

# Insight

## Barefoot Noomadi Hotels v MIRA

### Summary

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#### **Are OTA commissions under the Merchant Model subject to WHT?**

In the case of Barefoot Nomadi Hotels v MIRA<sup>1</sup>, the Tax Appeal Tribunal (“TAT”), by unanimous decision, held that commission payments made to Online Travel Agencies (“OTAs”) operating under the Merchant Model are not subject to Withholding Tax (“WHT”) under Section 6 of the BPT Act<sup>2</sup>.

The Tribunal deliberated on the taxability of the commissions charged by Agoda and Expedia – both OTAs, operating under the Merchant Model, and found that such payments do not fulfil the conditions that trigger WHT as set out in High Court’s decision in Jetan Travel Services v MIRA<sup>3</sup> and that the MIRA’s inconsistent application of the tax laws contravenes Article 97 of the Constitution.

<sup>1</sup> TAT-CA-W/2019/015 (8 October 2020).

<sup>2</sup> Business Profit Tax Act (Law Number 5/2011).

<sup>3</sup> 2015/HC-A/214 (23 April 2019).

# Facts and Observations

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## **A circular to charge tax and a tax ruling to abolish tax**

The MIRA issued a Circular<sup>4</sup> (the “Circular”) on 28 December 2016 instructing taxpayers to charge WHT on deemed OTA commission, irrespective of the model that the OTA operates, effective from 1 January 2017. This decision was later reversed by MIRA in November 2017 by issuing Tax Ruling B62<sup>5</sup>, which suggests that OTA commission will only be subject to WHT where the OTA operates under Agency Model, effective from 1 December 2017.

## **Questions on the scope of “other fee or commission”**

The MIRA carried out a WHT audit of Barefoot Noomadi Hotels and charged WHT on booking commission payments made to Agoda and Expedia – OTAs – under Section 6(a)(4) of the BPT Act, on the basis that said booking commission falls under “other fee and commission not constituting income from employment”. Although the audited period was from July 2015 to January 2018, additional tax was only assessed for the period from 1 January 2017 till 30 November 2017. (that is, from the effective date of the Circular, until the effective date of Tax Ruling B62). Upon the audit decision being disputed by Barefoot Noomadi, the MIRA vide the Objection Review Report refused to change MIRA’s position in the audit decision.

Barefoot Noomadi appealed MIRA’s decision to the TAT on the grounds that the MIRA imposed WHT on the transactions in dispute – payments made to OTAs – in contravention to Section 6(a)(4) of the BPT Act. Barefoot Noomadi argued that the scope of the term ‘commissions and fees not constituting income from employment’ as stipulated in Section 6(a)(4) is explained in Tax Ruling B25<sup>6</sup> and

<sup>4</sup> 220-TSD/CIR/2016/11 (28 December 2016).

<sup>5</sup> TR-2017/B62 (29 November 2017).

<sup>6</sup> TR-2013/B25 (10 January 2013).

B62<sup>7</sup> and, according to Tax Ruling B62, commission payments made to OTAs are liable to WHT where such payment 'is paid or becomes payable to the OTA by the tourist establishment'. Barefoot Noomadi contended that OTAs such as Agoda and Expedia operate under the Merchant Model and collect payment for rooms at the rate published on their respective websites. It was argued by Barefoot Noomadi that no commission payment was made by them to the OTA, nor were they liable to make such payment and as such, the MIRA's decision to impose WHT on this transaction is in violation of Section 6(a)(4) and Tax Ruling B25.

