

Sum recovered from Indian affiliate for software used to provide services to various group entities is royalty: ITAT

FACT OF THE CASE

1. The assessee was a Switzerland-based non-resident company. It rendered information technology (IT) services to its Indian affiliate RIPL and received Rs. 20.04 crores, which was offered to tax at a rate of 10 percent as per the India Switzerland tax treaty provisions.
2. However, another receipt of Rs. 3.89 crores from RIPL wasn't offered to tax, and it was claimed as reimbursement of IT license costs incurred towards the central purchase of software licenses used by RIPL.
3. The Assessing Officer (AO) held that amount of Rs. 3.89 crore claimed as reimbursement was no different from receipt of Rs. 20.04 crore from IT services rendered under Agreement, which was offered to tax. Thus, the same would be chargeable to tax in India as Fees for Technical Services/Royalty under article 12 of DTAA. The Dispute Resolution Panel (DRP) did not provide any succour to the assessee. The assessee filed the instant appeal before the Tribunal.

DECISION OF THE CASE

1. The Pune Tribunal held that to categorize a particular amount as reimbursement, it is sine-qua-non that expenditure should be incurred for and on behalf of others. It envisages two cumulative conditions, viz., first that undiluted benefit flowing from incurring of expenditure is passed on, as such, to other and second, that amount incurred is recovered as it is from other without any plus or minus to that.
2. In the instant case, 19 global entities were availing IT services from the assessee. The Indian entity had been allocated more than 17 per cent of the total costs as against each of the other 18 entities, getting an average allocation of 4.6 per cent. It showed that the assessee allocated costs for rendering IT services in a peculiar manner, the modus operandi of which was not open for verification to the tax authorities.
3. Further, clause (4) of the Agreement shows that the Agreement firstly talks of incurring software and license fee in rendering the services and then of loading software and license fee cost with a mark-up of 5 per cent. This brings one to the inevitable conclusion that the second constituent of reimbursement, the recovery of the amount incurred from the other without any plus or minus, also falls on the ground.
4. The cumulative satisfaction of both conditions is essential for constituting 'reimbursement'. If one of them is lacking, the test of reimbursement fails. In the instant case, both the conditions were failing. Neither the undiluted benefit of the software cost was passed on to RIPL, nor did the assessee recover the amount as it is from RIPL. Thus, the contention of 'Reimbursement' cannot be countenanced.