



## Global Business Tax Alert

### Sharp Insights

**The Ahmedabad Tribunal, in the case of DCIT v. Welspun Corporation Ltd. (77 taxmann.com 165), held that commission paid to non-resident export commission agents is not taxable in India and accordingly withholding tax provisions are not applicable. The Tribunal further held that such services are not in the nature of fees for technical services.**

**Issue no:** GBTA/5/2017

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## Background

- The taxpayer was engaged in the business of manufacturing of steel pipes, plates and coils. During the assessment year 2010-11, the taxpayer paid commission to non-resident export commissions agents ("NRs") worldwide without any tax deduction. Non-resident agents are subdivided in three broad categories:-
  - Tax residents of the jurisdictions with which India has tax treaties but the treaties have no specific article dealing with the taxability of fees for technical services ('FTS') (i.e. Thailand and UAE)
  - Tax residents of jurisdictions with which India has tax treaties and such tax treaties have a specific article dealing with taxability of FTS without a 'make available' clause (i.e. Malaysia, Oman and Trinidad & Tobago)
  - Tax residents of jurisdictions with which India does not have any tax treaties (i.e. Algeria and Venezuela)
- The Assessing Officer ('AO') held that the services rendered by the NRs were in the nature of rendition of technical services and so raised tax withholding demands under section 201 r.w.s. 195 of the Income-tax Act, 1961 ('ITA') for not deducting the tax at source.
- The Commissioner of Income-tax (Appeals) reversed the order of the AO and held that these payments were in the nature of commission earned from services rendered outside India which had no tax implications in India.

## Ruling of the Ahmedabad Tribunal

### **Tax treaties have no specific article dealing with the taxability of FTS**

- Payment is not taxable in India, since there is no specific FTS article in respective DTAA's and also the NRs do not have permanent establishment ('PE') in India.
- It is not taxable as other income since when a particular nature of income is dealt with in the treaty provisions, and its taxability fails because of the conditions precedent to such taxability and as specified in that provision are not satisfied, that is the end of the road for taxability in the source state.

### **Tax treaties have a specific article dealing with taxability of FTS or India does not have any tax treaties**

- The taxability in these cases is to be decided on the basis of the provisions in the domestic law; when no operations of commission agent's business were carried on in India, Explanation 1 to Sec 9(1)(i) takes the entire commission income outside the ambit of deeming fiction u/s 9(1)(i) r.w. 5(2)(b);
- Just because a product is highly technical does not change the character of activity of the sale agent...The object of the salesman is to sell and familiarity with the technical details, whatever be the worth of those technical details, is only towards the end of selling.
- Payment to NRs was for securing orders and not rendering any managerial, technical or consultancy services per se

## Conclusion

The commission paid to non-resident export commission agents is not taxable in India whether or not the non-resident is tax resident of a jurisdiction having a tax treaty and whether or not the tax treaty has an FTS clause. Accordingly withholding tax provisions are not applicable to such payments.

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