



**Global Business Tax Alert**  
Sharp Insights

The Mumbai Income Tax Appellate Tribunal (the Tribunal) in the case of Capgemini SA (72 taxmann.com 58) has held that corporate guarantee commission received by the appellant from its Indian subsidiary companies does not arise in India. Thus, Article 23 (Other Income) of the India-France tax treaty has no applicability and the guarantee commission was held to be not taxable in the hands of the appellant in India. Separately, the Tribunal also ruled in favour of non-applicability of surcharge in addition to the tax rate specified in Article 13 of the tax treaty in respect of Royalty income earned by the appellant.

**Issue no:** GBTA/40/2016

**In this issue:**

[Background](#)

[Conclusion](#)

[Do you know about Dbriefs?](#)

[Contacts](#)

## **Background:**

- The appellant, Capgemini SA, is a foreign company incorporated in France and is a tax resident there. It is engaged in the business of providing support, sustenance and developmental service to group companies globally.
- The appellant furnished corporate guarantee to a French bank in France on behalf of its various subsidiary companies across the world, including India.
- During the relevant tax year, the Indian subsidiary companies of the appellant availed credit facilities from the Indian branch of the French bank. In this regard, the Indian subsidiaries paid guarantee commission to the appellant in consideration for the corporate guarantee furnished by the appellant to the French bank.
- The appellant, contended that no service was rendered by it, much less a professional/ technical service, and in any case, no service can be said to have been rendered in India. Therefore, the corporate guarantee commission is not chargeable to tax in India and was not included in the tax return filed by the appellant.
- Further, the appellant also accrued certain royalty income from the Indian subsidiaries, which was offered to tax by the appellant under Article 13 of the India-France tax treaty ('tax treaty' or 'DTAA' @ 10%).
- The assessing officer and also the Dispute Resolution Panel ('DRP'), rejected the appellant's arguments and proceeded to tax the guarantee commission in the hands of the appellant under Article 23 (Other Income) of the India tax treaty by contending that the said guarantee commission arose in India.
- Further, in computing the tax liability in the assessment order, the assessing officer imposed surcharge over and above the tax imposed on incomes of guarantee commission and royalty under the tax treaty. Additionally, assessing officer also levied education cess on the tax so computed on royalty income.

## **Questions before the Tribunal**

Aggrieved by the order of the assessing officer/ DRP, the appellant preferred an appeal before the Tribunal on the following pertinent questions:

- Whether guarantee commission is taxable in the hands of the appellant under Article 23 of the India-France tax treaty?
- Whether surcharge is applicable in addition to the tax rate prescribed in the DTAA?

## **Ruling of the Tribunal**

### *On taxability of guarantee commission*

- While deciding on this matter, the Tribunal placed reliance on its own ruling in an identical past case of the same appellant. It was held that guarantee commission received by the appellant did not accrue in India and could not be deemed to accrue in India. Therefore, the same was held as not taxable in India under Income-tax Act ('the Act').
- Furthermore, As per Article 23.3, income can be taxed in India only if it arises in India. In the case of the appellant, the income of guarantee commission clearly arises in France because the guarantee has been given by the appellant, a French company, to a French Bank in France. Article 23.3 therefore would have no applicability on the guarantee commission as the same does not arise in India.
- Accordingly, the Tribunal held that income of guarantee commission received by the appellant is not taxable in India.

### *On applicability of surcharge and education cess*

- The Tribunal rejected the levy of surcharge and education cess by the assessing officer, over and above the tax rates specified in the tax treaty by referring to the definition of taxes in Article 2 of the India-France tax treaty, as per which the expression "income tax" would include any surcharge thereon.
- Further, Clause (2) of Article 2 prescribes that the tax treaty shall also apply to any "identical or substantially similar taxes" which may be imposed by either of the two countries after the signing of the treaty.
- In this regard, the Tribunal also placed reliance on the ruling of the Kolkata bench (22 taxmann.com 310), wherein it was held that education cess is in the nature of an additional surcharge.
- Thus, since Article 2 of the tax treaty provides that the taxes governed by such treaty would include taxes and surcharge thereon, the Tribunal rejected the levy of the surcharge and education cess over and above the cap of 10% prescribed in Article 13 as the tax rate for royalty income.
- The provisions of Article 13 of the India-France DTAA, prescribing a cap of 10% on the rate of tax, read with Article 2 thereof, would in any case prevail over the provisions of the domestic income-tax law. Thus, the tax liability on royalty income shall be capped at 10%.
- Therefore, the Tribunal directed the assessing officer to re-compute the tax liability of the appellant in respect of royalty income accordingly.

