



Tax Flash News

14 March 2024

The provision of a cloud-based software-driven platform cannot constitute technical services if it is not customised or specifically designed for a particular customer

The Delhi High Court in the case of *SFDC Ireland*¹ observed that the payment for the provision of cloud-based software driven platform cannot be taxed as fees for technical services (FTS) if it is not customised or specially designed for a particular customer.

A self-automatised analytical or predictive software or platform which caters to the requirement of multifarious customers as opposed to the one created with special attributes or characteristics tailored to the needs of a particular customer would fall outside the scope of technical services. A distinction must be made between 'service provided' and 'facility offered'.

Further, the technical assistance and training provided to understand the attributes and capabilities of such software cannot be regarded as specialised or exclusive technical services.

The High Court quashed the tax officer's order denying the nil tax withholding certificate and remitted the matter back to the tax officer for a fresh consideration in the light of the observations given in the judgment.

Facts of the case

- SFDC Ireland provided a cloud-based customer management platform (SFDC products) which enabled its users to track sales, collate customer data, digital marketing, etc.
- The platform was an automated managerial software as well as an analytical and predictive tool. These products were accessed over the internet by the end-user.
- SFDC Ireland entered into a reseller agreement with SFDC India and appointed it as a non-exclusive reseller of the SFDC products in India.
- The reseller agreement also dealt with 'SFDC products for reseller's internal use' (SPIU). While the SFDC products were provided to the end-user, the SPIU was made available to SFDC India to enable it to demonstrate the functionality of the SFDC products, and to provide training, to the end-user.
- SFDC Ireland applied to the tax officer for a nil tax withholding certificate relating to payments from SFDC India contending that the payments were not taxable in India as royalty or FTS. The FTS was defined to mean consideration for rendering of managerial, technical or consultancy services.
- Relying on the Supreme Court decision in *Bharati Cellular*², SFDC Ireland contended that the SFDC products were standardised products with the users having the option to pick any combination of products best suited to their business requirements. The products assisted the user in generating reports and summaries of the data which was fed into the software by the user itself. SFDC Ireland was providing access to software on a standardised basis as opposed to providing a customised solution. The access to software was without any human intervention by SFDC Ireland.
- The tax officer denied the nil tax withholding certificate to SFDC Ireland. It held that the payment received by SFDC Ireland was taxable in India as FTS, subject to tax withholding @ 10 per cent. It held that SFDC Ireland was not selling standard off-the-shelf and non-customised downloadable software.

¹ *SFDC Ireland Limited v. CIT* (W.P.(C) 14636/2023) (Delhi High Court) – Source: Taxsutra

² *CIT v. Bharti Cellular Limited* [2011] 330 ITR 239 (SC)

It was offering a comprehensive service experience or solution with the help of technology embedded in the software. Further, SFDC Ireland was obliged to extend technical assistance and training which constituted technical services.

High Court's decision

- The Court in the case of *Bharti Cellular*³ observed that in the definition of FTS, the word 'technical' stood sandwiched between the words 'managerial' and 'consultancy'. Applying the rule of *noscitur a sociis*, the word 'technical' would take colour from the words 'managerial' and 'consultancy' which are provided by humans. Accordingly, the word 'technical' would also have to be construed as involving a human element.
- The Supreme Court in *Kotak Securities*⁴ observed that modern-day scientific and technological developments may tend to blur or obviate the specific human element in an otherwise fully automated process by which the services may be provided. The Supreme Court also observed that the provision of a facility does not amount to rendering technical services, as the services involve catering to the special needs of the person using them and not a facility provided to all customers.
- A self-automatised analytical or predictive software or platform which caters to the requirement of multifarious customers as opposed to one created with special attributes or characteristics tailored to the needs of a particular customer would fall outside the scope of technical services. A distinction must be made between a 'service provided' and a 'facility offered'.

Relevant facts of the case

- The relationship between SFDC Ireland and SFDC India was that of a seller and a buyer, and all transactions were to be undertaken on a principal-to-principal basis.
- Unless there was a transfer of technological knowledge which is exclusive and specialised/ tailored to the need of the recipient, it would clearly not fall within the scope of technical service.
- SFDC Ireland had not transferred any intellectual property rights or technology to SFDC India. No right to manage, control, adapt, alter, modify, or reverse engineer the content of SFDC products was transferred to SFDC India.
- SFDC India was accorded the right to sell SFDC products as distinct from what would constitute the provision of technical service.

- The technical assistance and training imparted to SFDC India staff were aimed at enabling them to understand the various attributes and capabilities of SFDC products. It did not appear to bear the characteristics of a specialised or exclusive technical service.
- It did not constitute either the core or the foundational basis of the consideration which was received by SFDC Ireland. It was a concomitant to the sale of the principal product and was provided free of charge.
- The technical assistance and training were confined to marketing, distribution, support and sale of the SFDC products.
- The tax officer failed to allude to any material to prove that SFDC Ireland was not selling a 'standard off the shelf/ non customized/ electronically downloadable software'.
- It also failed to allude to any material to prove that the platform or the software was being customised or specially designed for a particular customer.
- Even if it was accepted that SFDC Ireland was providing comprehensive services experience or solutions with the help of technology embedded in the software, it would remain a facet or attribute of the software application available to any customer.
- The various streams and heads of revenue, earnings from customisation or individualisation of the SFDC suite of products, if any, were not examined by the tax officer.
- Thus, the tax officer's order was quashed, and the matter was remitted back for considering the SFDC Ireland's application afresh in the light of the above observations.

Our comments

The Delhi High Court in the instant case has dealt with an issue of taxability of consideration received for providing a cloud-based software driven platform. Though the matter was remitted back to the tax officer, the observations of the High Court are significant. It was reiterated that services cannot be regarded as FTS if such services are not exclusive and specific to the customer's needs. A standard facility provided to all customers cannot be held as technical services.

³ *CIT v. Bharti Cellular Limited* [2009] 319 ITR 139 (Del)

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

KPMG in India addresses:

Ahmedabad

Commerce House V, 9th Floor,
902, Near Vodafone House, Corporate Road,
Prahlad Nagar,
Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Bengaluru

Embassy Golf Links Business Park,
Pebble Beach, 'B' Block,
1st & 2nd Floor,
Off Intermediate Ring Road, Bengaluru – 560071
Tel: +91 80 6833 5000

Chandigarh

SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai

KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Gurugram

Building No.10, 8th Floor,
DLF Cyber City, Phase II,
Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

Hyderabad

Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2, Serilingampally
Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur

Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road,
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi

Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytila, Kochi – 682 019.
Tel: +91 484 302 5600

Kolkata

Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai

2nd Floor, Block T2 (B Wing),
Lodha Excelus, Apollo Mills Compound, N M
Joshi Marg, Mahalaxmi, Mumbai- 400011
Tel: +91 22 3989 6000

Noida

Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune

9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara

Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada

Door No. 54-15-18E,
Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000

kpmg.com/in

Follow us on:

kpmg.com/in/socialmedia



The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

KPMG Assurance and Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Mahalaxmi, Mumbai - 400 011 Phone: +91 22 3989 6000, Fax: +91 22 3983 6000

© 2024 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organization.

This document is meant for e-communication only.