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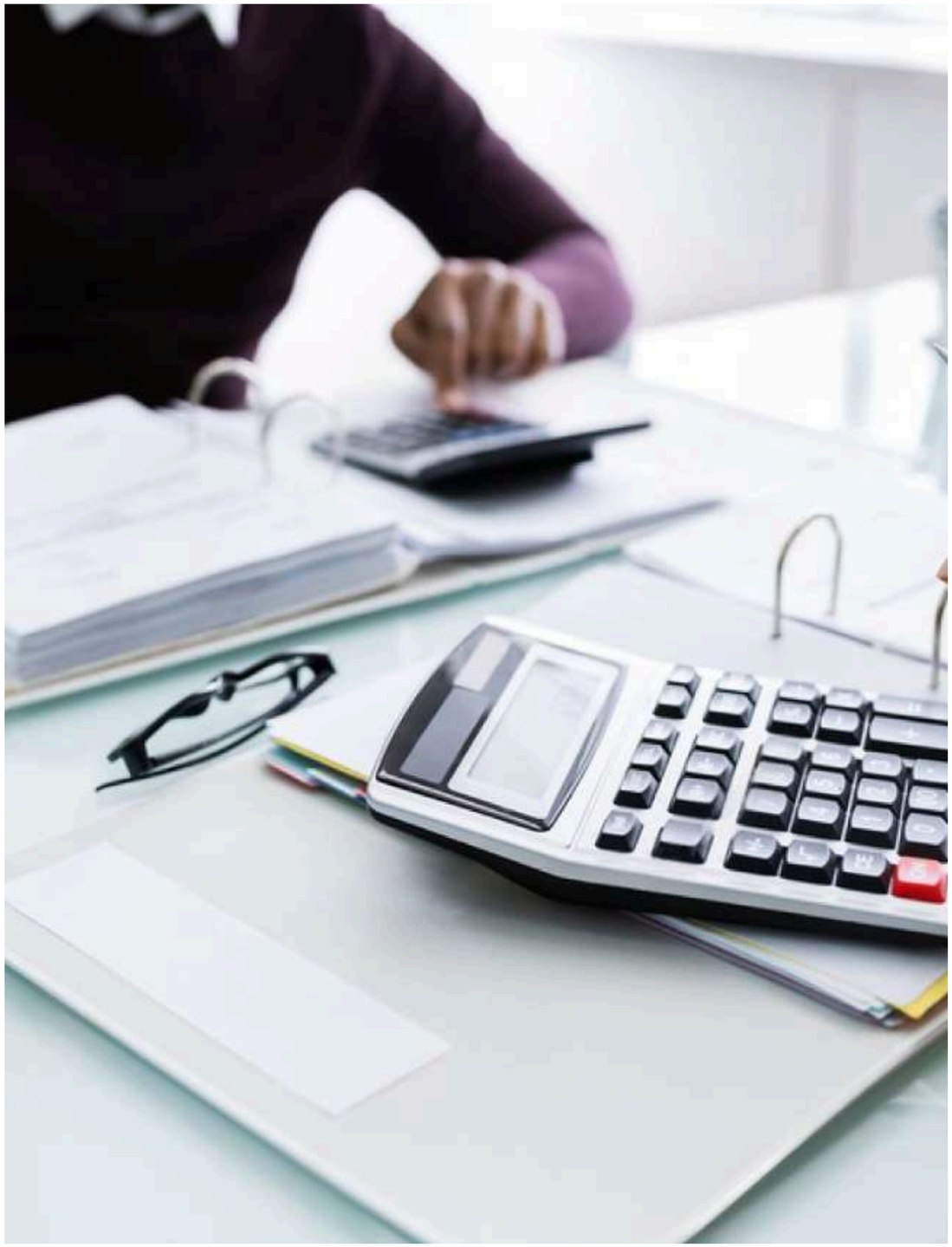
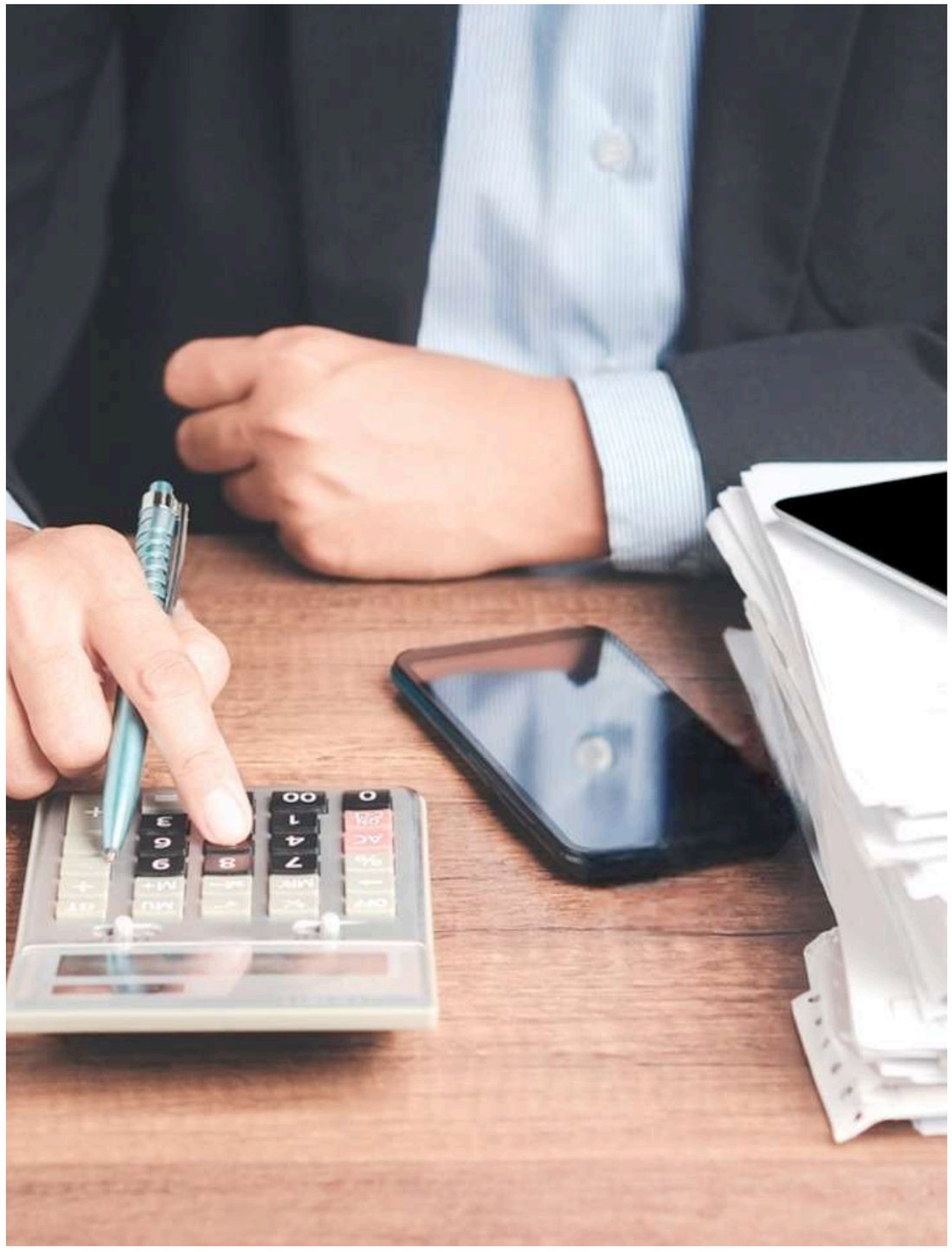
Facts

