



Tax alert: Testing services for providing technological know-how or scientific experience is taxable as royalty

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The Delhi Bench of Income-tax Appellate Tribunal (ITAT) has held that testing services in the nature of marker analysis and double haploid testing provided by taxpayer, is taxable as royalty under Article 12(4) of India-Netherlands tax treaty as the consideration was towards the information and knowledge developed out of technology and scientific experience imparted by the taxpayer.

In a nutshell



The nature of service rendered by the taxpayer to I Co was to support the breeding programs in India by providing marker analysis services and producing double haploids. The 'test reports' were not simply test but were 'marker analysis services' provided by the taxpayer to support I Co's breeding programs in India.

The taxpayer, through such information in the form of test reports, provides support to the I Co to enhance and improve the vegetable varieties; enables the I Co to achieve breeding progress through assessment of external and internal traits such as plant habitual disease resistance, yield or quality traits. The taxpayer provides I Co, plants' value chain and solutions for its customers and consumers worldwide demonstrating the industrial and commercial ramification of the analysis conducted by the taxpayer.



The other segment of 'royalty' definition under India-Netherlands tax treaty comprises of payment of any kind received as a consideration **for information concerning industrial, commercial or scientific experience**. The use of the expression **or for information concerning industrial, commercial or scientific experience** signifies a distinct and separate category than the "copyright" of 'literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process'.



The consideration paid to the taxpayer was not merely for the access to certain software, but more specifically for the information contained in the marker analysis and report of production of double haploid which was uploaded in the software's portal. In the current case, the consideration was not for use/right to use of copyright contained in the software whose access was given by the taxpayer, but for the information and knowledge developed out of technology and scientific experience imparted by the taxpayer to the I Co.



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Background:

- The taxpayer¹ is registered under the law of Netherlands. Its purpose, by collaboration with partners, is to improve vegetable varieties and solutions for customers, the vegetable value chain and consumers worldwide.
- The taxpayer, during the Financial Year (FY) 2020-2021, corresponding to Assessment Year (AY) 2021-22, received certain amount on account of testing services rendered to its Indian entity (I Co), to improve plant varieties. It also received amount towards reimbursement of information technology ('IT') support services from I Co.
- I Co sends some dried leaves to the taxpayer for **marker analysis** by placing a request for testing of such leaves through a common tool, available to group entities. The required details of leaves are also placed on the portal. The leaves are labelled by the taxpayer as different sample with a different number. Thereafter, all the samples shared with the taxpayer are tested at the taxpayer's Research and Development (R&D) centre with the use of required chemicals and technologies.

Once the samples are tested at R&D centre, results in a Microsoft excel sheet are shared with I Co through the same tool. The time or total duration required to perform the above testing and sharing of the results with I Co is approximately 20-25 days. As I Co lacks the technology and resources, hence the samples are sent to the taxpayer for marker analysis services.

There is another type of service which is called Double Haploid ('DH') services. A doubled haploid (DH) is a genotype formed when haploid cells undergo chromosome doubling. Doubled-haploid technology enhances "forward breeding" by allowing hybrids to be bred with new traits. This gives the taxpayer an early look at new lines and enhanced knowledge about their environmental adaptability before they are fully tested, developed and marketed.

The process flow involved for DH Services is that firstly, I Co sends some seeds to the taxpayer for DH conversion. The taxpayer grows these seeds at their poly houses till the time they become a plant. Out of that plant, a tissue or cell is extracted in R&D centre and new plant is formed which is called a DH plant. From DH plant, seeds are extracted again by R&D centre and sent back to the I Co. Time or total duration required to complete this process is 1.5 years (i.e., 18 months).

