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TAX FLASH NEWS

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Subscription fees for CRM services are not taxable as royalty under the India-Singapore tax treaty

Executive summary

Recently, the Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Salesforce.com Singapore Pte Ltd[1] (the taxpayer) dealt with the taxability of subscription fees paid for Customer Relationship Management (CRM) services. The Tribunal held that income earned by the taxpayer from the Indian customers with respect to the subscription fees for CRM was not taxable as royalty under Section 9(1)(vi) of the Income-tax Act, 1961 (the Act) as well as under Article 12 of the India-Singapore tax treaty (tax treaty). The Tribunal observed that all the equipments and machines relating to the service provided by the taxpayer were under its control and were outside India and the subscribers do not have any physical access to the equipment through which services were provided which means that the subscribers were only using the services provided by the taxpayer.

In the absence of granting any control over the equipment belonging to the taxpayer to its customers, the allegation of the Assessing Officer (AO) that the amount so received will constitute 'royalty' was not acceptable.

Facts of the case

The taxpayer, a Singapore based company, is a leading provider of comprehensive CRM services to its customers. Taxpayer's services enable customers and subscribers to systematically record, store and act upon business data, and help businesses to manage customer accounts, track sales, lead, evaluate marketing campaigns and provide better post-sales service.

The taxpayer provides web-based online access to its customer's data hosted on servers located in data centers maintained by the taxpayer outside India. The taxpayer does not have any data centers in India and hence it cannot be considered to have a fixed place of business in India. The taxpayer neither has a place of management in India nor has any equipment or personnel in India. Services rendered by the taxpayer help the client in generating reports and summaries of the data which is fed into the salesforce database by the client itself. The access to the taxpayer's database is for a limited duration and for the period for which the subscription fee is paid by the client.

The AO observed that the taxpayer had provided web services and it was made available to users over a network, which was normally through the web/internet. By entering into the agreement, clients do not get ownership rights on any of the above items. They only get a right to use the equipment and software and therefore, the same was to be considered as royalty, both under Section 9(1)(vi) as well as under Article 12 of the tax treaty. The Commissioner of Income-tax (Appeals) upheld the order of the AO.

Tribunal's decision

The taxpayer provides web-based online access to its customer's data hosted on servers located in data centers maintained by the taxpayer outside India. The taxpayer did not have any data centers in India and hence it cannot be considered to have a fixed place of business in India. The taxpayer neither had a place of management in India nor had any equipment or personnel in India. This fact was accepted by the CIT(A) in his order. Therefore, in the absence of granting any control over the equipment belonging to the taxpayer to its customers, the allegation of the AO that the amount so received will constitute 'Royalty' was not acceptable.

[1] Salesforce.com Singapore Pte Ltd v. DDIT (ITA No. 4915/DEL/2016) – Taxsutra.com

The taxpayer did not provide any information concerning industrial, commercial, scientific experience. The taxpayer only processes the proprietary data of the customers and provides the result in the form of desired reports, etc.

If the services were rendered without imparting of knowledge or transfer of any knowledge, experience or skill, then such services will not fall within the ambit of Article 12 of the tax treaty. Further, by granting access to the information forming part of the database, the taxpayer neither shares its own experience, technique or methodology employed in evolving databases with the users, nor imparts any information relating to them.

The decision relied on by the tax department in the case of Thought Buzz (P) Ltd[2] was distinguishable on facts of the present case. The taxpayer in that case was in the business of gathering and collating of data which was obtained from various sources and shared via report with the users, whereas in the case in hand, the taxpayer was using the data provided to it by the customers and then generates desired reports. Reference was made to various decisions[3].

Based on the facts of the case and in light of the Master Subscription Agreement, the customers do not have any access to the taxpayer's process.

All the equipments and machines relating to the service provided by the taxpayer were under its control and were outside India and the subscribers did not have any physical access to the equipment which was providing system service which means that the subscribers are only using the services provided by the taxpayer.

