

In Re: Cargo Community Network

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Court : Authority for Advance Rulings

Decided On : Jan-22-2007

Judge : S S Quadri, A Narang, A Sinha

Appellant : In Re: Cargo Community Network

Advocate for Pet/Ap. : Mr. S. Ramesh

Judgement :

Appellants: In Re: Cargo Community Network Pte. Ltd. Vs.

Syed Shah Mohammed Quadri, J. (Chairman), A.S. Narang and A. Sinha, Members o Income deemed to accrue or arise in India--DTAA between India and SingaporeActivity of providing access to an internet based cargo portal hosted at Singapore and having help desk in India--Applicant, a non-resident company having its registered office at Singapore, was engaged in business of providing access to an Internet based Air cargo portal. Applicant had a help desk support in India through which agent may clarify their doubts like using the portal. Applicant sought advance ruling on the question as to whether the payment made by Indian subscriber to it for providing a password to access and to use the portal hosted from Singapore, is taxable in India and is subject to deduction of tax at source. Held: The payment made by Indian subscriber for providing a password to access and to use the portal hosted from Singapore would be taxable in India and would be subject to deduction of tax at source.

Admittedly the applicant is having income from subscriptions received from various cargo agents in India towards the use of portal for cargo booking and cargo tracking of various airlines. The subscription consists of one time receipt of systems connect fee that includes training fee, monthly subscription fees and Help desk Charges as they arise (hereinafter collectively referred to as the payments). The Counsel have agreed that the payments are in the nature of business income of the non-resident (CCN Pvt. Ltd.). Counsel for the revenue has pleaded that L.O. has been converted into a permanent establishment, but this is strongly contested by the counsel for the applicant. [Para 6] The systems connect fee that includes training charges (for 2 persons), monthly subscription fee for concurrent access, fee for additional access and help desk charges are all payments essentially being made by a cargo agent in India for use of the Ezycargo portal developed by the applicant and hosted on his server in Singapore.

Portal is displayed on the computer screen of the cargo agent through which he can access various airlines for booking of cargo, and the acceptance of the concerned airline is conveyed in India. Therefore, it would be correct to say that the use of the commercial equipment is made in India and the 'payments' also arise in India. The complex portal designed by the applicant is the result of long standing commercial experience and research in the line of cargo booking. It offers a sophisticated platform for a complete range of services that enable the clients (forwarders) to manage their time-critical transactions with major carriers. It offers global online-access convenience to a comprehensive range of functions and complete management solution for cargo booking and subsequent multi-carrier track and trace facility. The portal designed by the applicant is hosted on its server in Singapore with Internet accessibility on one side to cargo agents and on the other side to different airways. The portal which is a complex, commercial, Internet site provides a gateway for processing requests for cargo booking to different airlines, and obtaining their acceptance. The use of portal is not possible without the use of server that provides Internet access to the cargo agents/subscribers on the one hand and to different airlines on the other hand for to and fro communication. Therefore, the portal and the server together constitute integrated commercial-cum-scientific equipment and for obtaining Internet access to airlines the use of portal without server is unthinkable. Whereas the portal performs

complex functions of providing access to different airlines and translation of messages from English to IMP language, the server provides connectivity and Internet access for processing requests for booking of cargo and subsequent multi carrier trace and track facility, etc. Therefore, the plea of that cargo booking agent never uses the server of the applicant for processing or obtaining any data, and that the use of the equipment involves at least some degree of domain or control over the equipment, to suit the business needs of the user, is not tenable. The factual position is that a cargo booking agent/subscriber depending on his business needs, can use the portal at will on the server platform of the applicant, at any time according to his needs for processing his request for booking cargo with various airlines, and obtaining benefits of other sophisticated services offered by Ezycargo. Para (3) of article 12 defines the term 'Royalties and fees for technical services'. [Para 7] It is seen that the term 'Royalties' as used in sub-clause (b) of para (3) of article 12 means payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment. As already stated, Ezycargo portal on the C.C.N. Server Platform is scientific equipment, authorized to be used for commercial purposes.

