License fee to use a software not liable to TDS as it wasn't taxable as royalty in AY 2009-10

Summary – The Mumbai ITAT in a recent case of Shinhan Bank, (the Assessee) held that Where assessee-company made payment to a foreign company relating to transfer of licence to use a software, since at relevant time there was no provision under law requiring deduction of tax at source from payment made for use of computer software as royalty, payment so made without deducting tax at source could not be disallowed

Facts

- During relevant year, the assessee made payment towards software charges to 'Comas Inc', a Korean entity without deduction of tax at source.
- In course of assessment, the Assessing Officer held that the relevant transaction related to transfer of license to 'use' the software and not sale and accordingly, provisions of clause (vi) to sub-section (1) to section 9 were attracted.
- The Assessing Officer finding that assessee did not deduct tax at source while making royalty payment to foreign company, disallowed said payment.
- The DRP confirmed disallowance made by Assessing Officer.
- On appeal:

Held

- Admittedly, at the time of payment for the software charges in May 2008 by the assessee there was no such provision under the Act that transfer of any right for use or right to use the computer software included granting of license irrespective of medium through which such right is transferred was not there in the statute. The case of the assessee has been that it has only purchased software for its banking business and license was given only for using the software. There is no transfer of any copyright *albeit* it was the transfer of the copyrighted article.
- Without going into the merits whether the said payment will fall within the nature of 'Royalty' under the newly amended provision brought with retrospective effect or not, it is opined that at the time of making of the payment there was no such provision under the law to tax such payment of computer software as 'Royalty'.
- If the licensees is not allowed to exploit the computer software commercially which they had acquired under the license agreement and only the copyrighted software which by itself was an article and not any copyright therein, then, the payment made for copyrighted article which represented the purchase price cannot be considered as 'Royalty' under the provisions of section 9(1)(vi) of the Act.

- Once that is so, then it is very difficult to hold that the assessee should have deducted TDS on such payment when there was no clear-cut law that such a payment would be taxable in India. Here, the maxim of *'lex non cogit ad impossplia,* that is, the law of the possibly compelling a person to do something which is impossible, that is, when there is no provision for taxing an amount in India then how it can be expected that a tax should be deducted on such a payment.
- Thus, the assessee was not obliged to deduct TDS at the time of making the payment and the law which has come into statute after four years from the date of payment cannot be held to be applied retrospectively at best for deduction of TDS. Hence, disallowance under section 40(a)(i) for non-deduction of TDS cannot be upheld.
- In the result, assessee's appeal is allowed.