

Atos IT Solutions and Services Inc vs Deputy Commissioner of Income Tax, International Taxation Circle 1(2)(1), Mumbai [TS-123-ITAT-2023(Mum)] dated 1st March , 2023

Facts:

- The Assessee is a US based company, received an amount of Rs.7.55 Cr towards rendering of two services namely: (i) usage of Microsoft license and (ii) service desk facility dealing with IT incidents to its Atos India (Indian Subsidiary) for execution of sub-contract with Tower Watson India and in pursuance to an agreement with Indian Subsidiary.
- Revenue treated the said services as Royalty as well as Fees for Technical Service (FTS) and accordingly, made addition of Rs.7.55 Cr.
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

Whether the Microsoft usage service and service desk service will be treated as Royalty and FTS?

Held:

- ITAT observed that assessee had entered into global contract with Microsoft license fees who provided services through a server and kept the ownership with itself.
- ITAT noted that assessee entered into a separate agreement with its Indian subsidiary for recharge of cost pertaining to usage of the Microsoft licenses which is based on usage of the licenses and invoices raised by the assessee were based on the actual utilization of the licenses.
- Relying on Engineering Analysis and EY Global Services, ITAT opined that there is no vestige of copyright being transferred by Microsoft and providing access to computer does not amount to Royalty under the domestic law as well as India-UK DTAA.
- ITAT opined that that service desk are provided by the Assessee to all group companies to enable the common services provided to Watson Group employees and there is nothing on record to indicate any independent service provided to Indian subsidiary that makes knowledge available to that subsidiary and it was held that the same to be taxable as business profit in terms of Article 7 of India-US DTAA.
- Thus, ITAT ruled in the favour of the assessee.

M/s. Uptodate Inc vs Deputy Commissioner of Income Tax, International Taxation Circle 3(1)(1), New Delhi [TS-96-ITAT-2023(DEL)] dated 28th February, 2023

Facts:

- The assessee, is a non-resident corporate entity incorporated in USA and a tax resident of USA.
- Assessee received 3.52 Cr. from Indian customers for providing access to online database and the same was not offered to tax.
- Revenue held the same to be taxable as royalty under Section 9(1)(vi) as well as Article 12(3) India-US DTAA on the ground that the assessee has transferred the right to use of a copyright, which was confirmed by CIT(A).
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

- Whether online database subscription fees will be taxable as Royalty?

Held:

- ITAT stated that the assessee is neither the creator of the content put in the database nor it has transferred any copyright or licence to use the content of the database.

- ITAT noted that the activities of the assessee include collating data relating to healthcare as available in public domain and put them in one place by creating a database, states that “The only improvement the assessee has made in the database is like analysis, indexing, description, appending notes for facilitating easy access to the customers.”
- Relying on SC ruling in Engineering Analysis and co-ordinate bench ruling in assessee’s sister concern Ovid Technology Inc wherein it was held that the receipts from Indian end-users/distributors for the resale/use of the computer software is not the payment of royalty for the use of copyright in the computer software and does not give rise to any income taxable in India.
- Thus, ITAT ruled in the favour of the assessee.

M/s. Sungard Availability Services LLP vs Income Tax Officer-4, Pune [TS-1042-ITAT-2022(PUN)] dated 28th November, 2022

Facts:

- Assessee is a USA based LLP, providing Cloud Services, Colocation and Network Services, Mainframe Services, Disaster/Data Recovery Services.
- Assessee entered into subcontracting agreement with an Indian IT Company under which its US subsidiary rendered software support services to McDonald’s Corporation by using the services of the assessee.
- Revenue held that assessee’s receipts from the India IT Company is taxable as FIS in India.
- On assessee’s appeal CIT(A) deleted the addition against which the Revenue preferred an appeal.
- Aggrieved, the assessee filed an appeal with the ITAT.

Issue:

- Whether fees Cloud Services, Colocation and Network Services, Mainframe Services, Disaster/Data Recovery Services will be taxable as FIS in India?

Held:

- ITAT noted that the assessee provided Cloud Infrastructure managed Private Cloud, Colocation and Network Services, Mainframe Services, Disaster/Data Recovery Services to the Indian IT Company under the sub-contracting agreement.
- ITAT observed that even if Revenue’s argument of applicability of Section 9(1)(vii) is accepted, the assessee, in light of Section 90(2), is very well entitled for the benefit under India-USA DTAA.
- ITAT also observed that Article 12(4)(b) of the DTAA states that the income arising from provision of technical services can only be taxable if the services concerned fulfils the make available condition.
- Relying on bench ruling in Faurecia Automotive Holding, wherein reliance was placed on Karnataka HC ruling in De Beers India Minerals and it was held that the ‘make available’ condition is said to be satisfied when the service recipient is independently able to make use of the technical know-how provided by the assessee, which is not proved in the present case.
- Thus, ITAT ruled in the favour of the assessee.