Therefore, payments made for concurrent access to utilize the sophisticated services offered by the portal, would be covered by the expression 'royalties' as used in article 12 of the DTAA. Further, the technical and consultancy services being rendered by the employees of the applicant in training the subscribers and providing help desk support, in India is covered by the description of 'Fees for technical services'. These are ancillary and subsidiary to the application and enjoyment of the use of, or the right to use, the scientific equipment for commercial purposes. [Para 4] What remains to be seen is whether the payments being made to the C.C.N. Pvt. Ltd. fall within the meaning of 'Royalty' and 'Fees for Technical Services' as defined in Section 9(1). [Para 8] Meaning of the term 'Royalty' as used in Explanation 2 to clause (vi) of Sub-section (1) of Section 9, is at par with the term 'Royalties' as used in article 12(3)(b) of the DTAA. The term 'Fees for Technical Services' as used in Explanation 2 of clause (vii) of Sub-section (1) of Section 9, is analogous to the term 'Fees for Technical Services' as used in article 12(4)(a) of the DTAA. In view of this position, the payments being made by the agents/subscribers (residents), to the C.C.N. Pvt. Ltd. (a non-resident), are

chargeable to tax in India, under article 12 of the DTAA as also under Section 9 of the Act. [Para 9] Inasmuch as the payments made by the subscribers to the applicant are in the nature of "Royalties and fees for technical services" and taxable under article 12 of the DTAA, the said payments cannot, therefore, be treated as business income. [Para 10] "The payments made by the Indian subscriber to the Cargo Community Network Private Limited at Singapore, for providing a password to access and use the portal hosted from Singapore, are taxable in India under article 12 of DTAA as also under Section 9 and subject to deduction of tax at source." [Para 14] 1. This application under Section 245Q(1) of the Income-tax Act, 1961 (for short "the Act"), in Form No. 34C (meant for non-resident applicants) has been filed on February 23, 2006, by M/s. Cargo Community Network Pte Limited (hereinafter referred to as "the applicant"), a tax resident of Singapore. The applicant is a company incorporated under the Companies Act, Singapore, having its registered office in Singapore. It is a matter of record that earlier the applicant had filed an application (AAR/664/2005) before the Authority on May 30, 2005, but on the ground that the relevant facts had not been incorporated in the annexure to the application, it was withdrawn with liberty to file a fresh application and accordingly that application was rejected as "withdrawn" on January 18, 2006.

2. The applicant is engaged in the business of providing access to an internet based air cargo portal known as Ezycargo at Singapore. An agent who books cargo through various airlines can subscribe for the portal-Ezycargo - which enables him to access the data bank of the airlines like flight schedules, availability of cargo space etc. The portal enables an agent to check the connect flight details to the desired place and enables him to arrive at the economics of transporting the cargo to the desired destination. The cargo space availability for booking cargo can be checked only for a specified aircraft of specified airlines. The agent can book the cargo by choosing a specified airline and submitting the details asked for in the booking sheet like airway bill number etc., as provided by the airlines, dimension and weight of the cargo. In addition the portal performs other functions like furnishing the status of booking to the agent, creating data base for various bookings by furnishing the status of the shipment, etc. The portal transmits data from the agent to the airlines by transmitting from simple English language to

Cargo IMP data and on receiving the reply of the airlines converts the Cargo IMP into simple English language and transmits the same to the agent. For these services the applicant charges subscription fee, system connects fee and helpdesk support fee, etc. The applicant opened a liaison office in Chennai with the permission of the Reserve Bank of India to act as a communication channel between the head office and parties in India. It is, however, mentioned that the liaison office does not take up any activity of a trading or commercial nature nor does it provide any consultancy or other services with or without consideration. The expenses of the liaison office are met exclusively out of funds remitted from Singapore through normal banking channel. It maintains account with Deutsche Bank at Chennai. There are two employees in the liaison office who receive messages from subscribers in India for the purpose of communicating with the head office and supplying information to the intending agents. The agents make subscription directly to the head office at Singapore and the agreement for the use of the portal is also signed at the head office at Singapore. No software or programme is installed in the computer system of the agent who is given an exclusive password to access the portal. The applicant also imparts training to agents to use the portal in its entirety. The training, it is stated, consists of only demonstration and no technical knowledge is imparted to the subscribers. The head office at Singapore maintains the portal. The applicant has a helpdesk support in India through which the agents may clarify their doubts like using the portal. The agents propose to deduct income-tax at source under Section 195 of the Act from the subscription amount which necessitates the applicant to approach the Authority.

