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TAX FLASH NEWS

14 July 2022

Indian insurance broker remitting 'premium' to overseas broker is not liable to deduct tax at source and it would not be considered as dependent agent PE

Executive Summary

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in case of International Reinsurance and Insurance Consultancy & Broking Services Pvt. Ltd.[1] (the taxpayer) dealt with (i) applicability of withholding tax (TDS) provisions on Indian insurance broker for remitting premium received from Indian insurance companies (Indian cedants) to non-resident reinsurers through Singapore based co-broker and (ii) whether the Indian broker would be considered as dependent agent PE of overseas co-broker. The Tribunal observed that the taxpayer and Singapore based co-broker being independent brokers are merely facilitating payments between Indian cedants and non-resident reinsurers (NRRs) and the remittance made by Indian insurance broker to Singapore based co-broker is not chargeable to tax in India in the absence of PE of Singapore based co-broker and NRRs in India. Further, the Tribunal also concluded that since the taxpayer is working on principal-to-principal basis and has received brokerage income from other NRRs as well, it does not work wholly and exclusively for Singapore based co-broker and hence the taxpayer is not a dependent agent PE of Singapore based co-broker.

Facts of the case

- The taxpayer is an Indian resident entity licensed as a composite broker with Insurance Regulatory and Development Authority of India (IRDAI). During Assessment Year (AY) 2016-17, the taxpayer made remittances of insurance premium received from Indian insurer to Aon Benfield Asia Pte Ltd (AB Singapore) who is 'overseas co-broker' for onward remittance to NRRs.
- As per IRDAI regulations, a Indian licensed broker who is seeking support from non-resident reinsurance company can work in co-ordination with overseas co-brokers. The regulation further defines 'co-broker' as person who places reinsurance business and settles account with NRRs.
- During the course of proceedings under section 201 of the Income-tax Act, 1961 (the Act), the Assessing Officer (AO) held that the taxpayer has failed to deduct tax at source on the remittance made to AB Singapore on account of premium to be further remitted to NRRs and also held that the assessee has failed to approach the revenue by not making an application under section 195(2) of the Act for determination of taxability of the said transaction and withholding tax thereon. The AO further stated that the activities of the taxpayer make it a dependent agent PE of AB Singapore as per the provisions of Article 5 of India Singapore tax treaty and consequently the profits of AB Singapore shall be taxable in India as per Article 7 of India-Singapore tax treaty. Thus, it was the responsibility of the taxpayer to deduct tax before making any remittance to AB Singapore.
- The Commissioner of Income-tax (Appeals) [CIT(A)] overturned the conclusion of the AO by holding that the taxpayer does not have ownership on the sum which is remitted to AB Singapore and it is merely facilitating the payment to NRRs through AB Singapore and if tax was required to be deducted, it is by the Indian cedant after examining the relevant provisions of India-Singapore tax treaty. Further, the CIT(A) also held that the onus to prove the existence of dependent agent PE is on the AO by examining the terms of contract, invoices and other documents and not on the taxpayer to prove the contrary.
- Aggrieved, the tax department filed appeal before the Tribunal.

[1] ITO (IT)-2(2)(2) v. International Reinsurance and Insurance Consultancy & Broking Services Pvt. Ltd. (ITA No. 2823/Mum/2019) – Taxsutra.com