The assessee filed return of income which was selected for scrutiny and the AO examined the receipts of the assessee from M/s J Ray Mcdermott SA which was on account of the provision of S-89 uniform project time charter party for offshore services vessel. The AO observed that the hire charges earned by the assessee from provision of vessels fall within the definition of royalty as prescribed u/s 9(1)(vi) of the Act or Article 12 of the Tax Treaty and if the assessee wanted to be governed by the provisions of Tax Treaty, the revenue earned by the assessee would be taxable as per Article 12 of the Tax Treaty. On the other hand, taxability of the income earned by the assessee was held to be falling within the ambit of section 115A if the assessee doesn't have a PE in India/section 44DA if the assessee has a PE in India. The AO observed that as the vessel was provided by the assessee company for the purpose of providing services/facilities for extraction or production of mineral oil in India, therefore, such services fall within the provisions of section 44BB of the Act and that this section does not embargo any addition on the assessee to have earned for PE in India. Further, the AO has taken into consideration a letter issued from the assessee for withholding tax certificate u/s 197 of the Act wherein the assessee had claimed applicability of section 44BB. Therefore, the amount of Rs.30,50,33,034/- were held to be received for





provision of offshore services vessel and taxable u/s 44BB of the Act.

Ruling

In the present case, the Hon'ble Tribunal analyzed that the payments received by the assessee are business receipts and the assessee does not have a PE in India. Therefore, the assessee is entitled to be benefitted of the DTAA provisions. Now, merely because of the fact that the assessee had applied for lower deduction certificate u/s 197 of the Act, that in itself cannot be a basis for imposing a tax liability as no admission against the interest of person is conclusive as far as it can be explained. To be more precise, determination of income and tax liability of a person cannot be decided based on concession given by any party at any stage of proceedings. If the assessee, in order to be cautious has sought this certificate u/s 197 of the Act, that cannot act as an estoppel. Thus, on that basis alone any adverse inference by the ld. tax authorities below was not justified. The Hon'ble Tribunal Places reliance on the coordinate bench decision in Smit Singapore Pte. Ltd. wherein it was held that hire charges were not royalty within the meaning of Article 12(3)(b) of India- Singapore DTAA; Further, Tribunal highlights the observations drawn by the SC in Sedco Forex International Inc., Uttarakhand HC in Enron Oil & Gas, and the coordinate bench in Baker Hughes Energy Technology UK and observes that dealing with the case of the assessee in that case that income of the assessee which is a tax resident of UK is not taxable in India since neither it had a permanent establishment in India nor the provisions of section 44B

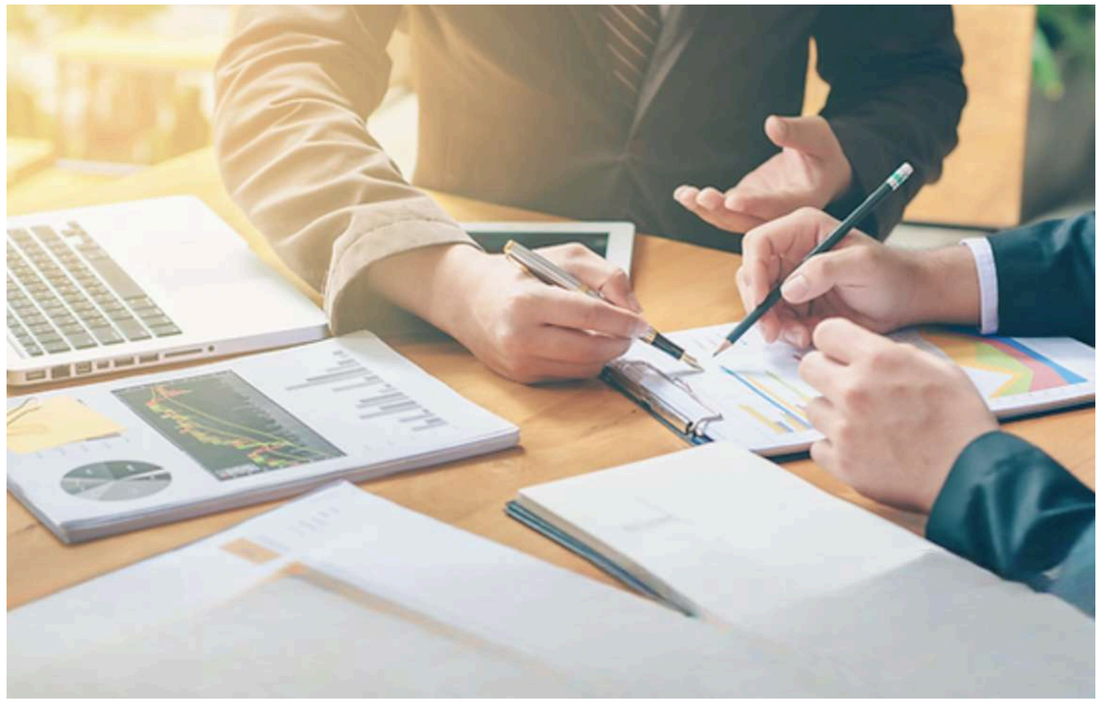
be applied. Therefore, the appeal of the assessee is allowed.

