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TAX FLASH NEWS

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Training centres of a Canadian entity do not constitute an agency PE in India

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of International Air Transport Association[1] (taxpayer) held that the activities of the training centre in India cannot be held to be devoted wholly or almost wholly on behalf of the taxpayer and such training centres cannot be treated as a Dependent Agent Permanent Establishment (DAPE) in India. Training Centres in India are independent agents, acting in the ordinary course of their business.

Further, the Tribunal held that income received in the form of accredited training centres fees, sale of physical publications (i.e. DGR manuals), provision of advertising space cannot be taxed as royalty.

Facts of the case

The taxpayer, a non-resident, is a non-profit organisation. It is engaged in the business of carrying out activities with an object to promote safe, reliable, secure and economical services for the benefit of the stakeholders of the world commercial aviation industry. The taxpayer had an Authorised Training Centers (ATCs) in India. It provides distance learning courses across the globe including India and allowed students to avail various distance learning courses pertaining to aviation sector for which the interested students could either directly register/enroll on the website of the taxpayer or approach an ATC. The taxpayer has opened a branch office (IATA Branch) in India duly approved by the Reserve Bank of India (RBI). During the Assessment Year 2012-13, the taxpayer offered income on account of classroom training, royalty, annual fee -accredited training centers. However, it had not offered certain receipts i.e. sale of distance learning materials, provision of e-services, collection of membership dues, sale of publications (DGR), provision of classroom training courses, provisions of consulting services, collection of royalties (Accredited Training Schools), collection of annual fee from accredited training centres, provisions of advertising space, clearing house facility, cost recovery, etc.

The Assessing Officer (AO) held that ATCs were to be treated as the DAPE of the taxpayer and hence the consideration received on the distance learning courses was taxable as business income. The AO attributed 40 per cent of the gross receipts as income attributable to Indian Branch Office (PE) on account of membership dues, BSP Link Services, etc. Further, income from sale of publications (DGR), application fees for sale of DGR manuals and provision of advertising space on websites and publications, annual fee from accredited training centres were taxable as royalty. The Dispute Resolution Panel (DRP) upheld the order of the AO.

Tribunal's decision

Dependent Agent Permanent Establishment

ATCs could not be held to be exclusively into providing of courses designed by the taxpayer but were also providing a host of other self-designed/third party courses. The activities of the ATC's in India cannot be held to be devoted wholly or almost wholly on behalf of the taxpayer. ATC's are independent agents, acting in the ordinary course of their business.

The taxpayer was carrying on its business in India through ATC's which were independent organisations doing their business of providing training to students to enable them to work in aviation, travel and tourism industry. Therefore, the taxpayer cannot be held to have a PE in India. The decision of Mumbai Tribunal in the case of Delmas France S.A.[2] relied upon by the taxpayer has been affirmed by Bombay High Court[3]. Accordingly, it was held that the ATCs being an independent agent within the meaning of Article 5(5) of the tax treaty could not have been held to be the DAPE of the taxpayer in India. Therefore, the addition of

[1] International Air Transport Association (Canada) v. ACIT [ITA No. 587/Mum/2016]- Taxsutra.com

[2] Delmas France S.A v. ACIT [2013] 141 ITD 67 (Mum)

[3] DIT v. Delmas France [2015] 232 Taxman 401 (Bom)

40 per cent of the revenue generated from sale of distance learning material, attributed to them in their status as that of DAPE of the taxpayer was to be deleted.

Permanent Establishment – Branch Office

BSP link charges

The taxpayer had merely acted as a facilitator/intermediary in recovering BSP Link charges from the airlines and agents (through IATA India branch) and had remitted the same to Spain entity without any mark-up. Accordingly, the collection of the BSP charges by the taxpayer from the airlines cannot be held to be its 'business income'. This matter is remitted to the lower authorities for proper adjudication.

