

TAX FLASH NEWS

1 April 2020

Corporate guarantee fees are not taxable as FTS under the India-France tax treaty. Surcharge and cess cannot be levied on the tax charged on gross basis under the tax treaty

The Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of JCDecaux S.A.¹ (the taxpayer) held that corporate guarantee related services are not in the nature of managerial, technical or consultancy services. Therefore, corporate guarantee fees received by the taxpayer are not taxable as Fees for Technical Services (FTS). The Tribunal also held that surcharge and education cess cannot be levied on the tax charged on gross basis under the India-France tax treaty (tax treaty).

Facts

The taxpayer, a tax resident of France², provided corporate guarantee to foreign banks for money borrowed by the Indian subsidiary. The taxpayer charged a fee from the Indian subsidiary for such facility. The Assessing Officer (AO) held that corporate guarantee fees received by the taxpayer was actually in lieu of the services rendered for assisting the Indian subsidiary in providing loan from foreign banks. It was taxable as FTS under the Act as well as under the tax treaty. Further, the AO levied surcharge and education cess on some of the payments which were offered to tax on gross basis under the tax treaty. The Dispute Resolution Panel (DRP) upheld the order of the AO.

Tribunal's decision

The corporate guarantee related services were not in the nature of managerial, technical or consultancy services. Therefore, corporate guarantee fees were not taxable as FTS³.

The Tribunal relied on the decision of BOC group Ltd⁴ where the Kolkata Tribunal while dealing with the India-UK tax treaty held that the tax rate prescribed under the India-UK tax treaty shall include surcharge and education cess. Since provisions of the tax treaty are also similarly worded in line with the India-UK tax treaty, surcharge and education cess cannot be levied on the income-tax charged on gross basis under the tax treaty.

Our comments

The issue with respect to the taxability of corporate/bank guarantee fees received by a foreign holding company from an Indian subsidiary has been a matter of debate before the Courts/Tribunal.

The Delhi Tribunal in the case of Johnson Matthey Public Ltd.⁵ held that corporate/bank guarantee fees received from an Indian subsidiary were taxable under 'other income' article. It was neither in the nature of 'interest' or 'FTS' (which could be taxed at beneficial rate) nor in the nature of 'business income'.

The Mumbai Tribunal in the case of Capgemini S.A.⁶ held that guarantee commission received by a foreign company neither accrues in India nor deemed to be accrued in India, therefore, not taxable in India under the Act. Further, as per Article 23(3) of the India-France tax treaty, income can be taxed in India, only if it arises in India. The income arises in the overseas country since the guarantee was given by the taxpayer in the foreign country and, therefore, Article 23(3) of the India-France tax treaty does not apply as income does not arise in India.

¹ JCDecaux S.A v. ACIT (ITA No. 1630/Del/2015, AY 2011-12)- Taxsutra.com

² In AY 2011-12

³ Either under the Section 9(1)(vii) or under Article 12 of the tax treaty

⁴ DCIT v. BOC Group Ltd [2015] 64 taxmann.com 386 (Kol)

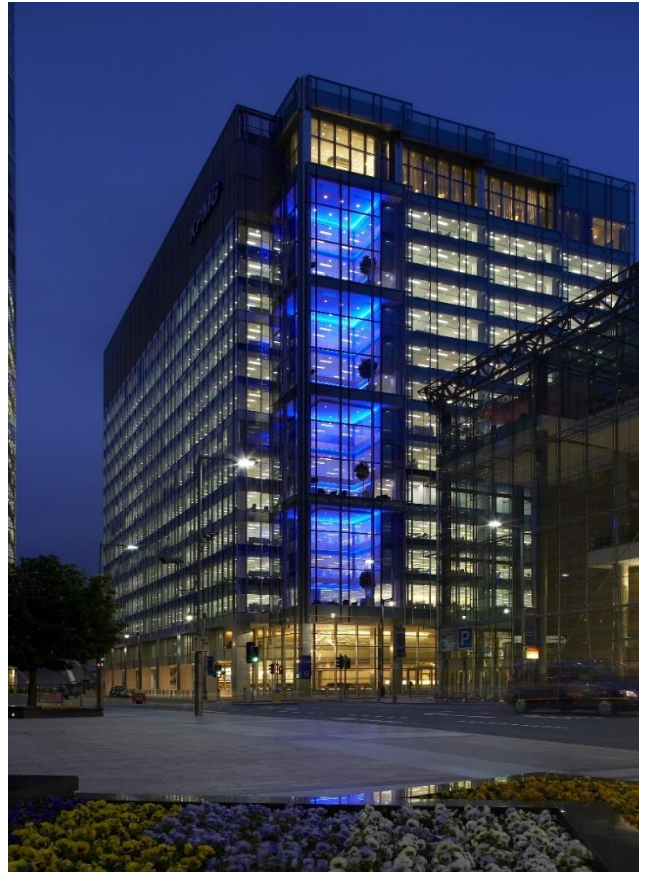
⁵ Johnson Matthey Public Ltd. Company v. DCIT [2018] 191 TTJ 1 (Del),

⁶ Capgemini S.A. v. ADIT (ITA No. 7198/Mum/2012, dated 28 March 2016)

The Tribunal in the present case has held that since the corporate guarantee related services are not in the nature of managerial, technical or consultancy services, it cannot be taxed as FTS.

With respect to the tax rate prescribed under a tax treaty, the Tribunal⁷ in various cases has held that the term 'tax' under a tax treaty includes 'education cess' and 'secondary and higher education cess' within its ambit. Therefore, the rate of tax on interest and royalty cannot be more than the specified percentage in the respective articles.

The Tribunal in the present case has held that the surcharge and education cess cannot be levied on the tax rate prescribed under the tax treaty.



⁷ DIC Asia Pacific Pte Ltd v. ADIT (ITA No. 1458/Kol/2011) (Kol), Sunil Motiani [2013] 33 taxmann.com 252 (Mum), Parke Davis and Company LLC v. ACIT [2014] 41 taxmann.com 193 (Mum), ITO v. M Far Hotels Ltd (ITA No. 430 to 435/Coch/2011, 5 April 2013), Capgemini SA v. DCIT [2016] 72 taxmann.com 58 (Mum)

home.kpmg/in/socialmedia

Ahmedabad

Commerce House V, 9th Floor,
902, Near Vodafone House, Corporate
Road,
Pralhad Nagar,
Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Bengaluru

Embassy Golf Links Business Park,
Pebble Beach, 'B' Block,
1st & 2nd Floor,
Off Intermediate Ring Road, Bengaluru –
560071
Tel: +91 80 6833 5000

Chandigarh

SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai

KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Gurugram

Building No.10, 8th Floor,
DLF Cyber City, Phase II,
Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

Hyderabad

Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2,
Serilingampally Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur

Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road,
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi

Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682 019.
Tel: +91 484 302 5600

Kolkata

Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai

1st Floor, Lodha Excelus,
Apollo Mills,
N. M. Joshi Marg,
Mahalaxmi,
Mumbai – 400 011.
Tel: +91 22 3989 6000

Noida

Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune

9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara

Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada

Door No. 54-15-18E,
Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2020 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The KPMG name and logo are registered trademarks or trademarks of KPMG International.

This document is meant for e-communication only