

Payment made for import of hardware couldn't be taxable as royalty

Summary – The Bangalore ITAT in a recent case of Bodhi Professional Solutions (P.) Ltd., (the Assessee) held that payment made for import of hardware and payment for services were outside from purview of section 9(1)(vi) and could not be taxable as royalty

Facts

- The assessee-company took distributorships from non-resident entities situated in various foreign countries and was reseller of hardware and software. The assessee disclosed certain amount as 'Import of Software' under Schedule 12 of financial statements for year under consideration, same amount was paid to non-residents without deduction of tax at source.
- The Assessing Officer held that payment for import of software constituted 'royalty' and hence liable for deduction under section 195 since payment to non-residents were made without deduction of tax at source, Assessing Officer made disallowance under section 40(a)(i).
- On appeal, the Commissioner (Appeals) upheld the views of Assessing Officer.
- On second appeal, the assessee submitted that payments made for import of hardware and payment for services has also been treated as 'royalty' by the Assessing Officer. It was further submitted that since the assessee in the instant case was a reseller of the software and there being no transfer of any right in copy right or grant of licence in its favour, impugned payments by the assessee do not constitute 'royalty' under the treaties.

Held

- Assessee filed paper book consisting of material on record before Assessing Officer and Commissioner (Appeals). Assessee also filed copies of agreements and details of imports of software. Assessing Officer considered payments made for import of hardware and payment for services amounting to Rs.46,514 also as 'royalty.' This is apart from considering payments made for import of software as 'royalty'.
- Payment made for import of hardware and payment for services could not be regarded as 'royalty' under section 9(1)(vi) because none of limbs of the definition of the term 'royalty' would be applicable as they cannot be regarded as payments made towards use of patent, design, copy right, etc. Thus, payment made for import of hardware and payment for services are outside the purview of section 9(1)(vi).
- Assessing Officer and the Commissioner (Appeals) have not examined if payments to non-residents consisted only for import of software or if payments were also made for import of hardware. Even though the figures of import of hardware and payment for services are on record, Assessing Officer was required to examine details of import of hardware, software and payment for services.

Assessing Officer had not properly examined provisions of the treaties in deciding if the impugned payments constitute 'royalty'.

- Unless facts of the case were clearly examined by Assessing Officer, the quantum and if payment for imports of software amount to 'royalty' cannot be decided. Matter remitted back to the file of the Assessing Officer.