IATA clearing house facility

The amount of profit that would be attributable to a Branch Office PE would be on the basis of role played by the PE in those transactions. In a case where the transactions had taken place outside India, the same cannot be attributed to the PE, because the PE had no role to play in such transactions. As such, only the portion of profits which are attributable to the PE in India are taxable in India, and the revenues from functions/activities carried outside India cannot be taxed in India. The decision of the Supreme Court in the case of Ishikawajima Harima Heavy Industries Co. Ltd. relied upon. The matter is remitted to the lower authorities for proper adjudication.

Collection of membership fees

The taxpayer claimed that though Branch Office constituted a PE of the taxpayer in India as per Article 5(2)(b) of the India-Canada tax treaty, the collection of the membership dues by the taxpayer was carried out directly outside India, therefore, the same could not have been attributed to the Branch Office. The Tribunal observed that only the portion of profits which are attributable to the PE in India are taxable in India, and the revenue from functions/activities carried outside India cannot be taxed in India. The Tribunal relied on the decision of the Supreme Court in the case of Ishikawajima Harima Heavy Industries Co. Ltd.[4]

Taxability as royalty

Accredited training centres fees

Although, the course material providing knowledge, information and training about the aviation and travel and tourism industry in general is sold to the students/ATC's, but no 'use' or 'right to use' any copyright in relation to such study material is granted to them. The student's/ATC's do not have any right to reproduce/sell the contents of the study material in any form or media. As the course material providing knowledge, information and training about the aviation and tourism industry in general is merely a sale of book/CD, which does not involve transfer of intellectual property, and also does not contain any undivulged technical information which is not available in the public domain and/or knowhow, it falls outside the scope of the term 'information concerning technical, industrial, commercial or scientific experience' under Article 12(3) of the tax treaty. As the consideration received by the taxpayer is towards a simplicitor sale of training material/books, the same cannot be treated as 'royalty' under the tax treaty. The Tribunal relied on the decisions of Hughes Escort Communication Ltd[5].

Income from sale of physical publications (i.e. DGR manuals)

The sale of DGR manuals was a simplicitor sale of a manual/book and did not involve any transfer of intellectual property. As the DGR manuals were a comprehensive and a user friendly compilation of instructions for safe transport of dangerous goods as laid down by ICAO, which did not contain any such undivulged technical information that was not available in the public domain, and/or know-how, therefore, the same cannot be stamped as 'information concerning technical, industrial, commercial or scientific xperience' as provided in Article 12(3) of the India-Canada tax treaty. The consideration received on sale of DGR manuals could not be characterised as 'royalty' within the meaning of Article 12(3) of the tax treaty for the following reasons:

- The publications were outright sales to the customers, and no 'use' or 'right to use' any copyright in relation to the publication was granted to the customer
- The customers did not get vested with any right to rproduce/sell the content of the publication in any form or media
- The customers also did not get any right to use the patent, trademark, design or model, plan, secret formula or process on supply of such physical publications.
- The information provided in the publications was merely a user-friendly and comprehensive compilation of data available in the public domain and hence, the same cannot tantamount to imparting of any information concerning the technical, industrial, commercial or scientific experience.
- The taxpayer by compiling the instructions for safe transport of dangerous goods as laid down by ICAO did not share its experience, techniques or methodology.
- Further, the information concerning any industrial, commercial or scientific experience (i.e., know-how) generally implies undivulged technical information in the areas of industry, commerce or science, which however, was not so insofar the information published in the DGR manuals was concerned.

[4] Ishikawajima Harima Heavy Industries Co. Ltd. v. DIT [2007] 288 ITR 408 (SC)

[5] Hughes Escort Communication Ltd. v. CIT [2012] 31 CCH 128 (Del)

- The decision of the Madhya Pradesh in the case of HEG Ltd.[6] relied upon.

