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Kerala High Court reaffirms meaning of 'make available' as contemplated under the term 'Fees for included services'

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Facts of the case

- US Technology Resources Pvt Ltd (the assessee) was a company incorporated in India. The assessee was engaged in providing software development services to its customers based in India.
- The assessee had entered into a management services agreement with US Technology Resources LLC (UST) – a company incorporated in the USA and a tax resident in USA. As per this management services agreement (agreement), UST agreed to provide assistance, advice and support in management, financial, legal, public relations, treasury and risk management services.
- One of the terms of the agreement was to provide training to the employees of the assessee which is incidental to the managerial service rendered by UST to the assessee.
- The assessee claimed deduction of payments made towards management service rendered by UST.
- Before the Assessing Officer (AO), the assessee claimed that the provisions of the India-US tax treaty provided for definition of Fees for Included Services (FIS). As per this article, the term FIS included payments of any kind to any person as consideration, for rendering any technical or consultancy services, if such services, make available technical knowledge, experience, skill, know-how or process. The term 'managerial service' was specifically excluded from the definition of FIS.
- The assessee also contended that UST did not make available any technical knowledge, expertise, etc. and hence there was no income arising in the hands of UST which was taxable in India. Accordingly, it was not liable to withhold any taxes on the payments made to UST.
- The AO disallowed the expenditure incurred by the assessee on account of non-deduction of tax at source without considering the effect of the tax treaty.
- The Commissioner of Income-tax (Appeals) [CIT(A)] dealt with the tax treaty and held that the services offered by UST to the assessee came under the ambit of the term 'fees for included services' and hence they are taxable in India. The Cochin Income-tax Appellate Tribunal (Tribunal) held the consideration to be covered under the expression 'FIS' as the same included technical training to the assessee's employees.

Issue under consideration

Whether management fees are covered/included within the ambit of 'Fees for included services' under the provisions of the tax treaty?

Ruling of the High Court

- The High Court affirmed the findings of lower authorities that the consideration for services availed by the assessee from UST was covered under the definition of the term 'Fees for Technical Services' under the Income-tax Act (the Act).
- The High Court also observed the definition of the term 'inclusive services' as per the tax treaty, to be quite distinct from the definition of 'technical and consultancy services' as per the Income-tax Act. Hence, judicial precedents relying on the definition of 'Fees for Technical services' under the Act cannot be applied in the case of the assessee.
- The High Court noted that the term 'Fees for included services' under the tax treaty entails payment for making available technical knowledge, experience, skill, know-how or processes or consist of development and transfer of a technical plan or technical design. This has to be read along with the MOU.
- As per the MOU, technology would be considered to be 'made available' only when the person acquiring the service is enabled to apply the technology. Hence, there should clearly be a **transfer of technology** with the recipient applying it to its business. The mere fact that the provision of a service may require technical input by the service provider, does not *per se* mean that the technical knowledge, skills etc., are made available to the person availing such services.
- The Court made reference to the decision of the Karnataka High Court in the case of De Beers India Minerals (P) Ltd issued in the context of India-Netherlands tax treaty. In the said case, the High Court had held that the services rendered by the Netherlands company to the assessee did not result in making available any technical expertise to the assessee.
- The Court noted the similarity of facts in the case of assessee and that in the case of the aforesaid decision viz:
 - There was no plan or strategy relating to management, finance, legal, public relations or risk management transferred to the assessee;
 - The services promised by UST were to only advise on such aspects as were specifically referred to in the agreement;
 - UST only assisted the assessee in making the correct decisions on such aspects as were specifically referred to in the agreement as and when such advice is required;
 - There was no technology transfer of know-how even on managerial, financial, legal or risk management aspects which would be available to the assessee to be applied without the hands-on advise offered by UST;
 - The advice offered on managerial, financial, legal or risk management aspects would have to be on a factual basis with respect to the problems arising at various points of time and there cannot be found any transfer of technical or other know-how to the assessee.

- In view of the aforesaid facts of the case and the distinct provisions of the tax treaty, the High Court held that none of the aspects on which UST had promised advice to the assessee, would fall under the 'included services'. Accordingly, the 'fees for included services' would not be taxable in India as per the tax treaty between India and USA in the hands of UST.

Conclusion

This ruling clearly lays down the fact that there should be a transfer of technology and that technology should be made available to the transferee/service recipient in order for the services to be considered to have been 'made available'. The ruling also affirms the fact that the narrow definition given to 'included services' and the MoU to tax treaty, together determine whether a particular service falls within the purview of the term 'included services' as per the tax treaty. This ruling can also be relied upon to interpret the term 'make available' as incorporated under treaties with other countries.

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