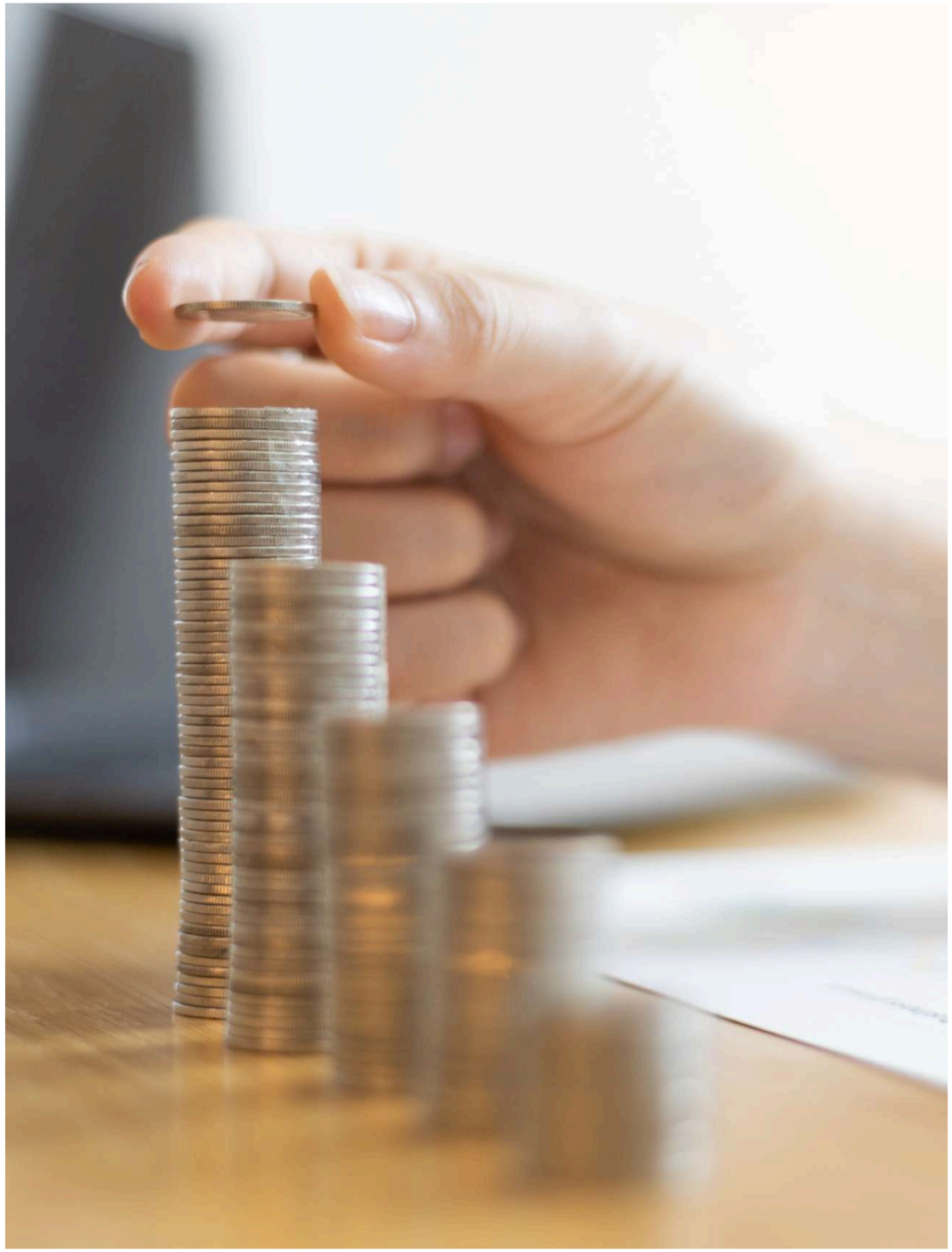
ITAT, New Delhi in the case of Kreuz Challenger Pte Ltd VS ACIT vide [TS-900-ITAT-2024(DEL)] on December 09, 2024

Washout charges is business income, not speculative income, not exigible to tax sans existence of PE

