

No Sec. 195 TDS on payment under Secondment when it was taxed in India as salary: ITAT

Summary – The Ahmedabad ITAT in a recent case of Burt Hill Design (P.) Ltd., (the Assessee) held that Where payment made by assessee-company in pursuance to secondment agreement with US-company consist of income which was chargeable, and had been charged, to tax in India under head 'income from salaries', assessee could not be said to have any tax withholding obligations under section 195

Facts

- The assessee, engaged in the business of providing information technology enabled services, is subsidiary of Burt Hill Inc USA. During the relevant period, under a secondment agreement with the assessee, BH Inc had placed certain employees at the disposal, and control, of the assessee.
- The income tax authorities during the course of survey proceedings found that the assessee has made remittances to BH Inc, in respect of reimbursement of payroll costs, without any deductions on account of tax withholdings.
- It was explained by the assessee that these are reimbursements plain and simple, and that these payments did not involve any profit element taxable in the hands of BH Inc. It was also explained the payments were in the nature of salaries, and that the assessee had duly discharged his tax withholding obligations from these salaries to the extent the recipients were taxable in India. The details of tax payment by the seconded employees were also furnished.
- The Assessing Officer was of view that since employees were of BH Inc, the payment was infact in the nature of payment for services rendered by these employees. The Assessing Officer proceeded to hold that the work done by these employees of BH Inc has resulted in creation of a service PE and that the entire amount so paid to BH Inc, being attributable to the PE, is taxable on gross basis, in the absence of details of expenditure of pe, @ 40%. Accordingly, demands under section 201 r.w.s. 195 were raised.

Held

- the payment made to Burt Hill Co Inc USA consists of income which is chargeable, and has been charged, to tax in India under the head 'income from salaries'. Whether the seconded employees continue to be in employment of the foreign entities or not is wholly irrelevant for this purpose. What is relevant is that the income embedded in the payments in question is taxable in India under the head 'Salaries', and if that be so, there are no tax withholding obligations under section 195. The income embedded in the impugned payments being in the nature of income chargeable to tax under the head 'income from salaries', the assessee cannot be said to have any tax withholding obligations under section 195 and therefore, impugned tax withholding demands, under section 201 r.w.s 195, are wholly devoid of any legally sustainable merits.