

Tax Flash News

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The cloud computing services are not taxable as royalty or FTS under the India-US tax treaty

Executive Summary

The taxability of cloud computing services has been a complex issue. Cloud computing is the provision of standardised, configurable, on-demand, online computer services, which can include computing, storage, software, and data management, using shared physical and virtual resources. Due to the complicated nature of such digital services, the characterisation of such services as royalty or Fees for Technical Services (FTS) has been a matter of debate before the courts. Recently, the Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Amazon Web Services, Inc.¹ (the taxpayer) while dealing with the taxability of cloud computing services held that such services were not taxable as royalty under the India-US tax treaty (tax treaty). There was no transfer of copyrights, Intellectual Property (IP), exclusive licenses or rights, etc. to the Indian customer by the US company/taxpayer. Further, such services were not taxable as FTS since they did not 'make available' technical knowledge, skills, etc. to the Indian customer and therefore did not satisfy the 'make available' clause under the India-US tax treaty.

Facts of the case

- The taxpayer, a US company, provided 'standard and automated' cloud computing services/AWS services to its customers around the globe.
- The Assessing Officer (AO) observed that the payment was taxable as royalty as well as FTS under the provisions of the Act and the India-US tax treaty.

Tribunal's decision

Royalty

- On perusal of the terms of the customer agreement, trademark guidelines and support services guidelines, the Tribunal observed that:
 - The customer does not receive any right to use the copyright or other IP involved in AWS service.
 - The customer was granted only a non-exclusive and non-transferable licence to access the standard automated services without the source code of the licence.
 - The customers have no right to use or commercially exploit the IP. Further, there was no equipment of any nature or at any time placed at the disposal of the customers by the taxpayer.
 - Under the Support Service Guidelines, only incidental/ancillary support was provided to the customers which includes answering queries/troubleshooting for the use of AWS Services subscribed by them. The technical support included in AWS services does not include code development, debugging, forming administrative tasks, etc.
- The Tribunal relied on various decisions² where it was held that consideration for cloud computing services was not chargeable to tax as a royalty under the tax treaty.

¹ Amazon Web Services, Inc. v. ACIT (ITA Nos. 522 & 523/Del/2023) – Taxsutra.com

² CIT v. MOL Corporation (ITA No. 99/2023) (Del), EPRSS Prepaid Recharge Services India (P.) Ltd v. ITO [2018] 100 taxmann.com 52 (Pune), Skycell Communications Ltd. v. DCIT [2001] 119 Taxman 496 (Mad), Urban Ladder Home Décor Solutions Pvt. Ltd v. ACIT (IT/IT)A No.615 to 620/Bang/2020 (Bang), Microsoft Regional Sales Pte. Ltd. v. ACIT [2022] 145 taxmann.com 29 (Del), Reasoning Global E-Application Ltd v. DCIT [2022] 145 taxmann.com 464 (Hyd)

- The Tribunal distinguished decisions³ relied on by the tax department based on the facts of the case.
- Accordingly, it was held that the payments received by the taxpayer from Indian customers from rendering AWS/cloud computing Services were not taxable as royalty under the India-US tax treaty.

Fees for Technical Services

- AWS Services provided by the taxpayer was merely a standard and automated facility commonly available to all, without any customisation.
- The Supreme Court in the case of Kotak Securities⁴ held that the use of standard facility does not amount to technical services. Technical services denote services catering to the special needs of the person using them and not a facility provided to all. Similarly, the Madras High Court in the case of Skycell⁵ held that the use of a standard facility provided to all does not amount to technical services.
- Services provided by the taxpayer i.e. support and troubleshooting services, etc., were the general /incidental support services provided by the taxpayer to its customers and do not involve any transfer of technology or knowledge. These support services did not result in the transfer of technology which enabled the customers to develop and provide cloud computing services on their own in the future and thus would not be treated as FTS/FIS.
- The customer was not able to make use of the technical knowledge, skill, process, etc. used by the taxpayer in providing cloud computing services by itself in its business or for its own benefit without recourse to the taxpayer in the future.
- The issue in the present case stands covered by the decisions of the Pune Tribunal in the case of Sunguard Availability Services LLP⁶ and Rackspace, US Inc.⁷ rendered in the context of cloud computing services. In those decisions, it was held that cloud computing services were not taxable as FTS.

