

Sum received for supplying of data without making available any technology for its use won't be taxed as royalty

Summary – The Hyderabad ITAT in a recent case of GVK Oil & Gas Ltd., (the Assessee) held that where assessee was granted license by two foreign companies (licensors) and licensors provided data relating to geophysical and geological information and they were not responsible for accuracy or usefulness of such data, since licensors had only made available data acquired by them but did not make available any technology available for use of such data by assessee, payments made by assessee to said licensors was not in nature of 'Royalty' as per respective DTAA

Facts

- The assessee-company was engaged in the business of Oil and Gas exploration. It had bid for the oil and gas exploration block offered under the Ministry of Petroleum and Natural Gas. To understand the geological and seismic quality of the block in order to optimise the risk of exploration and in order to evaluate various blocks, the assessee required available geological had entered into an agreements and for the purpose both with a USA based Corporation and a leading provider of a comprehensive range of advanced seismic Data and Derivatives and GGS, a UK based company. By virtue of these agreements, both the companies agreed to grant non-exclusive license/right to use certain Data and Derivatives in consideration for an agreed license fee.
- The Assessing Officer held that the payment made by the assessee to GXT by way of 'license fee' amounted to consideration for information concerning industrial, commercial or scientific experience and as such constituted 'royalty' both under US as well as UK DTAA. Since the assessee had failed to make TDS under section 195 before making the payment, the Assessing Officer held the assessee to be 'an assessee-in-default' under section 201(1) and made the disallowance under section 201(1).
- On appeal:

Held

- In both these transactions, the assessee had acquired a non-exclusive license to use the data in consideration for an agreed license-fee. As per various clauses of the agreement, it had obtained a license to use the product 'IndiaSPAN' for a period of 40 years from a GX, USA. 'IndiaSPAN', is a regional 2d seismic data programme and geological and geophysical study covering all the major prospective basins off-shore east and west India and is providing both the fundamental basis for evaluation of India's vast off-shore margins as well as the regional framework in depth domain. Thus, it is seen that the said product is highly technical and complicated and the data therein can be accessed only on the grant of a license by the owner. Further, it is also seen that the license is for a fixed period and that on the expiry of the license, the assessee is required to return the product or

destroy the data accessed by the assessee during the license period but is not required to destroy the product produced by the assessee by use of such data. Thus, it is clear that access to the technical knowledge acquired by GXT is granted to the assessee in order to enable it to process the same and use such data for furtherance of its objects. Similar is the transaction with GGS Spectrum Ltd., UK.

- The definition of 'Royalty' under DTAA between India and UK is also similar to the definition of 'Royalty' under DTAA between India and USA.
- The definition of 'Royalty' under the Income-tax Act is more exhaustive as compared to the definition under the DTAA between India and USA and India and UK. Under the Income-tax Act, consideration for granting of a license for the use of the property mentioned therein also means Royalty, whereas, there is no such provision under the Double Taxation Avoidance Agreements between India and USA & UK. In the case, the assessee has made payment for the right to use information embedded in the product. Further, though the said information is scientific as well as technical, the assessee is permitted to use the said information only as a licensee.
- Thus, the principle laid down in various judgments is that unless and until the license is given to use the copyrighted property itself, the consideration paid cannot be treated as 'Royalty'. In the instant case, the license is granted to use certain data from time to time upon the terms and conditions set in the license agreement. It is seen that both the licenses are non-exclusive licenses and therefore, the information/data is not customized to meet the assessee's requirements exclusively.
- As seen from the clauses of the agreement, all that is provided by the licensor was the data relating to the geophysical and geological information about the east and west coast of India and it was not responsible for the accuracy or usefulness of such data. Thus, licensors had only made available the data acquired by them and available with them but was not making available any technology available for use of such data by the assessee. The payments made by the assessee to GTX and GGS was not in the nature of 'Royalty' as per the respective DTAA's and, therefore, the provisions of section 195 are not applicable.