

TAX

The Income Tax Officer, TDS-I
Vs
Samsung Electronics Co. Ltd.¹

Issue-

The issue involved in the present case is whether the payments made by resident payer to foreign supplier of shrink wrapped software are liable to withholding tax in India.

Contention of the Revenue-

- The payments for supply of software are similar to licence fees and therefore are in the nature of royalty.

¹ 2009-TIOL-629-HC-KAR-IT

- In case of Transmission Corporation of A.P. Ltd Vs CIT², the Supreme Court held that when any payment which is not explicitly declared exempt under the Income Tax Act, 1961 ("Act"), the person making the payment had to withhold tax at source. In this case, it was further held that the only way to abstain the liability to withhold tax is by obtaining the assent of the assessing officer under section 195(2) of the Act.

Contention of the Assessee-

- Under section 195(1) of the Act, the liability of withholding tax arise only when the income is chargeable to tax in India under section 4(1) of the Act.
- In case of Samsung Electronics Co. Ltd. India Software Operations V. Ito (Tds)-I, Bangalore, the Bangalore ITAT took the view that

² 2002-TIOL-471-SC-IT

use of software, which is subject to a copyright, is different from the use of the copyright of such software. It was only a right to use a copy of the software, with the copyright retained by the developer of the software and hence the payment in respect of such use is not in the nature of royalty income in India and should not be subject to deduction of tax at source.

- The nature of payment is not 'royalty' even within the meaning and scope of section 9(1)(vi) of the Act for the reason that the non-resident supplier has sold only a copyrighted article and not the copyright itself.
- The judgment in case of Transmission Corporation of A.P. Ltd cannot be applied as in that case the payments were prima facie chargeable to tax.

Held-

- The liability to withhold tax arises as and when a payment is to be made to a non-resident and such payment is in the nature of income in the hands of the recipient.
- Section 195 is not a charging provision and under this section, the assessing officer cannot determine the nature of income of the non-resident to be taxed in India. If there is any income, tax has to be deducted.

- The only way out for the assessee is to approach the Assessing Officer under section 195(2) or (3) of the Act to determine the appropriate portion of income that can be remitted.
- It was held that in a case where payments are being made for the import of certain goods, the entire costs of the goods by itself may not constitute income in the hands of the non-resident, it is only the income component as may be determined in the manner provided under the Act which should be subjected to the withholding provisions.

DSK Comment-

- In this judgment, the High Court held that in all the occasions of payment to non-resident, if there is any income, the tax has to be withheld. It is irrespective of fact that the income is chargeable to tax in India or not.
- We are of the view that such an interpretation is highly improper as section 195(1) of the Act clearly provides that tax is to be withheld only in cases where the income is chargeable to tax in India.

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