India; Mauritius; United Arab Emirates

Payments to UAE, Mauritius Entities for Web Hosting, Software Development Not Taxable in India, Says Indian Court

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The Delhi Income Tax Appellate Tribunal (ITAT) has ruled that payments made by an Indian company to the UAE, Mauritius entities for web hosting, software development, and market survey and analysis cannot be taxed in India as fees for technical services (FTS) in the absence of a specific clause in the respective tax treaty and in the absence of the foreign companies' having a permanent establishment (PE) in India. Accordingly, the said payment is not subject to withholding tax (WHT) and cannot be disallowed as expenditure for the Indian company.

(a) Facts. The taxpayer, a tax resident of India, made payments to various companies in the UAE and Mauritius for web hosting, development of a mobile application (app), market survey and analysis services without deduction of WHT during the tax year 2017-2018. The tax authorities however, considered such payments as FTS/royalty under the respective tax treaties. Since the payments were made without deducting WHT, they sought to disallow such payments while computing business income of the taxpayer.

(b) Issue. The ITAT examined whether payments made by the taxpayer were in the nature of FTS/royalty subject to WHT in India. And if yes, whether the payments must be disallowed as expenditure for non-deduction of WHT.

(c) Decision. The ITAT approved the decision of the commissioner of income tax and ruled in favour of the taxpayer with observations set out below.

- Payments to Dubai Leading Technologies, UAE for the development of an android app cannot be brought to tax under article 22 of India-United Arab Emirates Income and Capital Tax Treaty (1992) in the absence of a specific clause for FTS in the said treaty. The payments are in the nature of business income which are not chargeable to tax in India in the absence of a PE of the UAE company in India.
- Payments to Brain Point Consultants, UAE for market survey and analysis services represent income of a non-resident agent from the provision of marketing and sales support services for overseas clients. Such income cannot be included under section 5(1) of the Income Tax Act, 1961 as it is not "deemed to accrue or arise in India". Further, in the absence of a specific clause on FTS under the India-United Arab Emirates Income and Capital Tax Treaty (1992), provisions of article 22 of the said treaty on residuary/other income cannot be invoked.
- Payments to OIT Managed Services, Mauritius for the provision of amazon web services, hosting services, identity and access management, virtual private cloud, virtual machine services cannot be classified as royalty or FTS. They are not taxable in India in the absence of any specific clause on FTS in the India-Mauritius Income Tax Treaty (1982) for the year under consideration.

Accordingly, the ITAT held that there is no obligation to deduct WHT as the payments are not chargeable to tax in India based on various judicial precedents and hence, the disallowance of expenditure is erroneous.

The decision, pronounced by the ITAT on 20 October 2023, in the case of *DCIT, International Taxation v. Campus Eai India Pvt. Ltd. (ITA No.355/Del/2021)* is available here (as a pdf and in English).
