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Transcending Frontiers

Commission Earned in Singapore on Distribution of Mutual Funds not Taxable in India

June 16, 2022

Introduction

The Mumbai Tribunal ("Tribunal") in its recent ruling in DCIT v. Credit Suisse (Singapore) Ltd[1]. ruled that offshore commission income earned from distribution of Indian mutual fund schemes was not taxable in India. The Tribunal held that since all operations were undertaken outside India, the distribution commission could not be treated as 'reasonably attributable' to any operations in India.

Background

The assessee is a tax resident of Singapore and is registered as a Foreign Institutional Investor ("FII") with Securities and Exchange Board of India ("SEBI"). The assessee and HDFC Asset Management Co Ltd ("HAMCL") had entered into an Offshore Distribution Agreement pursuant to which the assessee distributed mutual fund schemes launched by HAMCL, with a view to procure subscriptions for such schemes from investors outside India. During the relevant previous year, the assessee had earned offshore distribution Commission Income from HAMCL, which was claimed as exempt (relying on the 'make available' clause) under Article 12 of the India-Singapore DTAA ("Treaty") on the ground that no technology was provided to HAMCL nor any technical knowledge, experience, skill, know-how or process was made available to them.

Proceedings Leading up to the Tribunal

Indian Revenue contended that assessee is operating as a distributor/lead manager of an Indian fund, which is controlled and regulated by SEBI and RBI in India, therefore, location control and management of the fund is

1. ITA no.6098/Mum./2019 and ITA no.7262/Mum./2019.

situated in India, which constitutes a business connection in India creating a sufficient nexus of the offshore distribution income with India as per the provisions of section 9(1)(i) of the Income Tax Act ("Act"). Accordingly, the AO taxed the commission income by invoking the provisions of Article 23 of the Treaty r.w.s. 5(2) of the Act[2]. However, at the first appellate proceedings, the CIT(A) deleted the addition made by the AO by referring to the decision of Co-ordinate Bench of the Tribunal in DCIT v Credit Suisse AG[3], following which the revenue approached the Tribunal with the present appeal.

Tribunal's Ruling

The Tribunal noted that all the operations of the assessee were undertaken outside India, Therefore, in such circumstances offshore distribution commission income earned by the assessee could not be treated as being "reasonably attributable" to any operation carried out in India. The Tribunal relied on the SC ruling in CIT vs Toshoku Ltd[4]. wherein in the context of commission earned on sale proceeds of tobacco, it was held that "the commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India." Subsequently, it upheld the CIT(A)'s decision that offshore distribution commission earned by the assessee was in the nature of business income and as such could not be taxed in India in the absence of a permanent establishment.

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2. Article 23 of the Treaty covers income streams which are not included under any other Article of the Treaty and may be taxed in accordance with the taxation laws of the respective Contracting States. Further, Section 5 of the Act lays down the scope of total income for a non-resident which includes the income received or accrued or deemed to be received or accrued in India during the previous year.
3. ITA No. 1247/Mum/2016, The Tribunal had ruled in the same assessee's case for a previous year on similar issues.
4.[1980] 125 ITR 525 (SC).

Amicus Comments

In absence of deeming provision, the existence of a reasonable nexus between the income and jurisdiction is a prerequisite for charging tax on such income. The same has been ruled time and time again in several Court Rulings. The Supreme Court in the cases of Toshoku Ltd[5]. and Ishikawajima-Harima Heavy Industries Ltd. v. DIT[6] has ruled that if no business operations are carried out in the taxable territories, the income accruing or arising abroad from any business connection in India cannot be deemed to accrue or arise in India and won't be taxable.

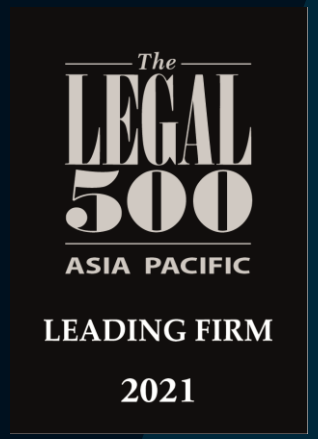
In the present case Revenue overlooked fundamental nexus requirement as all distribution operations were undertaken offshore. Moreover, the assessee had added protection on account of the 'make available' clause in the India-Singapore Tax Treaty whereunder a service does not qualify as 'Fee for Technical Services' unless certain technical knowledge, experience, skill, know-how or process was made available to recipient of service. Hence, the commission earned for distribution services were rightly held non-taxable.

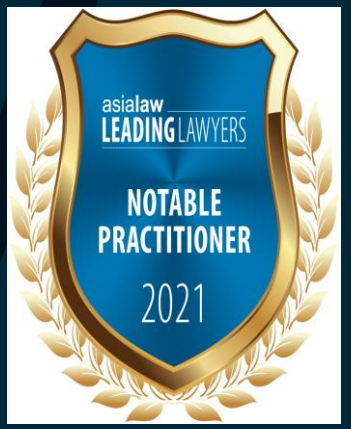
5. Ibid.
6.[2007] 288 ITR 408 (SC).