3. On the basis of these facts the applicant has sought advance ruling from the Authority on the following question: Whether the payments made by the Indian subscriber to the Cargo Community Network Pte Limited towards the portal located at Singapore is taxable in India and is subject to tax deduction at source?

4. During the course of hearing of the application on September 27, 2006, Mr. S. Ramesh, learned Counsel for the applicant, sought and was granted permission to amend the question. Following is the amended question: Whether the payment made by the Indian subscriber to the Cargo Community Network Private Limited at

Singapore, for providing a password to access and use the portal hosted from Singapore, is taxable in India and is subject to deduction of tax at source?

5. The Commissioner in his comments has stated that Ezycargo is a secure carrier-neutral service portal developed by Cargo Community Network Singapore (CCN). It is a sophisticated platform offering a complete range of services that enable the forwarders to manage their time-critical transactions with major carriers quickly, in a simplified and cost effective way. The result is a one-step, integrated communications solution catering to the needs of the airfreight community. It offers forwarders and carriers global online-access convenience to a comprehensive range of functions used for their day-to-day time-critical transactions. It also offers a range of complete management solutions to perform a variety of functions on one single platform. Its key features are:

6. With information available on demand there is vast improvement in the quality of service and information provided to the customers of the cargo agents/forwarders, as and when they need it. Therefore, the business of the applicant is not merely holding of the portal or providing access through the portal, but much more than that as specified above. The company was permitted to establish a liaison office at Chennai in India by the Reserve Bank of India for the sole purpose of acting as a communication channel between the head office and parties in India. The RBI permission was granted subject to certain conditions. The liaison office is headed by a general manager with two executives, one looking after administrative function and the other providing technical support. The technical person is trained on Ezycargo programme and he is training the agents in Chennai. The subscription fee for the first Ezycargo concurrent access is USD 180.00 per month. For the second to the fifth Ezycargo concurrent access, the subscription fee shall be USD 50.00 per month for each additional access. A connect fee (one-time) of USD 200.00 will be charged for the first Ezycargo concurrent access, which shall include a one day classroom training on the usage of Ezycargo, limited to two participants.

7. Subject to seats availability, a subscriber may nominate more than two participants to the training course by paying a surcharge of USD 80.00 for each

additional participant (limited to training in Chennai).

For each subsequent concurrent access a connect fee of USD 150.00 is levied. This shall include one day classroom training on the usage of Ezycargo, limited to two participants. Help desk support is provided during office hours, via telephone or e-mail until the problem is resolved. In the event of an on site support required to fix a problem due to no fault of CCN, a charge of USD 100.00 is levied. The applicant has opened a liaison office at Chennai for sthree years from 2004-05 for the purpose of undertaking solely liaison activities, i.e. to act as communication channel between the head office and parties in India, subject to conditions laid down by the RBI. Clause (vii) of the conditions in the annexure is as under: The office in India will not render any consultancy or any other service directly/indirectly with or without consideration.

8. The applicant violates this clause by providing training at Chennai on the usage of Ezycargo. Further the provision of on site helpdesk support by the technical staff and training to the agents indicate that the liaison office is carrying on the business of the applicant either wholly or partly. The applicant, therefore, carries on the business through the P. E. in India and the payments of subscription fees, system connect fee and help desk charges are directly or indirectly attributable to the P. E. in India.

9. The provisions of Article 7(1)(business profits) of the Double Taxation Avoidance Agreement states as under (see): The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment.