### **MIRA's inconsistency in application of the law**

Barefoot Noomadi contended that the MIRA's application of the BPT Act with respect to imposing WHT on payments made to OTAs that operate under the Merchant Model was primarily based on a Circular issued by the MIRA and is grossly inconsistent, as the application of 'law' in the view of the MIRA is only applied to a certain period within the audit, although the BPT Act remains unchanged during this period. In this regard, it was argued that the MIRA adopted conflicting positions with respect to application of the law over the audited period - July 2015 to January 2018 and this conflicting application of the law (by charging tax only for part of the audit period), violates Article 97 of the Constitution. Barefoot Noomadi further argued that MIRA's actions deprived the equal benefit and protection before the law guaranteed under Article 20 of the Constitution. Referring to the Supreme Court's decision in Mohamed Fahmy Hassan v State<sup>8</sup>, it was also argued that the MIRA's arbitrary and selective application of the tax laws violates the rule of law, and any decision that violates the rule of law shall be considered void.

<sup>7</sup> TR-2017/B62 (29 November 2017).

<sup>8</sup> 2012/SC-C/35 (14 March 2013).

The MIRA, responding to arguments raised by Barefoot Noomadi, contended that commission payments made to OTAs such as Agoda and Expedia fell within the scope of Section 6(a)(4) of the BPT Act and Tax Ruling B25. Referring to the High Court's decision in *Jetan Travel Services v MIRA*, the MIRA asserted that the elements of the transaction in dispute fulfilled the three conditions for a payment to subject to WHT: 1) a payment, categorically identified under Section 6(a), 2) the payment is paid or payable by a person carrying on business in the Maldives, 3) the recipient of the payment is a non-resident. The MIRA further argued that commissions paid to OTAs that operate under the Merchant Model fall within the scope of paragraph 4 of Tax Ruling B25 and that the purpose of the Circular on the subject matter was to clarify the tax treatment of commission regardless of the commercial arrangements between taxpayers and the OTAs. It was the MIRA's argument that the purpose of the Circular was to clarify the application of Tax Ruling B25 as the MIRA had observed that many taxpayers failed to comply with the said Tax Ruling.

/ 4

## Held

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### **Under the Merchant Model, no commission is paid or payable to the OTA**

In their decision, the Tribunal opined that commission of OTA's operating under the Merchant Model, do not fulfil the conditions that trigger WHT as per High Court's decision in *Jetan Travel Services v MIRA*. The Tribunal expounded on this, observing that Tax Ruling B62, which amends Tax Ruling B25 clearly shows that a tourist establishment is liable to pay WHT on a commission payment to an OTA, provided such amount is paid or payable by the tourist establishment. With regard to commission payments made to OTA's operating under the Merchant Model, the Tribunal found that Barefoot Noomadi was not liable to make any payment to Agoda or Expedia.

The Tribunal also noted that the MIRA has sent an email confirmation to Barefoot Noomadi, explicitly stating that WHT does not apply to commission of OTAs operating under the Merchant Model.

### **WHT treatment of the same transaction has been inconsistent**

The Tribunal further observed that MIRA's application of the tax law was inconsistent. The Tribunal noted that the MIRA, from 1 July 2011 to 1 January 2017 did not impose WHT on commission payments to OTAs operating under the Merchant Model, but had changed their position on taxation of such payment through a Circular. The MIRA, then reverted their position on taxation of such payments after issuing Tax Ruling B62. The Tribunal opined that, where a tax is imposed by a law, the MIRA is not empowered to levy such tax on a discretionary basis.

The Tribunal also observed that Section 84 of the Tax Administration Act - the power to issue Tax Rulings - does not empower the MIRA to impose tax on a discretionary basis. The Members observed that Section 84 granted the MIRA the authority to amend the regulations and expound on tax principles. The Members opined that, as per Article 97 of the Constitution, the power to impose tax resides only with the Parliament, and MIRA's exercise of the legislative function is *ultra vires*.

**/ 5**

## **Our comments**

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Application of WHT on OTA commission has been subject to much controversy for a long period of time. This has particularly been the case after taxpayers noticed that the MIRA's application of the law changed upon the issuance of the Circular in question. The TAT's decision in this case brings closure to this matter - at least for the time being.

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/ **6**



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