

## No withholding from sum paid to NR agent who was assisting to win a contract to be carried outside India

**Summary – The High Court of Kerala in a recent case of Southern Borewells, (the Assessee) held that where assessee entered into a contract with an agent in foreign country who did not have PE in India, payment made to agent cannot be construed as income accrued in India.**

### Facts

- The assessee entered into a contract for providing marketing support to win the contract for construction of bore wells in a foreign country. The agent did not have a permanent establishment in India and the agency commission had to be paid in a foreign country in foreign currency.
- The Assessing Officer held that the assessee was liable to deduct tax at the time of making payment as agency commission.
- The Commissioner (Appeals) upheld the order of the Assessing Officer.
- The Tribunal held that payment made outside the country cannot be construed as income accrued in India and therefore no part of the income of the agent was taxable under the Act.

### Held

- The Apex Court in *GE India Technology Cen. (P.) Ltd. v. CIT* [\[2010\] 327 ITR 456/193 Taxman 234/7 taxmann.com 18](#) while considering the scope of section 195(1) especially the expression 'sum chargeable under the provisions of the Act' observed that the payer becomes an assessee-in-default only when he fails to fulfil the statutory obligation under section 195(1). If the payment does not contain the element of income the payer cannot be made liable. Further it was held that when the payer remits an amount to a non-resident out of India, he claims deduction or allowances under the Act for the said sum as an expenditure. The Apex Court referred to the amendment made to the Finance Act, 2008 with effect from 1-4-2008 and observed that since the provision has been brought into force only from 1-4-2008, it will not apply for the period prior to the same.
- In view of the above, the appeal of the revenue is dismissed.