10. Accordingly, the payments made by the subscriber/cargo agent for the use of portal are taxable as business income. Moreover the consideration paid as subscription fees, etc., amounts to payment for use of portal and server of the applicant on the seven features of the comprehensive "Ezycargo" system, and is well within the ambit of royalty as per clause (iva) of Explanation 2 to Section

9(1)(vi) of the Act, especially when the contract for cargo booking is made in India and the source of payments is also in India. Article 12(3)(b) of the Double Taxation Avoidance Agreement with Singapore defines royalty as payments of any kind received as a consideration for the use of, or the right to use any industrial commercial or scientific equipment.

11. In the rejoinder it has been stated that the applicant's income is from subscription received from various agents towards portal for cargo booking and cargo tracking of various airlines. The subscription consists of one time receipt of system connect fees which includes training, monthly subscription fees and help desk charges as they arise. The above income can fall within the definition of business income of the applicant. In such a situation, whether the same falls within the taxable territory of India, depends on whether the liaison office is a permanent establishment or not. The company opened the liaison office (L.O.) at Chennai for the purpose of acting as a communication channel. The L.O. at Chennai has not undertaken or is not undertaking any activity of a trading or commercial nature nor had it entered into any business contracts in India. The entire expenses of the L.O. at Chennai are met exclusively out of the funds remitted from Singapore through normal banking channel. The L.O. at Chennai has employed two staff members to receive messages from subscribers in Chennai who intend to communicate with the head office. The intending subscribers make the subscription directly to the head office at Singapore. The agreement for usage of the portal on behalf of the company is signed at the head office. The information accessible and the statistics accessible in the web portal are those of various airlines. The company does not undertake or offer any technical services to any subscribers. No software or program is installed in the system of the subscribers. Only an exclusive password is given to the subscribers to enable them to access the website. This password is case sensitive and wrong usage would deny access to the portal by the subscriber. The company demonstrates the user of the portal to familiarize the portal so that they can use the portal in its entirety.

The company termed this demonstration as imparting training to the subscribers. The training is only a demonstration of how to access the website properly and to demonstrate the importance of entering data correctly for proper access. That the

portal is wholly maintained by the head office in Singapore and it has a helpdesk support through which the subscribers here clarify their doubts while using this portal. That the function of the portal is to translate the data sent by the subscribers from simple English language to airlines system language and to transmit the data to the specific airline and also vice versa. The L.O. does not have access to any data of the subscribers nor their user I. D. and password. The L.O. acts as a mere communication link between the head office and subscribers. The L.O. is not carrying out any revenue earning activity within the territorial jurisdiction of India, which will be chargeable to tax under the Indian tax laws. The entire expenditure of the L.O. has been met out of remittances from head office only. The L.O. does not generate any revenue and that can be evidenced from the receipts and payments account of the L.O., in view of this position the liaison office cannot be treated as permanent establishment. That subscription fee, system connect fee and helpdesk support charges cannot be treated as royalty or fees for technical services either under the Double Taxation Avoidance Agreement or the Act.

12. During the course of oral hearing on September 27, 2006, and in the subsequent written submissions filed on November 13, 2006, it has been contended by Shri S. Ramesh, C.A. on behalf of the applicant that Article 12(3)(b) defines the term "royalty" to mean payment of any kind received as a consideration for the use of, or the right to use any industrial, commercial or scientific equipment. This expanded definition of royalty covers the payment for use of equipment.

Obtaining access to the Singapore company's portal for getting the commercial information by any stretch of reasoning does not amount to use of equipment of the Singapore company. Use of equipment involves at least some degree of domain or control over the equipment to suit the business needs of the person. In this regard, the cargo-booking agent never uses the server of the applicant for processing or obtaining any data. The server functions only as a gateway to submit the booking sheet into the system of airlines by translating from simple English to cargo IMP data (airlines system language). Neither the portal of the applicant nor the server of the airlines is automated to take decision for booking

