

TAX

Fringe Benefit Resulting From The Payment By An Employer For The Provision Of Tax Consulting Services To Its Expatriate Employees

2 October 2019 5 min read

By Erich Bell, Director

In the recent case of *BMW South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service* (1156/18) [2019] ZASCA 107 (6 September 2019), the Supreme Court of Appeal (“SCA”) was required to consider whether the payment by BMW South Africa Proprietary Limited (“BMW SA”) to tax consulting firms for the provision of tax consulting services to its expatriate employees constituted a taxable fringe benefit in the hands of such employees in accordance with the Seventh Schedule to the Income Tax Act, No 58 of 1962 (“Act”).

Employees of the BMW Group (“Group”) are required to work for certain periods of time in foreign jurisdictions in which the Group has a presence. Such employees are remunerated on a tax equalisation basis, which means that the Group ensures that the take home pay of such employees is equal to what it would have been, had such employees performed their services solely from their home countries. This is achieved by the Group settling any additional taxes incurred by such employees when employed in foreign countries having higher tax rates than in their home countries.

At its own cost, BMW SA engaged tax consultants for the provision of the following services to its South African expatriate employees (i) registration and deregistration as taxpayers; (ii) preparation and submission of income tax returns; (iii) review of annual income tax assessments; (iv) disputing assessments with SARS; and (v) preparation and submission of provisional tax returns.

The issue before the SCA was whether the cost of these services constituted taxable fringe benefits in the hands of the expatriate employees in terms of paragraphs 2(e) or (h) of the Seventh Schedule to the Act, which state the following:

*2. For the purposes of this Schedule and of paragraph (i) of the definition of ‘gross income’ in section 1 of this Act, a taxable benefit shall be deemed to have been granted by an employer to his employee in respect of the employee’s employment with the employer, if as a **benefit or advantage of or by virtue of** such employment or as a reward for services rendered or to be rendered by the employee to the employer-*

*(e) any service ... has at the expense of the employer been rendered to the employee (whether by the employer or by some other person), **where that service has been utilized by the employee for his or her private or domestic purposes and no consideration has been given by the employee to the employer in respect of that service ...; or ...***

(h) the employer has, whether directly or indirectly, paid any debt owing by the employee to any third person ... without requiring the employee to reimburse the employer for the amount paid or the employer has released the employee from an obligation to pay any debt owing by the employee to the employer ...” (emphasis added)

In the proceedings before the Tax Court and the Gauteng Division of the High Court, it was argued on behalf of BMW SA that the expatriate employees received no benefit or advantage in respect of the tax consulting services as (i) they had no choice but to utilise such services as it formed part of the conditions of their secondment agreements; (ii) BMW SA had engaged the tax consultants in order to protect its own interests and those of BMW AG – not as a benefit or advantage for its expatriate employees; and (iii) due to the tax equalisation agreement, the expatriate employees were in a financially neutral position, irrespective of whether or not the tax consultancy services were rendered to them.

In the SCA, it was argued on behalf of BMW SA that the services were procured as part of its tax equalisation policy and that they were, accordingly, rendered at least partly for the benefit of BMW SA. The SCA was referred to a well-known tax reference book wherein it was stated that “the use must be wholly private or domestic – if used partially for the business or affairs of the employer, it falls outside the provision”.

The SCA held that the amounts paid by BMW SA for the tax consultancy services were made in terms of the employment contracts of the expatriate employees and that these employees would otherwise have been required to personally pay such amounts (i.e. the services are utilised by the employees for private purposes). It was, accordingly, held that the provision of the tax consulting services constitute taxable fringe benefits in the hands of such employees in terms of paragraph 2(e) of the Seventh Schedule to the Act.

In rejecting the above views in the tax reference book, the SCA held that there could be instances in which taxable benefits or advantages contemplated in the Seventh Schedule also benefit the employer. It was held that the primary enquiry should be whether a benefit or advantage was granted by an employer to an employee for the employee’s private or domestic use or consumption.

The lesson to be learned from this case is that an ancillary benefit derived by an employer from the provision of private or domestic services to an employee will not preclude such services from constituting taxable fringe benefits in the hands of the employees. The determination as to whether a service is provided for the private or domestic use of an employee must furthermore be determined on an objective basis and the subjective view of the employee is not relevant.



Erich Bell

Director, Werksmans Tax (Proprietary) Limited

[View Profile](#)