



## Global Business Tax Alert

Delivering Clarity

**Consideration received for conducting training programs, providing access to computer systems do not qualify as fees for technical services as per Article 12(5) of India-Netherlands tax treaty**

*ITA No. 7159/Mum/2012*

**Issue no:** GBT/18/2018

**In this issue:**

[Background of the litigation](#)

[Issue under consideration](#)

[Ruling of the Tribunal](#)

[Conclusion](#)

[Deloitte tax@hand App](#)

[Do you know about Dbriefs?](#)

## Background of the litigation

### Facts

- Renaissance Services BV (assessee) is a tax resident of Netherlands and is a part of the Marriott group. The assessee is engaged in conducting training programs and providing access to computer systems i.e., centralized reservation system, property management systems and other systems, to hotels operating under the Marriott brand globally. The assessee had entered into a Training and Computer Systems Agreements (TCSA) with two Indian hotels.
- The assessee did not offer receipts pursuant to the TCSA with the Indian hotels to tax. The assessee filed its return of income declaring total income of Rs. Nil on the basis that the consideration received from the Indian hotels (i) were in the nature of reimbursement of expenditure and no mark-up or profit element was embedded in the receipts; (ii) did not make available any technical experience, skill, knowledge, process, etc., and thereby does not qualify as Fees for Technical Services (FTS) as per the provisions of Article 12(5) of the India-Netherlands tax treaty (the treaty); and (iii) were in the nature of business income and not liable to tax in India in absence of a Permanent Establishment (PE) in India as per the provisions of Article 7, read with Article 5 of the treaty.
- The Assessing Officer (AO) concluded the assessment by taxing the consideration received for conducting training programs as being in nature of FTS under section 9(1)(vii) of the Income-tax Act, 1961 (the Act), as well as under the provisions of Article 12 of the treaty. Further, the AO treated the consideration received for providing access to computer systems as royalty under section 9(1)(vi) of the Act as well as FTS as per the provisions of Article 12(5)(a), read with Article 12(4) of the treaty.
- The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO. However, with respect to consideration received for providing access to the computer systems, it taxed the aforesaid consideration as FTS only in accordance with the provisions of Article 12(5)(a) of the treaty.
- The assessee therefore, preferred an appeal before the Income-tax Appellate Tribunal, Mumbai (Tribunal).

### Issue under consideration

Whether the consideration received by the assessee for conducting training programs and providing access to the computer systems qualify as FTS under the Act as well as under the treaty?

### Ruling of the Tribunal

- The Tribunal rejected the claim of the assessee that the payments received were in nature of reimbursement, due to lack of documentary evidences.

- The Tribunal, however, held that the training receipts does not qualify as FTS on account of the following:
  - Relied on the Bangalore Tribunal in case of ITO vs. Veeda Clinic Research P. Ltd. (2011) 13 taxmann.com21 (Bang), in holding that the onus is on the revenue authorities to demonstrate that the training services *make available* technical knowledge, experience, skill, etc.
  - There was nothing on record from the proceedings before the lower authorities and that the Revenue’s counsel also did not place anything on record to substantiate that the training programs did involve *make available* or transfer of technology.
  - Even if conducting training programs were construed as rendering *professional services* as alleged by the CIT(A) relying on the decision of the Apex Court in case of CBDT vs. Oberoi Hotels (India) Pvt. Ltd (1998) 231 ITR 148 (SC), then the corresponding receipts will be covered within the ambit of Article 14 dealing with *Independent Personal Services* and would automatically be excluded from Article 12 of the treaty.
  - The Tribunal observed that (i) the assessee did not own any brand or trademark for which any royalty income was received by it as provided in Article 12(4) of the treaty; (ii) the services provided were in the ordinary course of the assessee’s business; and (iii) such services cannot qualify as *ancillary and subsidiary* services as provided in Article 12(5)(a) of the treaty. Hence, the consideration received for rendering the training services pursuant to the TCSA cannot be held as FTS as per the provisions of Article 12(5)(a) of the treaty.
- Further, the Tribunal held that the receipts for providing access to the computer systems does not qualify as FTS on account of the following:
  - Access to the computer systems were common facilities provided by the assessee to the Marriott chain of hotels across the world and were not tailor made services to suit the specific requirements of the Indian hotels.
  - Relied on the judicial precedents in case of CIT vs. Kotak Securities Ltd (2016) 383 ITR 1 (SC); and DIT vs. A.P Moller Mersk (2017) 392 ITR 186 (SC).
  - The said consideration received cannot constitute FTS as per the provisions of Article 12(5)(a) of the treaty for the reasons discussed above.

## Conclusion

- The decision of the Tribunal is welcoming in so far as the following is concerned:
  - It clarifies that the consideration received from conducting training in the areas of soft skills dealing with managerial / leadership training cannot be characterized as FTS as it does not involve making available any technical knowledge, experience skills, etc.
  - The onus of substantiating that the services rendered by a non-resident taxpayer makes available technical knowledge, experience, skills, etc, is on the Revenue authorities.
  - It reiterates the principles laid down in the judicial precedents dealing with the taxability of consideration received for providing standard facilities wherein the courts have held that such receipts do not constitute FTS.
- The Tribunal has specifically refrained from adjudicating on characterization of consideration received from providing access to the computer systems as *royalty* since this was never the case of the CIT(A).

## Deloitte tax@hand App

### Current. Comprehensive. Convenient.

Download [tax@hand](#) app, a secure digital platform for timely global and regional news, perspectives, and resources. Do visit the tax@hand webpage [here](#).



**Deloitte.**

#### IOS



Download from App Store

#### Android



Download from Google Play

#### Website



Add to favorites

## Do you know about Dbriefs?

Dbriefs are live webcasts that give valuable insights on important developments affecting your business. To register, visit the [Dbriefs](#) page.

Download the report



Deloitte makes an impact that matters

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a more detailed description of DTTL and its member firms.

This material and the information contained herein prepared by Deloitte Touche Tohmatsu India LLP (DTTI LLP) is intended to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). This material contains information sourced from third party sites (external sites). DTTL LLP is not responsible for any loss whatsoever caused due to reliance placed on information sourced from such external sites. None of DTTL LLP, Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this material, rendering professional advice or services. This information is not intended to be relied upon as the sole basis for any decision which may affect you or your business. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.

No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this material.

©2018 Deloitte Touche Tohmatsu India LLP. Member of Deloitte Touche Tohmatsu Limited