



## **Global Business Tax Alert**

### Sharp Insights

**The Bangalore Tribunal in the case of Flughafen Zurich AG vs. Deputy Director of Income-tax (International Taxation) (IT(IT)A Nos. 1525/Bang/2010, 1437,1438/Bang/2013, 244/Bang/2015), held that the payments made to foreign company towards reimbursement of salary for services provided by the seconded employees to India should be taxable as Fees for Technical Services ('FTS') under India-Swiss Tax Treaty ('Tax Treaty').**

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## Background

- Flughafen Zurich AG. ('the taxpayer'), a non-resident incorporated and tax resident of Switzerland, is engaged in providing operations and management services to airports, including Bangalore International Airport Limited ('BIAL').
- The taxpayer entered into an Expatriate Remuneration Reimbursement Agreement ('agreement') for secondment of skilled personnel to BIAL. The secondees / assignees were holding high managerial positions such as CEO and CCO.
- In addition to the remuneration paid in local currency by BIAL, the assignees were entitled to remuneration in foreign currency from the taxpayer, which was reimbursed by BIAL.
- The taxpayer claimed that the seconded personnel work under the direct control and supervision of BIAL as BIAL has the right to issue directions to them, and thereby, establishing an employer-employee relationship between the secondees and BIAL.
- The Assessing Officer ('AO') in three years considered the payments made to taxpayer as FTS. An appeal was filed by the taxpayer before Commissioner of Income Tax (Appeals) ['CIT(A)'] against the order of the AO. The CIT(A) confirmed the order of the AO.
- In one of the years, AO had considered part payment as FTS. The Dispute Resolution Panel ('DRP') did not accept the contentions of the taxpayer and directed the AO to consider the entire payment received from BIAL under the head "Reimbursement of Expenses" as FTS.
- Aggrieved by the directions of the DRP and the order of CIT(A), the taxpayer preferred to file an appeal with the Tribunal.
- In the appeal to the Tribunal, the taxpayer challenged the treatment of expenses as FTS and also challenged the jurisdiction of the DRP in enhancing the total income.

## Ruling of the Tribunal

### Fees for Technical Services

- The Tribunal observed that there is no dispute on the fact that at the time of entering into the agreement, the secondees were under the employment of the taxpayer and accordingly, it was not an employment or recruitment by BIAL.
- The Tribunal also observed that there was no dispute that the secondees were holding high managerial positions and were not ordinary employees but had the expertise in the field of management. Therefore, the purpose of the assignment was to avail expertise services of the personnel.
- The Tribunal observed that an identical issue was considered by the co-ordinate bench of the same Tribunal in the case of Intel Corporation<sup>1</sup> wherein after considering the decision of the co-ordinate bench of the same Tribunal in the case of Food World Supermarkets Limited<sup>2</sup> it was held that the seconded employees were rendering the managerial and expertise services for which the assessee received the payment and accordingly, should be taxable as FTS.
- In the case of Food World Supermarkets Limited, the Tribunal relied on the decision of the Delhi High Court in the case of Centrica India Offshore Private Limited<sup>3</sup> and concluded that the payments made to the foreign company partook the character of FTS under explanation 2 to section 9(1)(vii) of the Income-tax Act, 1961 ('the Act').

- The Tribunal observed that it did not find material variations in the terms and conditions of the secondment agreement in the above cases as well as that of the taxpayer. The Tribunal further observed that if there is a restriction of the right to continue employment with the taxpayer, it would not determine the relationship as the employee with BIAL.
- The Tribunal observed that there is no significant difference between the definition of FTS under the Act and Tax Treaty. Therefore, when the payment is considered for rendering of a managerial service, it becomes irrelevant to go to the second aspect of definition i.e. provision of services by technical or other personnel.
- Accordingly, the Tribunal held that the reimbursement of expenses qualify as being in the nature of FTS and taxable accordingly in the hands of taxpayer.

### **Jurisdiction of the DRP**

- The Tribunal observed that while filing objections before the DRP against the draft assessment order, in addition to challenging the treatment of part of the expenses as FTS, the taxpayer raised a specific objection in respect of the treatment of expenses reimbursed as FTS.
- While adjudicating these objections, the DRP found that the entire payment received from BIAL under the head "Reimbursement of Expenses" should be treated as FTS instead of only the part amount identified by the AO.
- The Tribunal, relying on the decisions of the Apex Court<sup>4</sup> and Bombay High Court<sup>5</sup>, held that even if no express power of enhancement is provided to an authority under the Act, it has inherent power to decide the issue, which was a subject matter before it, which may result in enhancement.
- Accordingly, the Tribunal dismissed the appeal filed by the taxpayer.

<sup>1</sup> IT(TP)A No.1486/Bang/2013

<sup>2</sup> 174 TTJ 859

<sup>3</sup> 364 ITR 336

<sup>4</sup> Hukumchand Mills Limited vs. CIT (63 ITR 232)

<sup>5</sup> Ahmedabad Electricity Co. Limited vs. CIT (199 ITR 351)

## **Conclusion**

The Tribunal held that the payments made by BIAL to the taxpayer for operations and management services provided, including salary costs, should be taxable as FTS. In respect of arrangement of secondment, it may be pertinent to analyse whether the payments received could be construed as being in the nature of FTS and even when the payment is on cost basis, it could be taxable in the hands of the parent entity on gross basis.

Further, it also held that since the issue was a subject matter of adjudication before the DRP, the authorities have the inherent power to decide the issue even if it leads to enhancement.

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