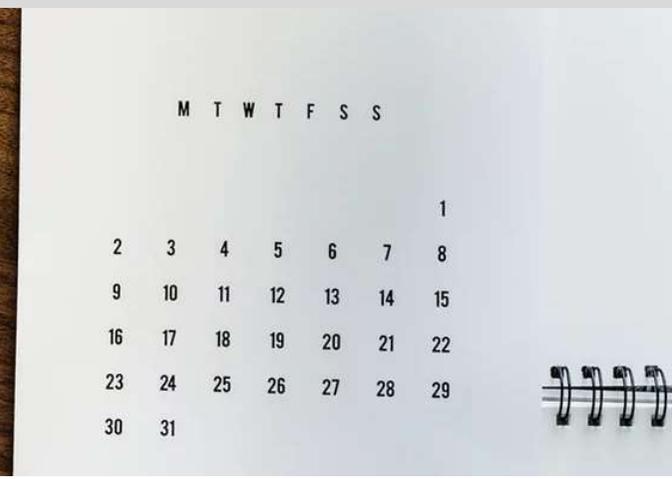


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# NDM ADVISORS LLP

## International Tax Alert (South Africa)



# ***Supreme Court of South Africa - Tax consultancy fee paid by employer would be taxable as perquisite in the hands of expatriate employees***

## **Executive Summary**

This alert summarizes recent decision of the Supreme Court of Appeal of South Africa ('SC') in the case of '*BMW South Africa (Pty) Ltd and The Commissioner for the South African Revenue Service (Case No. 1156/2018)*'.

In the aforesaid case, the SC dismissed appeal by the appellant, BMW South Africa (Pty) Ltd ('BMWSA') and held that the payments made by it to tax consultants in respect of expatriate tax compliances constituted a 'benefit or advantage' as contemplated in the definition of 'gross income' under the tax laws of South Africa and accordingly, the same were taxable in the hands of the employees.

## **Background and Facts**

BMWSA, as a matter of group policy, sent expatriate employees to South Africa for assignments. Employment of such employees was on 'tax equalisation basis' which was standard policy of the BMW Group for expatriate employees. Under such policy, the Group ensures that the 'expatriate employees' are not worse off in terms of their net remuneration on account of additional costs incurred because of their relocation from host countries.

In order to effect the 'tax equalisation policy', BMWSA engaged services of professional services firms to facilitate tax compliances, registrations etc. for the expatriate employees.

It was argued on behalf of BMWSA that the employees received no benefit from the services of tax professional firms hired by the employer as they were in a financially neutral position, irrespective of whether the taxes were overpaid or underpaid. Further, it was also argued that a large portion of the services accounted for liability of employer towards withholding taxes and reporting obligations and also ensuring that the tax equalisation calculations of the employees were correctly done. Further, it was emphasised that the services of professional firms was not towards employees' private or domestic purpose.

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## **Decision of Supreme Court**

The SC rejected the argument of BMWSA that there was no link between the employment of the expatriate employees and the payment of the tax consultants' fees. The SC had regard to BMWSA's letter of engagement of the tax consultants and considered the nature of the services rendered. They included:

- a. Registration/deregistration of expatriate employee as a taxpayer with the South African Revenue Service.
- b. Preparation and submission of annual income tax return and review of annual income tax assessment from South African Revenue Authorities.
- c. Letter of objection to address any inaccuracies reflected on the assessment.
- d. Preparation and submission of provisional tax returns, if required.

The SC concluded that the completion of the tax registration process and of an expatriate employee's tax returns were admittedly complex. The services rendered by the firms to expatriate employees, as set out in engagement letter were to ensure that the latter met their obligations to South African Revenue Authorities. It was held that the amount expended as per engagement letter with tax consultants constituted payments by BMWSA for the services rendered to the expatriate employees. That payment was made in terms of the contract of employment of the expatriate employees and those were the services that the expatriate employees would otherwise have had to pay for personally. The SC concluded that the services provided were a benefit or advantage taxable in hands of the expatriate employees. Accordingly, appeal of BMWSA was dismissed with costs, including the costs of two counsel.

## **NDM Comments**

The SC decision can arguably open a wide array of litigation in terms of expatriate taxation and interpretation of taxable benefits in hands of the employees in South Africa. It is imperative that the MNC's sending their employees to South African countries revisit the employment contracts and non-monetary benefits which are provided to the employees. Also, the decision lays down the importance of agreements/ contracts and requisite documents keeping in view the heavy reliance that is placed by the Revenue Authorities on the same.

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