Facts

The assessee filed return of income for the assessment year 2020-21 declaring income of Rs.23,97,94,240/- on 31.12.2020 for Tax as per section 115A of the IT Act, 1961 @ 20% plus applicable surcharge and cess. Subsequently, this case was selected for scrutiny on the basis of CASS and notice u/s 143(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") dated 29.06.2021 was issued and duly served upon the assessee within the stipulated time. The assessee is engaged in trading of agricultural commodities including palm oil. The assessee, during the year, has received a further consideration amounting to Rs. 10,58,32,302/- from Adani Wilmar group. The Assessing Officer found that assessee entered into a buying contract for Palm Cargo with Adani Wilmar, however, at the later stage, the assessee decided to settle the contract and thus, it entered into another contract for selling of Palm Cargo to Adam Wilmar. The difference between the buying price and selling price between both contracts is recorded as “Washout Charges” by the assessee. The AO held that the assessee did not offer the consideration received for washout charges amounting to Rs. 10,58,32,302/- as income. The assessee explained that in the normal course of business, for the purpose of protecting itself from risk of price fluctuations of various commodities (as in its industry, prices are subject to fluctuations), it enters into various contracts with parties across globe including India. The contracts entered into by the assessee with Adani Wilmar were for purpose of hedging. The Assessing Officer, however, was not convinced and passed the final assessment order holding that the washout transaction of Rs. 10,58,32,302/- undertaken by the assessee with Adani Wilmar was in the nature of commodity trading without actual movement of goods. Hence, the transaction is distinct from business activities and is speculative in nature.





Ruling

The Hon’ble Tribunal noted that the assessee has undertaken transaction with Adani Wilmar resulting in receipt of washout charges after being washed out at later stage, to guard against loss through future price fluctuations in respect of the contracts for actual delivery of goods sold by it. The Tribunal was of the considered view that the income arising out of washout transaction is not in the nature of income from speculative activities. They are therefore, of the view that the said transaction is duly covered by business income under Article 7 read with Article 5 of India-Singapore DTAA and hence, in absence of PE of the assessee in India, the said income is not taxable in India. Thus, once an income is covered by Article 7 read with Article 5, Article 23 (residuary Article) cannot be invoked. The view is supported by the decision of the co-ordinate bench at Mumbai in the case of JCIT vs Merrill Lynch Capital Market Espana SA SV [2019] 112 taxmann 119. They are also agreeable with contention of the assessee that it is not covered u/s 9(1)(i) of the Act on account that the receipt is arising from an Indian Entity. viz., Adani Wilmar. Adani Wilmar, being the payer, is only source of money received and not the source of income as no business activity of the assessee exists in India. The source of income is dependent on the situs of activities with respect to the transactions. They are of the view that the “washout” charges are in the nature of business transaction and therefore credit of “washout” charges will be business income of the assessee. The Hon’ble Tribunal found support from the

“decision of Delhi ITAT in case Louis Defrus TS 657-ITAT-2019 wherein washout charges” are held to be business expense in the hands of taxpayer. The nature of transaction is nothing more than a business transaction and where it is credited, it will be business income and where it is debited, it will be revenue expense. Thus, considering the fact that there are no business activities of the assessee, namely entering of contract, receipts of money etc. is performed in India and the fact that assessee does not have any PE in India to carry out any business activities, there is no source for the assessee in India resulting in any income. The court,consequently, direct the AO to delete the addition on account of “washout” charges. The appeal of the assessee is allowed.

ITAT, New Delhi in the case of Cargill International Trading Pte Ltd. vs ACIT vide [TS-939-ITAT-2024(DEL)] on December 18, 2024

Receipts from cloud-native machine data analytics solution, not FTS; Refers Coursera Inc. ruling

Facts

The assessee is a company registered in United States of America (“USA” in short), in 2010 in Delaware. The assessee also submitted a tax resident certificate issued by the USA. The assessee operates a cloud-native machine data analytics solution (Sumo Logic Solution). It offers a software platform that enables organizations to address the challenges and opportunities presented by digital transformation, modern applications and

cloud computing. It enables to automate the collection, ingestion and analysis of application, infrastructure, security and IT data to derive actionable insights. At the time of assessment, assessee submitted that the receipts received from Indian customers did not constitute consideration for the use or right to use of any copyright or equipment or for information concerning industrial, commercial or scientific knowledge/ experience etc. The receipts are not in consideration of make available any technical knowledge/ skill etc. to the customers. It was submitted that the above said revenues are neither taxable as royalty nor as fees for technical services (FTS) under the Income tax Act, 1961 as well as the India-US tax treaty.

