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CHARTERED ACCOUNTANTS

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HC Holds No Transfer of Intellectual Property Rights; Revenue Failed to Establish Link between Payment received by Assessee and Consideration for FTS

Facts

The assessee, SFDC Ireland, was a tax resident of the Republic of Ireland holding a valid Tax Residency Certificate under Article 4 of the Double Taxation Avoidance Agreement (DTAA). Additionally, the assessee did not have a Permanent Establishment (PE) as per under Article 5 of the DTAA.

The assessee was engaged in the business of operating customer relationship management offerings, applications, and platforms, including sales, service, marketing, commerce, integration, analytics and related products and services (hereinafter referred to as "SFDC products").

On 01.02.2023, the assessee entered into a Reseller Agreement with SFDC India. As per the terms of the Reseller Agreement, the relationship between the two parties was that of seller and buyer and all transactions were to be undertaken on a principal-to-principal basis. As per the terms of this agreement, SFDC India was to market, distribute and sell SFDC products in India.

During the year under appeal, the assessee estimated receipts of INR 518.21 Cr. as being receivable from SFDC India in terms of the Reseller Agreement. The same were held as royalty by the Assessing Officer (AO) and brought to tax.

Consequently, the matter reached the Hon'ble court for adjudication.

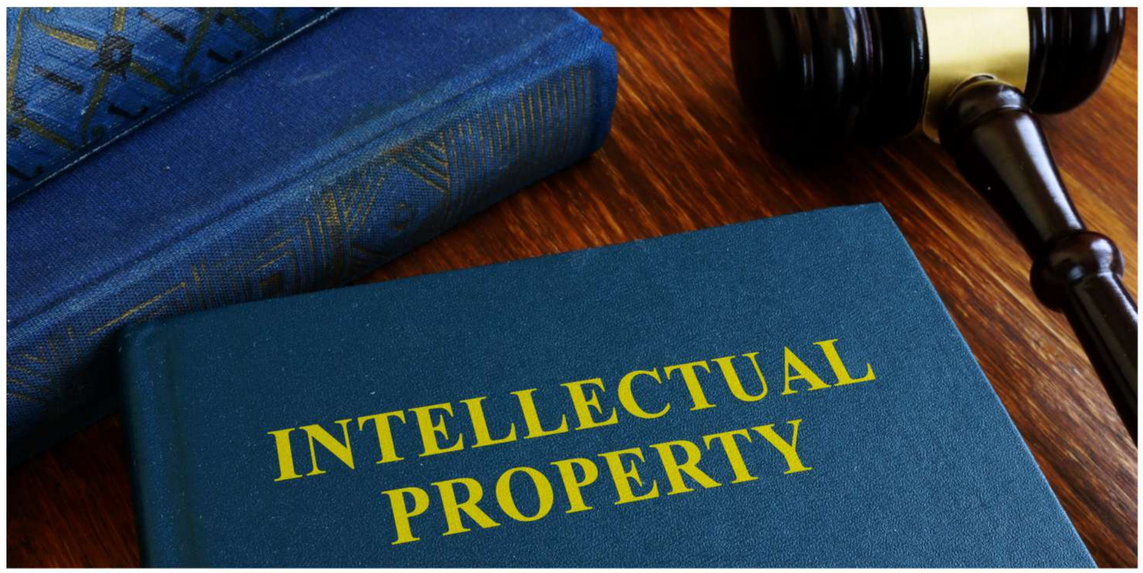
Ruling

The Hon'ble court ruled in favor of the assessee. It opined that it was undisputedly evident that the Reseller had not transferred any Intellectual Property Rights. The right of sale of SFDC Products as conferred upon the Reseller was found to be on a non-exclusive basis. Furthermore, it was noted that the Reseller was also not vested with any right to bind SFDC Ireland by its actions and the SFDC Products were cloud based and hence accessed over the internet by end customers. The Hon'ble Court referred to the following cases to support its conclusions:

1.Commissioner of Income tax vs. Bharti Cellular Limited 2008 SCC Online Del 1452 affirmed by the Apex Court in (2014) 6 SCC 401
2.Commissioner of Income tax vs. Kotak Securities (2016) 11 SCC 424

The Hon'ble court held that in order to fall within the ambit of Fees for Technical Services (FTS), it was incumbent upon the revenue to establish an indelible link between the payment received by SFDC Ireland and the same constituting consideration for providing technical services. However, the same failed to be established and consequently the assessee's petition was allowed.

