

No disallowance for TDS default if TDS liability was imposed via retro-amendment to provision

Summary – The Mumbai ITAT in a recent case of Holcim Services South Asia Ltd., (the Assessee) held that where assessing Officer disallowed payment made to non-resident without deducting TDS in view of Explanation inserted under section 9 by Finance Act, 2010 with retrospective effect from 1-6-1976, disallowance was not justified as assessee could not have visualized to deduct TDS in absence of any provision at time of making payment and since there was a already prevailing law laid down by Supreme Court that in such a case no TDS was to be deducted

Facts

- The assessee's delegates participated in training programmes conducted outside India by a foreign company. The assessee made payment to said company for above activity but did not deduct TDS. The assessee argued it was under a *bona fide* belief that no TDS was required to be deducted on said payment in view of decision of Supreme Court in the case of *Ishikawajma-Harima Heavy Industries Ltd. v. DIT* [\[2007\] 288 ITR 408/158 Taxman 259](#) wherein it was held that services rendered outside India would be taxable in India only if such services had been utilized in India.
- The Assessing Officer disallowed payment for want of TDS on ground that above decision of Supreme Court would not be applicable or was no longer valid in view of *Explanation* brought by the Finance Act, 2010 with retrospective effect from 1-6-1976 under section 9 which provided, *inter alia*, that the fees for technical services received by a non-resident shall be deemed to accrue in India whether or not it had rendered services in India.
- The Commissioner (Appeals) upheld the disallowance.
- On appeal before the Tribunal:

Held

- Though, such an amendment has been brought in the statute with retrospective effect but at the time of making the payment there was no such provision and in fact, the law of the land as laid down by the Supreme Court in *Ishikawajma-Harima Heavy Industries Ltd. (supra)* was that, if the services has not been rendered in India and such services are not utilized in India then there is no liability for deducting TDS. The amendment has been brought specifically to negate the decision of the Supreme Court. An assessee who has to make the payment cannot visualize or apprehend that in future a retrospective amendment would be brought whereby it would require withholding of tax. Even if the purported amendment has been brought with the intention to clarify the provision but there was no such judicial interpretation that payments made to non-residents for rendering of services in India is taxable in India in absence of any business connection in India or PE in India and in the absence of any clear-cut law, assessee cannot be held to be liable to deduct TDS. It is a trite legal maxim '*lex non cogit ad impossibilia*' which means that, the law cannot possibly compel a

person to do something which is impossible to perform. Thus, at the time of making the payment, assessee could not have visualize to deduct TDS when there was no provision and in fact, there was a already prevailing law laid down by the Supreme Court that in such a case, no TDS was to be deducted, then obvious conclusion is that on such payment no disallowance can be made. If the view and contention raised by the revenue is to be accepted that such a law, fixing the liability on the assessee is to be reckoned from retrospective date, then it will cause not only great hardship and injustice but also prejudice to the assessee. Accordingly, it is held that disallowance on account of any retrospective amendment is wholly vitiated and cannot be sustained.