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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 138/2024

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -2 ..... Appellant

Through: Mr. Ruchir Bhatia, SSC with Ms. Deeksha Gupta, Adv.

versus

HIRERIGHT LTD. ..... Respondent

Through: Mr. Kishore Kunal & Ms. Ankita Prakash, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

O R D E R

% 26.02.2024

1. The Commissioner of Income Tax seeks to impugn the order of the Income Tax Appellate Tribunal ["**ITAT**"] dated 06 September 2023 and proposes the following questions for our consideration:

> "2.1 Whether on the facts and circumstances of the case and in law, the Ld. ITAT has erred in not holding that receipts of the assessee from its clients in India are Royalties?
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> 2.2 Whether on the facts and circumstances of the case and in law, the Ld. ITAT has erred in not holding that this information is an-information which involves imparting of commercial experience, skill or expertise?
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> 2.3 Whether on the facts and circumstances of the case and in law, the Ld. ITAT erred in holding that report provided by the assessee in physical and online mode/access is not covered under royalty?
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> 2.4 Whether on the facts and circumstances of the case and in law, the Ld. ITAT has erred in holding that receipts of Assessee from clients is not Royalty despite the fact that these reports are protected by copyright laws and therefore, use of these reports is use of copyright?"

2. We note that the issue itself arises out of the assessee undertaking employment background checks and verification of testimonials for various clients. The appellant sought to contend that the fees so generated from that exercise would fall within the ambit of "*fee for technical services*" in terms of Article 13 of the India-UK Double Taxation Avoidance Agreement ["**DTAA**"]. We note that Article 13 reads as follows:

> "ARTICLE 13
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> **ROYALTIES AND FEES FOR TECHNICAL SERVICES**
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> 1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
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> 2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed:
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> (a) in the case of royalties within paragraph 3(a) of this Articles, and fees for technical services within paragraphs 4(a) and (c) of this Article,—
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> (i) during the first five years for which this Convention has effect ;
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> (aa) 15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first-mentioned Contracting State or a political sub-division of that State, and
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> (bb) 20 per cent of the gross amount of such royalties or fees for technical services in all other cases; and
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> (ii) during subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and
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> (b) in the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this Article, 10 per cent of the gross amount of such royalties and fees for technical services.
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> 3. For the purposes of this Article, the term "royalties" means:
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> (a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic

or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received ; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received ; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

5. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid :

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(a) of this Article;

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;

(c) for teaching in or by educational institutions ;

(d) for services for the private use of the individual or individuals making the payment ; or

(e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 15 (Independent personal services) of this Convention.

6. The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business profits) or Article 15 (Independent personal services) of this Convention, as the case may be, shall apply.

7. Royalties and fees for technical services shall be deemed to arise in a Contracting State where the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to make payments was incurred and the payments are borned by that permanent establishment or fixed base then the royalties or fees for technical services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

8 Where, owing to a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for technical services paid exceeds for whatever reason the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

9. The provisions of this Article shall not apply if it was the main purposes or one of the main purposes of any person concerned with the creation or assignment of the rights in respect of which the royalties or fees for technical services are paid to take advantage of this Article by means of that creation or assignment."

3. Before us, Mr. Bhatia, learned counsel appearing in support of the appeal essentially rested the case of the appellant on sub-article (4) of Article 13 and which relates to "*fee for technical services*" received

as consideration for rendering any technical or consultancy services. According to learned counsel, the service rendered by the assessee would clearly fall within sub-clause (c).

4. We find ourselves unable to sustain that submission bearing in mind the following findings which have come to be returned by the ITAT:

> "**10.** We have heard the Ld. Representative of the parties and perused the records. It is an undisputed fact that the assessee is a tax resident of UK and does not have a PE in India and hence it has opted to be governed by the provisions of the India-UK DTAA being more beneficial to the assessee. Provision of services by the assessee and its nature thereof is also not under dispute. Perusal of the agreement of the assessee with Barclays shows the exact nature of services performed by the assessee. We have gone through the relevant extracts of the said agreement and are convinced with the contention of the Ld. AR that the assessee's role is restricted to verification of the information concerning various candidates proposed to be hired by its clients (viz. educational qualifications, past employment details etc.) and providing the clients the relevant facts captured by the assessee during the course of validation. The source of information used for verification of the details may be available on public domain or obtained telephonically from the previous employers of the candidates and in some cases, even the records of the courts/public authorities. It is also evident that the assessee physically verifies the information/data in relation for screening services. The reports generated thereof are delivered to the clients in physical mode and/or through online access. The assessee does not provide any advice/analysis/recommendation on hiring of the employees by its client and does not assume any responsibility with regard to hiring decisions taken by its clients on the basis the assessee's report. The information collected by the assessee is not protected by any copyright but its circulation is regulated under the UK and other local laws. Further, considering the nature of the business of the assessee, it has to comply with the local laws wherein a duty is cast upon the assessee to ensure the confidentiality of reports which contains details of the applicants.
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> **12.** As regards the impugned receipts being in the nature of royalty, in our considered view, none of the requisites under Article 13(3) of the India-UK DTAA are satisfied so as to qualify such receipts as 'royalty'. What assessee is providing to the clients in India is merely a report summarising its findings with

