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*India*

## Tribunal: India Can't Tax Intra-Group Reimbursements Under Singapore Treaty

The Indian tax authority can't charge withholding tax on an Indian company's payments to its Singapore group when the payments are merely a reimbursement of fees paid and not income, a Tribunal has ruled.

Mumbai-based chartered accountant Vispi T. Patel of Vispi T. Patel & Associates said the Tribunal's ruling is significant as it lays to rest one aspect of an ongoing controversy that has led to disputes between taxpayers and Indian tax authorities—compensation for intra-group services paid by Indian subsidiaries to their overseas counterparts.

Rajesh H. Gandhi, partner at Tax at Deloitte Haskins & Sells LLP, told Bloomberg BNA via e-mail May 11 that the decision will be helpful for taxpayers falling under the India-Singapore tax treaty, and also for taxpayers seeking the benefit of treaties such as those with the U.K., U.S., Canada and other countries where the ''make available'' clause is present and payments for services are considered ''fees for technical services'' only where the services ''make available'' any technical knowledge, experience, skill, know-how, etc. to the service recipient.

**Shared Costs.** The case involved Tata Technologies, an India resident company that entered into a ''group cost recharge agreement'' with its group of companies under which costs incurred by any group entity for the benefit of the others would be shared between the companies. A Singapore entity called Tata Technologies Pte Ltd. (''TTPL'') acted as a conduit to recharge and allocate the group costs among the beneficiary entities under the agreement.

Tata received a number of services under the pact relating to marketing and business development; IT infrastructure and support; global human resources support; legal and company secretarial services; quality initiative services; and finance and treasury management services. It made a remittance to the credit of Singapore's TTPL toward ''group costs recharge'' for availing these services, but India's tax authority declared TTPL to be an ''assessee in default'' because Tata didn't deduct withholding tax at the rate of 10 percent—a rate that would apply for ''fees for technical services'' under Article 12 of the India-Singapore tax treaty, read with Section 115A of the Income Tax Act.

The assessing officer contended the payment made by Tata to TTPL was for availing services of a technical and managerial nature, for which Tata was liable to deduct tax at source under Section 195 of the Act. Further, TTPL had ''made available'' technical knowledge, experience and skill to Tata in terms of the bilateral tax treaty.

Tata disagreed with this assessment, countering that the fees paid to the Singapore entity were merely a reimbursement of costs, without any mark-up, which were incurred for services availed by a group company in the ratio of the benefit derived.

The company said TTPL was a conduit and it had not itself provided any services to Tata Technologies and had no business operations in India. Therefore, the remittance couldn't be regarded as income accrued or arisen in India from any business connection in India. Moreover, it didn't qualify for the definition of ''make available'' under the fees-for-technical-services clause under the tax treaty.

The dispute was first heard by the commissioner of income tax (Appeals), who found in favor of Tata Technologies, saying that TTPL had not ''made available'' any technical knowledge, experience, skill and know-how, and the payment to TTPL therefore didn't fall within the definition of ''fee for technical services'' and Tata wasn't required to withhold tax. It also noted that since the treaty provisions were more beneficial than the provisions of the Income Tax Act, these would apply.

However, the tax department then appealed the order at the Pune Income Tax Appellate Tribunal (ITAT), which also ruled in favor of Tata Technologies. The tribunal dismissed the tax authorities' appeal and ruled that the payment made by Tata to TTPL wasn't liable to be taxed in India.

**ITAT Decision.** The Tribunal held March 30 (ITA 1171/PN/2013) that the reimbursement of costs without any element of profits embedded— which is what Tata Technologies' payment to TTPL constituted—couldn't be held to be a sum chargeable under the provisions of the Income Tax Act. Moreover, no actual services were rendered by TTPL to Tata Technologies.

The tribunal said that to fall within the description of services which ''make available'' technical knowledge and skills under Article 12 of the India-Singapore DTA, technical or managerial services should be imparted to and absorbed by the receiver of the service so that the receiver can deploy similar technology or techniques in the future without depending upon the provider.

The ITAT relied on two past cases involving Transmission Corp. and Dunlop Rubber Co. Ltd to uphold the principle that Section 195 of the Income Tax Act applies only when income arises per se in the hands of the non-resident recipient. It also cited a decision of the Goa Bench of the Bombay High Court in Sera Resources Ltd, upholding the position of law that before effecting deduction at source it has to be determined whether such income is taxable under the Act.

As such, it dismissed the tax authorities' appeal and ruled that the payment made by Tata Technologies to TTPL for group service recharge wasn't liable to be taxed in India.

**Ruling Clarifies Tax Treatment.** New Delhi-based chartered accountant Avinash Gupta of APT & Co. said the ruling clarifies that the mere reimbursement of group cost allocated on an actual basis without any mark-up can't be taxed. It also can't be regarded as existing to ''make available'' technical knowledge, rendering it outside the ambit of ''fee for technical services'' under the bilateral treaty between India and Singapore, he told Bloomberg BNA May 11 via e-mail.

While considering the implications of the tribunal case, practitioners said India isn't likely to propose revisions to Article 12 of its double tax treaty with Singapore if it decides to renegotiate its existing agreement.

Gupta and Patel said Article 12 of the existing double tax treaty, which covers royalties and fees for technical services, isn't likely to change because of the implications it could have to other bilateral agreements and because it doesn't pose a risk on double non-taxation.

India may renegotiate its existing agreement with Singapore after making successful changes to its agreement with Mauritius on capital gains taxation to end treaty abuse (91 ITM, 5/11/16). Following the conclusion of that agreement, Revenue Secretary Hasmukh Adhia said in a Twitter message May 10 that India could revise its agreement with Singapore in line with the changes it has recently agreed with Mauritius. Finance Minister Arun Jaitley also confirmed May 16 that the treaty will be re-negotiated, according to local media reports.

By Madhur Singh

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*The Tribunal order is at http://src.bna.com/eXX.*

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