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Global Business Tax Alert
Sharp Insights

The Delhi High Court in the case of Steria (India) Ltd. (72 taxmann.com 1) has held that Protocol forms an integral part of a DTAA. Accordingly, the 'Most Favoured Nation' ('MFN') clause (Clause 7) in the Protocol to the India-France DTAA is self-operational and does not require a separate notification from Central Government to be effective. Overruling the AAR's decision, the High Court, held that the amount paid to offshore service provider for provision of managerial services does not constitute 'Fees for technical services' ('FTS') by virtue of restricted scope/definition of FTS under the India-UK DTAA which must be read as forming part of India-France DTAA.

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Background:

- The petitioner, Steria (India) Ltd., is a public company registered in India, engaged in the provision of information technology driven services to its clients.
- The petitioner entered into a Master Service Agreement ('MSA') with Groupe Steria SCA ('Steria France'), a limited liability partnership incorporated in France. Steria France provided management services to the petitioner with a view to rationalize and standardize the business conducted by the petitioner in India.
- The services agreed to be rendered by Steria France under the broad category of General Management Services included Corporate Communication Services, Group Marketing Services, Development Services, Information System and Services, Legal Services, Human Relation Services etc.
- No personnel of Steria France visited India for providing such services which were provided through telephone, fax, email etc. Further, Steria France did not have a Permanent Establishment ('PE') in India as per India-France DTAA.
- With a view to seek clarity regarding the tax implications arising under the MSA, the petitioner filed an application before the Authority for Advance Rulings ('AAR') in India.

Questions before the AAR

- Whether the payment made by Steria (India) to Steria France for management services will not be taxable in India as per the India-France DTAA?
- If consideration for management services is not subject to tax in the hands of Steria France, whether Steria India will be liable to withhold tax in India?

The Petitioner contended that having regard to Clause 7 of the 'Protocol' in the India-France DTAA which provided for MFN clause, the restrictive definition of the expression FTS appearing in the India-UK DTAA, must be read as forming part of the India- France DTAA as well.

AAR Held as under:

The AAR held that the management services rendered by Steria France under the MSA were taxable as FTS. In doing so, the AAR held that the Protocol cannot be treated as the same with the provisions contained in the DTAA itself. It observed that clauses found in India-UK DTAA could not be read in to the expression FTS occurring in India-France DTAA unless there was a notification under Section 90 of the Act issued by the Central Government to incorporate the less restrictive provisions of the Indo-UK DTAA into the India-France DTAA.

Decision of the High Court

The High Court observed as under:

- It is not in dispute that DTAA entered into between India and UK, in which the scope and ambit of the term FTS was more restrictive than the India-France DTAA in two important aspects:

  – The India-France DTAA included fees for managerial services in FTS definition, whereas, in contrast, the India-UK DTAA expressly excludes fees for managerial services from FTS definition;

  – The India-UK DTAA contained a "make available" clause, for a service to constitute "technical service". In contrast, the India-France DTAA did not incorporate any such "make available" requirement or criterion.

- The purpose of Clause 7 of the Protocol is to afford to a party to the Indo-France Convention the most beneficial of the provisions that may be available in another Convention between India and another OECD country. The words "a rate lower or a scope more restricted" occurring therein envisages that there could be a benefit on either score i.e. a lower rate or more restricted scope. One does not exclude the other.

- The AAR appears to have failed to notice that the wording of Clause 7 of the Protocol makes it self-operational, which is also evident from the preamble to the Protocol. It is also not in dispute the separate Protocol signed between India and France simultaneously forms an integral part of the Convention itself. Upon DTAA (containing the Protocol) being notified, there is no need for another notification for application of beneficial provisions in some other Convention.

- As regards the nature of the services being provided under the MSA, again the Court is unable to find any case made out by the Revenue before the AAR that what was provided was anything other than the managerial service which in any event stands excluded in the definition of the FTS under the Indo-UK DTAA.

- What is being provided by Steria France to the Petitioner in terms of the MSA is managerial services. It is plain that once the expression 'managerial services' is outside the ambit of FTS, then the question of the Petitioner having to deduct tax at source from payment for the managerial services, would not arise.

- As regards contention of Revenue on Steria France having a PE in India, the Court held that the question whether the French entity had a PE in India would arise only if the Revenue contended that Steria France earned any business income in India, which is not even the case of Revenue

Conclusion

This is a welcome decision, wherein the Delhi High Court, reversing the AAR ruling, has held that the MFN clause (Clause 7) of the Protocol to the India-France DTAA does not require a separate notification to become operational, and the petitioner may import the restricted scope/ tax rate from other DTAAs in accordance with the said clause.

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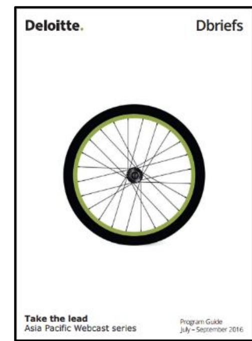

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