Taxability of receipts from provision of advertising space

The provision of advertising space by the taxpayer to its customers, either on its website or publications/manuals did not result to vesting of any right to use, display, exploit or modification of the taxpayer's brand or logo, in any manner. As such, the consideration received by the taxpayer from provision of advertisement space in its publications/manuals or website would not fall within the realm of the definition of 'royalty' as provided in Article 12(3) of the tax treaty. In sum and substance, as no 'use' or 'right to use' any copyright, patent, trademark, design or model, plan was granted to the customers by the taxpayer in the course of providing of advertising space to them in its publications/manuals or website, the consideration received in lieu thereof cannot be brought within the meaning of the definition of the term 'royalty' as provided in Article 12(3) of the tax treaty. The Tribunal relied on the decision of Yahoo India (P) Ltd.[7], Right Florists[8] and Pinstorm Technologies Pvt. Ltd.[9] Accordingly, the consideration received by the taxpayer for providing advertising space to its customers cannot be taxed as royalty.

Our comments

With respect to dependent agent PE, some of the Courts/Tribunal[10] have held that the activities of the Indian subsidiary were not devoted wholly or almost wholly for the foreign company. The Indian company was a service provider to the foreign company and it was not having any authority to conclude any contracts on behalf of the foreign company. Therefore, the taxpayer was not having a DAPE in India.

The Delhi High Court in the case of E-Funds Corporation[11], held that the subsidiary by itself cannot be considered to be a DAPE of the principal. However, a subsidiary may become a dependent or an independent PE agent provided the tests specified under Article 5(4) and 5(5) of the relevant tax treaty are satisfied. The transactions between the taxpayers and E-Fund India were at an arm's length and were also taxed on the arm's length principle and therefore, requirements of Article 5(5) were not satisfied. Therefore, there was no agency PE of the taxpayer in India.

In the present case, the Mumbai Tribunal has held that the activities of the ATCs in India cannot be held to be devoted wholly or almost wholly on behalf of the taxpayer. Training Centres in India are independent agents, acting in the ordinary course of their business. Therefore, the taxpayer did not have a DAPE in India.

With respect taxability of receipts from provision of advertising space, the Bangalore Tribunal in the case of Google India Private Limited[12] held that the payment for granting distribution right of 'Adwords program' was taxable as 'royalty' under the India- Ireland tax treaty. It was observed that it was not merely an agreement to provide the advertisement space but is an agreement for facilitating the display and publishing of an advertisement to the targeted customer with the help of various patented tools and software. The taxpayer is having the access to various data and it uses the information for the purposes of selecting the ad campaign and for maximising the impression and conversion of the customers to the ads of the advertisers.

However, the Mumbai Tribunal in the present case has held that the consideration received by the taxpayer from the customers was for providing advertisement space in its publications/manuals or websites, without vesting of any right to use, display, exploit or modify the taxpayer's brand or logo in any manner. Accordingly, the consideration received by the taxpayer for providing advertising space to its customers cannot be taxed as royalty.

[6] CIT v. HEG Ltd. [2003] 263 ITR 230 (MP)
[7] Yahoo India (P) Ltd. v. DCIT (2011) 140 TTJ 195 (Mum)
[8] ITO v. Right Florists Pvt. Ltd. (2013) 143 ITD 445 (Kol)
[9] Pinstorm Technologies Pvt. Ltd. v. ITO (2013) 154 TTJ 0173 (Mum)
[10] NetApp BV v. DDIT [2017] 78 taxmann.com 97 (Del), DDIT v. Western Union Financial Services Inc [2012] 50 SOT 109 (Del), National Petroleum Construction Company v. DIT [2016] 383 ITR 648 (Del), SPE Networks India Inc v. DCIT (ITA No. 652/Mum/2014)
[11] DIT v. E-Funds Corporation [2014] 364 ITR 256 (Del)
[12] Google India Private Ltd. v. ACIT [IT(TP)A.1511 to 1518/Bang/2013] – Taxsutra.com

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