Sum paid to NR for providing equipment and software to Indian clients facilitating 'Forex deal matching' is royalty

Summary – The Mumbai ITAT in a recent case of Reuters Transaction Services Ltd., (the Assessee) held that where, assessee, a UK based company, entered into a contract with Indian clients for providing its foreign exchange deal matching system services, in view of fact that in terms of contract, assessee allowed its subscribers to use software and computer system to have access to its portal for finding relevant information and matching their request for purchase and sale of foreign exchange, it amounted to imparting of information concerning technical, industrial, commercial or scientific equipment work and payment made in respect of same would constitute royalty in terms of article 13(3) of India-UK DTAA.

ORDER

The assessee, M/s Reuters Transaction Services Limited is a company incorporated under the laws of England and is a tax resident of United Kingdom. The assessee is engaged in the business of providing Reuters Dealing 2000-2 and Dealing 3000 which are electronic deal matching systems enabling authorized dealers in foreign exchange such as banks, etc to effect deals in spot foreign exchange with other foreign exchange dealers. The main server of the assessee is located in Geneva and the assessee has executed a Dealing Services Marketing Agreement with M/s. Reuters India Pvt. Ltd ('RIPL') whereby RIPL will market the services of the assessee to the subscribers in India.

During the Financial Year ended 31st March 2008, the assessee earned revenue of Rs. 5,42,34,380/- and for the F.Y. ended on 31st March 2009, the assessee earned revenue of Rs. 6,52,28,026/- from its customers in India.

The assessee claimed that the revenue earned by the assessee from its subscribers in India are in the nature of business profit and as per Article -7 of the India-UK DTAA, business profits of the assessee are taxable in India only if it has a Permanent Establishment (PE) in India to the extent the profits are attributable to the PE in India.

The assessee claimed that for the A.Ys under consideration, the assessee did not have PE in India as contemplated under Article-5 of the treaty. Thus the assessee claimed that its revenue from the Indian subscribers are not liable to tax in India in terms of provisions of DTAA.

The assessee has also claimed that the revenue earned by the assessee are not in the nature of royalty or fee for technical services and accordingly not liable to tax under Article -13 of DTAA.

The Assessing Officer noted that in order to receive the services of the assessee, the subscribers in India have entered into two agreements namely

(*i*) Domestic Service Agreement with the assessee for providing the matching services, and

(*ii*) Access agreement with M/s Reuters India Pvt. Ltd. for obtaining the equipment to be installed at the subscriber's premises.

The Assessing Officer has examined and analyzed the terms and conditions of these agreements as well as the provisions of the Act and DTAA- for determining the character of the income received by the assessee as well as the existence of PE of assessee in India.

The Assessing Officer has held that the revenue received by the assessee during these years is in the nature of "Royalty" as well as Fee for Technical Services(FTS) which is subjected to tax in India under the provisions of Income Tax Act as well as DTAA. Alternatively the Assessing Officer has also held that even if the business profits of the assessee is taxable in India because the RIPL constitutes an agency PE of the assessee as well as the assessee is having equipment in India which constitutes a fixed base PE.

The CIT(A) was of the view that the clause 4(c) of Article -13 of the U.K treaty has no application in this case as was held by the Assessing Officer. Since the CIT(A) has held that the income of the assessee is taxable as Royalty and FTS, therefore, the CIT(A) did not go into the issue that the assessee has PE in India and taxability of the business income. Accordingly, the CIT(A) has held that the royalty and fee for technical services is taxable on gross basis in case of non resident and the Assessing Officer has taxed the same on the gross basis, and the provisions of section 44D are irrelevant for this purpose.

The ITAT after a thorough examination and hearing both parties concluded that the nature of service rendered by the assessee includes the information concerning commercial use by the subscriber. Further the entire system of the assessee including the equipments and connectivity facility is provided at the site of the subscriber. Therefore, the assessee is providing the service in the form of information and solution to the need of the subscribers by providing the matching party. The entire system along with the matching system and connectivity involves processing of subscriber's business queries and orders and finding out the matching reply in the shape of counterpart demand or supply for execution of the transaction of purchase and sale of foreign exchange. This system of the assessee is available only to the subscribers who have been given the access to the information concerning commercial as well as processing the orders placed by the subscribers. It is the term of the contract/agreement that the subscriber is given the license to use the software running the system.

As per the terms and conditions stipulated in the agreement the Indian clients/subscribers accept the individual non-transferable and non exclusive license to use the licensed software programme for the purpose of carrying out the purchase and sale of foreign exchange. Thus, what is granted under the

agreement is license to use the software for internal business of Indian clients. Further, the Assessee also permitted the Indian clients to sub-license the software with prior permission of assessee. It is pertinent to note that its not the license to use the software alone but the Assessee has made available the computer system along with the software. The Indian clients are paying for use and right to use of equipment (scientific, commercial) along with software for which license was granted by assessee. It is clear from the terms and conditions of the agreement and arrangement between parties that the Indian clients are not permitted to access the portal of the Assessee from any other computer system other than the computer provided by the Assessee and by use of software provided in the said computer system. Therefore, it is not a case of simplicitor payment for access to the portal by use of normal computer and internal facility but the access is given only by use of computer system and software system provided by the Assessee under license. Indian clients make use of the copyright software along with computer system to have access to the requisite information and data on this portal hoisting on the server of the Assessee . Accordingly, by allowing the use of software and computer system to have access to the portal of the Assessee for finding relevant information and matching their request for purchase and sale of foreign exchange amount to imparting of information concerning technical, industrial, commercial or scientific equipment work and payment made in this respect would constitute royalty.

Thus it was concluded that the income received by the assessee from the Indian Banks is in the nature of royalty, therefore, the other issues of fee for technical services becomes academic and we do not propose to decide the same.

In the result appeal of the assessee is dismissed.