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TAX FLASH NEWS

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Reimbursement of salary cost of seconded employees to a foreign company is not taxable as Fees for Technical Services in India

Recently, the Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of BOEING India Pvt. Ltd.[1] (the taxpayer) held that the reimbursement made by an Indian company, for salary and other costs of the seconded employees working in India, to foreign entities does not constitute Fees for Technical Services (FTS)/Fees for Included Services (FIS) under the relevant tax treaties. Hence, the taxpayer was not required to deduct tax at source under Section 195 of the Income-tax Act, 1961 (the Act).

Facts of the case

During the Assessment Year 2015-16, the taxpayer made reimbursement of salary and other cost to the related companies located in US, Korea and Australia (Associated Enterprises/AEs). The reimbursement was for the salary cost of expatriate employees which was seconded to the taxpayer in India. The taxpayer claimed that reimbursement of salary cost of seconded employees was not taxable as FIS/FTS, both under the Act as well as under the relevant tax treaties (i.e. India-US, India-Korea and India-Australia tax treaties). Therefore, tax is not required to be deducted on such reimbursement.

The AO drawing support from the decision of the Delhi High Court in the case of Centrica India Offshore India Ltd[2] held that the taxpayer was liable to deduct tax at source on the reimbursement of salary of seconded employees to the companies located in US, Korea and Australia. Since the taxpayer had failed to deduct tax at source on the reimbursement, the AO made disallowance under the provision of Section 40(a)(i).

The Dispute Resolution Panel (DRP) upheld the order of the AO.

[1] **BOEING India Pvt. Ltd. v. ACIT (ITA No. 9765/DEL/2019) – Taxsutra.com**
[2] Centrica India Offshore (P.) Ltd. **v. CIT [2014] 364 ITR 336 (Del)**

Tribunal's decision

As per the salary reimbursement agreement, the secondees have expressed their willingness for deputation to the taxpayer and AEs have agreed to release these employees to the taxpayer. It was provided that the AEs will facilitate payment of salaries in secondees home country on behalf of the taxpayer.

Under the head employment status, it was provided that the secondees shall be working for the taxpayer and will be under supervision, control and management of the taxpayer as an employee of the taxpayer.

It is clear from the relevant clauses of the agreement that the secondees were, in fact, in employment of the taxpayer and as per the terms, the AEs were paying salaries at the home country of the secondees and, therefore, there was reimbursement by the taxpayer. These facts clearly show that the taxpayer had been paying to its own employees and this fact alone clearly distinguishes the decision in the case of Centrica India Offshore Ltd.

The Tribunal relied on the decision of the Delhi Tribunal in the case of AT & T Communication Services India Pvt Ltd.[3], wherein the Tribunal had distinguished the decision of the Delhi High Court in the case of Centrica India Offshore Pvt Ltd and held that reimbursement made by Indian company for salary and other costs to a foreign company located in US for the seconded employees working in India did not constitute FTS or FIS under the Act or under the tax treaty. Hence, Indian company was not required to deduct tax under Section 195 .

On perusal of the TDS certificates, Forms 15CA and 15CB, there was no dispute that the taxpayer had deducted tax at source under Section 192 . On the given facts of the case, the Tribunal held that the provisions of Section 195 will not apply.

[3] AT & T Communication Services (India) P. Ltd. v. DCIT (ITA No.354/Del/2017)

Our comments

The issue with respect to whether tax needs to be deducted on reimbursement of salary cost under the secondment arrangement has been a matter of debate before the Courts/Tribunal.

Some of the Courts/Tribunal[4] have held that if the seconded employees are viewed in substance as employees of the Indian entity, the payments made to the foreign entity by the Indian entity may be characterised as a mere reimbursement, and accordingly, no further tax implications arise on the payment thereof.

However, in few cases the Courts/Tribunal[5] have held that a payment made to a foreign company for the services of the deputed personnel under the secondment agreement is taxable as FTS. In the case of payment being FTS or royalty under Section 9(1) , it is irrelevant whether any profit element is included in the income or not.

The Delhi Tribunal in the case of AT & T Communication Services (India) P. Ltd.[6] while distinguishing the decision of the Delhi High Court in the case of Centrica India Offshore (P.) Ltd. held that reimbursement made by the Indian company could not be classified as FTS/FIS under the Act as well as under the India-US tax treaty. It was observed that the seconded employees of a foreign company were not engaged in the business of the foreign company in India, but, were effectively working under the control and supervision of the Indian company.

The Delhi Tribunal in the present case has also held that the reimbursement made by the taxpayer, an Indian company, for salary and other costs of the seconded employees working in India, to foreign entities does not constitute FTS/FIS under the tax treaty. Hence, the taxpayer was not required to deduct tax at source under Section 195.

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[4] Abbey Business Services (India) (P) Ltd v. DCIT [2012] 53 SOT 401 (Bang), DDIT v. Tekmark Global Solutions LLC [2010] 38 SOT 7 (Mum), Morgan Stanley Asia (Singapore) Pte. Ltd. v. DDIT [2018] 95 taxmann.com 165 (Mum), Temasek Holdings Advisors (I) (P.) Ltd. v. DCIT [2013] 38 taxmann.com 80 (Mum)

[5] Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300 (Del), Food World Supermarkets Ltd. v. DDIT [2015] 174 TTJ 859 (Bang)

[6] AT & T Communication Services (India) P. Ltd. v. DCIT (ITA No.354/Del/2017)

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