CNK & Associates LLP
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## Judicial Decisions-Transfer Pricing and International Tax

## INDEX

**The TPO having accepted TNMM as the MAM at entity level, it would be inappropriate to treat payment of technical know-how as a separate international transaction which is integral and inseparable to the business segment of the assessee**

## Tata Power Solar Systems Limited vs. ACIT (TS-287-ITAT-2023) (Bangalore Tribunal)

**In favour of assessee**

### Facts

The assessee had entered into various international transactions with its Associated Enterprise **(AE)**, including payment of technical know-how fees. The assessee had paid technical know-how fees of Rs. 9.07 crores pursuant to a License Agreement entered with the AE. The assessee aggregated all the international transactions on grounds of being inextricably and closely linked to each other, for the purposes of computation of Arm's Length Price **(ALP)** and benchmarked them at entity level. The assessee had considered Transaction Net Margin Method **(TNMM**) as the most appropriate method **(MAM)**. The assessee had earned a net margin of 12.34% which was higher than the net margin of comparable companies of 9.23%.

During the transfer pricing assessment proceedings, the assessee had provided evidence to demonstrate the actual receipt of the technical know-how from the AE and the benefits derived from acquiring the said technical know-how. It was demonstrated that the said payment was not arbitrary, but was based on identified costs, which were further negotiated with the joint venture partners and approved by the Board of Directors. The Transfer Pricing Officer **(TPO)** considered the benchmarking analysis of the assessee and accepted the same for all international transactions, except for the payment of technical know-how. The TPO thereafter concluded that the technical know-how fees should not have been paid to its AE and thus, treated the ALP of such payment at NIL.

### Held

The technical know-how is integral and inseparable to the business segment of the assessee. All the documents explaining the need and benefit for payment of technical know-how were submitted to the TPO. It would be impractical and inappropriate to evaluate payment of technical know-how fee on an individual or on a stand-alone basis. The TPO had accepted assessee's benchmarking analysis for all transactions, except payment of technical know-how fee to AE. Once the TPO has accepted TNMM as the MAM at entity level, it would be inappropriate to treat a particular expenditure as a separate international transaction.

### CNK Comment

Many a time, it becomes difficult to identify exact comparable transactions for payment of technical know-how fees or royalty payment considering the unique nature of intangibles involved. Accordingly, in such cases, it is not possible to use Comparable Uncontrolled Price **(CUP)** method or Other Specified Method as the MAM. Where the taxpayer is able to demonstrate that the payment of technical know-how fees or royalty is closely linked to the business of the assessee, the same can be aggregated together for the purpose of benchmarking as bundled transaction. Further, it would be possible to use TNMM as the MAM, where the entity level margins earned by the taxpayer exceeds that of comparable companies.

**The assessee is duty bound to discharge the onus by filing necessary evidence to prove actual rendering of services. In absence of the assessee to prove the same, the TPO was correct in determining ALP at NIL**

## Intimate Fashions India Pvt. Ltd. vs. DCIT/JCIT (TS-341-ITAT-2023) (Chennai Tribunal)

**In favour of revenue**

### Facts

The assessee, an Indian company was a joint venture between Sri Lankan, Liechtenstein, and American entities. The assessee was engaged in the business of

manufacturing and sale of intimate garments and other related items. The assessee primarily exported the manufactured garments to the American entity. The assessee had entered into an Agency Agreement with Sri Lankan and Liechtenstein entities, whereby it paid 5% commission on net sales for agency services. The assessee also paid 3% commission on net sales to Sri Lankan entity for designated products/ services.

The assessee benchmarked the transaction of commission paid using CUP method based on the rate prescribed by the RBI. The said transaction was alternatively benchmarked using TNMM.

The TPO rejected the benchmarking approach adopted by the assessee and concluded that agency commission paid at NIL on the basis that the assessee could not furnish necessary evidence to prove rendering of services by the AEs and need for such payment. The TPO held that since the entire sales were made to the AE, no independent party would have paid such commission.

### Held

The assessee claimed that the AE had provided services in connection with marketing and production of garments. However, the assessee could not file any credible evidence to prove the actual availing of services from the AEs. The email correspondence provided by the assessee was general correspondence regarding follow-up on orders and delivery, production planning and capacity assessment introduction of a new model, etc. Those emails did not throw any light on the services rendered by AEs.