- The taxpayer filed its return of income declaring NIL taxable income and claimed the above receipts as non-taxable.
- During the audit proceedings, the Assessing Officer (AO) rejected the taxpayer's claim of exempt income and assessed the total income as taxable against NIL returned income.
- Aggrieved, the taxpayer filed objections before the Dispute Resolution Panel (DRP) which held that the receipt of amount on account of testing services rendered should be treated as royalty taxable as per applicable rates prescribed under India-Netherlands tax treaty read with section 9(1)(vi) of the Income-tax Act, 1961 (ITA). With respect to the amount on account of reimbursement of IT support services, the DRP held that it partakes the nature of Fees for technical services (FTS) liable to tax under the India-Netherlands tax treaty read with section 9(1)(vii) of the ITA.
- Aggrieved, the taxpayer filed an appeal before the Delhi Bench of the Income-tax Appellate Tribunal (ITAT).

¹ Nunhems Netherlands B.V. vs. ACIT, International Taxation [2025] 181 taxmann.com 497 (Delhi - Trib.)

Relevant provisions in brief:

Article 12-Royalties and Fees for Technical Services (India-Netherlands tax treaty)

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.*
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 laws of that State, but if the recipient is the beneficial owner of the royalties, or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or the fees for technical services.*
3.
4. ***The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.***

Decision of the ITAT

The ITAT acknowledged that the issue was whether the Marker Testing Services and Double Haploid (DH) Services, considering its nature, would fall within the definition of 'Royalty' as enumerated under Article 12(4) of the India-Netherlands tax treaty?

The ITAT observed as follows:

- The nature of service rendered by the taxpayer to I Co was to support the breeding programs in India by providing marker analysis services and producing double haploids.
- The 'test report' were not simply test but were 'marker analysis services' provided by the taxpayer to support I Co's breeding programs in India.
- The Cambridge English Dictionary describes the term 'analysis' as the act of studying or examining something in detail, in order to discover or understand more about it, or your opinion and judgment after doing this. Thus the 'marker analysis service' contained examination of the seeds and leaves on which the taxpayer and I Co formed an opinion and judgement with respect to future breeding programs in India.
- The term "Royalty", under Article 12(4) of the India-Netherland tax treaty has two segments. The tax treaty thus defines two categories of consideration - one for use of '**copyright**' and the other is for use of '**information**'.
'Royalty', in one segment, is payments of any kind received as a consideration for the use of, or the right to use, any **copyright** of literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process.
The other segment comprises of payment of any kind received as a consideration **for information concerning industrial, commercial or scientific experience**. The two segments are segregated by the use of expression, '**or**' which is primarily a **coordinating conjunction**, used to connect alternatives. The use of the expression **or for information concerning industrial, commercial or scientific experience** therefore, signifies a distinct and separate category than the "copyright" of 'literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process'.
- In the current case, the taxpayer was supplying information in the form of scientific experience which had commercial ramification to the I Co in breeding plant variety. The taxpayer was mandated and bound by the 'agreement' with I Co, to mandatorily support the breeding programme in India because it possessed and was equipped with all the technology and resources.

This was because the I Co did not have the technology and resources and hence the samples of leaves and seeds were sent to the taxpayer for testing and analysis. The taxpayer tested and conducted analysis of the leaves and seeds sent by I Co which was labelled by it as different sample with a different number and thereafter, the leaves were tested at taxpayer's R&D centre with the use of required chemicals and technologies. The whole process took approx. 20-25 days and the result were shared with the I Co.