³ Asia Satellite Communication Co. Ltd. vs DCIT [2003] 85 ITD 478 (Del), Cargo Community Network (P.) Ltd. [2007] 289 ITR 355 (AAR)

⁴ CIT v. Kotak Securities [2016] 383 ITR 1 (SC)

⁵ Skycell Communications Ltd. v. DCIT [2001] 119 Taxman 496 (Mad)

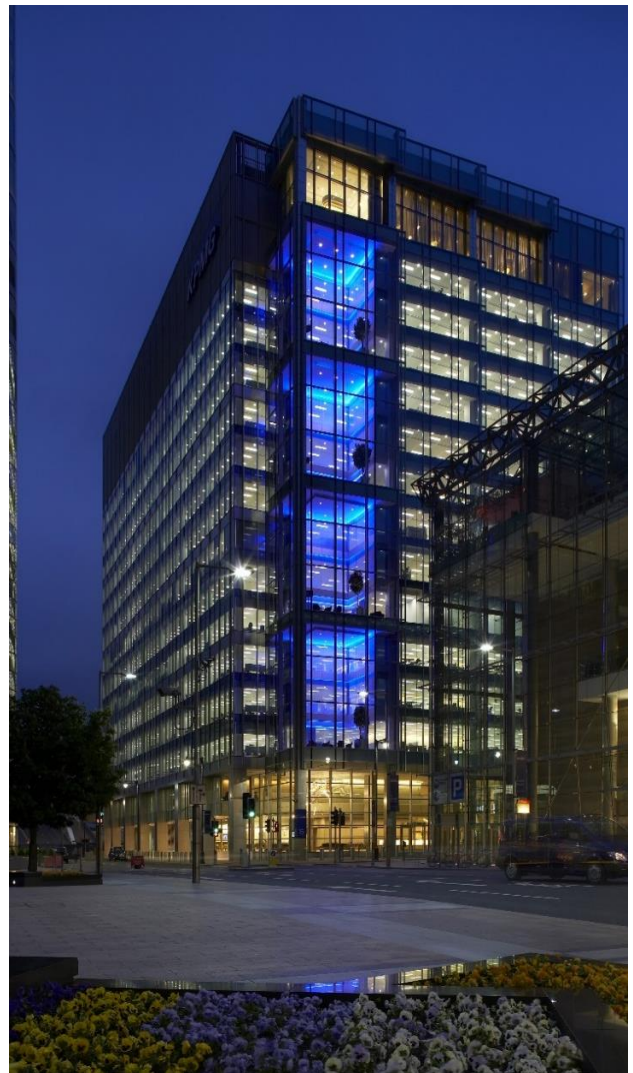
⁶ ITO v. Sunguard Availability Services LLP (ITA No. 258/Pun/2021) (Pune)

⁷ Rackspace, US Inc. v. DCIT [2020] 113 taxmann.com 382 (Mum)

- Accordingly, the receipts for AWS services/cloud computing services did not satisfy the 'make available' conditions under the India-US tax treaty and therefore not taxable as FTS in India.

Our comments

Whether cloud computing services are standard facilities and therefore not taxable as royalty or FTS. This issue has been a matter of debate before the courts/Tribunal. Some of the courts/Tribunal on the detailed analysis of the agreement between the service provider and the Indian customer have held that such services do not involve transfer of copyright or technology. Further, such services are not in the nature of technical services, nor it make available technical knowledge, skill, process, etc. Accordingly, such services are not taxable as royalty or FTS. In the instant case, the Tribunal has reiterated the above-referred principles and held that the cloud computing services are not taxable as royalty or FTS under the India-US tax treaty.



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