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PAYMENTS MADE TO EXPATS WORKING IN INDIA AS EMPLOYEES OF AN INDIAN COMPANY WILL NOT ATTRACT SERVICE TAX LIABILITY

In the recent ruling of November 2015[1], the Authority of Advance Ruling ("AAR") has considered an issue of payment of service tax for service provided by an expatriate in India as employee of an Indian company. This Ruling is a welcome ruling for the Indian companies which often engage expatriates for working with them. On considering the issue to pay service tax on the salary and the allowances payable by these Indian companies, to the expatriate, in terms of the dual employment agreement, AAR has held that no service tax shall be levied on such payments. We have provided below a brief overview of the facts of this case and the ruling of the AAR.

Facts:

- M/s. North American Coal Corporation of India Pvt. Ltd. ("**the applicant**") is a subsidiary of NAC, US, an American company ("**NAC US**").
- The applicant has employed one employee, namely Steve R. Sloan ("**the expat**").
- The expat is on the permanent roll of the NAC US, however, his services were required by the applicant for its activities.
- There is a tripartite agreement between NAC US, the applicant and the expat.
- As per the agreement, the services of the expat were to be utilized by the applicant for a particular term and so long as the expat serves in India, all his salaries are to be paid by the applicant.
- It is also provided in the agreement that even when the expat stays in India and serves the applicant, his social security interests will be taken care of by NAC US and such social security interest will not be in any manner reimbursed by the applicant to NAC US.

Relevant provision of the Finance Act,1994:

- Erstwhile, prior to change in the tax regime in 2012, service of manpower supply was taxable under the category of "manpower recruitment or supply agency service" under

[1] M/S North American Coal Corporation India Pvt. Ltd. [AAR Ruling No. AAR/ST/13/2015] dated 6th November, 2015.

contd...

Section 65(68) read with Section 65(105)(k) of the Finance Act, 1994 (as amended from time to time) (" **Finance Act**")

- Post 2012 , and with the introduction of the Negative List[2], various categories of taxable services have been done away with and a new definition of "service" is provided under Section 65B(44) of the Finance Act which is as follows:

  "Service means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include;

  (a) ….

  (b) A provision of service by an employee to the employer in the course of or in relation to his employment.

  (c)…..

Issue before AAR: Whether there shall be any liability to pay service tax on the salary and the allowances payable by the applicant to the expat in terms of the dual employment agreement as per the provisions of the Finance Act?

Applicant's contention:

- The exclusion provision which is under Section 65B(44)(b), suggests that a provision of service by an employee to the employer in the course of or in relation to his employment shall not be included in the definition of service.
- The service provided by the expat to the applicant is in his capacity as an employee which is clear from the wordings of the agreement and there is no question of any service tax provision being applicable to the salary paid by the applicant to the expat.
- The agreement is very clear to suggest that so long as the expat is serving in India, he will be treated to be the employee of the applicant though his interests as the employee of NAC US, in so far as the social security interests are concerned, will be taken care of by the NAC US. The only obligation on NAC US is regarding the social security which is not reimbursed by the applicant to NAC US.

Revenue's contention:

- Since NAC US is bearing the social security interest of the expat while he is in India, this social security amounts to a consideration paid by the applicant for employing the services of the expat and, therefore, this will not fall within the purview of Section 65B(44)(b).

Observation and AAR ruling:

- Since the agreement is very clear to suggest that the expat is providing service to the applicant in his capacity as an employee, there is no question of any service tax provision being applicable to the salary paid by the applicant to the expat as the same would fall under the exclusion of the definition of service (i.e. provision of service by an employee to the employer in the course of or in relation to his employment).

[2] Manpower supply service does not fall under the Negative List of services.

- The contention of the Revenue is incorrect. Merely because the social security of expat while he is in India is being taken care of by NAC US, the service of the expat to the applicant cannot be viewed otherwise, in view of the clear language of section 65B(44).
- Therefore, AAR held that there shall be no liability to pay service tax on the salary and the allowances payable by the applicant to the expat in terms of the dual employment agreement and such salary will not be liable to levy of service tax as per the provisions of the Finance Act.

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