/personnel. The Indian group companies received standard IDC services and not use of any software. Bandwidth and networking infrastructure were used by the taxpayer to render IDC services.

Indian companies only get the output of usages of such bandwidth and network and not its use. The consideration was for IDC services and not any specific program and no embedded/secret software was developed by the taxpayer. Relying on various decisions² it has been observed that revenues under the IDC agreement were not taxable as royalty under the Act as well as under the tax treaty.

Taxability of management service fees

There was no dispute that under the provisions of Section 9(1)(vii), rendering of management services are taxable as FTS. However, as per the tax treaty, the managerial, technical or consultancy services are taxable as FTS only if such services are 'make available' to the service recipient. In the present case, the management services were provided only to support its Indian group companies in carrying out its business efficiently and running the business in line with the business model, policies and best practices followed by the taxpayer. These services do not 'make available' any technical knowledge, skill, know-how or processes to its Indian group companies. Relying on various decisions³, the Tribunal held that the management services fees were not taxable as FTS under the tax treaty.

Taxability of referral fees

The referral services were provided to support its Indian group companies in carrying on its business. These services do not make available any technical knowledge, skill, knowhow or processes to Indian entity because there is no transmission of the technical knowledge, experience, skill etc. from the taxpayer to Indian entity or its clients. The referral fees were not taxable as royalty under the Act/tax treaty or FTS under the tax treaty.

² Bharati Axa General Insurance Co. Ltd. [2010] 326 ITR 477 (AAR), Standard Chartered Bank v. DDIT [2011] 11 ITR(T) 721 (Mum), ExxonMobil Company India (P.) Ltd. v. ACIT [2018] 92 taxmann.com 5 (Mum), DCIT v. Reliance Jio Infocomm Ltd. (ITA No. 936/Mum/2017)

³ De Beers Minerals (P.) Ltd. [2012] 346 ITR 467 (Kar), Intertek Testing Services Indian P Ltd [2008] 307 ITR 418 (AAR), Bharati Axa General Insurance Co. Ltd. [2010] 326 ITR 477 (AAR)

Our comments

The issue with respect to taxability of FTS has been a matter of debate before the Courts/Tribunal.

On one hand, while dealing with the technological services relating to data center, some of the decisions⁴ have held that such services are taxable as royalty/FTS. However, on the other hand, in some of the decisions⁵ such services were not held to be taxable as royalty/FTS.

The Tribunal in the instant case has held that infrastructure data centre services are not taxable as royalty under the Act as well as under the tax treaty.

The Mumbai Tribunal relied on various decisions relating to 'make available' concept and held that referral and management services are not taxable as FTS under the tax treaty. These services do not make available any technical knowledge, skill, know-how or processes to the Indian entity and therefore not taxable as FTS.



⁴ Frontline Soft Ltd. v. DCIT [2007] 12 DTR 131 (Hyd), Cargo Community Network (P.) Ltd. [2007] 289 ITR 355 (AAR)

⁵ ADIT v. Antwerp Diamond Bank NV [2014] 65 SOT 23 (Mum), Standard Chartered Bank v. DDIT [2011] 45 SOT 494 (Mum)

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