

India; Netherlands

Standard Software Services Provided Are Not Fees for Technical Services Under India-Netherlands Tax Treaty, Says Indian Court

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The Delhi Income Tax Appellate Tribunal (ITAT), in the case of *Service Now Nederland BV vs. Assistant Commissioner of Income Tax (ITA No.2242/Del/2022)*, has ruled that standard services provided by the taxpayer to Indian customers were not in the nature of "make available" of fees for technical services (FTS) and, accordingly, were not taxable in India under its domestic tax laws or under the [India-Netherlands Income and Capital Tax Treaty \(1988\)](#) (the Treaty).

(a) Facts. The taxpayer, a tax resident of the Netherlands, was engaged in the business of providing enterprise cloud computing solutions. During tax year 2019-20, the taxpayer provided subscription, training and professional services to various Indian customers and considered the income from such services to be non-taxable in India as it was not in the nature of royalties or FTS. The tax authorities, however, sought to tax such income in India as FTS.

(b) Issue. The ITAT examined whether the said income was in the nature of FTS and, accordingly, taxable in India.

(c) Decision. The ITAT ruled in favour of the taxpayer with observations set out below:

- the taxpayer's master agreement with its customers discussed a copyrighted article. Thus, the payment made by Indian customers was in the nature of FTS and not royalties, as determined by the tax authorities;
- the taxpayer had merely granted access to software and there was no transfer of technology. Hence, services rendered by the taxpayer did not fall within the definition of FTS as per the Income Tax Act, 1961 and the Treaty; and
- article 12(5)(a) of the Treaty was not applicable in the case at hand. Further, article 12(5)(b) insists on the "make available" clause to fall within the ambit of FTS. Thus, the taxpayer was not covered under the article 12(5) of the Treaty.

The decision, pronounced by the ITAT on 29 August 2023, is available [here](#).

