

Reimbursement of salary of seconded employees to AE couldn't be treated as 'FTS' to attract TDS under sec. 194J

Summary – The Mumbai ITAT in a recent case of Mahanagar Gas Ltd., (the Assessee) held that Reimbursement of salary of seconded employees to AE couldn't be treated as 'FTS' to attract TDS under section 194J

Facts

- The assessee had incurred the secondment charges of employees seconded by Gail and British Gas (BG) to do technical work with the assessee, the joint venture company.
- The remuneration payable to these seconded employees was being paid by BG or GAIL recoverable from assessee on cost to cost basis.
- As the assessee had not deducted TDS on secondment charges, the Assessing Officer disallowed same by invoking provisions of section 40(a)(ia).
- On appeal, the Commissioner (Appeals) deleted the disallowance made by the Assessing Officer.
- On revenue's appeal:

Held

- The assessee made a categorical statement that British Gas (BG) has deducted TDS on the remunerations paid to seconded employees and also deposited in the treasury of the Govt. of India. The TDS on salary payment to expatriate seconded employees to assessee had been given certificate to assessee stating the above fact. All taxes have been paid by British Gas and second time TDS cannot be deducted on the same amount. For this, the assessee relied upon **CBDT Circular No. 720, dated 30-8-1995** clarifying that any sum payable shall be liable for deduction of tax only under one section.
- The issue is covered by the decision of the Tribunal, Bangalore bench in the case of *IDS Software Solutions (India) (P.) Ltd. v. ITO (International Taxation)* [2009] 32 SOT 25, where the assessee entered into a 'secondment agreement' with a US Company and obtained the services of an employee and the question arose whether the reimbursement by the assessee to the US Company of the salary paid by the US Company was chargeable to tax as 'fees for technical services'. It was held that though the US Co. was the employer in a legal sense but since the services of the employee had been seconded to the assessee and since the assessee was to reimburse the emoluments and it controlled the services of the employee. It was the assessee which for all practical purposes was the employer. Accordingly, the salary reimbursed to the US Co. was not chargeable to tax. Though the person deputed by the US Co was a technical person, the

consideration paid under the secondment agreement was not 'fees for technical services' because the fact that the seconded employee was responsible and subservient to the payer (assessee) and was required to also act as officer or authorized signatory or nominee of the assessee, made it inconsistent with an agreement for providing technical services. In view of above, the revenue's appeal is to be dismissed.