Insight

Aishath Asima v Maldives Inland Revenue Authority (2014)[1]

Volume 1, Issue 1

Who should read this?

All taxpayers, particularly those paying Withholding Tax.

Keywords:

Withholding Tax, Tax Appeal Tribunal, Expenditure incurred

Are payments subject to WHT even if they are not made by the taxpayer?

Implications

Summary

On 10 November 2014, the Tax Appeal Tribunal ("TAT") decided on its first case relating to Withholding Tax ("WHT"). In substance, the case is on the subjectivity of payments to WHT where payments that, generally speaking, seem to fall within the ambit of Section 6(a) of the Business Profit Tax Act ("BPTA")[2], but are not made by the taxpayer and therefore not recorded in the taxpayer's books.

While making it clear that such payments are indeed subject to WHT, the case raises broader questions on the very nature of such payments and on the meaning of "expenditure incurred" as stated in Section 10(a) of the BPTA.

[1] *Aishath Asima v Maldives Inland Revenue Authority* [2014] TAT-CA-W/005

[2] Business Profit Tax Act (Law Number 5/2011)

Facts and Observations

Payments not made by the Appellant, and are not recorded in the Appellant's books

Ms. Aishath Asima ("Appellant") is the operator of Ocean Sounds, a guesthouse in Hulhumale'. The Appellant's husband made payments to a website based in the UK for the promotion of the guesthouse. These payments were made using a personal credit card issued by a bank in the UK to the Appellant's husband.

The Appellant did not claim the payments in dispute as an expense, nor were they recorded in the Appellant's books in any other form.

MIRA: payments made for the benefit of the Appellant are subject to WHT

In imposing WHT on the payments in dispute, it is the MIRA's argument that the payments, though not made by the Appellant, were made for the promotion of the Appellant's business (i.e. the guesthouse) and that the Appellant is the ultimate beneficiary of this promotion. The MIRA argued that under Section 10(a) of the BPTA, all expenses incurred for the purposes of production of income are 'business expenses' even if they are not paid by the Appellant.

Section 10(a) of the BPTA states that:

> "... deductions may not be made in computing any taxable profits for any tax year except in respect of *expenditure incurred* during that year wholly and exclusively *for the purpose of production of income*."
>
> [emphasis added]

Furthermore, the MIRA argued that though not claimed by the Appellant, the payments must be included in the Appellant's books as an expense and therefore are subject to WHT.

Appellant: the payments are not within the Jurisdiction of the Maldives

The Appellant's case was built up on two primary, but closely related, arguments. Firstly, it was argued that the payments in dispute were not made by the Appellant nor by the Appellant's business.

Secondly, the Appellant argued that a payment made to a non-resident would be subject to WHT under Section 6(a) of the BPTA only if the 'money' (i.e. the payment) originated from the Maldives. In this regard, as the payments were made via a bank in the UK, the Appellant was of the view that the payments were not within the jurisdiction of the Maldives and therefore not taxable under the BPTA.

The TAT observed, from the Appellant's records and from prior communications with the MIRA and the Appellant, that the Appellant's husband who had made the payments in dispute is in fact the manager of the guesthouse (although no salary or other form of remuneration is paid). Taking together this relationship between the husband and the business,

and the observation that there was no bank account in the Appellant's name for use in the business operations, the TAT observed that it suggests that the Appellant may be required to use the husband's personal credit card to make payments for business purposes.

Held

Purpose of the payment is vital

It was held – by majority view – that as the Members were of the opinion that the payments in dispute were made for the benefit of the Appellant's business, they must be considered a business expense of the Appellant and therefore are subject to WHT. The TAT dismissed the Appellant's claim that the payments are not within the jurisdiction of the Maldives citing that, for a payment to be subject to WHT, it is not a requirement under the law for the money to "originate" from the Maldives.

Dissenting Opinion

Section 10(a) is not related to WHT

In his dissenting opinion, Member Hassan Zuhair Mohamed held the view that Section 10(a) and Section 6(a) of the BPTA are not related to each other and therefore Section 10(a) cannot be interpreted to include in the Appellant's books a payment that is made by a third party, whether or not that person is associated with the Appellant.

Member Zuhair also held the view that there exists no point of law to consider an expenditure incurred by a third party as a business expense of the Appellant, taking note that the expenditure was never claimed by the Appellant.

Our Comments

Who benefits from the payment?

The case of *Asima* makes it very clear that if a payment is made for the 'benefit' of a business, regardless of the person who actually makes the payment, it must be considered a business expense and should therefore be accounted for in the calculation of the taxpayer's BPT liability. If the payment falls within a category stated in Section 6(a) of the BPTA, the payment is subject to WHT.

What is the accounting treatment?

One of the key arguments in favour of imposing WHT on the payments in dispute was that the payments were made for the benefit of the Appellant and therefore are an "expense incurred [by the taxpayer] for the generation of income" as stated in Section 10(a) of the BPTA. Taking analogy from the outcome of the case, it can be said that the TAT sustained the MIRA's contention that the test to be applied for ascertaining whether an expenditure has been 'incurred' – the general rule for claiming an expense for tax purposes – is the determination of who benefited from

that expenditure.

From an accounting perspective, now the question arises as to whether the payment should first be treated as a loan obtained by the Appellant, or should it be treated as a gift? In the former case, the Appellant must record it as a liability, while in the latter it should be recorded as an income. Regardless of the correct treatment in this regard, it is clear that there are two transactions at play: firstly a loan/gift to the Appellant by her husband, and secondly, a payment to a non-resident for the promotion of the business.

Onus of accounting for WHT

The fact that the payer (i.e. the husband) was not a taxpayer leaves us with another key question. Had the payment been made by a taxpayer other than the Appellant, without having it claimed as an expense by the Appellant, would the onus of accounting for WHT on the payment be on the payer? One may argue that Section 6(a) of the BPTA, which states that "the person who makes the payment shall be chargeable to tax in respect to such payment", makes it clear that the onus of accounting for WHT is always on the payer. On the contrary, Section 25(a)(1) of the BPTA states that WHT must be deducted from the payment by the person "liable to make the payment". We are yet to see how these two sections may be read together as there clearly are instances where the person making the payment may not be the same as the person liable to make it.

The case has been appealed and is pending a decision from the High Court.

How is your business impacted?

If you are using personal bank accounts or credit cards for business purposes, or if some other person have made payments on your behalf, this case will have potential implications for your business. If you are unsure of the tax implications of a similar transaction, we can:

1. Review the facts to assess any potential tax implications; and
2. Advise you on how to properly account for WHT and in dealing with any related accounting or legal matter.

You may contact the following member of our team:

Husam Shareef
Advisor, Tax Planning
husam@ctlstrategies.com
+960 958 8258

ctl strategies | TAX & LEGAL ADVISORS

CTL Strategies LLP is a firm specialised in providing tax and legal advisory services to businesses. We offer a comprehensive range of tax advisory services to all types of clients from family run businesses, SME's to accounting and law firms, and local and multinational companies.

Our tax advisory services encompass all aspects of tax related business planning to achieve a more tax-efficient operational and business structure including corporate reorganisations and consolidations, structured finance and tax-driven transactions.

We can provide strategic advice, assistance and advocacy at every stage of tax controversies and legal disputes. With our affiliated international taxation experts, we can create a tailored international tax planning and compliance program for business doing cross-border transactions.

CONTACT US

Second Floor
H. Karankaa Villa
Kurangi Goalhi
Male', Maldives

ask@ctlstrategies.com
www.ctlstrategies.com