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TAX FLASH NEWS

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Tax is not required to be deducted on reimbursement of expenditure incurred in foreign countries as well as on participation fees for a conference held outside India

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Roche Diagnostics India Pvt Ltd[1] (the taxpayer) held that remittance to foreign companies towards participation of its employees in a conference cannot be treated as Fees for Technical Services (FTS) under Section 9(1)(vii) of the Income-tax Act, 1961 (the Act) since no services in the nature of consultancy, technical or managerial have been provided to the taxpayer. Further, such remittance is not taxable in India under the relevant tax treaties.

The Tribunal also held that the tax is not required to be deducted on reimbursement of various expenditure in foreign countries.

Facts of the case

The taxpayer is engaged in the business of distribution of biomedical equipment, reagents and spares for such equipment in India. The taxpayer supplies main products for the critical care segment like Blood Gas and Electrolyte Analyzers. It also provides marketing support services for diagnostic equipments distributed by a Singapore company.

During the Assessment Year (AY) 2011-12, the taxpayer remitted payment to German and Singapore residents towards participation of its employees in conference held in Hong Kong and Singapore respectively.

The taxpayer also reimbursed various expenses (i.e. taxes of employees, salary, travel and stay expenses, relocation expenses, special discounts and additional support, promotional expenses, etc.) to employees/third parties of various countries (Switzerland, USA, Germany, Bangladesh, Sri Lanka, etc.).

The taxpayer did not deduct tax on these payments. Thus, the Assessing Officer (AO) disallowed these payments on account of non-deduction of tax at source.

Tribunal's decision

Remittance towards participation fees for a conference held outside India

The Tribunal held that income was not accrued or deemed to be accrued in India on account of remittance towards participation fees for a conference held outside India. The payment can be characterised as FTS under Section 9(1)(vii) of the Act, only when a person pays to another person a payment for rendering of services which is in the nature of consultancy, technical or managerial in nature. Professional services are not covered by the definition of FTS under Section 9(1)(vii) of the Act. Thus, the said payments in the instant case cannot be characterised as FTS under Section 9(1)(vii) as no services in the nature of consultancy, technical or managerial have been provided to the taxpayer. The Tribunal relied on the decision of Bharat Forge Ltd.[2] and Utility Powertech Ltd.[3].

[1] Roche Diagnostics India Pvt Ltd. v. ACIT- ITA No. 1537/Mum/2016 (AY-2011-12) - Taxsutra.com

[2] Bharat Forge Ltd. v. ACIT [2013] 36 taxmann.com 574 [Pune]

[3] ACIT v. Utility Powertech Ltd. [2008-TOIL-14-ITAT-Del]

In the case of German resident, the remittance towards participation in a conference does not specifically fall within any specific Article of India-Germany tax treaty as the said remittance was not in the nature of royalty or FTS. The said remittance was to be treated as business income of the payee and in the absence of Permanent Establishment (PE) of the payee in India, the said sum could not be taxed in India. Further, as per Article 21 of the India-Germany tax treaty dealing with other income, any income which is not dealt with any of the Article of tax treaty can be taxed only in Germany.

With respect to payment made to Singapore resident, the Tribunal observed that it did not have a PE in India under the India-Singapore tax treaty and therefore, the business income cannot be taxed in India. Further, Singapore company had not transferred or made available any technical knowledge or skills to the taxpayer and therefore, payments made to Singapore company were not in the nature of FTS and not liable to tax in India.

Since participation fees for attending seminar was not taxable in India, the question of TDS on the aforesaid payment does not arise.

Reimbursement of various expenditure incurred in foreign countries

With respect to reimbursement of taxes of employees paid outside India, the Tribunal held that the taxpayer had not claimed the said taxes (recovered from the employee) in its profit and loss account and hence, the question of disallowance would not arise.

With respect to reimbursement of salary to USA and German employees, it was observed that the tax with respect to such salary was deducted and paid under Section 192 of the Act in India, as was evident from Form No. 16 of such employees. Therefore, the tax was not required to be deducted again at the time of reimbursing salary cost. The Tribunal relied on various decisions[4].

With respect to payment to German entity towards other reimbursement viz. travel and stay, conference participation fees and web access charges, it was observed that it was a mere reimbursement of expenditure and cannot be construed as a 'fee' for the services rendered. It was mere repayment of what has already been spent and was not a reward or compensation for services rendered. Further, the transactions relating to reimbursement of expenses to Associate Entity (AE) was subject matter of Transfer Pricing (TP) assessment and the reimbursement of various expenses were at actual cost, with no profit element which was accepted by the Transfer Pricing Officer (TPO).

With respect to relocation expenses, the Tribunal held that that reimbursement of such expenses did not constitute income and could not be liable to TDS.

The Tribunal observed that foreign companies were acting as an exclusive distributor of the taxpayer's diagnostic products and it also perfomed marketing activities for promoting sales of Roche products in foreign companies. Further, as per the arrangement between foreign companies and the taxpayer, foreign companies buy products and re-sell them on its own account. The business between foreign companies and the taxpayer was on a principal-to-principal basis. Further, the taxpayer had booked the expenses in earlier financial year i.e. FY 2009-10 and only remittance was made during the FY under consideration. The Tribunal observed that the taxpayer had submitted copies of debit notes, third party invoices, salary statement of the employee, Tax Residency Certificate, No PE certificate, Form No. 15CA and 15CB and these documents indicated that payments pertained to pure cost reimbursement.

