Sum paid for importing service manuals which contained instructions for usage of equipment wasn't royalty

Summary – The Bangalore ITAT in a recent case of Antrax Technologies (P.) Ltd., (the Assessee) held that where assessee, in course of business of importing and selling of visual and information technology equipments like projectors, LCD cables, projector lamps etc. within India, also imported manuals and software which contained operating and servicing instructions for use of those equipments, since said service manuals were not protected by any licence or copyright and they could be used by anybody who purchased them without any restriction on right to transfer or usage, it was a case of purchase of copyrighted product and, thus, payment for such service manuals was not in nature of 'fees for technical services' or 'royalty' requiring deduction of tax at source.

ORDER

This appeal is filed by the Revenue. The relevant assessment year is 2007-08. The Revenue has raised the following grounds of appeal :—

"(1) The order of the ld. CIT(A), in so far as it is prejudicial to the interest of Revenue, is opposed to law and the facts and circumstances of the case.

(2) The ld CIT(A) has erred in deleting the addition of Rs.24,83,438/- made by invoking the provisions of sec.40a(ia) of the Act, without appreciating the facts and circumstances of the case.

(3) The ld. CIT(A) has erred in arriving at his findings that these payments made to the non-resident entities towards purchase of service manuals do not involve any element of income for the purpose of sec. 195 of the Act and, therefore, are not liable for TDS, without examining the nature of the transaction and nature of the payment made by the assessee.

(4) The ld. CIT(A) has erred in deleting the addition without appreciating the findings recorded by the AO to the effect that these expenses would fail under provisions of sec. 9(1)(vi) of the Act, that on any such payment, tax was required to be deducted at source u/s 195 of the IT Act, 1961, and that since no tax was deducted at source, such payments became not deductible for the purpose of computing profits and gains of business.

(5) For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed in so far as the above mentioned issue is concerned and that of the assessing officer be restored."

The brief facts of the case are that the assessee is a company which filed its return of income for the assessment year 2007-08 declaring a total income of Rs.2,27,730/-. During the assessment proceedings u/s 143(3), the AO observed from the profit and loss account of the assessee that it has debited an expenditure of Rs.24,83,438/- towards service manuals. The assessee was asked to furnish the details

about the same. The assessee vide letter dated 3/11/2009 submitted that the assessee is engaged in the business of importing and selling of Visual and Information Technology equipments like projectors, LCD cables, projector lamps etc. within India and incidental to these imports, it also imported manuals and software which contains operating and servicing instructions for the use of these equipments. It was submitted that these manuals and software are copyrighted products and the payment made by the company is for the use and sale of copyrighted product and not for acquiring any copyright. It was thus submitted that the payment for the service manuals is not in the nature of 'fees for technical services' or 'royalty' requiring deduction of tax at source. The AO was however not convinced with the contention of the assessee and held that the decision of the Hon'ble Karnataka High Court in the case of Samsung Electronic Co. Ltd'; in ITA No.2988 of 2005 and Sonata Information Technology Ltd in ITA No.3076 of 2005 are applicable to the facts of the case before us and the payment for purchase of software is to be treated as 'royalty' and the assessee is liable to deduct tax at source. Since the assessee failed to deduct tax at source, the AO disallowed the payment of sale consideration u/s 40a(ia) of the Income-tax Act and added it back to the returned income of the assessee and brought it to tax.

Aggrieved, the assessee preferred an appeal before the CIT(A) reiterating its submissions made before the authorities below and also bringing out the distinction between the copyrighted article and the copyright. The CIT(A), after considering the assessee's contentions at length, held that the assessee's case is different from the issue decided by the Hon'ble High Court in the case of *Samsung Electronics Co. Ltd.,* (cited Supra) and *Sonata Information Technology Ltd.,* (cited Supra). He held that there is a difference between purchase of service manuals or a book (which can be used once they are purchased) and the software stored in a dumb CD (which requires a licence to enable the user to download it upon his hard disk and in the absence of which there would be infringement of owner's copyright). He held that the decision rendered by the Hon'ble High Court of Karnataka in respect of shrink-wrapped software does not apply to the assessee and that the AO is not correct in invoking the provision of sec. 40a(ia) of the Income-tax Act, as the assessee was not required to make a TDS from such payment. Accordingly, the appeal was allowed.

Aggrieved by the relief given by the CIT(A), the Revenue is in appeal before us.

The learned DR relied upon the order of the AO, while the learned counsel for the assessee placed reliance upon the order of the CIT(A) and also the decision of the 'B' Bench of this Tribunal in the case of *Mphasis BFL Ltd.* v. *ITO (Taxation)*, Ward-19(2), Bangalore reported in [2006] 9 SOT 756 (Bang). In rebuttal, the learned DR pointed out that the tribunal in the case of Mphasis BFL Ltd. had followed the decision of this Tribunal in the case of Samsung Electronics which has been subsequently overturned by the Hon'ble Karnataka High Court and hence it cannot be applied to the case in hand.

Having heard both the parties and having considered their rival contentions, we find that the expenditure which is disallowed by the AO is the expenditure incurred for the purchase of service manuals relating to the goods which are imported by the assessee. These are the books which give guidance for operating and also instructions or usage and after-sale service of these equipments. Therefore, these manuals are part and parcel of the equipments imported by the assessee, Further as rightly pointed out by the learned CIT(A), these manuals are copyrighted products and can be used by any party who has purchased the equipment, whereas the software stored in the dumb CD requires

licence to enable the user to down load on to the hard disc. Thus, there is a clear distinction between the copyrighted article and an equipment which comes with a copyright or licence to use the copyright. The Hon'ble High Court of Karnataka in the case of *Samsung Electronics* (*cited Supra*) and *Sonata Information Technology* (*cited supra*) was dealing with the cases of import of software as a product, where the CDs contained a licence to use the copyrights and, therefore, in those circumstances, the Hon'ble High Court has held that the payment made was in the nature of 'royalty' requiring deduction of tax at source. In the case before us, the service manuals are not the products themselves but are only manuals which guide in using the products. Further, the products imported by the assessee are not protected by licence or copyright. They can be used by anybody who purchases them without any restriction on the right to transfer or usage. In view of the above, it is clear that the service manuals imported by the assessee are different from the equipment which comes with the copyright or licence to use the copy right. Therefore, we do not see any reason to interfere with the order of the CIT(A).

In the result, the appeal filed by the Revenue is dismissed.