It was not a case of the assessee that AEs have rendered services in connection with achieving sales targets, identifying new customers, collection follow up, etc. The assessee could not even furnish any evidence to prove that there are negotiations between the assessee and the AEs with regard to marketing strategy, sales targets, credit period, etc. In absence of any evidence with regard to rendering of services by the AEs, the TPO/AO has rightly benchmarked payment of agency commission as NIL. It is always for the assessee to discharge the onus by filing necessary evidence to prove rendering of services, which is pre-requisite for making any payment.

**Providing access to data base pertaining to legal and law related information without providing full-fledged service and solutions for legal professionals cannot be taxed as 'fees for technical services' in India. Subscription fees for providing such access would be 'Business profit', not taxable in India in absence of PE**

## RELX Inc. vs. ACIT (149 taxmann.com 78) (Delhi Tribunal)

**In favour of assessee**

### Facts

The assessee, a tax resident of USA, was engaged in the business of maintaining an online database. The database pertained to legal and law related information, which included articles, copy of judgments filed, patent applications before patent registry and other legal information. The assessee earned subscription fees income from Indian subscriber for providing access to database.

The assessee filed its return of income by treating subscription fees received for providing access to database as 'Business Income', not taxable in India as per India USA Tax Treaty. The Assessing Officer **(AO)** treated subscription fees receipt as fees for technical services **(FTS)** by holding that the assessee was not providing 'mere access' to a static database but was providing full-fledged services and solutions to legal professionals.

**Argument of the assessee**

Electronic versions of books/ journals/ articles are available that can be purchased online by paying the price of the book. The frequent consumers can opt to subscribe to the database for a certain period on payment of subscription fees which allows them to access the e-books/e-journals/e-articles on the online database. In both cases, the content received by the user remains the same, that is, books, journals, and articles in an electronic format.

**Argument of the Income Tax authorities**

The assessee was not merely providing access to database but also providing specific solutions to its

customers which are technical in nature. Such solutions become the knowledge base for customers to build up further analysis/solutions. Therefore, the services rendered by the assessee was taxable as 'fees for included services" as per Article 12(4)(b) of India USA Tax Treaty.

### Held

Where the Income Tax authorities were unable to demonstrate that assessee was providing full-fledged service and solutions for legal professions, the same cannot be taxed in India as FTS. Granting mere access to the database to the Indian subscriber would be 'Business Profit', not taxable in India in the absence of Permanent Establishment **(PE)** of the assessee in India.

**The Income-tax authorities cannot ignore the valid Tax Residency Certificate (TRC) issued by the Government authority of the other contracting state. The Indian company providing similar services to others in the ordinary course of business cannot be considered to trigger Dependent Agent PE ('DAPE') where the assessee did not have any financial, managerial or any other type of participation in the Indian company**

## CIT(IT) vs. Alibaba.Com Singapore E-Commerce Private Ltd. (TS-361-HC-2023) (Bombay High Court)

### In favour of assessee

### Facts

The assessee was a non-resident company incorporated in Singapore. The assessee was a global company which provided the subscription services to the customers across the world, including Indian customers.

In the course of its business, the assessee had transacted with Alibaba Hong Kong by way of availing of web hosting and related services. The Alibaba website www.alibaba.com was commonly used by the entire Alibaba Group and services were being provided to the suppliers from all across the countries including India, except China, Hong Kong, and Macau.

The website facilitated Indian suppliers to do business online through a global trade marketplace. The Indian subscribers subscribed to the assessee's service/ facility offering through which they could place there storefront and get their products advertised/ listed, when visitors went to the website for search of products required by them.

The Alibaba website was operated by Alibaba.com Hong Kong. The servers which hosted the website were located in California, USA.

Overview of the Subscription arrangement

The subscribers would register with the assessee, availing services provided by the assessee (i.e., putting advertisements on its website), by agreeing to the terms of the Agreement and payment of the applicable fees. Once the account was opened by the Subscribers, they could proceed to display information about their business, products sold and offer to buy or sell products or services for visitors to the assessee's website to browse. The subscribers and the buyers reached out to each other, and the communication was taken forward independently without any participation or involvement of the assessee. The limited role of the assessee was to provide a facility of posting an advertisement or displaying of the information about product of services in the electronic form.

The Indian business was carried out through another company viz. Infomedia, a listed company which had specialized in the business of directories, magazine publishing, direct marketing etc. Infomedia provided customer support and after-sales support. Infomedia also provided payment collection services from subscribers in India for which it was paid remuneration ranging between 40% to 50% plus cash bonus depending upon the target achieved by it.

