

No disallowance of 'FTS' due to TDS default on basis of retro-amendment to sec. 9: Mumbai ITAT

Summary – The Mumbai ITAT in a recent case of Ashok Piramal Management Corpn. Ltd., (the Assessee) held that Retrospective amendment made by Finance Act, 2010 with effect from 1-6-1976 in Explanation 2 to section 9(2), effective from 8-5-2010, does not create any liability upon assessee, an Indian company, for deduction of tax under section 195 on remittance to French resident on payment made much earlier in period relevant to year 1-4-2008 to 31-3-2009

Facts

- The assessee-company, a management consultant, availed services of a French resident (OBT). Remittance of professional fees was made by the assessee to 'OBT' towards rendering of services in respect of due diligence of 'DIAM' Group of France. The assessee was of the view that since these services were rendered by 'OBT' outside India, the same was not taxable in India and, therefore, the assessee did not have any obligation to deduct tax at source under section 195 while making said payment.
- The Assessing Officer made disallowance of professional fees under section 40(a)(i) for non-deduction of tax at source under section 195 on remittance made to OBT.
- The Commissioner (Appeals), however, being of the view that the said remittance made to 'OBT', was in the nature of fees for technical services, held that the assessee was under obligation under section 195 to withhold tax at source from this payment and proceeded to uphold the disallowance made under section 40(a)(i).
- The assessee submitted, by virtue of amendment to *Explanation* to section 9(2) by the Finance Act, 2010, with effect from 1-6-1976 even income received from services rendered outside India was to be treated as FTS. However, he submitted, by virtue of such retrospective amendment liability of TDS cannot be fastened upon the assessee under section 195, since as per the existing provision at the relevant period the income was not taxable and, hence, assessee was not required to deduct tax at source.

Held

- Withholding tax ('TDS') obligations are to be discharged in the light of the law as it stands at that point of time. In the case on hand, the disallowance under section 40(a)(i) can be effected only if and when the assessee had an obligation to deduct tax at source on the remittance to 'OBT' and the assessee fails to comply with such obligation. In this view of the matter, so far as the payments/remittances were made before 8-5-2010, the assessee did not have any liability to deduct tax on remittance to 'OBT' which were rendered outside India and therefore no disallowance under section 40(a)(i) can be made or was sustainable since the assessee made the remittances to 'OBT' in the period relevant to assessment year 2009-10 which is before 8-5-2010.

- The retrospective amendment made by the Finance Act, 2010 with effect from 1-6-1976 in *Explanation 2* to section 9(2), which received the assent of the President of India on 8-5-2010, does not create any liability for the assessee for deduction of tax under section 195 on the remittance to 'OBT' since the payment was made much earlier, in period relevant to Financial year 1-4-2008 to 31-3-2009. Since the assessee was not liable at that point in time to deduct tax at source in respect of the remittance to 'OBT' the disallowance made thereof under section 40(a)(i) could not have been made being factually and legally unsustainable.