

SATURDAY INTERNATIONAL TAX GYAN !!!

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Flipkart Internet Pvt. Ltd. v. Deputy Commissioner of Income-tax, Circle 1(1)

Payment to non-resident company for reimbursement of salary of seconded employee in India who are under control of Indian company would not be liable for TDS u/s 195.

Date: 02.07.2022

Facts of the Case

- ❖ The petitioner (Flipkart Internet Private Limited) is in the business of providing Information Technology Solutions and support services for E-commerce industry.
- ❖ **Walmart Inc. and petitioner** has entered into an inter-company **Master Services Agreement (M.S.A.) for secondment of employees** and provision of services (i.e. either of the parties could use services of seconded employees).
- ❖ Walmart Inc. had seconded four employees to the **petitioner and** had entered into a '**Global Assignment Arrangement**' with the **seconded employees**, which provided that the seconded employees would work for the benefit of the Flipkart.
- ❖ Petitioner had also entered into an agreement with employees and it was the economic employer of such employees and Flipkart was also deducting TDS u/s 192 on such salary.

Assessee's/ Petitioner's Contention

- ❖ Petitioner contends that the payment made to M/s. Walmart Inc. in the nature of "**pure reimbursement**" of salaries paid to the seconded employees and once such payments are salaries, the same **falls outside** the purview of '**FIS**'.
- ❖ In this regard the petitioner **requested** the Department for issuance of a '**Certificate of No Deduction of Tax at Source**' for payment to Walmart Inc in relation to salaries to the deputed expatriate employees as petitioner had already deducted TDS on salary paid to employees.
- ❖ Petitioner contends that it is not required to deduct tax under Section 195 on payments which are in the nature of reimbursement.
- ❖ Also, any service that does not make technology available to the person acquiring the service **would not fall in** the category of '**make available**' and accordingly would stand excluded from the provision of Article -12 of 'DTAA.'
- ❖ The petitioner has paid only the actual cost of salaries of the seconded employees and there is **no 'mark-up'** which is retained by 'Walmart Inc.' on such costs.

Revenue's contention

- ❖ Assessing Officer submitted that the **services** rendered by the seconded employees are in the **nature of technical services** under the Income Tax Act and 'DTAA',
- ❖ The mere deduction of tax at source under Section 192 does not obviate the need to deduct tax at source under Section 195, as tax at source is to be deducted on the gross payment.
- ❖ He contends that even if consideration is agreed on cost-to-cost basis, the character of payment would not be altered.

Legal provisions

As per **Section 9(1)(vii)(b) of Income Tax Act, 1961** - income by way of fees for technical services payable by a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India.

Article 12(1) of 'DTAA' provides for taxation of Royalties and 'FIS' arising in a Contracting State and paid to a resident of other Contracting State.

Further, **Article 12(2)** provides that Royalties and 'FIS' may also be taxed in the Contracting State in which they arise.

Legal provisions

As per Article 12(4) of India-USA DTAA –

For purposes of this Article, "**fees for included services**" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

- (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or
- (b) "**make available**" technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design."