The entire subscription revenue was received by the assessee from the customers / subscribers all over the world including from the Indian subscribers in its own rights. It alone was the beneficial and legal owner of the entire revenue collected, on which it paid the taxes in Singapore. The assessee claimed that its income

from the Indian subscriber was not taxable in India, in absence of PE in India.

The AO determined the total income of the assessee at Rs 2.74 crores. The AO denied the benefit of the India-Singapore Tax Treaty to the assessee by holding that the assessee was merely an intermediary between the Indian subscribers and one Alibaba.com Hong Kong. The AO did not accept the certificate of incorporation and the TRC issued by the authorities in Singapore.

The AO also held that the assessee had a 'business connection' in India by way of its agreement and transactions with Infomedia and therefore, the assessee's income was taxable in India as per section 9(1)(i) of the said Act. The AO also held that in the alternative, the payments made by the Indian subscribers to the assessee was also taxable in India as FTS as per the Act as well as the Tax Treaty.

**Factual finding recorded by the Tribunal**

Various documentary evidence, including the TRC of assessee was examined. The assessee was incorporated under the laws of Singapore and a TRC was issued by the Inland Revenue Authority of Singapore. The tax residency and residence status of the assessee was also established by filing certificate of incorporation of the assessee. Audited financial statements and the return of income of the assessee for the relevant years, were also filed before the Singapore Authorities. All these facts taken together showed that subscription fees received by the assessee from the subscribers all over the world, including from India, was its own income. The assessee alone was the economic owner of the subscription it received from Indian subscribers. It had received the subscription income in its own right and not on behalf of Alibaba.com Hong Kong. Factual finding was made that the assessee could not be held as non-existent entity or some kind of conduit of Alibaba.com Hong Kong.

Notice of assessment issued by Singapore Tax Authorities validates the fact that the assessee was assessed in Singapore and had the place of control and management also in Singapore. Meeting of the board of directors of assessee, web-based agreement between Alibaba.com Hong Kong and the assessee led to the conclusion that Alibaba.com Hong Kong had absolutely no connection, or contract with the Indian subscribers or assessee's customers in India.

Infomedia had entered into several collaborations with other partners like assessee and the assessee did not have any financial, managerial or any other type of participation in Infomedia. Infomedia carried out a host of other activities for other clients and Infomedia was an independent entrepreneur. Further while dealing with the assessee, Infomedia was compensated for its services by the assessee.

The activities of Infomedia under the Agreement with the assessee were in the ordinary course of business. Its activities in no way were dedicated wholly or almost wholly to the assessee.

## Held

**Validity of TRC**

The TRC was sufficient to determine the proof of residency and the income-tax authorities cannot ignore the valid tax residency certificate issued by the Government authority of the other contracting state, that is, Singapore.

**Services of an Independent agent would not trigger Business connection**

Infomedia was not a dependent agent, in view of proviso to section 9(1)(i) of the Act. Income of the assessee cannot be held to be deemed to accrue or arise in India in terms of section 9(1)(i) of the Act. Accordingly, the income of the assessee cannot be taxed as business income in India. Once the income is not taxable as per the Act, then it is not necessary to go into the Tax Treaty.

The activities of Infomedia under the Agreement with the assessee were in the ordinary course of business. Its activities in no way were dedicated wholly or almost wholly to the assessee.

## KEY TAKE AWAY

- **The TPO having accepted TNMM as the MAM at entity level, it would be inappropriate to treat payment of technical know-how as a separate international transaction which is integral and inseparable to the business segment of the assessee.**
- **The assessee is duty bound to discharge the onus by filing necessary evidence to prove actual rendering of services. In absence of the assessee to prove the same, the TPO was correct in determining ALP at NIL.**
- **Providing access to data base pertaining to legal and law related information without providing full-fledged service and solutions for legal professionals cannot be taxed as 'fees for technical services' in India. Subscription fees for providing such access would be 'Business profit', not taxable in India in absence of PE.**
- **The Income-tax authorities cannot ignore the valid TRC issued by the Government authority of the other contracting state. The Indian company providing similar services to others in the ordinary course of business cannot be considered to trigger Dependent Agent PE (DAPE) where the assessee did not have any financial, managerial or any other type of participation in the Indian company.**




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