

Usance charges paid to NR on import purchases would be considered as an interest; liable to TDS

Summary – The Panaji ITAT in a recent case of Indian Furniture Products Ltd., (the Assessee) held that Usance charges paid to non-resident on import purchase by assessee would be considered as interest and liable to TDS

Facts

- The assessee was engaged in manufacture of wooden doors, frames, furniture etc. and trading in timber.
- The assessee had paid usance charges on import purchase.
- The Assessing Officer was of the view that the usance charges paid to the non-resident was the income arising to the non-resident reckoning within the meaning of provisions of section 5(2)(b), read with section 9(1)(v)(c)(b) and therefore, the assessee was liable to deduct TDS in accordance with the provisions of section 195. Accordingly, he disallowed same under section 40(a)(i).
- On appeal, the Commissioner (Appeals) deleted the addition relying on *Explanation* to section 10(15)(iv)(c) by observing that in this case payment has been made to non-resident suppliers, no parts of whose income are assessable in India. Thus, Assessing Officer was not justified in making disallowance under section 40a(i) on account of usance charges/commission.
- On appeal to Tribunal

Held

- The Gujarat High Court in *CIT v. Vijay Ship Breaking Corpn.* [2003] 261 ITR 113/129 Taxman 120 has taken the view that the usance charges are interest within the provisions of section 2(28A) and has accrued in India, therefore section 195 was clearly applicable and assessee has committed default by not deducting TDS. When the matter went before the Supreme Court, *Explanation (2)* was inserted under section 10(15)(iv)(c) by the Taxation Laws (Amendment) Act, 2003 with retrospective effect from 1-4-1962.
- From the reading of this explanation it is apparent that this explanation is applicable only in a case where an undertaking is engaged in business of ship breaking and usance charges are payable outside India by that undertaking in respect of purchase of a ship from outside India. The nature of the business of the assessee is not that of ship breaking. This explanation is applicable only to ship breaking activity, not to other activities. Therefore, *Explanation (2)* to section 10(15)(iv)(c) on which the assessee has heavily relied on, will not assist the assessee.
- From reading the decisions of the Supreme Court and the Gujarat High Court it is apparent that the Supreme Court has not reversed the decision in the case of *Vijay Ship Breaking Corpn. (supra)* on the finding that the usance charges are not interest under section 2(28A) except where an undertaking

is engaged in the business of ship breaking in view of *Explanation (2)* to section 10(15)(iv)(c) inserted by the Taxation Laws (Amendment) Act, 2003 with retrospective effect. The decision of the Gujarat High Court has impliedly been approved by the Supreme Court in respect of assesseees who are engaged in the business of ship breaking. Therefore, the order of the Commissioner(Appeals) is set aside.

- In the result, all the appeals filed by the revenue stand allowed.