Newsflash

HABIBULLAH & CO.
CHARTERED ACCOUNTANTS
India www.hcoca.com

ITAT Ahmedabad in the case of ACIT vs. Panasonic Energy India Co. Ltd.

Reference: Article 2 & Article 12 of **India-Japan DTAA**

Issue: Whether rate prescribed in DTAA is total withholding rate inclusive of surcharge and cess?

Held:
Article 2 of India-Japan DTAA provides that the term "taxes" referred to in the DTAA for Indian purposes means the income tax including surcharge thereon. A plain reading of the provisions of DTAA reveals that the amount of tax includes surcharge.

Further as per Article 12, the tax that can be charged on royalty is restricted to 10% of the gross amount of royalty. Having regard to the definition of "taxes" in Article 2, the total tax including surcharge is restricted only to 10% under Article 12. Therefore, Taxpayer was not liable to withhold tax on the payment made to Foreign Company after including the surcharge over and above the tax rate as specified under Article 12 of India-Japan DTAA.

Further, as held in the case of *DIC Asia Pacific Pte. Ltd. (18 ITR 358)*, since education cess is charged on the income tax, it partakes the character of the surcharge. Therefore, Taxpayer was not liable to include education cess over and above the taxes withheld by the Taxpayer.

ITAT Delhi in the case of ULO Systems LLC vs. ADIT

Reference: Article 5(2)(h) of **India-UAE DTAA**

Issue: Whether grouting activity undertaken in India by UAE Company for a period of 9 months result in construction PE under India-UAE DTAA?

Held:
It is a settled legal principle that a specific provision would override a general provision. Thus, Article 5(1) could not be applied where activities are covered under the specific construction PE article [Article 5(2)(h)] of the DTAA.

Article 5(2)(h) does not differentiate between a simple/complex construction work. Thus, the fact that grouting activity is not a simple masonry work and involves complex aspects is not relevant for determining whether it is covered by construction PE article.

Evaluation of whether there exists a PE needs to be made on a year to year basis.

While construction PE clause of some treaties (like India-Australia and India-Thailand) are worded in a manner to specifically aggregate the time spent on multiple projects, Article 5(2)(h) of India-UAE DTAA is worded differently and uses singular expressions '*a building, site or construction or assembly project*'. Thus, time spent on multiple projects in India cannot be aggregated for calculating the threshold period under India-UAE DTAA.

Since the Taxpayer's presence in India in the relevant year for carrying on each of the grouting project was less than 9 months, there was no construction PE of the Taxpayer was constituted in India.

ITAT Ahmedabad in the case of Sophos Technologies Pvt. Ltd. vs. DCIT

Reference: Article 12(1) of **India-Israel DTAA and India -Russia DTAA**

Issue: Since charge of tax on royalty arises only at the time of payment, whether tax is required to be withheld when provisions for payment of royalty is made.

© Habibullah & Co. Chartered Accountants, India

Held:

Article 12(1) of India-Russia DTAA and India-Israel DTAA are identically worded and provide that "royalty arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State". Thus, in terms of the DTAA, royalty is taxable only at the point of time when the royalty is paid to the resident of the other Contracting State.

The liability to deduct tax at source arises only when the income embedded in the relevant payment is eligible to tax.

In the present case, royalty in respect of the bundled product became payable when the product was activated and not at the point of sale of bundled software. Thus, the taxes were also required to be withheld only upon activation of license keys.

ITAT Delhi in the matter of ACIT vs. Grant Thornton

Reference: **Article 13 of DTAAs;** Section 9(1)(vii) of the Act

Issue: Whether payment made to non-resident LLPs towards professional services qualified as IPS?

Held:

There is no dispute that the services rendered by Non Resident LLPs were professional services. The IPS article in some of the DTAAs applied in respect of payments made to "residents", while in some other DTAAs, it applied to individual (both in his own capacity and as a member of a partnership). Thus, there was no infirmity in the order of CIT (A) who had upheld the applicability of IPS article on payments made to Non Resident LLPs.

Further, in absence of satisfaction of make available condition, the payment made to Non Resident LLPs did not qualify as FTS under respective DTAAs.

Thus, in absence of chargeable income, there was no obligation on Taxpayer to withhold taxes on payments made to NR LLPs.

Glossary

- *ITO: Income Tax Officer*
- *ITAT: Income Tax Appellate Tribunal*
- *DTAA: Double Taxation Avoidance Agreement*
- *DCIT: Deputy Commissioner of Income*
- *ACIT: Assistant Commissioner of Income*
- *CIT(A): Commissioner of Income Tax (Appeals)*
- *PR: Permanent Establishment*
- *FTS: Foreign Technical Services*
- *IPR: Intellectual Property Rights*
- *TRC: Tax Residency Certificate*
- *Act: Refers to the Indian Income Act 1961*

Credits

- *ITAT*
- *Bombay Chartered Accountants Society*
- *The Institute of Chartered Accountants of India*
- *Bombay Stock Exchange*
- *National Stock Exchange*

© Habibullah & Co. Chartered Accountants, India

For Private Circulation Only

Newsflash

HABIBULLAH & CO.

CHARTERED ACCOUNTANTS

India **www.hcoca.com**

About Us

Habibullah & Co. (HCO) is a professional services firm providing audit, assurance, tax, financial advisory and consulting services to a wide range of publicly traded and privately held companies, guided by core values including competence, honesty and integrity, professionalism, dedication, responsibility and accountability.

At HCO, the interests of our clients are paramount. Our focus on the mid-market means we have a real understanding of the environment in which our clients operate and are ideally placed to help them grow and prosper.

Who we are and what we stand for

- Established 1962
- 10 Partners
- 100 + staff
- 7 offices across India
- International Representation through “Antea-Alliance of Independent Firms”
- Member Firm of The Institute of Chartered Accountants of India since 1962
- Registered with all major Government Regulators in India

Our Services

- Accounting and Assurance
- Business Setups in India
- Tax Compliance, Planning and Management
- Transfer Pricing Advisory
- Business Advisory
- Expat Taxation
- Corporate Law Advisory
- Book Keeping

Member of Antea Alliance of independent firms

United Tax Network Worldwide

Let’s talk

For a deeper discussion of how this issue might affect your business, please contact, Managing Partner for International Relations:

CA. Vivek Agarwal
E: vivek@hcoca.com
T: 00 91 983 911 9370

Offices in India

New Delhi
Gorakhpur
Varanasi
Rewa
Lucknow
Hajipur
Mau
Ranchi

Associates at

Kolkata
Allahabad
Mumbai
Agra

Website

www.hcoca.com

Connect with Us @

Unsubscribe

Reply to this mail with subject “unsubscribe”

Disclaimer

This presentation is exclusively designed and prepared by Habibullah & Co. and no part of this can be reproduced without consent. While due care has been taken to draft this please obtain professional advice before taking any decision.