

Commission paid to foreign agent for procuring export orders wouldn't attract TDS under sec. 195

Summary – The Bangalore ITAT in a recent case of Apsara Silks, (the Assessee) held that Commission payment made by the assessee to commission agents outside India for procuring export orders could not be brought to tax in India and as a consequence, TDS was not deductible

Facts

- The assessee-company made payment to non-resident companies for procuring export orders.
- The Assessing Officer as well as Commissioner (Appeals) held that said payment was taxable as per Explanation to section 9.
- On appeal:

Held

- The Assessing Officer has proceeded on the basis that as per Explanation 2 to section 9(1)(i), business connection shall include any business activity which is carried out through a person acting on behalf of non-resident. The non-resident commission agent is carrying out business outside India on behalf of resident assessee, and thus, Explanation 2 to section 9(1) (i) is not applicable in the present case.
- Article 7 in the DTAA's of various countries i.e., Qatar, South Africa, Spain, USA, Singapore and Argentina is similar in all these DTAA's and as per the same, profits of an enterprise of a contracting State shall be taxable only in that State, unless the enterprise carries on business in the other contracting States through a PE situated therein. Therefore, in the absence of a finding that commission agents are having PE in India as per article 7 of DTAA between India and Qatar, the business profit of commission agents cannot be brought to tax in India and as per section 90(2), if DTAA is more beneficial than the domestic laws, then DTAA has to prevail.
- In this view of the matter, the order of Assessing Officer and Commissioner (Appeals) are not sustainable because in the facts of the present case and legal position as discussed above, commission payment made by the assessee to commission agents outside India for procuring export orders cannot be brought to tax in India and as a consequence, TDS was not deductible.