## **Conclusion**

The ruling places reliance on an earlier ruling in the case of the same appellant, and does not delve much into the technical aspects/ interpretational issues under the Act or the tax treaty, and fails to provide much clarity on the controversial issue of taxability of guarantee commission. Further, on the aspect of levy of surcharge and education cess, the ruling adds to the pre-existing precedents wherein non-applicability of surcharge and education cess has been upheld in a scenario where tax rate specified in the tax treaty is applicable.

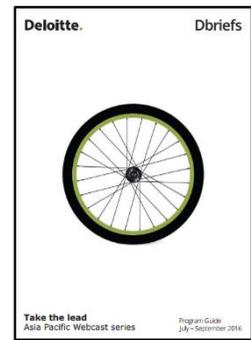
---

## Do you know about Dbriefs?

Dbriefs are live webcasts that give valuable insights on important developments affecting your business. To register, visit the [Dbriefs](#) page



Download the report



# Contacts

## Ahmedabad

19<sup>th</sup> Floor, Shapath - V  
SG Highway,  
Ahmedabad – 380 015.  
Tel: + 91 (079) 6682 7300  
Fax: + 91 (079) 6682 7400

## Coimbatore

Shanmugha Manram  
41, Race Course,  
Coimbatore  
Tamil Nadu - 641018  
Tel: + 91 (0422) 439 2801  
Fax: +91 (0422) 222 3615

## Kolkata

Bengal Intelligent Park Building  
Alpha, 1st floor, Block EP and GP  
Sector V, Salt Lake Electronics  
Complex,  
Kolkata - 700 091.  
Tel : + 91 (033) 6612 1000  
Fax : + 91 (033) 6612 1001

## Bangalore

Deloitte Centre, Anchorage II,  
100/2, Richmond Road,  
Bangalore 560 025.  
Tel: +91 (080) 6627 6000  
Fax: +91 (080) 6627 6010

## Delhi/Gurgaon

Building 10,  
Tower B, 7th Floor,  
DLF Cyber City,  
Gurgaon 122 002  
Tel : +91 (0124) 679 2000  
Fax : + 91 (0124) 679 2012

## Mumbai

Indiabulls Finance Centre,  
Tower 3, 28th Floor,  
Elphinstone Mill Compound,  
Senapati Bapat Marg, Elphinstone  
(W),  
Mumbai – 400013  
Tel: + 91 (022) 6185 4000  
Fax: + 91 (022) 6185 4101

## Chennai

No.52, Venkatanarayana Road,  
7th Floor, ASV N Ramana Tower,  
T-Nagar,  
Chennai 600 017.  
Tel: +91 (044) 6688 5000  
Fax: +91 (044) 6688 5050

## Hyderabad

1-8-384 and 385, 3rd Floor,  
Gowra Grand S.P.Road,  
Begumpet,  
Secunderabad – 500 003.  
Tel: +91 (040) 6603 2600  
Fax: +91 (040) 6603 2714

## Pune

106, B-Wing, 7<sup>th</sup> Floor,  
ICC Trade Tower,  
Senapati Bapat Road,  
Pune – 411 016.  
Tel: + 91 (020) 6624 4600  
Fax: +91 (020) 6624 4605



Deloitte makes an impact that matters

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a more detailed description of DTTL and its member firms.

This material is for internal distribution and use only among personnel of Deloitte Touche Tohmatsu Limited, its member firms, and its and their affiliates. The recipient is strictly prohibited from further circulation of this material. Any breach of this requirement may invite disciplinary action (which may include dismissal) and/or prosecution. Deloitte Touche Tohmatsu Limited, its member firms, and its and their affiliates shall not be responsible for any loss whatsoever sustained by any person who relies on this material.

© 2016 Deloitte Touche Tohmatsu India LLP. Member of Deloitte Touche Tohmatsu Limited