India; United States

Standard Cloud Computing Services Fees Not Royalty or Fees for Included Services, Indian Court Says

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The Delhi Income Tax Appellate Tribunal (ITAT), in the case of *Amazon Web Services, Inc. v. Assistant Commissioner of Income Tax (ITA. Nos 522 and 523/Del/2023)*, held that receipts from the provision of standard cloud computing services were not in the nature of royalty or fees for included services (FIS) and accordingly, were not taxable in India.

(a) Facts. The taxpayer, a tax resident of the United States, provides "standard and automated" cloud computing services (AWS Services) to its customers around the globe. During the relevant tax year, the taxpayer received payments from various Indian companies without deduction of withholding tax on payments for such services. The taxpayer claimed that these receipts were not taxable in India under the domestic tax law as well as the India - United States Income Tax Treaty (1989). However, the tax authorities considered the above fees to be taxable as royalty, fees for technical services (FTS) as well as FIS under article 12(4) of the treaty.

(b) Issue. The ITAT considered the issue of whether the fees earned by the taxpayer were in the nature of royalty/FTS/FIS and accordingly, whether they were taxable in India.

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

Receipts were not in nature of royalty under article 12(3) of treaty and hence, were not taxable in India for reasons set out below.

- AWS Services provided by the taxpayer were merely standard and automated services, publicly available online to anyone and were rendered without any customization.
- On perusal of the terms of the customer agreement, trademark guidelines and support services guidelines, the prerequisites for the receipts to be treated as royalty income in terms of article 12(3) of the treaty were not met as: (i) the customer did not receive any right to use the copyright or other intellectual property (IP) involved in AWS Services; (ii) the customer was granted only a non-exclusive and non-transferable licence to access the standard automated services without the source code of the licence; (iii) the customer had no right to use or commercially exploit the IP; and (iv) there was no equipment of any nature or at any time placed at the disposal of the customer by the taxpayer.
- Under the trademark guidelines, the customer was granted a limited, non-exclusive, revocable, non-transferable right to use AWS marks only to the limited extent for identification of the customer who was using AWS Services for their computing needs.
- Under the support service guidelines, only incidental/ancillary support was provided to the customers, which includes answering queries/troubleshooting for use of AWS Services subscribed by them. The guidelines specifically provided that the technical support did not include code development, debugging, and forming administrative tasks.
- Various judicial precedents have held that payments for cloud computing services were not in the nature of royalty (for example, *EPRSS Prepaid Recharge Services India* (P.) *Ltd v. ITO* [2018] *100 taxmann.com 52* (Pune - Trib.), and *Urban Ladder Home Decor Solutions Pvt. Ltd vs ACIT* (IT) TS-773-ITAT- 2021(Bang)).

Receipts were not in nature of FIS under article 12(4)(b) of treaty and hence, were not taxable in India for reasons set out below.

- A bare reading of article 12(4)(b) of the treaty and the protocol thereto clearly indicates that a payment is considered as FIS only if such services "make available" technical knowledge, experience, skill, know-how or processes;
- AWS services provided by the taxpayer were standardized services that did not provide any technical services to its customer nor did they satisfy the "make available" test as the customer would not be able to make use of the technical knowledge, skill, and process in providing cloud services by itself in its business or for its own benefit without recourse to the taxpayer in future.
- Various judicial precedents, viz. *ITO v. Sunguard Availability Services LLP* ITA No. 258/Pun/2021 and *Rackspace, US Inc. v. DCIT* (2020) *113 taxmann.com 382(Mum)*, have held that rendering cloud computing services cannot be held to be liable to tax in India as FTS/FIS.

The full decision, pronounced by the ITAT on 1 August 2023, is available here (as a pdf and in English).

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