Accordingly, it was held that the income earned by the taxpayer from the Indian customers with respect to the subscription fees for CRM cannot be taxed as royalty under Section 9(1)(vi) of the Act as well as under Article 12 of the tax treaty.

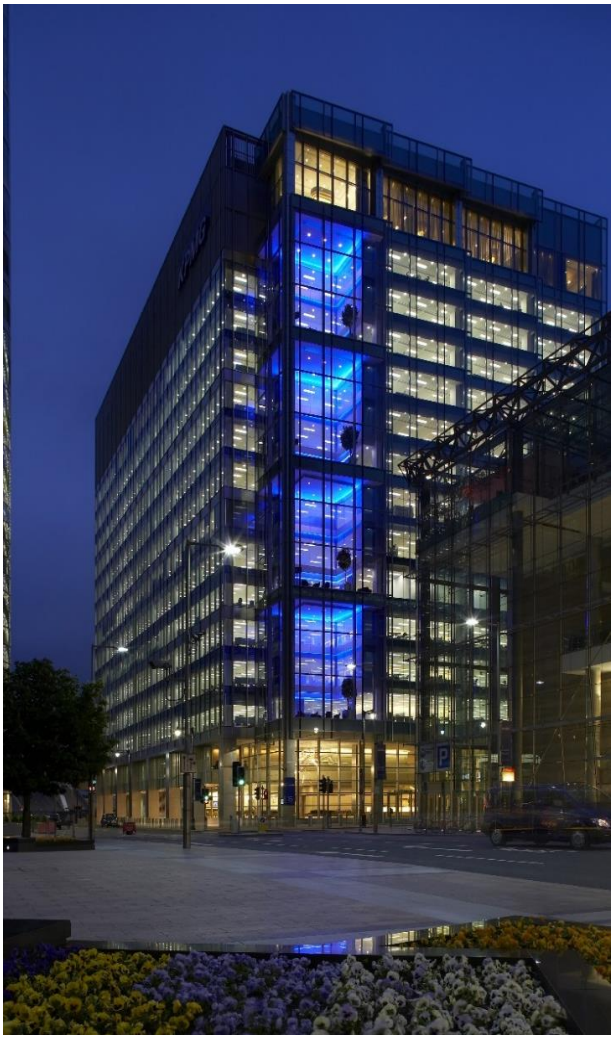
Our comments

The issue with respect to the characterisation of payments made for cross-border services, especially for the use of software, online facilities or IT infrastructure has been a matter of debate before the Courts/Tribunal.

The Mumbai Tribunal in the case of Elsevier Information Systems GmbH[4] held that the subscription fees for the use of online database were not taxable in India as royalty or FTS as per Article 12 of the India-Germany tax treaty since subscription fees received by the taxpayer were for the use of the copyrighted article and not for the use of or right to use of copyright.

However, the AAR in the case of Thought Buzz (P.) Ltd[5] held that transfer of web based social media monitoring services amounts to use of information concerning scientific experience and hence taxable as royalty under the India-Singapore tax treaty.

The Tribunal in the present case has held that in the absence of granting any control over the equipment belonging to the taxpayer to its customers, the subscription fees received by the taxpayer were not taxable as royalty under Section 9(1)(vi) or under Article 12 of the tax treaty.



[2] Thought Buzz (P) Ltd [2012] 346 ITR 345 (AAR)
[3] American Chemical Society v. DCIT [2019] 106 taxmann.com 253 (Mum), GECF Asia Ltd [2010] 48 Taxmann.com 148 (Del), Kotak Mahendra Primus Ltd (ITA No. 2714 & 2001/2011)

[4] Elsevier Information Systems GmbH v. DCIT [2019] 106 taxmann.com 401 (Mum)
[5] Thought Buzz (P) Ltd [2012] 346 ITR 345 (AAR)

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