respect to the background check undertaken by the assessee which is primarily a factual data and cannot per se qualify as literary or artistic or any other copyrightable work. Such a report cannot be copyrighted as it does not fulfil the requirements enlisted under section 13(1)(a) of the Indian Copyright Act, 1957. Also, none of the rights as mentioned in Section 14(a) of the Indian Copyright Act, 1957 have been rested with the client by the assessee while rendering its services. Income from provision of the services rendered by the assessee cannot be characterised as royalty for use of copyright in the report as the client merely has the right to use the findings in the report for its own internal consumption. The client does not have any rights to publicly display, sell/ distribute, copy, edit, modify or undertake any other commercial exploitation of the said report. It is thus evident that the consideration received by the assessee under the terms of its agreement with its client is purely towards provision of background screening services and does not include any consideration for use or right to use any copyright or a literary, artistic or scientific work, patent, trademark, design, model, plan, secret formula, or process or information. Thus, the impugned receipts of the assessee from its clients in India cannot be regarded as 'Royalties' under the provisions of Article 13 of the India-UK DTAA. Support may be drawn by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. vs. CIT (2021) 125 taxmann.com 42 (SC)/432 ITR 471 (SC).

13. Further the assessee does not provide access to any database to its clients but only access to reports requisition by the client in electronic form. Provision of online access of the report to its client is limited to providing access to the specific report providing relevant facts for the concerned candidates captured during the course of validation. Nothing has been brought on record by the Revenue to refute the aforesaid claim of the assessee. In the light of these facts, in our opinion online access to background screening results cannot be construed as providing access to database maintained by the assessee.

14. It is a fact on record that the information obtained by the assessee from various sources is in the nature of factual data about the prospective candidates proposed to be hired by the clients. In our view this information is not an information which involves imparting of any kind of commercial experience, skill or expertise. The validation report merely contains some personal details of candidates such as educational and professional details which would not amount to imparting of commercial experience etc. What is delivered to the client is validation report assuring its clients about the authenticity of information contained in the report on the basis the information collated in the process of

validation. Hence it cannot tantamount to imparting of commercial experience. The screening report which is issued does not involve any transfer of commercial experience to the client or getting the right to use the experience. There is also no transfer of any skill or knowledge of assessee to the customers in the issuance of screening reports, as the client is only given access to findings of the assessee in the form of a report which contains factual information but nowhere the assessee imparts its experience, skill of carrying out background screening services to its client. It is thus clear that there is no imparting of information concerning industrial, commercial or scientific experience by assessee when it issues the reports to its clients.

15. As regards the characterisation of impugned receipts as FTS, in our view, the services rendered by the assessee do not involve any technical skill/knowledge or consultancy or make available any technical knowledge, experience, skill, know-how or processes to the clients. Assessee's role is restricted to the verification of information provided by various candidates proposed to be hired by its clients. It involves seeking information from various sources that is accessible on specific requests and no advice/guidance on the credentials of the candidate is provided by the Assessee to its client. The role of the assessee is limited to validation of data provided by the candidate and provide relevant facts captured during the course of validation. The clients make an independent decision to hire the candidate. Hence, in our view the services should not be considered as FTS under Article 13(4) of the India-UK DTAA. Accordingly, ground No. 1 to 2.3 are decided in favour of the assessee."

5. In our considered opinion, the mere undertaking of background checks of an employee or the verification of testimonials cannot possibly be recognised as entailing the use of any technical knowledge, experience or skill as provided under Article 13(4) of the India-UK DTAA. The assessee is merely verifying disclosures and which activity cannot be recognised as being imbued with any technological characteristic. There is also a complete absence of a transfer of data or information which could be described as "*technical*" as the word is commonly understood. In view of the aforesaid, we find no reason to take a view contrary to what has been expressed by the ITAT.

6. The appeal fails to raise any substantial question of law. It shall consequently stand dismissed on the aforesaid terms.

YASHWANT VARMA, J

PURUSHAINDRA KUMAR KAURAV, J

FEBRUARY 26, 2024/kk