the cargo. In such a situation, the subscription made by the subscriber cannot be treated as usage for equipment. The cargo-booking agent pays for the provision of data for booking the cargo in turn to be passed on to the airline system. The subscription fee, system connect fee and helpdesk support charges are paid by the cargo booking agent to the applicant to pass on his requirement of booking the cargo to the specified airlines, the reason being airlines never allow the cargo booking agent to access their server directly for security reasons. Moreover, air cargo can never be booked without human intervention. That is to say, whenever an agent books cargo at any given point of time, he can approach only for a specific flight for a specific consignment of a particular dimension and make request for booking. The request is accepted or declined by the airline staff. As the portal or server of the applicant cannot automate the decisions, the payments made cannot be regarded as payments made for use of equipment. As per the definition of equipment from / . A. Parks Principles and Practices of Valuation on page 483 as "Equipment are the ancillary assets that are used to assist productive function in an enterprise, viz, trailers, lorries, tractors, computer installation, photo copier, telephone system, fire engine and the like". Further it states that plant, machinery and equipments though often embedded on the earth are regarded as fully replaceable assets. From the above, it is evident that the portal cannot be treated as equipment. In support of the above contentions reliance has been placed on the following cases: 1. The Madhya Pradesh High Court in CIT v. HEG Ltd. followed by the Income-tax Appellate Tribunal 2. The Madras High Court in Sh/cell Communications Ltd. v. Deputy CIT .

13. It is also contended that even if it is presumed that Article 12 applies in respect to the payments made by the cargo-booking agent as royalty or fees for technical services, Clause 6 of Article 12 should be applied. This clause provides the application of Article 7 wherein Clause 1 states "the profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment". On the other hand, if the payments are treated as business income, the business of the applicant falls under the category of shipping and air transport.

Clause 4(d) of Article 8 of the Double Taxation Avoidance Agreement between India and Singapore excludes the income from taxability in India. It is taxable only in Singapore.

14. Shri S.D. Kapila, learned Counsel for the Commissioner, has pleaded that the applicant has a Permanent Establishment in India inasmuch as it has a fixed place of business in Chennai that is DBS Business Centre where the applicant is providing training which is an ongoing process.

That for the purpose the applicant has employed two senior trainers and additional fees is charged for training depending on the number of persons who are sponsored by the cargo agent who subscribes for the use of the portal. The training is not just preparatory or auxiliary but an essential and inseparable part of the process of use of a complex portal and as such the business profits earned by the applicant in India are taxable under Article 7(1) and (8) of the Double Taxation Avoidance Agreement with Singapore, since the applicant is having a P.E. in the garb of the L.O. Alternatively, it is argued that the portal, which the server in Singapore hosts is nothing but a virtual market that is accessed by the booking agent in India, and it is displayed on the computer screen of the cargo agent. Proposal for booking is made in India and acceptance is conveyed by the concerned airline in India and contract is concluded in India. Thus, the portal equips the cargo agent to access the server of the airlines and in that sense it is intangible equipment by itself and the location of the server of the applicant (being in Singapore) is immaterial. The systems connect fees that include training fee, monthly subscription fees and help desk charges, are therefore nothing but royalty for the use of, or the right to use scientific equipment under Article 12(3)(b). That the royalty is also taxable under Explanation 2(iva) of Section 9(1)(vi) of the Act. That Sub-clause (iva) was introduced with effect from April 1, 2002, therefore, old case law prior to that date would not be applicable. It was also stated by learned Counsel that the case law relied on by the applicant was distinguishable on facts and in law.

15. We have carefully considered the written submissions of the applicant, and the Revenue as also the submissions of learned Counsel during the course of oral

hearing. Admittedly, the applicant is having income from subscriptions received from various-cargo agents in India towards the use of portal for cargo booking and cargo tracking of various airlines. The subscription consists of a one time receipt of systems connect fee that includes training fee, monthly subscription fees and help desk charges as they arise (hereinafter collectively referred to as the payments). Counsel have agreed that the payments are in the nature of business income of the non-resident (CCN Pvt. Ltd.).

Counsel for the Revenue has pleaded that the L.O. has been converted into a permanent establishment, but this is strongly contested by counsel for the applicant. Before we examine the plea of the learned Counsel, it is important to refer to paragraph 7 of Article 7 of the Double Taxation Avoidance Agreement with Singapore (hereinafter referred to as the DTAA) notified, vide Notification No. GSR 610 (E), dated August 8,1994 (See). Paragraph 7 deals with items of income, which are dealt with separately in other articles of the Double Taxation Avoidance Agreement. The relevant extract is given hereunder (page 9): (7) Where profits include items of income which are dealt with separately in other articles of this agreement, then the provisions of those articles shall not be affected by the provisions of this article.