- The other type of testing took 1.5 years (i.e., 18 months) i.e., double haploid, the process of testing of seeds was more technical which involved chromosome doubling in the seed, where the taxpayer grew these seeds at their poly houses till the time they become a plant. Out of that plant, a tissue or cell was extracted in R&D centre and new plant was formed which was called a DH plant. From DH plant, seeds were extracted again by R&D centre and sent back to the I Co. Thus, DH testing imparted technology and knowledge to the I Co to 'forward breeding' by allowing hybrids to be bred with new traits wherein it got equipped with knowledge to create new lines and greater knowledge about their environmental adaptability before they were fully tested, developed and marketed.
- The taxpayer's report sent to the I Co, encapsulated all the scientific experience and knowledge of the taxpayer, gleaned in the process of converting the seed from ordinary to DH seeds, prepared over a time period spanning over 18 months. The reports sent were nothing but a bank of scientific experience and advice emanating from technological and scientific method undertaken by the taxpayer as was mandated in the 'agreement' between taxpayer and I Co.
- In the current case, the consideration was not for use/right to use of copyright contained in the software whose access is given by the taxpayer to the I Co, but for the information and knowledge developed out of technology and scientific experience imparted by the taxpayer to the I Co.
- The taxpayer was not simply providing testing services. It provided specific information of the leaves and seeds to the I Co which were soaked in taxpayer's scientific experience where it carried out experiments on the seeds sent to it, involving extraction of tissue or cell to create a new plant. Further a new breed of seed is extracted from the said plant developed by the taxpayer which is utilized by the AE in breeding new variety of plant for commercial exploitation.
- The taxpayer through such information, in the form of test reports, provided support to the I Co to enhance and improve the vegetable varieties; enabled the I Co to achieve breeding progress through the assessment of external and internal traits such as plant habitual disease resistance, yield or quality traits. The taxpayer provided I Co, plants value chain and solutions for its customers and consumers worldwide demonstrating the industrial and commercial ramification of the analysis conducted by the taxpayer.

In view of the above, the ITAT held that the receipts from testing service satisfied the condition under Article 12(4) of the India-Netherlands tax treaty to be considered as 'Royalty'.

Comments:

Classification of payments as fees for technical services or royalty and thus, applicability of beneficial ta treaty provisions has been a subject of litigation.

The ITAT in this ruling, amongst others, has examined if the income classifies as royalty under the India-Netherlands tax treaty, on the basis that it is a consideration for information concerning industrial, commercial or scientific experience.

The ITAT in this ruling, based on the facts of the case, has *inter-alia* held as follows:

- The nature of service rendered by the taxpayer to I Co was to support the breeding programs in India by providing marker analysis services and producing double haploids. The 'test report' were not simply test but were 'marker analysis services' provided by the taxpayer to support I Co's breeding programs in India.

- The taxpayer through such information, in the form of test reports, provide support to the I Co to enhance and improve the vegetable varieties; enables the I Co to achieve breeding progress through the assessment of external and internal traits such as plant habitual disease resistance, yield or quality traits. The taxpayer provides I Co, plants' value chain and solutions for its customers and consumers worldwide demonstrating the industrial and commercial ramification of the analysis conducted by the taxpayer.
- The use of the expression ***or for information concerning industrial, commercial or scientific experience*** signifies a distinct and separate category than the "copyright" of 'literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process'.
- The consideration paid to the taxpayer was not merely for the access to certain software, but more specifically for the information contained in the marker analysis and report of production of double haploid which was uploaded in the software's portal. In the current case, the consideration was not for use/right to use of copyright contained in the software whose access was given by the taxpayer, but for the information and knowledge developed out of technology and scientific experience imparted by the taxpayer to the I Co.

Separately on the issue of taxpayer receiving consideration for IT support services from the I Co, the ITAT held that the taxpayer engaged a third party to provide a bundle of IT support services to affiliate entities across the globe. The third party along with its local supplier, would provide IT support services to the taxpayer and the I Co wherein the I Co may request for end-to-end IT support services including IT infrastructure services, data centre services, cyber security, applications, and maintenance of various business suite applications etc.

The said receipts were merely reimbursement of IT support services, where whatever the third party charges the taxpayer, the same was recouped from the I Co.

The services rendered by taxpayer were routine in nature and were provided on recurring basis and it never 'made available' any skills, know-how, knowledge, experience, etc. known to the recipient of the service so as to equip him to independently perform the technical function himself in future, without the help of the service provider and hence, the same was not taxable as fees for technical services (FTS). When the "make available" clause was not satisfied, the receipts for IT support services cannot be brought under the ambit of FTS under the Article 12(5) of the India-Netherlands tax treaty.

Taxpayers may want to evaluate the impact of this ruling to the specific facts of their cases.



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