With respect to reimbursement of special discounts and additional support, the Tribunal held that in order to achieve sales targets in certain cases, the taxpayer directed foreign companies to sell its products at discount to the customers in Bangladesh and Sri Lanka by way of discount schemes. In such cases, the foreign companies had given special discount to its customers based on direction of the taxpayer. Further, the actual amount of special discount (the difference of local sales price of foreign companies and the discounted price at which they had sold the products) was reimbursed by the taxpayer to them. Also, the taxpayer had not adjusted the said special discount against sales to foreign entity and instead recorded it as a separate transaction.

With respect of reimbursement of promotional expenses, the Tribunal held that the taxpayer has reimbursed promotional cost incurred by Bangladesh based company (on behalf of the taxpayer) on actual basis without any element of mark up or profit thereon.

With respect to reimbursement of cost of manager, the Tribunal observed that as per the arrangement between the taxpayer and foreign companies, the taxpayer would provide the technical, scientific and marketing support including training of engineers, salesmen to foreign companies for sale of its products. It was observed that marketing executive was appointed in Bangladesh and Sri Lanka exclusively for advertisement and promotion of the taxpayer's products and for providing various services to the new customers (end user) like providing guidance on usage of the products, its benefits etc. and foreign companies had recovered the actual salary cost of employee and other related costs incurred by foreign companies from the taxpayer.

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[4] DIT v. Mark & Spencer Reliance India (P.) Ltd. (ITA No. 893 of 2014), Morgan Stanley Asia (Singapore) Pte Ltd. v. DDIT [2018] 95 taxmann.com 165 (Mum), AT & NT Communication Services India Pte Ltd. v. ACIT [TS-644-ITAT-2018 (Del)

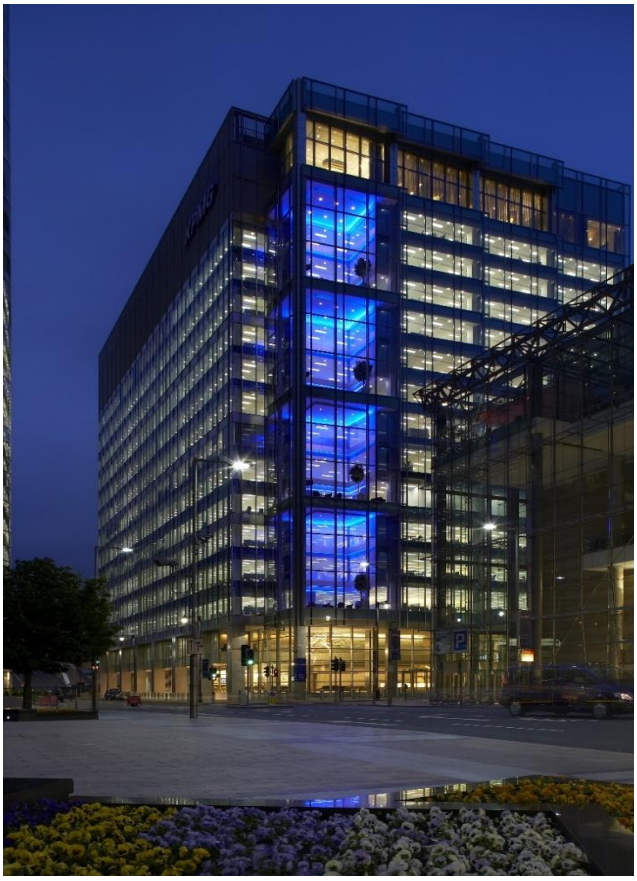
Our comments

The issue with respect to withholding of tax on payment /reimbursement of expenses to non-resident has been a subject matter of debate before Courts/Tribunal.

On the issue of reimbursement, the Delhi Tribunal in the case of DLF Projects Ltd[5] held that tax is not required to be deducted on reimbursement of manpower expenditure to the foreign company in the absence of any income element. The tax should be deducted under Section 195 of the Act only on the mark-up and not on the reimbursement of actual cost to a non-resident. However, the Tribunal in the case of SMS Iron Technology Pvt. Ltd.[6] held that the payment made by the taxpayer cannot be termed as reimbursement of expenditure since the taxpayer has not produced any agreement, debit notes or working of such reimbursement. It may be noted that reimbursements should be backed up by third party documentation, i.e., an agreement, debit note, etc.

In the present case, the Tribunal held that tax is not deductible on reimbursement since it was supported by the copies of invoices, third party transaction details, Form 15CA and Form 15CB which indicates that the payments were in the nature of reimbursements.

Further the Tribunal held that remittance to foreign companies towards participation of its employees in conference cannot be treated as FTS under Section 9(1)(vii) of the Act since no services in the nature of consultancy, technical or managerial have been provided to the taxpayer. Further such remittance was not taxable in India under the relevant Indian tax treaties.



[5] DCIT v. DLF Projects Ltd (ITA No. 5178/Del/2014)
[6] SMS Iron Technology Pvt. Ltd v. ITO (ITA No. 4480 to 4486/Del/2014)

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