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Sharp Insights

[1]Ahmedabad Tribunal confirms payment made for sharing of standard operating procedures developed over a period of time as 'royalty' under Article 13 of India Germany tax treaty

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[1] Oncology Services India (P.) Ltd. vs. Assistant Director of Income-tax, International Taxation-III, Ahmedabad [2017] 82 taxmann.com 42

Background / Facts

- Oncology Services India (P.) Ltd. ('the taxpayer') had made payment to a Germany-based entity, namely, OSE Oncology Services Europe S.a.r.l ('OSE') without deducting tax at source.
- The assessing officer ('AO') was of the view that the payment was toward using the name, goodwill and the market reputation of OSE and therefore, taxable in India as royalties under section 9(1)(vi) of the Income-tax Act, 1961 ('the Act').
- Accordingly, the AO issued a show cause notice to the taxpayer to explain as to why it should not be treated as an 'assessee in default' for non-deduction of tax at source against the payment made by it to OSE.
- The taxpayer explained that the payment was made toward Standard Operating Procedures ('SOPs'), access to database, email server, hardware and software and in the absence of a permanent establishment ('PE') of OSE in India, the payment was not taxable in India. The taxpayer also contended that it was permitted by OSE to use the brand name, logo and website without any cost or financial obligation.
- Eventually, the AO held that the payment made by the taxpayer was for the use of technology, patent, trademark of OSE and accordingly treated the same as royalty under section 9(1)(vi) of the Act and as per the India Germany tax treaty.
- Aggrieved with the order of the AO, the taxpayer appealed before the Commissioner of Income-tax (Appeals) ['CIT(A)'] which upheld the order of the AO.

Observations and Ruling of the Tribunal

- Based on the agreement between OSE and the taxpayer, the Tribunal observed that OSE had agreed to permit the taxpayer to use its name, brand, logo and website without any costs or financial liability. Hence, no part of the payment made by the taxpayer was for the purposes of use of name, brand or logo etc. Further, the Tribunal acknowledged that the payment was for sharing of the SOPs, access to database, email server, hardware and software of OSE.
- In view of Article 13(3) of the India Germany tax treaty, the Tribunal held that sharing of the SOPs amounted to sharing 'information concerning industrial, commercial or scientific experience'. The Tribunal relied on the written submissions filed by the taxpayer itself before the CIT(A) that the SOPs were 'matured validated standard procedures' which had been developed by OSE over a period of time and approved by regulatory bodies.
- The Tribunal observed that the taxpayer itself had acknowledged that the SOPs were non-transferable and the taxpayer was not allowed to make any changes in it. In effect, it was only sharing of information about scientific experiences by OSE. But the payment by the taxpayer for such sharing of scientific, or for that purpose, industrial and commercial, experiences, is covered by Article 13(3) of the India Germany tax treaty.
- It was also held that the mere fact that OSE did not have a PE in India is only elementary and a foreign entity not having a PE in India does not come in the way of taxation of royalties.

Conclusion

In the light of the arrangement between the taxpayer and OSE, the Tribunal held that the payments for sharing of SOPs developed by the foreign company over a period of time, amounted to scientific experience and thus taxable as royalty under the India Germany tax treaty.

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