

Payment for end-user software license can't be held as royalty : ITAT

Summary – The Hyderabad ITAT in a recent case of Quaalcomm India (P.) Ltd., (the Assessee) held that Payment made by assessee, Indian-company to various non-resident companies for software support licence packages was not royalty

Payment made by assessee, Indian company, to US company for providing internet and bandwidth services for which equipments had to be installed at customer's premises to access network connection by customers and not for exclusive use of assessee, was not royalty

Facts - I

- Assessee-company was engaged in design, manufacture and marketing of digital wireless equipments. It provided the software design, development and testing services to its group companies. It had made payment without deducting tax for use of software licenses to various companies in USA, UK, and Germany, *etc.* It was the case of the assessee that the payment was for purchase of the copyrighted article and, therefore, the deduction of tax at source was not necessary.
- However, the Assessing Officer held that where the license was given for the use of a copyright, it was in the nature of royalty, both under the Indian Income-tax Act and the DTAA between India and the vendor countries. Therefore, he treated the assessee as the 'assessee-in-default' under section 201(1) and also levied the interest under section 201(1A).
- Commissioner (Appeals) confirmed the order of the Assessing Officer.
- On appeal:

Held - I

- The software allegedly purchased by the assessee are the end user software license packages and the remittances are to companies in various countries, such as USA, UK, Germany, Japan, Singapore *etc.* The copies of the invoices show that the payments are for purchase of End User License packages. The assessee gets the right to use the product. Thus, it can be seen that what the assessee has been granted is the license to use the software to test whether the wireless equipments are working according to the desired specifications, and the software was for assisting the assessee in rendering its services of software development and testing services to its group companies. Thus, these softwares are, in a way, the tools used by the assessee. By the issuance of license to use the software, it cannot be said that the assessee has been granted a right to utilize the copyright embedded in the software, but it is seen that the assessee has been granted only a right to use the software product. The assessee's contention that the software purchased by the assessee is the copyrighted article and cannot be construed as the license to use the copyright itself is to be agreed.

- Further, since the payment for the licensed software has been treated not as 'royalty' but payments for purchase of software, the payment for 'support services' also cannot be treated as royalty.

Facts – II

- The assessee-company had made remittance to Verizon Business Services, USA for 'leased circuit line charges' without deduction of tax at source.
- Assessing Officer observed that Verizon was providing highly technical equipment, which was customer specific and exceptionally designed for assessee's requirements. Therefore, he was of the opinion that the assessee was making payment for the scientific or commercial equipment and therefore, fell under sub-clause (iva) of section 9(1)(vi) and fell within the category of 'royalty'. Since the assessee had not deducted tax at source while remitting the payment, the Assessing Officer treated the assessee as 'an assessee-in-default' under section 201(1).
- The Commissioner (Appeals) confirmed the order of the Assessing Officer.
- On appeal:

Held - II

- Verizon Business, USA, has entered into an agreement with Qualcomm Inc., USA and the assessee being a group company of Qualcomm of USA, is also receiving services from Verizon Business, USA. From the nature of the services rendered by Verizon Business, it is seen that these are basically internet or bandwidth services provided to facilitate the assessee in discharge of its obligations to its group companies, *i.e.*, providing software design, manufacture and testing services to its group companies through the bandwidth services provided by Verizon. The bandwidth services definitely require certain sophisticated equipment which has to be installed at the customers' premises. It is the contention of the assessee that the equipment provided at the customers' premises is in the nature of 'modem' and 'routers' which cannot be considered as scientific equipments as defined under section 9(1)(vi) and further it is also stated that the equipment is to be provided at the customer's premises in USA only and not outside USA. Therefore, the undersea cables and the routers *etc.*, which are part of the equipment are not the customer's equipment but rather it is the equipment installed and used by Verizon Business Services, USA for rendering their services of providing bandwidth or internet services to its customers worldwide. It is stated that the internet facility to be provided by Verizon USA to its customers across the world requires sophisticated and complex equipments, but it cannot be said that the assessee is given an exclusive right to use those equipments for which it is making the payment. Further, the assessee is also provided with CPE (Customer Premises Equipment) by Verizon through its partner in India. It is not just network connection but the equipment required to access the network connection. From the CPE agreement, it is seen that a customer may purchase or take on rent/lease the CPE. The customer may also provide its own CPE if approved by Verizon and maintenance is done by Verizon subject to the customer providing the necessary information to Verizon. Therefore, it is clear that the CPE is

not personalized/sophisticated modified equipment for specific and exclusive use of the assessee. It is a sophisticated product, but the payment made by the assessee cannot be said to be for use of scientific or commercial equipment within the meaning of 'royalty' under the Indian Income-tax Act.