Dealings between assessee and NR on principal-to-principal basis rule out existence of 'service PE'

Summary – The Mumbai ITAT in a recent case of Reliance Infocom Ltd., (the Assessee) held that where assessee, an American company, had entered into software supply agreement with Indian group company on principal to principal basis and had not deputed any personnel to India, it could not be said to have an agency PE in India as per Indo-US DTAA

Facts

- The assessee (Reliance) had entered into a Wireless Software Contract and Wireless Network General Terms and conditions Contract (GTC) with Indian company LTHPL and another Wireless Software Assignment and Assumption Agreement with LTHPL and an American company LTGL for purchase of certain software for the purpose of operation of wireless telecommunication network.
- It filed applications under section 195(2) before the Assessing Officer requesting for payment for purchase of software without deduction of tax at source under section 195.
- The Assessing Officer held that the Reliance was getting only licence to use the software and no other title or interest in the software was being transferred to the Reliance and, therefore, payment made for the licence to use software amounted to 'royalty' within the meaning of section 9(1)(*vi*) and the tax had to be deducted at source.
- On appeal, the Commissioner (Appeals) held that the assessee under the Software Contract acquired only a copy of software programme and did not acquire any copyright over such software as envisaged by section 14 of the Copyright Act and under these circumstances, payment made by the assessee to LTGL could not be said to be payment for the use of or right to use of copyright. He, therefore, held that payment was only for purchase of copyrighted article and did not amount to royalty within the meaning of article 12(3) of the DTAA. It was accordingly, held that the Assessing Officer was not justified in directing to deduct the tax at source under section 195.
- On revenue's appeal:

Held

- Before the Commissioner (Appeals), the assessee's contention was that the consideration received by the parties from Reliance is in the nature of business profit and not royalty. In the absence of any Permanent Establishment of the respective suppliers in India, the said business profit/income on supply of software is not taxable in India. These contentions were more or less accepted by the Commissioner (Appeals).
- It is clear that under various agreements, what is transferred is only a licence to use the copyright belonging to the non-resident, subject to the terms and conditions of the agreement, and the non-resident supplier continues to be the owner of the copyright and all other intellectual property rights. It is well-settled that copyright is a negative right. It is an umbrella of many rights and licence

is granted for making use of the copyright in respect of shrink wrapped software/off the shelf software under the respective agreement, which authorizes the end-user, *i.e.*, the customer to make use of the copyright software contained in the said software, which is purchased off the shelf or imported as shrink wrapped software. The same would amount to transfer of part of the copyright and transfer of right to use the copyright for internal business as per the terms and conditions of the agreement. Therefore, the contention that there is no transfer of copyright or any part thereof under the agreements entered into by the Reliance with the non-resident supplier of software cannot be accepted. Under these circumstances, payment made by Reliance to LTGL/ other suppliers can be said to be payment for the use of or right to use of copyright and does amount to royalty within the meaning of artilce-12(3) of the DTAA. Accordingly, the Assessing Officer was justified in directing to deduct the tax at source under section 195.

- In fact, the assessee also admitted that there were only supply of software, without purchase of equipments either from the same party or from any other party. There are certain agreements which are only 'Licence agreements' and are not seller or vendor agreements as in other cases.
- Therefore, the Commissioner (Appeals) erred in holding that there is no necessity to deduct tax.