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ITAT Mumbai in the case of Dimension Data Asia Pacific Pte Ltd. vs. DCIT.

Reference: Article 5(6) & Article 12 of **India-Singapore DTAA** along with Explanation 2 to section 9(1)(vii) of the Income Tax Act 1961

Issue: Whether presence of employees is to be tested separately for each type of service for computing Service PE threshold and whether application of beneficial provisions of the Act for one source of income and treaty for another source of income is permissible?

Held:
In cases of multiple sources of income, a taxpayer has an option to choose the provisions of the Act for one source while applying the provisions of the DTAA for the other source of income.

Taxability of Management Support Fees
There is no dispute that the management support fee qualifies as business income under Article 7 of the India-Singapore DTAA. However, such income would be taxable only if the Taxpayer had a PE in India under Article 5 of the DTAA.

Since the employees' presence in India for rendering management support services was less than 30 days, such presence of employees did not create a Service PE for the Taxpayer in India.

Hence, management support fee received from Indian company is not taxable in India. Presence of employees in India for rendition of technical services is not to be reckoned for calculation of service PE duration.

Taxability of Service Fee
Taxpayer's employee had the requisite expertise in the field of IDCs and they were sent to India to assist and provide guidance to Indian company in setting up of IDCs. Thus, the services rendered by the employees of the Taxpayer made available technical knowledge and skill to Indian company. Hence, the fee paid for such services qualified as FTS under Article 12 of DTAA. Therefore, such service fee was taxable in India.

Once the income qualified as FTS under Article 12 of DTAA, owing to exclusion in Article 5 with respect to services covered under Article 12 of DTAA, the same fell outside the scope of Article 5 of DTAA dealing with PEs. Hence, evaluation of whether there was a service PE became academic.

ITAT Delhi in the case of Ciena Communications India (P.) Ltd vs. ACIT

Reference: Article 12(4) of **India-USA DTAA** and Explanation 2 to section 9(1)(vii) of the Income Tax Act 1961

Issue: Whether consideration received for rendering on call advisory services in the nature of troubleshooting, isolating problem and diagnosing related trouble and repair services remotely, without any on-site support, did not satisfy make available condition under DTAA, it was not taxable in India.

Held:
Article 12 of India-USA DTAA provides that payment made for technical services qualifies as fee for included services (FIS), if such services make available technical knowledge and skill to the recipient of service, such that the service recipient is enabled to use such knowledge/skill on its own.

Services provided by AE to Taxpayer involved provision of assistance in troubleshooting, isolating the problem and diagnosing related trouble and alarms and equipment repair services. These services were provided remotely outside India and no on-site support services were rendered in India. Although, the technical knowledge or skill was used by the US AE for

rendering of the services, it did not make available any technical knowledge or skill to the Taxpayer.

Thus, the amount paid by Taxpayer to the US AE did not qualify as FIS and hence, it was not taxable in India as per Article 12 of India US DTAA.

ITAT Pune in the case of EPRSS Prepaid Recharge Services India P. Ltd. vs. ITO

Reference: Article 12 of **India-USA DTAA** and Explanation 2 to section 9(1)(vi) of the Income Tax Act 1961.

Issue: Whether payment made towards web hosting charges not taxable as royalty under the Act as well as the DTAA

Held:
As per the terms of the agreement, the Taxpayer had made payments for use of technology driven services of foreign company and not for use of any IPR or rights owned by foreign company. The fact that payments made to foreign company foreign company varied with the use of technology also supported the fact that the payments were for availing services. Accordingly, the payments made for web hosting services did not qualify as royalty.

Further while using the technology services provided by foreign company, the Taxpayer did not use or acquire any right to use any industrial, commercial or scientific equipment. Hence, the payments made by Taxpayer cannot be said to be covered under clause (iva) to Explanation 2 of section 9(1)(vi) of the Act. Reliance was placed on the decision of Madras HC in *Skycell Communications Ltd. & Anr.*

Thus, the Taxpayer was not liable to withhold taxes on web hosting charges paid to foreign company

Without prejudice, the definition of royalty, which was retrospectively amended to include use of, or right to use, an equipment cannot be applied in respect of the tax years which have elapsed before the amendment came into force.

In any case, since payments were made by the Taxpayer to foreign company before the retrospective amendment came into force, the Taxpayer cannot be held to be in default for failure to withhold taxes on the basis of retrospective amendment.

Also, retrospective amendment to the Act cannot amend the DTAA. Thus, amended definition of 'royalty' under the Act cannot be read into the DTAA. Since the Taxpayer had no control over the servers of foreign company, payment for such services did not qualify as royalty under the DTAA as well.

ITAT Bangalore in the case of Maya C. Nair vs. ITO

Reference: Section 5 of the Income Tax Act 1961

Issue: Whether salary for services rendered outside India but received in India is not taxable in India in **absence of TRC** if the Taxpayer furnishes evidence in support of accrual of salary outside India.

Held:
In *ITO vs. Bholanath Pal*, it was held that salary accrues where the services under the employment are rendered. The facts of the Taxpayer are similar to the facts in the said decision. Absence of TRC cannot be a ground for denying DTAA benefit. A taxpayer is required to provide evidence in support of exemption claimed. The Taxpayer had furnished evidence of her stay outside India and since the salary for services rendered outside India did not accrue in India, it was not taxable in India.

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ITAT Chennai in the case of Panasonic Corporation vs. DCIT

Reference: Section 9 of the Act and Article 12 of **India-Japan DTAA**

Issue: Whether payments received by Japanese company in respect of deputation of high-level technical executives to Indian subsidiary were FTS, particularly because technical knowledge was made available and whether in absence of reconciliation of receipts with actual payments, the receipts could not be treated as reimbursement of cost.

Held:

The deputed personal were all holding senior technical/managerial positions with Indian company and reported to the top management of Foreign Company. They were working under direction, control and supervision of Foreign Company The deputed personal were rendering highly technical services. Further, the services resulted in technology being made available to Indian company, which obviated the necessity of employees to be deputed again. Accordingly, order of the AO and DRP was confirmed.

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*
- *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*

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

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