

## Prior to issue of circular 7/2009, export commission paid to NR outside India wasn't liable to TDS

**Summary – The Lucknow ITAT in a recent case of Reliance International, (the Assessee) held that payment of commission made outside India to NR was not liable to TDS prior to applicability of Circular No. 7 of 2009.**

### Facts

- The assessee was an 100 per cent export oriented unit exporting leather saddlers. It procured and executed orders outside India through agents and paid commission to them.
- The Assessing Officer made disallowance of commission payment on account of non-deduction of TDS by assessee.
- The Commissioner (Appeals) accepted the contention of the assessee that TDS on payment of commission to foreign agent was not required to be deducted as the foreign agents were not liable to pay taxes and, accordingly, allowed the claim.
- On appeal, the assessee submitted that in view of Circular No. 23 and Circular No. 786, the assessee was not required to deduct TDS from payments made to non-residents.
- The revenue resisted on ground that payment of commission could not be allowed without deducting TDS, placing reliance upon the Circular No. 7 of 2009 whereby earlier [Circular No. 23 of 1969, dated 23-7-1969](#) and [Circular No. 786, dated 7-2-2000](#) allowing for non-deduction of TDS on commission to non-residents, were withdrawn.

### Held

- Payments were made during the financial year 2007-08 and at the relevant point of time [Circular No. 23 of 1969, dated 23-7-1969](#) and [Circular No. 786, dated 7-2-2000](#) were very much in force and Circular No. 7 of 2009 was not issued. Therefore, the assessee was justified in non-deduction of tax on payment of commission to foreign agent following the old [Circular No. 23 of 1969, dated 23-7-1969](#) and [Circular No. 786, dated 7-2-2000](#).
- Though the revenue has argued that the payments to the non-residents were made in India, as it is recorded in the books of account maintained in India, but no evidence is placed in this regard.
- Thus, keeping in view the totality of the facts and circumstances of the case, it was held that payment of commission to non-resident was made outside India for the services rendered outside India and merely an entry in the books of account is made in India, for which it cannot be held that non-resident has received any payment in India. Therefore, the assessee was not required to deduct tax at source on the payment of commission to non-resident.