

Control and supervision test not the sole criterion for determining employer-employee relationship: Bombay HC

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Summary

The Bombay High Court (HC) in a recent decision¹ has held that where an employee is deputed overseas to a foreign entity, the mere exercise of control and supervision by the foreign entity would not classify the foreign entity as the employer. Accordingly, the HC held that the Indian entity continues to remain the employer of such deputed personnel and payment made by it to them should be treated as a 'salary' on which tax is deductible at source under section 192 of the Income-tax Act, 1961 (the Act). Thus, the HC held that section 195 of the Act is not applicable to such salary payments.

Facts of the case

- M/s Radiant Services through its sole proprietor (taxpayer) had entered into a manpower supply agreement with a Kuwait-based company (the company). As per the agreement, the taxpayer was to provide a commissioning engineer to the said company on a deputation basis.
- The taxpayer received a fixed monthly sum from the company, out of which it paid remuneration to the deputed personnel. The taxpayer deducted tax at source while making such payment under section 192 of the Act treating it to be in the nature of 'salary'.
- The tax officer disallowed the expense by holding that since the payment was made to a non-resident, tax is required to be deducted at source from such payments under section 195 of the Act.

¹ Pr. Commissioner of Income Tax -27 versus Smt. Supriya Suhas Joshi (Income Tax Appeal No. 382 of 2017)

- The taxpayer contended that the person so employed continues to be its employee and was merely deputed to the Kuwaiti company for carrying out the work as per the requirement of the said company.
- Both the Commissioner of Income Tax (Appeals)² and the Income Tax Appellate Tribunal held in favour of the taxpayer and held that the deputed personnel is an employee of the taxpayer on which tax is required to be deducted at source under section 192 and not section 195 of the Act.
- Before the HC, the Revenue contended that the Kuwaiti company was the employer of the deputed personnel since it exercised supervision and control over the personnel. The revenue placed reliance on the Supreme Court ruling in case of Ram Prashad v CIT³.

Held by the Bombay HC

- The HC perused the terms of the agreement and noted that the taxpayer was engaged to supply a commissioning engineer to the Kuwaiti company on deputation basis for an on-going project. Further, the HC observed that the terms and conditions of the deputation were to be mutually discussed between the taxpayer and the Kuwaiti company.
- The HC further noted that in case of deficient services, the right to terminate the service of the deputed personnel was with the taxpayer. Thus, the HC held that the concerned employee was in the employment of the Indian entity and not the Kuwaiti company.
- Accordingly, the HC held that the payment made by the taxpayer to the deputed personnel would be treated as a case of salary payment on which tax is required to be deducted under section 192 of the Act. Hence, it held that section 195 was not applicable to the instant case.
- As regards the Tax Department's argument of control and supervision over the deputed personnel, the HC noted that in the instant case, the Kuwaiti company enjoyed considerable supervising powers and control over the personnel.
- The HC, however, opined that while the determination of control and supervision was an essential criterion for determining whether a person is an agent or an employee, in case of deputation arrangements, the question of dual control would

² First Appellate Authority

³ (1972) 86 ITR 122 (SC)

always arise. Thus, it held that in such circumstances, a mere test of on-spot control or supervision in order to decide the correct employer may not succeed.

Our comments

Taxability of payments for a secondment arrangement has been a matter of litigation. However, the dispute was largely in cases where a foreign company was deputing its employee to an Indian company. This case poses a reverse situation where the Indian company is deputing its employee to a foreign company and the Tax Department has sought to tax salary remittance made to the employee as technical fees. The ruling by the HC should provide clarity on taxability in cases of outbound manpower supply arrangements.

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