

Sum paid to purchase software isn't royalty as there is no transfer of copyright or patent of software product

Summary – The Hyderabad ITAT in a recent case of Locuz Enterprise Solutions Ltd., (the Assessee) held that where assessee was only a reseller of software products of a non-resident company in India, since transaction in question was in nature of trade, payment made by assessee to non-resident towards purchase of products did not fall within purview of royalty under section 9(1)(vi)

Facts

- The assessee, an Indian company, was basically engaged in the trading of software. It made payment to a foreign company namely 'Altiris' without deduction of tax at source as required under section 195. The assessee's case was that it had been appointed as a registered re-seller of software products of 'Altiris' and the nature of transaction was that the assessee purchased products from 'Altiris' or its authorized distributors and sold them directly to customers in the prescribed territory. Thus, assessee submitted that it was merely a trader of software and the actual user of the software and licensee were the customers to whom the assessee had sold the software.
- The AO took the view that right to sell or distribute any copy of the computer programme was an exclusive right of the copyright owner, which in the instant case was the foreign company. He further opined that assessee-company was authorized by the foreign supplier to do an act protected under the copyright and the consideration for the right to sell/distribute was paid by assessee to the said foreign company on the basis of the number of copies of the computer software/programme or number of such licenses or the duration of such licenses, which amounted to right to use the copyright. Hence, it was in the nature of 'royalty'. On the basis of the above reasoning, the AO proceeded to compute the tax and interest u/s. 201(1) and 201(1A) for assessee's default in deducting tax under section 195 on the payments made to Altiris.
- The Commissioner (Appeals), however, accepted the assessee's claim that it was a case of purely purchase and sale of goods and there was no right to use of any copyrighted articles or things conferred on the assessee by the foreign company.
- The Commissioner (Appeals) thus deleted disallowance made by the Assessing Officer.
- On revenue's appeal:

Held

- As can be seen, the Assessing Officer has treated the payment made by the assessee to 'Altiris' as 'royalty' on the reasoning that as the assessee is authorized by the foreign company to sell a product which is protected under the copyright, the consideration for the right to sell/distribute is to be treated as 'royalty'. According to the Assessing Officer, as the payment made by the assessee to the foreign company is towards acquiring a right to distribute the computer programme to clients in India is an exclusive right under the Copyright Act, the payment made amounts to 'royalty'. The findings of the Assessing Officer in the assessment order are conflicting.

- Though the Assessing Officer on going through the terms of the agreement accepts the fact that assessee is not the user of the software products and sells them to end users, but he nevertheless contradicted himself by observing that assessee has acquired the right to use a copyrighted article while re-selling them to the clients in India. The conclusion drawn by the Assessing Officer is not acceptable.
- On going through the order of the Commissioner (Appeals), it is found that he has exhaustively dealt with the terms of the re-seller agreement between the assessee and the foreign company and other materials on record and has passed a well reasoned order bringing on record the fact that assessee is purely a trader in software and not the user of the software.
- From the terms of the registered re-seller agreement between the assessee and the foreign company, *i.e.*, 'Altiris' as a whole, it is very much clear that the assessee has been appointed as a non-exclusive distributor/re-seller of the software products of the foreign company within the territory of India. The role of the assessee, to put it simply, is to purchase the software products from Altiris and sell it to customers in India. Therefore, the end user of the software products procured/obtained from the foreign company is not the assessee but the customers of India, to whom the assessee has sold the products.
- The nature of activity of the assessee under the registered re-seller agreement is to book orders with Altiris on behalf of customers, collect payment and deliver software to the end users or customers. As found by the Commissioner (Appeals), most of the time, the delivery is actually made via e-mail or via internet download. It is also established that no ownership rights in the patents, copyrights or international transactions relating to the products had been transferred by said company to the assessee. In fact the assessee is not permitted to make copies or duplicate the software. To some extent, the Assessing Officer has also accepted aforesaid factual position.
- In these circumstances, when the department has not been able to bring any material on record to controvert the factual findings arrived at by the Commissioner (Appeals), there is no merit in the contention of the department that the payment made is in the nature of 'royalty'. On going through the facts and materials on record, it is held that the payments made by the assessee to Altiris do not come within the purview of 'royalty' as finds place under section 9(1)(vi).
- In the aforesaid facts and circumstances, there is no reason to interfere with the order of the Commissioner (Appeals) which is accordingly upheld.