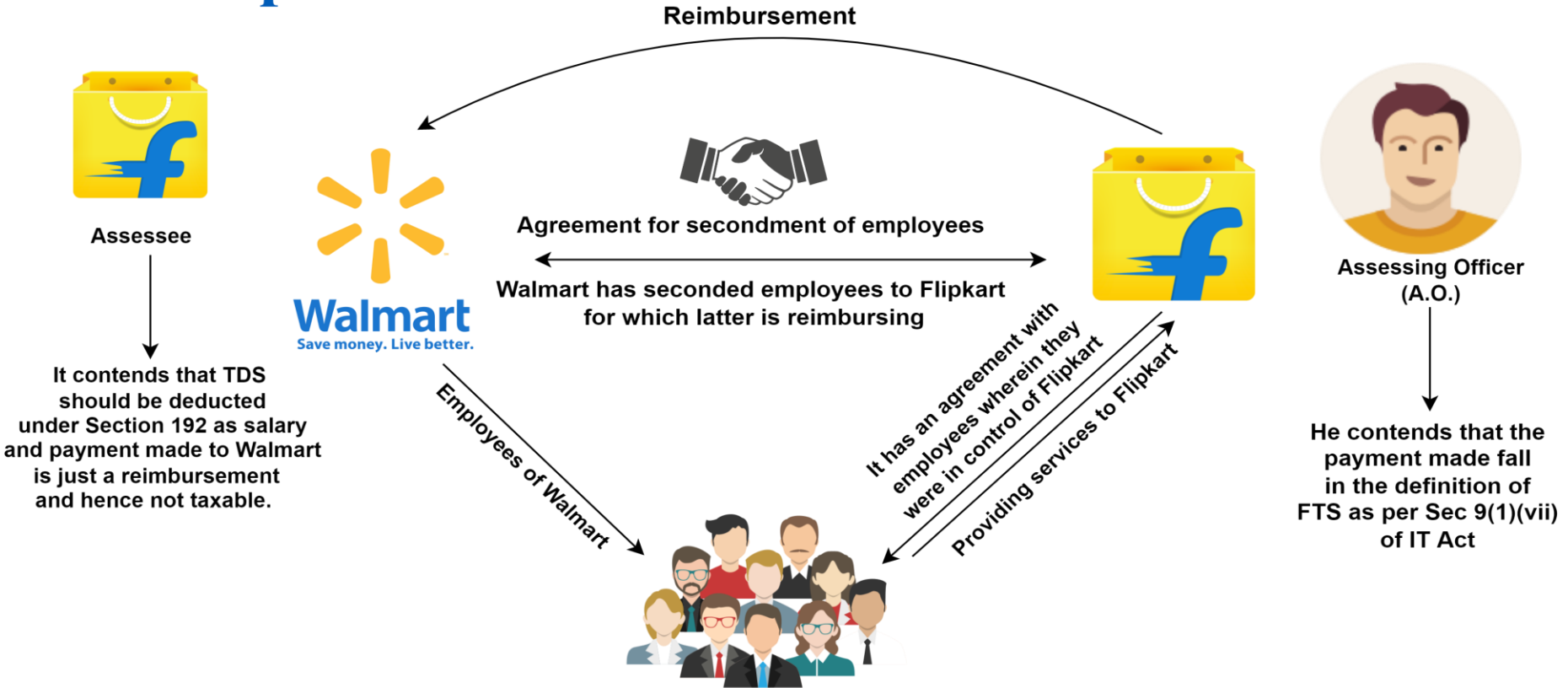
Ruling

- ❖ I.T. Act provides that where the Central Government has entered into an agreement with a country outside India for the purpose of granting relief of tax or for avoidance of double taxation in relation to the assessee, provisions of the Act would apply to the extent they are more beneficial to the assessee.
- ❖ '**FIS**' under Article 12(4) would refer to payments of any kind to any person in consideration for rendering of technical or consultancy services (including through the provision of services of technical or other personnel) if such services **make available** technical knowledge, experience, skill, know-how or processes or consists of development or transfer of technical plan or technical design.
- ❖ As per **make available clause**, the payment discussed above is said to be the reimbursement of salary by the assessee to Walmart Inc. hence it does not fall in the definition of FIS as per Article 12(4) of India-USA DTAA.
- ❖ The C.I.T. seeks for granting approval to M/s Flipkart Internet Private for deduction of TDS at the rate of zero per cent on cost-to-cost reimbursement.

Our Comments

- ❖ There is employer-employee relationship between M/s Flipkart Internet Private limited India and secondees seconded by Walmart Inc.’ as Flipkart would be considered as economic and real employer of the seconded employees. Hence the payment to employee would be liable for TDS u/s 192.
- ❖ The Secondment Agreement constitutes an independent contract of services in respect of employment with assessee.
- ❖ In various recent judgements the make available clause was broken into two parts wherein it was held that in the second leg “i.e. transfer of a technical plan or technical design”, make available clause is not applicable and hence such transaction could be taxable as FIS. Thus it is important to check that whether such clause is getting attracted in the agreement or not.

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1. The Secondment Agreement constitutes an independent contract of services in respect of employment with assessee.
2. Because of "Make Available" clause in DTAA AO is directed to issue Certificate of "Nil Tax Deduction at Source".

Section/Article	9(1)(vii) of the Income Tax Act, Article 12
DTAA/Country	India – USA DTAA
Court	Karnataka High Court
Date of decision	24.06.2022

Note: Case law name in **Red**- in favour of the revenue, **Green**-In favour of the Assessee, **Orange** = Partial



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