Source: High Court, Delhi in SFDC Ireland Limited vs. Commissioner of Income tax & Anr vide W.P.(C) 14636/2023 dated March 11, 2024.



Long Term Capital Gain of Mauritian Company holding TRC Not Taxable under DTAA; Relies on Azadi Bachao Andolan

Facts

The assessee was a non-resident corporate entity incorporated under laws of Mauritius as well as a tax resident of Mauritius by virtue of the Tax Residency Certificate (TRC) issued by Mauritius Revenue Authority. The assessee was an investment holding company and Category -1 Global Business License holder and had invested in shares. Additionally, the assessee was also registered as a foreign venture capital investor with Securities and Exchange Board of India (SEBI).

In connection with its business activity, the assessee had invested in equity shares of various Indian companies. The assessee had also sold shares of certain Indian companies and derived capital gain. In the return of income filed for assessment year under dispute, the assessee offered the short-term capital gain of INR 15.03 Cr. to tax, however, the long-term capital gain of INR 302.30 Cr. was not offered to tax by the assessee claiming exemption under Article 13(4) of India Mauritius DTAA.

The AO concluded that the assessee was controlled and managed from outside and noted that the ultimate parent company of the assessee was beneficially owned by the entity in USA. He observed that under India-USA DTAA, the long-term capital gain would have been chargeable to tax and to avoid the taxability of long-term capital gain, the assessee company was interposed in Mauritius to derive benefit under the treaty. He believed that the assessee company was a mere shell company or sham arrangement for treaty shopping.

Thus, he held that as per the circumstances the TRC would not be enough to prove the tax residency of the assessee and substance over form approach had to be adopted. Accordingly, he framed the draft assessment order by bringing to tax the income derived from long term capital gain on sale of shares.

Aggrieved, the assessee raised objections before the Dispute Resolution Panel (DRP). While implementing the directions of DRP, the AO maintained the addition as was proposed in the draft assessment order.

Consequently, the assessee preferred an appeal before the Tribunal.

Ruling

The Tribunal ruled in favor of the assessee. It opined that it had been undoubtedly proven that the shares on sale of which the assessee derived capital gain were acquired prior to 01.04.2017. In tandem with the fact that the assessee was a holder of the TRC it was clear that it was the beneficial owner of the capital gain and accordingly entitled to benefits under Article 13(4) of the DTAA. The Tribunal found that the denial of the treaty benefits to the assessee conflicted the CBDT Circular No.789 dated 13.04.2000. The Tribunal held that the issue was no more res integra in view of ratio laid down by the Hon'ble Supreme Court in case of Union of India vs Azadi Bachao Andolan [2003] 263 ITR 706 (SC).

The Tribunal referred to the following judgements to support its point of view:

1.The Hon'ble Bombay High Court in CIT vs. JSH Mauritius (919) WPNo. 30702016(J)
2.The Hon'ble Bombay High Court in Bid Services Division (Mauritius) Ltd. vs. AAR WPNo. 713 of 2021
3.The Hon'ble Punjab & Haryana High Court in Serco BPO (P.) Ltd. vs. AAR (2015) 60 taxmann.com 433
4.The Hon'ble Delhi ITAT in MIH India (Mauritius) Ltd. vs. ACIT ITA No. 1023/Del/2022

Hence the Tribunal concluded that on a conspectus of ratio laid down in the decisions cited above, it was evident that the capital gain derived from shares prior 01.04.2017 would not be taxable as per Article 13(4) of the DTAA.

