

TDS rate on payments made to resident of France excludes surcharge and education cess

Summary – The Cochin ITAT in a recent case of M Far Hotels Ltd, (the Assessee) held that where DTAA is silent about inclusion of surcharge and education cess for purpose of deduction of tax at source on payments to non-residents, the TDS rates would be exclusive of surcharge and education cess.

Facts

- The assessee deducted TDS on payments of management fee and interest made to a resident of France exclusive of surcharge and education cess in view of provisions of the DTAA.
- The Assessing Officer held that TDS was to be deducted after including surcharge and education cess and made addition to assessee's tax liability.
- The Commissioner (Appeals) deleted the said addition as per the rate applicable under DTAA.

Held

- The ITAT held that DTAA between the Government of India and France does not say anything about inclusion of surcharge and education cess for the purpose of deduction of tax at source. Therefore, there is an apparent conflict between the Income-tax Act and DTAA between the two sovereign countries with regard to deduction of tax at source on surcharge and education cess.
- Accordingly, the question that arises for consideration is whether the provisions of Indian Income-tax Act would prevail over the double taxation avoidance agreement between the two sovereign countries.
- It is obvious that in respect of a taxpayer to whom the double taxation avoidance agreement applies, the provisions of the Indian Income-tax Act shall apply to the extent they are more beneficial to that taxpayer.
- In other words, if the provisions of DTAA are more beneficial to the taxpayer, then the provisions of DTAA would prevail over the Indian Income-tax Act.
- Since the DTAA is silent about the surcharge and education cess for the purpose of deduction of tax at source, the ITAT held that the taxpayer may take advantage of that provision in the DTAA for deduction of tax. Therefore, there was no infirmity in the orders of the lower authority.