Ruling

The Hon'ble Tribunal found that the assessee has provided cloud-native machine data analytics solution to various customers in India on the basis of monthly/ quarterly. Further, it was brought to court notice that assessee has not made available the relevant technology nor transferred the same to its customers in India. They further notice that assessee also filed tax resident certificate before the lower authorities. The Assessing Officer considered the submissions of the assessee and he merely observed that global income of the parent company is loss, therefore, he was of the opinion that the income derived by the assessee in India were not offered to tax effectively and he further observed that there is no evidence to show

that the relevant income was offered to tax anywhere outside India. He also rejected TRC certificate submitted by the assessee and proceeded to treat the income derived by the assessee in India as taxable in India as FTS. After careful consideration the hon'ble tribunal observe that similar issue was considered by the Coordinate Bench in Coursera Inc. (supra), wherein coordinate Bench has considered the similar issue/ facts on record. The court observe that the assessee has submitted TRC and also offered income generated in India in the resident country and offered the same as income and it does not make any difference whether the global income assessed to tax are income or loss, as long as, the income generated are offered in the resident country as business income which is the requirement of law. In view of the above discussions, the tribunal hold that receipt did not qualify as FTS under Article 12(4) of the India-US tax treaty. In the result, appeal filed by the appellant is partly allowed.

ITAT, New Delhi in the case of Sumo Logic, Inc. vs ACIT vide [TS-951-ITAT-2024(DEL)] on December 27, 2024

Advertisement space purchased from third party not taxable under Article 12(3) of India-Singapore DTAA

Facts

The assessee is a private limited company incorporated in Singapore and a tax resident of Singapore and the beneficial provisions of India-Singapore Double Taxation Avoidance Agreement (hereinafter referred to as 'DTAA') applies. The assessee is engaged in the business of providing advertisement

and re-targeting services to its customers (i.e., advertisers and marketing agencies) in Singapore on various online third-party platforms/websites. The assessee does not have a presence in India or Permanent Establishment ('PE') in India under Article 5 of the DTAA during the year under consideration. The assessee has entered into a Services Agreement for rendering services on need basis with its group entity in India, Criteo India Private Limited ('Criteo') which is also engaged in providing advertisement services to its customers in India. Criteo India paid Rs 6,04,33,792 to the assessee in lieu of provision of the aforementioned services and withheld taxes @ 10%, amounting to Rs. 60,43,400/-. For the year under consideration, the assessee filed its return of income u/s 139(1) of the Act on 29.01.2021 declaring the receipts from Criteo India for the aforementioned services amounting to Rs. 6,04,33,792/- as exempt by relying on the restrictive definition of Royalty/Fee for Technical services ('FTS') under Article 12 of the India-Singapore DTAA. The assessee also considered that as it does not have a PE in India as per Article 5 of the India-Singapore DTAA, such amounts were not chargeable to tax as 'business income' also in India as per Article 7 of the India-Singapore DTAA. Accordingly, the assessee claimed a refund of the taxes withheld while filing the ROI for the year.

Ruling

The Hon'ble Tribunal are of considered opinion that in order to invoke 'make available' clause, to fit into the terminology "making available", the technical

knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end and the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Thus, the technical or consultancy services may be said to be 'made available' only when the service recipient is enabled to apply the technology/ skill/ services in future without recourse to the service provider. A mere incidental advantage to the recipient of service is not enough. The test is the transfer of technology/ skill and not the incidental benefit to the recipient. In the instant case, Criteo India is unable to apply the technical knowledge/ skill on its own, i.e., without recourse to such personnel, in future. The technical knowledge and skill does not remain with the Criteo India after the particular contract comes to an end and the technical knowledge or skills of the assessee is not imparted to and absorbed by Criteo India so that it can deploy similar technology or techniques in the future without depending upon the assessee. The services are in the nature of support services, which are rendered by the Assessee to all group companies in the APAC region. Operational support (such as finance, accounting, business and legal support, statutory compliance, financial planning etc.) has been rendered by the Assessee with an intention to ensure consistency with the Assessee's global brand standard, and hence needs to be rendered continuously based on the requirements of Criteo India. Training/ recruitment and human resource support neither result in transfer of technology or knowledge or skill or know-how. The receipts on account of travelling, by no stretch of imagination, can be considered in the nature of managerial, technical or consultancy services or for any use or right to use of any technology or software or equipment. Employees of the assessee travelled to India on certain occasions for a very short duration in relation to supervisory activities only. In view of the above, the receipts in the hands of the assessee for providing Business support services, travelling related services and external consultants' services to Criteo India are not in the nature of 'FTS' as defined in Article 12(4) of the India-Singapore DTAA. The court direct the AO to delete the said addition. The appeal of the assesse is partly allowed.

ITAT, New Delhi in the case of Criteo Singapore Pte. Ltd vs ACIT vide [TS-926-ITAT-2024(DEL)] on December 18, 2024

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