ABOUT AMICUS

Amicus is legal and tax consulting firm with focus on corporate finance, re- structuring, private equity, international taxation, transfer pricing and goods and services tax. The Firm's tax team also represents clients in assessments and litigation including Tax Tribunal and Higher Courts.

The Firm focuses on providing efficient, effective, solution- oriented advice and representation based on specialist knowledge and experience. Amicus' boutique tax practice has been consistently ranked as a leading practice by Legal 500, Asia Law and World Tax (ITR).





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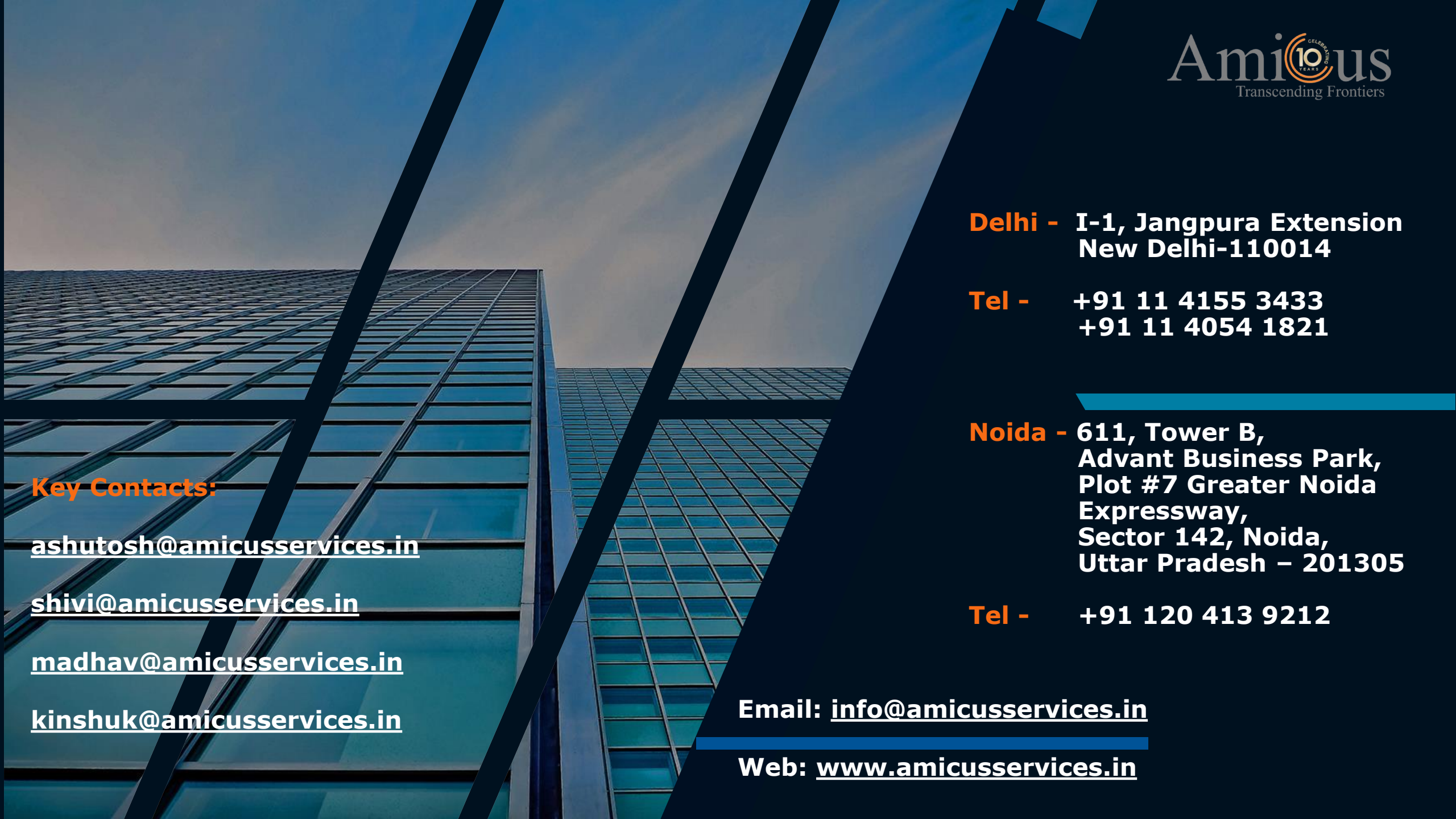

Amicus
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Delhi - I-1, Jangpura Extension
New Delhi-110014

Tel - +91 11 4155 3433
+91 11 4054 1821

Noida - 611, Tower B,
Advant Business Park,
Plot #7 Greater Noida
Expressway,
Sector 142, Noida,
Uttar Pradesh – 201305

Tel - +91 120 413 9212

Key Contacts:

ashutosh@amicusservices.in

shivi@amicusservices.in

madhav@amicusservices.in

kinshuk@amicusservices.in

Email: info@amicusservices.in

Web: www.amicusservices.in