Insight

HPL Resorts (Maldives) Pvt Ltd v Maldives Inland Revenue Authority (2017)[1]

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Who should read this?

All taxpayers paying WHT, particularly taxpayers in the tourism industry and those having reimbursement arrangements with non-resident parties.

Keywords:

Withholding Tax, Reimbursements, Management Fee

Are reimbursements part of a management fee?

Summary

In the case of HPL v MIRA, the Tax Appeal Tribunal held that reimbursement of expenses made under management agreements are not subject to WHT unless they are for a service specifically stated in Section 6(a) of the BPT Act[2].

The key point noted by the TAT is that a payment will attract WHT, not because of the type of agreement under which it is paid, but because of the nature of the underlying service.

[1] HPL Resorts (Maldives) Pvt Ltd v Maldives Inland Revenue Authority [2017] TAT-CA-W/2015/003

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

Facts and Observations

WHT charged on reimbursements made under a management agreement

H.P.L Resorts (Maldives) Pvt Ltd entered into a resort management agreement with Four Seasons Hotel and Resorts B.V ("Four Seasons") - a non-resident company - for the management of a tourist resort in the Maldives. Under the agreement, HPL pays a fee to Four Seasons for the management services it provides. In addition, HPL also reimburses several expenses (such as travel, food, accommodation, telephone etc.) paid for by Four Seasons on behalf of HPL. As per HPL, these expenses are incurred by HPL and Four Seasons merely acted as an intermediary in making those payments.

The MIRA has charged WHT on the reimbursements arguing that they constitute part of the management fee. As per the MIRA, it was part of the arrangement - under the resort management agreement - that Four Seasons makes the payments on behalf of HPL.

MIRA: If there is an agreement, it takes precedence over wording of the law

To support its view, the MIRA argued that, had there been no management agreement, HPL would not have received the service (i.e. the reimbursement arrangement with Four Seasons). Moreover, in response to a question put forward by the Bench, the MIRA stated that where an agreement is made between two parties, subjectability of the payments to WHT will be determined based on the provisions of that agreement and, in the absence of an agreement, the law will take precedence.

Furthermore, it was argued by the MIRA that the purposive approach stated in Section 6(a) of the Interpretation Act must be adopted in determining the scope of "payments for management service". According to the MIRA, the inference derived from application of the purposive approach is that all payments under the management agreement are payments for services envisioned under the management agreement. However, this argument did not take into account, the multiplicity of the services provided, and the nexus that the respective services had with the management agreement in question.

HPL: Reimbursements are not part of the consideration for management services

The key argument presented by HPL was that, although the reimbursements were made under the resort management agreement, the reimbursements were not part of the consideration (i.e. the management fee) for the management service provided by Four Seasons. HPL further argued that the matter in dispute is not a question of whether or not the reimbursements are made under the resort management agreement but

whether the underlying transactions fall within the definition of "payments for management services" as stated in Section 6(a)(4) of the BPT Act.

With respect to the interpretation of the law, HPL noted that the wording of Section 6(a)(4) of the BPT Act is clear on its meaning and therefore the literal rule under Section 3 and, Section 12 of the Interpretation Act must be applied. HPL further noted that the MIRA has not substantiated its argument that the intention of the law is to impose WHT on all payments under the management agreement..

Held

Is the underlying transaction subject to WHT?

By majority opinion of the TAT Members, it was held that the MIRA's decision to charge WHT on the reimbursements made to Four Seasons under the resort management agreement was incorrect because the reimbursements relate to transactions that do not fall within the ambit of Section 6 of the BPT Act.

In arriving at this judgement, the majority members noted that Section 6 of the BPT Act refers to a "management service" and not a "management agreement" - meaning that reimbursements would not be subject to WHT simply because they are paid under a resort management agreement.

Learned Member of the TAT, Mr Hassan Zuhair also noted that subjectivity to WHT should be determined as stated in Section 6 of the BPT Act regardless of whether or not there exists a management agreement. Member Zuhair writes that agreements may differ between businesses and therefore a decision favoring the agreement over the law will lead to discrimination, which violates the right to equality as guaranteed by law.

Literal rule over purposive approach

Citing Section 3(a) of the Interpretation Act, Member Zuhair also noted that WHT should be imposed on payments specifically mentioned in Section 6(a) of the BPT Act. Section 3(a) of the Interpretation Act reads:

> "3. In the that interpretation of Acts, the rule of literal or ordinary meaning shall be applied, to achieve the following:
>
> (a) Give priority to maintaining the ordinary meaning of a word, phrase or sentence used in stating a particular matter in the Acts passed by the Parliament."

Dissenting opinion

Reimbursements made under the management agreement are subject to WHT

Members, Mr Nasrulla Jameel and Ms Aminath Fareesha expressed a dissenting opinion that the MIRA's decision to charge WHT on the reimbursements is in accordance with the law. They were of the opinion that where an agreement exists, the scope of "payments for management services" may be understood with reference to the management agreement, and in the absence of an agreement, the "nature of the transaction" should be considered.

The Members who expressed the dissenting opinion also noted that Section 6(a) of the BPT Act stated "the following payments" - as opposed to "profits" or "net amount" - must be read to exclude any deductions [from the payments made under the management agreement].

Our Comments

A question of the underlying transaction - not the agreement

The TAT's decision on the case is crucial, especially for taxpayers in the tourism industry where resort management agreements are a common practice. The MIRA's interpretation, and practice, has been that any payments made under a management agreement constitute part of the management fee. The case, however, makes it clear that a payment is subject to WHT not because of the type of agreement under which it is paid, but because of the nature of the underlying transaction. In the case of HPL, the reimbursements relate to a number of transactions which included travel, food, accommodation, telephone and such - which would not be subject to WHT if directly paid for by HPL.

The case highlights the importance of segregation of fees paid to non-residents and clear identification of the service for which a payment is made.

How we can assist

If you would like to know more about the implications of this case on you or want to inquire about any of our practice areas, you may contact the following member of our team:

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