Source: Tribunal, Delhi in Norwest Venture Partners, X-Mauritius vs. DCIT vide ITA No. 2311/DEL/2023 dated March 19, 2024.

ITAT Holds No Presence of Virtual PE of Clifford Chance; Revenue's View Based on Misunderstanding of Facts and Law

Facts

The assessee was a tax resident of Singapore and had opted to be governed by the provisions of India- Singapore DTAA. It was engaged in providing legal advisory services to several international clients including India. For the AY 2020-21, the assessee filed its return of income (ROI) declaring Nil income and claimed credit of taxes deducted at source (TDS) of INR 3.32 Cr. For AY 2021-22 the assessee filed its ROI declaring Nil income and claimed credit of TDS of INR 82.80 Lakhs. The assessee's cases were selected for scrutiny under CASS.

During the relevant AYs, the assessee entered into legal advisory contracts with the Indian clients. In AY 2020-21, part of the advisory services were rendered remotely outside India and while there were situations where employees of the assessee travelled to India for rendering services. In AY 2021-22, the services were rendered remotely from outside India and no employees had visited India for provision of services.

During the assessment proceedings, the AO observed that the assessee had a gross total receipt of INR 15.55 Cr. for the AY 2020- 21 and INR 7.76 Cr. for the AY 2021-22 from rendering services to Indian clients but the same have been claimed as exempt in its ROI by the assessee. The AO proceeded to tax the same respectively to the total income of the assessee on account of constitution of service PE of the assessee in India.

Aggrieved, the assessee filed objections before the DRP who directed the AO to reconsider the facts/information and material placed on record by the assessee during the assessment proceedings, before passing the final assessment order.

Pursuant to the above directions, the AO passed final assessment order for AY 2020-21 holding that the assessee constituted service PE based on physical presence of employees in India and also virtual service PE on the ground that in terms of para 6 of Article 5 of the India-Singapore DTAA. He, therefore attributed 100% of the gross receipts of INR 15.55 Cr. to such service PE.

For AY 2021-22, he passed the final assessment order on holding that the assessee constituted virtual service PE in India and further attributed 100% of the gross receipts amounting to INR. 7.76 Cr. to such alleged virtual service PE on the basis of the order passed in the AY 2020-21.
Consequently, dissatisfied by the above orders, the assessee appealed before the Tribunal.

Ruling

The Tribunal ruled in favor of the assessee. It observed that as per Article 7 of India-Singapore DTAA, the profits of a foreign enterprise (not falling within the purview of any other Article dealing with specific items of income i.e., FTS) could be taxed in India only if business was carried on through a PE situated in India.

The Tribunal opined that it was an undisputed fact that during AY 2020-21 part of the advisory services were rendered remotely outside India and part of services were rendered in India through the employees of the assessee who travelled to India for rendering such services. Whereas in AY 2021-22 none of the employees of the assessee travelled to India and the services were rendered from outside India which was duly evidenced by the submissions of the assessee. Additionally, the assessee had no office/fixed base in India during the relevant AYs.

Accordingly, the Tribunal held that applying the provisions of Article 5(6)(a) to the present case, to constitute a service PE actual performance of service in India was essential and only when the services were rendered by the employees within India with their physical presence during the relevant financial year would be considered for computing threshold limit for creation of a service PE of the assessee in India.

Moreover, the Tribunal referred to the judgement of the Hon'ble Supreme Court in the case of ADIT vs. E-Funds IT Solution Inc. 86 taxmann.com 240 (SC), wherein it was observed that the requirement of service PE is that services must be furnished "within India".

The Tribunal held that in both the AYs under consideration the AO was of the view that the assessee constituted virtual service PE in India and that such view was not based on the correct appreciation of facts and understanding of law enshrined in Article 5(6)(a) of the India-Singapore DTAA.
Hence the additions with respect to the TDS amount were set aside by the Tribunal.

Source: Tribunal, Delhi in Clifford Chance PTE Ltd. vs. ACIT vide ITA No 437/Del/2023 dated March 14, 2024

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