Tribunal's decision

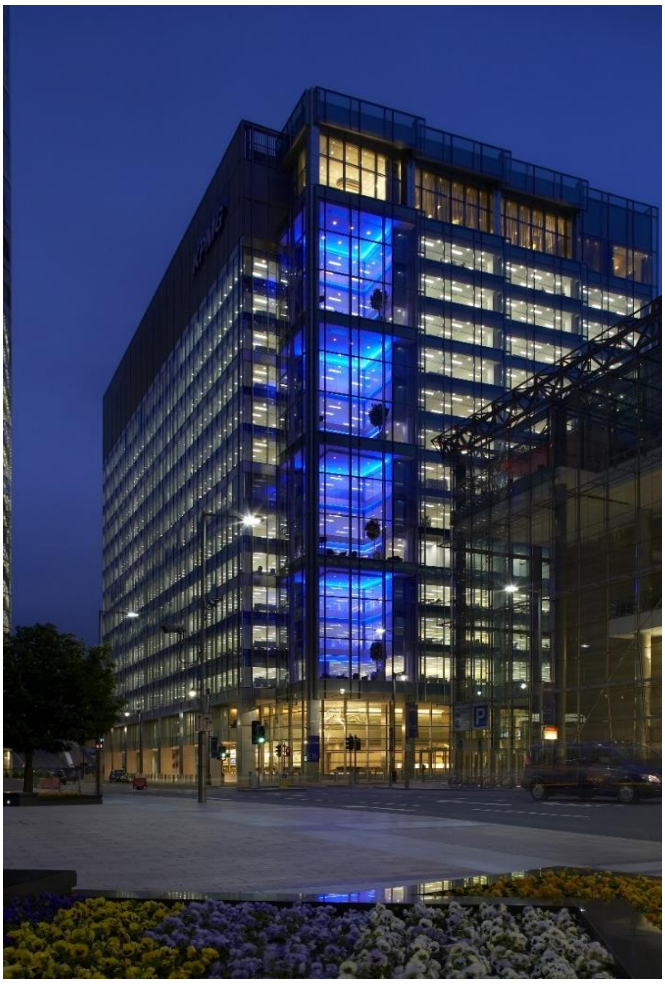
- The Tribunal in the present case, held that the taxpayer is merely a broker and not required to withhold tax on premium remitted to overseas broker by relying upon the clarification issued by IRDAI (upon request of the taxpayer) wherein the IRDAI stated that the amount transferred by domestic broker as reinsurance premium to overseas broker is not the income of overseas broker and in fact it is the income of NRRs who are providing reinsurance cover.
- Further, the Tribunal held that (i) the taxpayer as well as AB Singapore are mere facilitators for remitting the premium from the Indian cedant to NRRs and are entitled for commission for facilitating the same as per broker regulations of IRDAI and (ii) the premium so remitted to AB Singapore is not the income of AB Singapore since it is in turn further remitting the same to NRRs and the NRRs would be liable to tax on the same in the country of domicile and not in India as they do not have a PE in India which is supported by copy of tax residency certificates, Form 10F along with No PE declaration of the NRRs submitted by the taxpayer which has not been challenged by the AO.
- In relation to the contention of AO that the taxpayer is a dependent agent PE, the Tribunal held that para 8 of Article 5 of India-Singapore tax treaty is not applicable in the present case since it is not a case (i) where taxpayer concludes contract for AB Singapore or (ii) maintains stock of goods for AB Singapore or (iii) secures orders for AB Singapore. Further, the Tribunal stated that as per Article 5(9) of India-Singapore tax treaty, the transaction is carried out in ordinary course of business between independent brokers and the activities of the taxpayer are not wholly devoted for AB Singapore which is evidenced by the fact that the taxpayer has earned majority of the brokerage income (73 percent) from NRRs without having any involvement with AB Singapore.
- The Tribunal further rejected the reliance place by the department on the decision of ITAT Chennai in case of United India Insurance Co. Ltd[2] and Cholamandalam MS General Insurance Co. Ltd[3] since the assessees in those cases were themselves insurance companies and reinsurance premium paid to NRRs were disallowed under section 40A(i) of the Act while computing the taxable inome of those assessees whereas in the present case, the taxpayer is merely remitting the premium received from Indian cedant to overseas co-broker and no deduction for the same is claimed in the profit and loss account.

[2] United India Insurance Co. Ltd v. JCIT (2018) 97 taxmann.com 466 (Chennai Tribunal)
[3] DCIT v. Cholamandalam General Insurance Co. Ltd (2018) 99 taxmann.com 302 (Chennai Tribunal)

Our comments

There are judicial precedents[4] wherein it is held that reinsurance premium payable to foreign reinsurance company by Indian insurers is not liable for tax in India and consequently there is no requirement to deduct tax. Typically, in insurance industry, the broker in India collect premium from Indian cedents and remits it to overseas broker who inturn remits to foreign reinsurance company. Of late, the tax officers in the assessment of Indian brokers are deep diving into this aspect and are alleging that the Indian broker is dependent agent PE of overseas broker in India and also Indian broker is liable to deduct tax on reinsurance premium remitted to overseas broker/non-resident reinsurance company.

This decision of the Mumbai Tribunal would help the Indian brokers in defending their technical position vis-à-vis (i) non applicability of withholding tax on reinsurance premium remitted to overseas broker in the capacity of facilitator since broker is not the person responsible for paying and (ii) non-constitution of dependent agent PE of overseas brokers in India.



[4] Cholamandalam General Insurance Co. Ltd v. DCIT (2018) 102 taxmann.com 292 (Mad), General Reinsurance AG v. DCIT (ITA No.7433/Mum/2018) (2019) (Mum), Tata AIG General Insurance Company Limited v. DIT (ITA No. 1718/Mum/2020) (2022) (Mum)

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