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India | Tax & Regulatory | For private circulation only | 24 May 2017

Global Business Tax Alert

Sharp Insights

The Mumbai High Court in the case of [1]Marks & Spencer Reliance India Pvt. Ltd., has held that the cost reimbursement made by the taxpayer to the overseas entity under a secondment agreement is not chargeable to tax in India.

Issue no: GBTA/43/2017

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[1] Addl. Director of Income Tax v. M/s. Marks & Spencer Reliance India Pvt. Ltd. [TS-178-HC-2017 (Bom)]

Background/ Facts

- Marks & Spencer Reliance India Pvt. Ltd. ('the taxpayer') is a joint venture between Marks & Spencer Plc ('M&S' or 'overseas entity') and Reliance Retail Ltd. ('RRL').
- The taxpayer entered into an agreement with M&S ('secondment agreement') whereby the taxpayer was provided personnel to carry out the functions in the area of management, setting up of business, property selection and retail operation, product and merchandise selection and setting up merchandise team.
- In accordance with the terms of the secondment agreement, the taxpayer remitted certain amount to M&S towards salary cost of the deputed employees.
- The Assessing Officer ('AO') took a view that the payment made to M&S UK is in the nature of Fee for Technical Services ('FTS') and the taxpayer has defaulted in not withholding any tax in India on such payments.

Taxpayer's key contentions

- The amount paid by the taxpayer was a pure reimbursement and is not an income in the hands of the overseas receiver.
- The payment does not qualify as Fee for Technical Services (FTS) under the India-UK tax treaty.

Revenue's key contentions

- The seconded employees were having requisite skills and experience to carry out functions of business development, preparing business strategies and advertising on retail matters in order to complete the preparatory necessary for the start of the business of the taxpayer. The nature of the services provided by the overseas entity through its employee is technical and expert's services in the field of management and other affairs.
- Remittance of the money in question was for the service rendered by the payee i.e. M&S through its employees and therefore, the said payment is in the nature of FTS.
- The seconded employees remained the employees of the overseas entity and their salaries were paid by the overseas entity and not by the taxpayer. The payment was made on the basis of invoice raised by the UK Company. Thus, the taxpayer was liable to withhold tax on such payment.
- In case of payment made to a non-resident, the taxpayer cannot take a unilateral decision that payments are not sum chargeable to taxes. He could have obtained certificate from the AO under section 195(2) before making the remittance.

Ruling of the High Court

- As per the definition of FTS in Indo-UK DTAA, the consideration for rendering of any technical or consultancy services which make available technical knowledge, experience, skill, know-how or process, or consist of development and transfer of technical plan or technical design shall be treated as FTS.
- Reliance was placed on the Special bench decision in the case of [2]Mahindra and Mahindra and Karnataka High Court ruling in case of De Beers India Minerals Pvt. Ltd.[3], wherein it was held that payment of consideration would be regarded as FTS only if the twin test of rendering of services and making technical knowledge available at the same time is satisfied.
- Merely providing the employees or assisting the taxpayer in the business and in the area of consultancy, management etc. would not constitute make available of the services of any technical or consultancy in nature.
- Thus, expatriation of employee under secondment agreement without transfer or technology would not fall under the term 'make available' as per Article 13(4) c) of India-UK tax treaty.
- Even under the Income-tax Act, 1961 ('Act'), if the payment is only reimbursement of expenses, the same cannot be regarded as income in the hands of the payee/recipient.
- The Court observed that in the present case, there is no profit element in the payment made to the overseas entity and the claim of the taxpayer is also supported by the various clauses of the agreement(s) entered into between the Parties.
- The Court concluded that since the entire amount of salary received by the employees has been subjected to tax in India at the highest average rate of tax, there is no question of any default on the part of the taxpayer.

[2]Mahindra & Mahindra Ltd. 313 (AT) 263 (Mum) (SB)
[3]CIT v. De Beers India Minerals (P.) Ltd. 346 ITR 467 (Kar.)

Conclusion

The taxability of payments made to an overseas company for deputation of its employees on a full time basis to India has been a matter of prolonged litigation. The said decision in favour of the taxpayer reinforces that the taxability in such cases should be determined based on a close examination of the factual matrix and underlying documentation on a case to case basis.

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Contacts

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

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

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

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

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

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

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

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

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

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