



Software development services are not taxable under 'Independent personal services' Article of the India-USA tax treaty since conditions given under the said Article are not fulfilled

Background

The Ahmedabad Tribunal in the case of Susanto Purnamo¹ (the taxpayer) held that software development services, which require predominant intellectual skill and are dependent on individual characteristics of the person pursuing software development, qualify as professional services. Since such professional services are rendered by an individual, they are covered by the 'Independent Personal Services' (IPS) Article², and not by the 'Fees for Included Services' Article under the India-USA tax treaty (tax treaty). Further, in the absence of fixed base in India and not being present in India for more than 90 days during the relevant assessment year, software development services are not taxable under the IPS Article of the tax treaty.

The Tribunal observed that due to a specific clause under Article 12(5)(e), once an amount is covered under IPS, the same cannot be sought to be covered under 'Fees for included services' Article³.

Facts of the case

- The taxpayer, a sole proprietorship, is fiscally domiciled in the USA. During the year under consideration, it provided certain software development services to an Indian Company.
- The Assessing Officer (AO) observed that no tax was paid by the taxpayer on the income earned from providing services to the Indian Company.

- The taxpayer contended that the professional services are covered by Article 15 of the tax treaty and in the absence of fixed base in India or the prescribed days of stay in India, the income is not liable to tax in India.
- The AO contended that the services rendered by the taxpayer were not in the nature of independent services covered under Article 15. Further, the fact that services enabled the user to apply the technology is sufficient to demonstrate that technical knowledge was made available and would be covered under Article 12.
- The Commissioner of Income-Tax (Appeals) CIT(A) held that Article 15 would apply to the services and since neither of the dual conditions of having a fixed base nor prescribed number of days stay in India were satisfied, income cannot be brought to tax in India.
- The tax department preferred an appeal before the Tribunal challenging the order of the CIT(A).

Tribunal's observations & decision

- The taxpayer is entitled to the benefits under the India-USA tax treaty and the same is not disputed. By virtue of Section 90(2), the provisions of the tax treaty or the Act whichever is more beneficial is to be applied to the taxpayer.

¹ ITO v. Susanto Purnamo [I.T.A. No.254/Ahd/2015] - taxsutra.com

² Article 15 of the India- USA tax treaty

³ Article 12 of the India- USA tax treaty

- The specific professions set out in Article 15 are only illustrative and not exhaustive. The decision in case of Graphite India⁴ has been followed to determine the scope of services which constitute IPS for purposes of Article 15. Software development services provided by taxpayer falls under the ambit of 'professional services' under Article 15.
- There could be overlapping effect of scope of services covered by other Articles, but as long as services are rendered by individual, the same is covered by Article 15. Article 12(5)(e) exemplifies this approach.
- The conditions precedent to taxability under Article 15 are not satisfied since neither the taxpayer has any fixed base available to him in India nor has visited India for more than 90 days.
- Once a service is found to be of nature as covered in Article 15, the same shall stand excluded from the ambit of Article 12 of the DTAA. This is supported by Article 12(5) which provides for exclusion of services governed by IPS clause.
- As conditions set out in Article 15 are not satisfied, taxability under the said Article does not arise. Further, since the services are governed by Article 15, taxability under Article 12 (4) is academic and infructuous.

Our comments

The characterisation of services and whether it is governed by a particular article of a tax treaty has been a subject matter of litigation. Further, there is also litigation before the courts with respect to overlap in the scope of nature of services between professional services and technical, consultancy and managerial services. The India-USA tax treaty provides for a specific exclusion clause between the IPS Article and 'Fees for included services' Article. However, there are certain tax treaties which do not provide for such a specific exclusion. In the absence of such a specific exclusion, this issue of overlap in the scope of services between the IPS Article and the 'Fees for Technical Services' Article becomes relevant. In case of such overlap in the scope of tax treaty Articles and where one Article is more beneficial than the other, the Courts/Tribunal have held that the more beneficial provision applies to the taxpayer⁵.

⁴ Graphite India Ltd v. DCIT [2002] 86 ITD 384 (Kol)

⁵ DDIT(IT) v. Stock Engineer and Contractors B.V. [2010] 122 ITD 49 (Mum)

The Tribunal in this decision has dealt with Software Development services and held that, in absence of fixed base in India or stay beyond specified days, no taxability arises under IPS-Article 15 of the tax treaty. The Tribunal observed that due to a specific clause under Article 12, once an amount is covered under IPS, the same cannot be sought to be covered under 'Fees for included services' Article.



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