16. A plain reading of the paragraph quoted above shows that where profits include items of income which are dealt with separately in other articles of the agreement, then the provisions of those articles shall not be affected by the provisions of this article. Therefore, it follows that if the "payments" fall under any other article of the Double Taxation Avoidance Agreement, they will have to be dealt with under that particular article. The plea of the Revenue is that they are covered by Article 12 of the Double Taxation Avoidance Agreement, which deals with "Royalties and fees for technical services". If the payments fall under Article 12 then Article 7 is ipso facto excluded. It is, therefore, necessary to ascertain the nature of the "payments".

17. The systems connect fee that includes training charges (for 2 persons), the monthly subscription fee for concurrent access, the fee for additional access and help desk charges are all payments essentially being made by a cargo agent in

India for use of the Ezycargo portal developed by the applicant and hosted on his server in Singapore. The portal is displayed on the computer screen of the cargo agent through which he can access various airlines for booking of cargo, and the acceptance of the concerned airline is conveyed in India. Therefore, it would be correct to say that the use of the commercial equipment is made in India and the "payments" also arise in India. The complex portal designed by the applicant is the result of longstanding commercial experience and research in the line of cargo booking. It offers a sophisticated platform for a complete range of services that enable the clients (forwarders) to manage their time-critical transactions with major carriers. It offers global online-access convenience to a comprehensive range of functions and complete management solution for cargo booking and subsequent multi-carrier track and trace facility. The portal designed by the applicant is hosted on its server in Singapore with internet accessibility on one side to cargo agents and on the other side to different airways. The portal which is a complex, commercial, internet site provides a gateway for processing requests for cargo booking to different airlines, and obtaining their acceptance.

18. The use of the portal is not possible without the use of the server that provides internet access to the cargo agents/subscribers on the one hand and to different airlines on the other hand for to and fro communication. Therefore, the portal and the server together constitute integrated commercial-cum-scientific equipment and for obtaining internet access to airlines the use of the portal without the server is unthinkable. Whereas the portal performs complex functions of providing access to different airlines and translation of messages from English to IMP language, the server provides connectivity and internet access for processing requests for booking of cargo and subsequent multi-carrier trace and track facility etc. Therefore, the plea of Shri S. Ramesh that cargo booking agent never uses the server of the applicant for processing or obtaining any data, and that the use of the equipment involves at least some degree of domain or control over the equipment, to suit the business needs of the user, is not tenable. The factual position is that a cargo booking agent/subscriber depending on his business needs, can use the portal at will on the server platform of the applicant, at any time according to his needs for processing his request for booking cargo with various airlines, and obtaining benefits of other sophisticated services offered by Ezycargo. Paragraph

(3) of Article 12 defines the term "royalties and fees for technical services". For the sake of convenience the relevant clauses of Article 12 are extracted below: 3. 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:....

(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8 4. For purposes of this article, 'fees for technical services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provisions of services of technical or other personnel) if such services: (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or 19. From the above, it is seen that the term "royalties" as used in Sub-clause (b) of paragraph (3) of Article 12 means payments of any kind received as a consideration for the use of, or the right to use, any industrial, commercial or scientific equipment. As already stated, the Ezycargo portal on the C.C.N. server platform is scientific equipment, authorized to be used for commercial purposes. Therefore, payments made for concurrent access to utilize the sophisticated services offered by the portal, would be covered by the expression "royalties" as used in Article 12 of the Double Taxation Avoidance Agreement. Further, the technical and consultancy services being rendered by the employees of the applicant in training the subscribers and providing help desk support, in India is covered by the description of "fees for technical services". These are ancillary and subsidiary to the application and enjoyment of the use of, or the right to use, the scientific equipment for commercial purposes.

20. Now, what remains to be seen is whether the payments being made to the C.C.N. Pvt. Ltd. fall within the meaning of "royalty" and "fees for technical services" as defined in Section 9(1) of the Act: 9. Income deemed to accrue or arise in India.

