

Legal Update

Central Bank Issues Revised Norms for Repatriation of Payments for Services

Regulation of Foreign Exchange in Nepal

Section 9C of the Foreign Exchange (Regulation) Act, 1962 (the "FERA") specifically requires a person / entity residing in Nepal to comply with the provisions specified by Nepal Rastra Bank (the "Central Bank") for any indirect or direct: (i) payment to a person residing outside Nepal, (ii) creation of any payment obligation to a person residing outside Nepal, or (iii) payment to any person on the instruction or on behalf of a person residing outside Nepal.

By way of a background, for payments made outside Nepal, the Central Bank has generally been authorizing Class "A" and Class "B" licensed banks and financial institutions to approve repatriation of such payments upon the submission of certain documents; this limit was increased to USD 10,000 from USD 6,000 vide Circular No. 578 dated August 08, 2012. Such facilities are generally applicable to all payments made outside Nepal (including payment of royalties, services fees, etc.) but cannot be used to make capital account transactions (such as payments for acquisition of shares of a foreign entity).

For repatriation of an amount above USD 10,000, there was uncertainty as to whether prior approval of the Central Bank was required to be obtained for entering into any agreement, pursuant to which repatriation of more than USD 10,000 would have to be made. The general practice though was to obtain approval of the Central Bank at the time of repatriation of payments, and not at the time of entering into the agreement pursuant to which such payments are made. It may be relevant to note that pursuant to Circular No. 620 dated August 04, 2014, such limit for payment of service fees for- (A) lease / right to use of satellite service by telecom operators from foreign service providers and, (B) maintenance service from foreign service providers by airline operators, was capped at USD 100,000.

Revised Norms for Repatriation of Payments for Services

The Central Bank came out with Circular 645 dated August 22, 2015 (the "Circular") pursuant to which the Central Bank has sought to clarify the norms for repatriation of payments for services obtained by Nepalese resident entity / person from foreign service providers. The Circular sets out the different procedure required to be followed for the repatriation of service fees based on certain monetary threshold applicable to the transaction. The procedure set out in the Circular is provided in the table below:

http://www.nrb.org.np/fxm/circulars/List_of_Circular--578.pdf

http://www.nrb.org.np/fxm/circulars/List_of_Circular--620.pdf

http://www.nrb.org.np/fxm/circulars/List_of_Circular--645.pdf



| S.N. | Monetary Threshold | Authorizing Entity | Documents to be Submitted |
|------|--|--|--|
| 1. | Up to USD 10,000 | Class "A" and "B" Banks and Financial Instructions | Documents as required by Class "A" and "B" licensed Banks and Financial Institutions, including relevant invoices, documents evidencing deposit of the withholding of tax (where applicable). |
| 2. | USD 10,000 and above (where the relevant regulatory authority can be identified) | Central Bank | In addition to the documents under (1) above: (A) Registration certificate of the remitting entity; (B) Tax clearance certificate; (C) Latest audit report; (D) Agreement with the service provider; (E) Copy of minutes of the meeting of the board of directors (such other corporate decision) of the remitting entity containing (a) details of the services provided by the foreign entity under the service agreement and agreeing to obtain foreign exchange for the payment of the same, and (b) decision to take responsibility in case of misuse of foreign exchange; (F) Documents evidencing fulfillment of the services under the service agreement; (G) Bank statement and documents from the employer / service recipient evidencing payment, where payments have been received from the employer / service recipient; (H) Recommendation of the relevant regulatory authority. |
| 3. | USD 10,000 – USD 50,000 (where the relevant regulatory authority cannot be identified) | Central Bank | All of the documents under (2) above except (H). In case the remitting entity is a company / industry, the Office of the Companies Registrar ("OCR") or the Department of Industries ("DOI") will need to inform the Central Bank regarding whether or not it will be able to provide recommendation for the transaction. |
| 4. | Above USD 50,000 (where the relevant regulatory authority cannot be identified) | Central Bank (Prior approval required) | All of the documents under (2) above except (F) – (H). |

[1] This requirement under the Circular is not clear.



The Circular provides that, where a firm / company / organization has already availed of consultancy or other services from a foreign service provider prior to issuance of the Circular, and such entity has not obtained the recommendation of the relevant regulatory authority (or the relevant regulatory authority cannot be identified), then such entity is required to obtain the approval of the Central Bank for the repatriation of payments for such services, within 6 months from the date of the Circular.

While the purpose of the Circular appears to be to provide clarity to Nepalese companies for repatriation of service fees to foreign / multinational service providers, there are number of issues it raises. The same have been outlined below:

In case of repatriation of amount in excess of USD 10,000, would the recommendation of the relevant regulatory authority be required prior to entering into the service agreement, or at the time of repatriation of the payments under such service agreement?

The Circular clearly provides that prior approval of the Central Bank will be required for entering into service agreement pursuant to which service fees of more than USD 50,000 is proposed to be paid to the foreign service provider, in the event the relevant regulatory authority cannot be identified. Further, the Circular appears to also suggest that the requirement to obtain information from the DOI / OCR (on whether or not they can provide recommendation), where the service fees for the services is more than USD 10,000 but less than USD 50,000, and the relevant regulatory authority cannot be identified, is also not a prior requirement and is only applicable at the time of repatriation of the service fees.

However, where the service fees to be paid under a service contract is above USD 10,000 and where the relevant regulatory authority can be identified, it is not clear whether the recommendation from the relevant regulatory authority is required to be obtained prior to the entering of the service contract, or only at the time of repatriation of payments. What adds to the confusion is the fact that the Circular states that the recommendation of the relevant regulatory authority will be required in the event "a firm / company / organization registered in Nepal is required to (i) enter into an agreement with a foreign service provider pursuant to which an obligation to make payment of more than USD 10,000 arises, or (ii) is required to make payment of such amount to a foreign service provider".

In case of the relevant regulatory authority cannot be identified, whether the OCR / DOI will provide information on whether or not it can provide its recommendation?

While in case of certain entities it may be apparent as to who the relevant regulatory authority is (for instance in case of hydropower company, the relevant regulatory authority is Department of Electricity Development with the specific authority to provide recommendation as contemplated by the Circular), in case of other entities (IT companies, as an example), it may not be possible to identify the relevant regulatory authority. In such cases, the Circular requires the OCR or the DOI to provide information to the Central Bank on whether or not they can provide recommendation which is not very practical as they do not have the authority to provide such recommendation. In absence of such authority, it may be challenging to even obtain a written statement of their inability to provide such recommendation.

What constitutes documents evidencing fulfillment of the services under the service agreement?

As discussed in the table above, the Nepalese service recipient company is required to submit documents evidencing fulfillment of services under the service agreement to the authorized banks and financial institution for the



repatriation of service fees. It is however not clear what would constitute fulfillment of services under the service agreement. Whether a written statement of the service recipient would suffice, or the actual documents submitted by the service provider in connection with rendering of the services (such as project report, etc.) which may contain confidential or commercially sensitive information, would also have to be submitted. Further, since the requirement is to submit documents evidencing fulfillment of services, it is not clear how payment of advance or payment in installments over the course of the term of the service agreement, would be dealt with.

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