Payment made to access online database couldn't be held as royalty

Summary – The Ahmedabad ITAT in a recent case of Cadila Healthcare Ltd., (the Assessee) held that Where bio analytical services provided by non-residents did not involve any transfer of technology and recipient of services where not enabled to use these services in future without recourse to service provider, said services would not be regarded as FTS

Where assessee made payment for use of copyrighted material rather than for use of copyright, payment in question could not be treated as royalty liable to withholding tax

Facts

- The assessee had made certain payments to the non-resident entities based in USA, Canada and UK.
- The Assessing Officer was of the view that the services so rendered by the non-resident entities were highly technical in nature and were required to be taxed as such in the hands of the recipients of these payments.The Assessing Officer in addition to elaborate discussion about the nature of services and as to how technical these services were, observed that the 'make available' clause is not to be applied merely with respect to technical knowledge but also with respect to experience, skill and process as well, and, therefore, even if experience or skill is made available to the assessee, the make available clause would be satisfied and the nature of service would be liable to be treated as fee for included services. It was in this backdrop that the Assessing Officer proceeded to hold that the assessee had obligation to deduct tax at source from these payments, as these amounts were taxable in India in the hands of non-residents, under section 195. Accordingly, tax withholding demand under section 201 read with section 195 was raised on the assessee.
- On appeal, the Commissioner (Appeals) held that none of these services satisfied the 'make available' clause under the tax treaties, and, accordingly, deleted the impugned demand.
- On appeal by revenue to the Tribunal:

Held

- The relevant provisions in the relevant tax treaties, which govern the taxability of fees for technical services, are:
  (i) Article 13 in Indo-UK tax treaty
  (ii) Article 12 in India-Canada tax treaty and
  (iii) Article 12 in Indo-US tax treaty.
- The common thread in all these tax treaties is the requirement of 'make available' clause. As assessee rightly puts it, its not simply the rendition of a technical service which is sufficient to invoke the taxability of technical services under the make available clause. Additionally, there has to be a transfer of technology in the sense that the user of service should be enabled to do the same thing

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next time without recourse to the service provider. The services provided by non-residents did not involve any transfer of technology. It is not even the case of the Assessing Officer that the services were such that the recipient of service was enabled to perform these services on its own without any further recourse to the service provider. It is in this context that the scope of expression 'make available' has to be examined.

- As for the connotations of make available clause in the treaty, this issue is no longer *res integra*. There are at least two non-jurisdictional High Court decisions, namely Delhi High Court in the case of *DIT* v. *Guy Carpenter & Co Ltd.* [2012] 346 ITR 504/207 Taxman 121/20 taxmann.com 807 and Karnataka High Court in the case of *CIT* v. *De Beers India Minerals (P.) Ltd*. [2012] 346 ITR 467/208 Taxman 406/21 taxmann.com 214 in favour of the assessee, and there is no contrary decision by the High Court or by the Supreme Court.
- As noted earlier, it is not even the case of the Assessing Officer that the assessee, *i.e.* recipient of services, was enabled to use these services in future without recourse to the service providers. The tests laid down by the Court were clearly not satisfied. The mere fact that there were certain technical inputs or that the assessee immensely benefited from these services, even resulting in value addition to the employees of the assessee, is wholly irrelevant. The expression 'make available' has a specific meaning in the context of the tax treaties and there is, thus, no need to adopt the day to day meaning of this expression, as has been done by the Assessing Officer. It is also found that the issue regarding taxability of these services is also covered, in favour of the assessee, by the order dated 30-11-2015 passed by a co-ordinate bench. In view of these discussions, and as the well reasoned findings of the Commissioner (Appeals) are acceptable, the conclusions arrived at by the Commissioner (Appeals) are approved. The order of the Commissioner (Appeals) stands confirmed.

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