

TAX FLASH NEWS

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Business support services are not taxable as FTS in view of the MFN clause under the India-Belgium tax treaty

Recently, the Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Magotteaux International SA¹ (the taxpayer) dealt with the taxability of business support services under the India-Belgium tax treaty (tax treaty). The Tribunal held that the business support services are not taxable as Fees for Technical Services (FTS) under the tax treaty applying the Most Favoured Nation (MFN) Clause. By virtue of the MFN clause under the tax treaty, the restricted scope i.e., make available clause under the India-Portugal tax treaty, will apply to the India-Belgium tax treaty. Since the services provided by the taxpayer do not make available technology, skill, know-how, etc., to the Indian company, the same cannot be treated as FTS.

Facts of the case

The taxpayer, a tax resident of Belgium, is engaged in providing operational consultancy and other management services to various group entities. The taxpayer has entered into an agreement with an Indian company for the provision of business support services, such as, marketing, sales, finance, administration and other services. Such services were provided by the taxpayer from outside India. During the Assessment Year 2011-12, the taxpayer received income in the nature of group management fees from the Indian company. The Assessing Officer (AO) observed that the support services provided by the taxpayer were both managerial and consultancy services including the technical consultancy services. Referring to Article 12 of the tax treaty, the AO observed that these services were taxable as FTS both under the tax treaty as well as under the provisions of Section 9(1)(vii) of the Income-tax Act, 1961.

The taxpayer relied on the MFN clause under the tax treaty and contended that the restricted scope i.e., make available clause under the subsequent India-Portugal tax treaty, will apply to the India-Belgium tax treaty. Since the services provided by the taxpayer do not make available technology, skill, know-how, etc., to the Indian company, the same cannot be treated as FTS.

The AO dismissed the taxpayer's contention and treated the services as FTS. The DRP upheld the order of the AO.

Tribunal decision

The service agreement indicates that the services provided are routine in nature and do not make available experience, know-how to the recipient Indian company. The lower authorities also held that as per the service agreement, the services provided by the taxpayer were in the nature of routine support services, which are not very complex in nature.

Considering the MFN clause under the tax treaty, restricted scope under the subsequent India-Portugal tax treaty has to be considered. Under the India-Portugal tax treaty, fees for included services (FIS) is defined as consideration for the rendering of any technical or consultancy services if such services make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or technical design which enables the person acquiring the services to apply the technology contained therein.

The Tribunal observed that the services received by the Indian company did not make available any technology, skill, know-how, etc., and therefore such services were considered to be in the nature of managerial, technical or consultancy in nature.

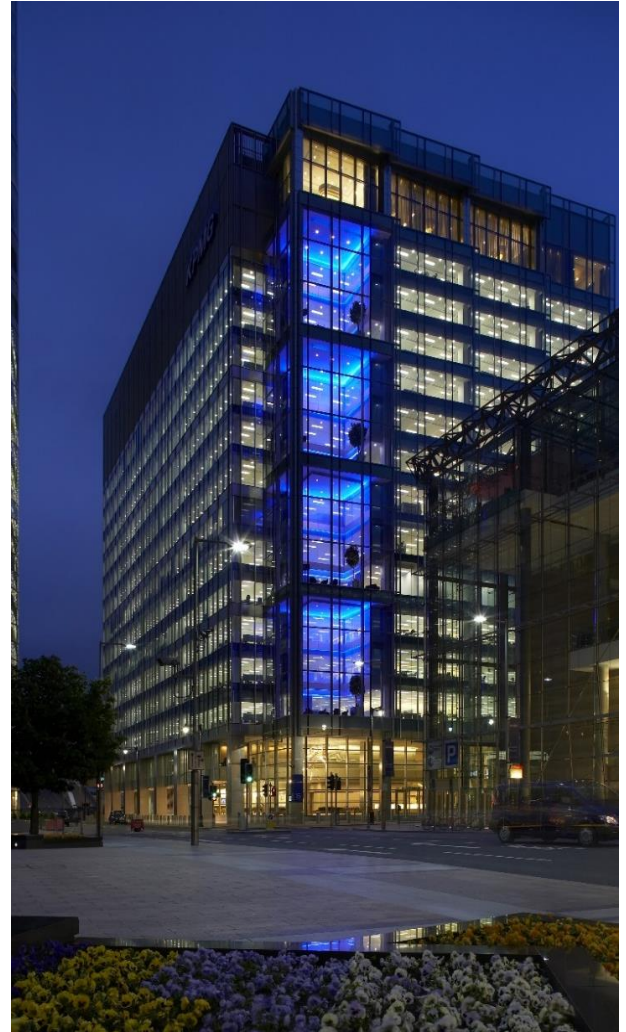
¹ Magotteaux International SA v. DCIT (ITA No. 1358/DEL/2015) – Taxsutra.com

Our comments

The Karnataka High Court in the case of De Beers India Minerals Pvt. Ltd.² had applied the MFN clause under the India-Netherlands tax treaty and observed that the meaning of the term 'make available' under the Netherlands tax treaty can be further narrowed down by emphasising the words 'which enables the person acquiring the service to apply technology contained therein' available under the India-Singapore tax treaty.

However, the AAR in the case of Steria (India) Ltd³ has denied the benefit of MFN clause under the India-France tax treaty and held that payment for management services would be taxable as FTS since the Protocol cannot be treated as the same with the provisions contained in the tax treaty itself, though it may be an integral part of the tax treaty. Further, the AAR in the case of Mersen India Private Limited⁴ while denying the benefit of the MFN clause under the French tax treaty has held that 'make available' concept is applicable only to technical and consultancy services and not to the 'managerial services' since the comparative tax treaty (i.e., India-USA tax treaty) does not include managerial services.

The Tribunal, in the present case, has held that the business support services are not taxable as FTS under the India-Belgium tax treaty applying the MFN clause. The Tribunal has applied the restricted scope i.e. 'make available' clause available under the India-Portugal tax treaty to the India-Belgium tax treaty. Since the services provided by the taxpayer did not make available technology, skill, know-how, etc., to Indian company, the same were not taxed as FTS.



² CIT v. De Beers India Minerals (P) Ltd. [2012] 346 ITR 467 (Kar)

³ Steria (India) Ltd. [2014] 364 ITR 381 (AAR)

⁴ Mersen India Private Limited [2013] 353 ITR 628 (AAR)

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