- (1) The following incomes shall be deemed to accrue or arise in India....

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person outside India or for the purposes

of making or earning any income from any source outside India ; or....

Explanation 2. - For the purposes of this clause, 'royalty' means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head 'Capital gains') for-....

(iva) the use or right to use, any industrial, commercial or scientific equipment but not including the amounts referred to in Section 44BB ; (b) a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or....

Explanation 2. - For the purposes of this clause, 'fees for technical services' means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries'.

21. After carefully going through the above provisions we find that meaning of the term "royalty" as used in Explanation 2 to Clause (vi) of Sub-section (1) of Section 9, is at par with the term "royalties" as used in Article 12(3)(b) of the Double Taxation Avoidance Agreement.

The term "fees for technical services" as used in Explanation 2 of Clause (vii) of Sub-section (1) of Section 9, is analogous to the term "fees for technical services" as used in Article 12(4)(a) of the Double Taxation Avoidance Agreement. In view of this position, the payments being made by the agents/subscribers (residents), to C.C.N. Pvt. Ltd. (a non-resident), are chargeable to tax in India, under Article 12 of the Double Taxation Avoidance Agreement as also under Section 9 of the Act.

22. Inasmuch as we have concluded that the payments made by the subscribers to the applicant are in the nature of "royalties and fees for technical services" and

taxable under Article 12 of the Double Taxation Avoidance Agreement, the said payments cannot, therefore, be treated as business income.

23. The contention of Shri S. Ramesh that if Article 12 is applicable then in view of paragraph 6 thereof, the payments should be treated as business income to which Article 7(1) applies, is misplaced since paragraph 6 excludes the provisions of paragraphs 1 and 2 of Article 12 which deal with taxation of "royalties and fees for technical services" in the other State/or in the Contracting State, provided the beneficial owner of the royalties or FTS, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or FTS arise through the permanent establishment situated therein or if the beneficial owner 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 FTS are paid is effectively connected with such permanent establishment or fixed base. It is nobody's case that the conditions to invoke paragraph 6 are present in the instant case. The alternative contention of learned Counsel that if the payments are to be treated as business income, the same fall under the category of shipping and air transport, and therefore, taxable only in Singapore (paragraph 4(d) of Article 8 of the DTAA), is also not sustainable. Firstly, the business of the applicant is to provide services of internet based portal, which does not fall within the category of shipping and air transport. Secondly, we have already concluded that the payments are in the nature of royalties and fees for technical services and not business income.

24. Learned Counsel has placed reliance on the decision of the Madhya Pradesh High Court in the case of HEG Ltd. . As per the facts in that case remittance of USD 25000 had been made to a non-resident for supply of a monthly compilation called "executive overview". On examining the question whether the information contained in the journal was secret and confidential, it was held that payment for each and every information supplied would not have the status of royalty. These facts are clearly distinguishable since payments in the present case are for the use of complex, commercial equipment and for providing training. Reliance is also placed on the decision of the Income-tax Appellate Tribunal, Bangalore Bench in the case of Wipro Ltd. , wherein following the case of the Madhya Pradesh High

Court discussed above, it was held that payments made to a foreign publishing house giving access to certain data, to those willing to pay for the same, would not constitute payments of royalty.

The reliance placed on that case, is of no help to the applicant since the facts of the present case are entirely different and distinguishable.

25. The applicant has also placed reliance on the decision of the Madras High Court in the case of Skycell Communications Ltd. v. Deputy CIT . As per the facts arising in that case it was held by the High Court that the provision of cellular mobile telephone services would not tantamount to providing technical services. The facts in the instant case are clearly distinguishable as here training and help desk support is being provided by the applicant in India for the use of a complex portal-a commercial equipment-for access to different airlines for booking air cargo. The reliance placed on the above case does not help the applicant. In the light of the foregoing discussion we rule as under: The payments made by the Indian subscriber to the Cargo Community Network Pvt Ltd at Singapore, for providing a password to access and use the portal hosted from Singapore, are taxable in India and subject to deduction of tax at source.

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