

Person whose income is subjected to withholding tax is entitled to claim its refund and not the deductor

Summary – The High Court of Bombay in a recent case of Grasim Industries Ltd., (the Assessee) held that where TDS was deposited by petitioner company on behalf of a foreign company, credit of refund could only be given to said foreign company.

Facts

- The petitioner company entered into a foreign technical collaboration for Basic Engineering and Training (BEAT) Agreement with D, a foreign company, to set up a gas based Sponge Iron Plant in India. In terms of the agreement, D was to deliver the designs, drawings and data besides training certain number of employees of petitioner company outside India. In lieu of the services, it was agreed that in addition to the consideration, all tax liabilities of D, if any, arises in India shall be borne by the petitioner company.
- The petitioner company sought no objection certificate from income tax authorities to remit the consideration payable to D without deducting TDS but the same was denied.
- Subsequently, the petitioner company paid TDS under protest as withholding tax which was over and above the agreed consideration payable to D.
- Later on, D filed its *nil* return of income in India for the same period but the Assessing Officer held that D had taxable income in India and accordingly, the withholding tax paid by the petitioner company was adjusted towards D's tax liability.
- Against such order, a writ petition was filed together by petitioner company and D wherein on 5-5-2010, the Court rendered its judgment and held that such income was not taxable in India and further the income tax authorities were directed to pass fresh orders excluding the income received by D.
- Subsequent to this order, the petitioner company requested income tax authorities that it is entitled for refund of TDS deposited on behalf of D but the department refuted its claim by holding that since TDS was deposited on behalf of D and D had claimed the credit of such TDS deposited in its return of income, petitioner company was not entitled for such refund.
- On writ:

Held

- When this Court in its order dated 5-5-2010 specifically directed the respondents to pass fresh assessment orders excluding the income received by 'D' for providing technical services to petitioner pursuant to BEAT agreement, the respondents are duty bound to comply with the said direction. There appears to be some substance in the grievance made by the petitioner that notice was sent to the address of Chartered Accountant of D which has been closed down and, therefore, the notice on D would never be served. In any case, the respondents have not challenged the judgment and order

dated 5-5-2010 in Writ Petition rendered by this Court. Therefore, the petitioner has made out a case for grant of interim relief.

- By this interim order, the Income Tax Officer is directed to pass a fresh assessment orders in case of 'D' for the Assessment year 1990-91 and 1991-92 after excluding the income received by 'D' as fees for providing technical services to the petitioner under BEAT agreement dated 22-10-1989. Thereafter the Assessing Officer (according to respondent) will pass consequential orders including refund, if any, in accordance with law.
- As regards the question whether the petitioner is entitled to get such refund, the Court is not expressing any opinion at this stage. However, the Court directs that if any amount deducted at source for the Assessment's years 1990-91 and 1991-92 is required to be refunded to D pursuant to the judgment dated 5-5-2010 in Writ Petition of this Court, the respondents shall deposit the said amount along with interest in accordance with law in this Court.