

SITG No.
126

SATURDAY INTERNATIONAL TAX

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JLC Electromet (P.) Ltd.

v.

ACIT, Circle-4

**Commission, exhibition charges and testing charges paid outside
India for sales outside India is not liable for TDS u/s 195**

[2020] 113 taxmann.com 157

Date: 05.11.2022

Fact of the Case

- ❖ Assessee company is engaged in the business of manufacturing of wire and other products made of various metals including Nickel, Copper, Iron, Chromium etc..
- ❖ During the year under consideration, the assessee has made payment of Rs. 1,54,37,362/- towards Selling Commission on export sales, Rs. 17,91,586/- for payment of Exhibition Expenses and Rs. 88,410/- for payment of Testing Expenses to various non-resident entities, without deduction of tax at source.
- ❖ During the course of assessment proceedings, the assessee was asked to explain as to why these payments should not be disallowed u/s. 40(a)(ia) in view of insertion of Explanation 2 to Section 195 by the Finance Act, 2012 with retrospective effect from 01.04.1962.

Assessee's Contention

- ❖ The payments were made to the non-residents towards the services rendered outside India hence, no income has accrued or arisen in India, therefore, no tax was required to be deducted u/s. 195 of the Act.

Revenue's contention

- ❖ Revenue contended that assessee has not provided any evidence on record to prove that the non-resident to whom amount has paid does not have place of business in India and hence revenue is of a considerate view that TDS needs to be deducted on such amount and as per explanation 2 to section 195, TDS needs to be deducted whether or not the non-resident had a place of business in India.

Legal provisions related to Income tax Act

195. (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode.

Explanation 1.—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

- (i) a residence or place of business or business connection in India; or**
- (ii) any other presence in any manner whatsoever in India.**

RULING

- ❖ The explanation provides that the obligation to deduct tax at source applies to all persons but it doesn't and cannot take away the fundamental requirement under law which is that the sum has to be chargeable under the provisions of the Act and therefore, only in a scenario, the sum is chargeable under the Act, the obligation is cast on all persons to deduct tax at source irrespective of the residential status or business connection or presence in India.
- ❖ Such commission payment cannot be held chargeable to tax in India. Similarly the exhibition expenses have been paid in respect of participation in various exhibitions held outside of India and even the testing charges have been paid for testing services outside of India. Therefore, these payments will not fall in the category of income which has accrued or arisen or deemed to accrued or arise in India.
- ❖ Further, payments have been made outside of India. Accordingly, we are of the considered view that there was no liability to deduct tax at source u/s. 195(1) as these payments are not chargeable to tax and the provisions of section 40(a)(ia) cannot be invoked in the instant case.

OUR COMMENTS

- ❖ Based on the above judgement and provisions it can be said that the basic test to decide on the withholding of tax of non-resident in India is to check whether the income paid to non-resident is chargeable to tax in India or not.
- ❖ If income is not chargeable to tax in India i.e. if income is not accrued or deemed to accrue in India or receive or deemed to receive in India then no TDS needs to be deducted on such income.
- ❖ Further, while making the payment for exhibition held outside India it is to check that such exhibition is not held for getting sales in India otherwise such payment could be taxed in India as was held in case of Volkswagen Finance Pvt Ltd v. Income Tax Officer (International Taxation).
- ❖ Also, in case of testing it is to be kept in mind that such service should not fall within the ambit of technical service otherwise it could be liable for tax in India as fees for technical service irrespective of whether the service provider has a place of business in India or not.

Section/Article	Section 195, 9, 5
DTAA/Country	
Court	Jaipur - Trib.
Date of decision	04.09.2019

Note: Case law name in **Red**- in favour of the revenue, **Green**- In favour of the Assessee, **Orange** = Partial



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