# SAP charges paid to AE for use of licensed software on intranet were taxable as royalty: Delhi ITAT

**Summary – The Delhi ITAT in a recent case of SMS Iron Technology (P.) Ltd., (the Assessee) held that Payment of SAP charges made by assessee to its AE for use of licensed software was liable to tax as 'royalty' in India**

**Facts**

- The assessee was a subsidiary of a German company, engaged in the business of supply of assemblies/sub-assemblies of metallurgical equipment, provisions of consultancy and technical services in design and engineering to ferrous and non-ferrous sectors.
- During relevant year, assessee made payments of SAP charges to AE for use of licensed software as intranet without deducting tax at source.
- The Assessing Officer took a view that said payment amounted to royalty under section 9(1)(vi) as well as under article 12(3) of India-Germany DTAA, liable to tax in India. He thus disallowed payments in question on account of non-deduction of tax at source.
- The Commissioner (Appeals) confirmed the said disallowance.
- The assessee filed the instant appeal contending that it was a case of reimbursement of expenses and therefore, no tax was required to be deducted thereon.
- On second appeal:

**Held**

- It is noted that the Commissioner (Appeals) asked the assessee to file the copies of all agreement, in pursuance to which payments for SAP and intranet charges were made so that the nature of the contracts in transactions could be examined in detail, particularly with reference to the provisions of the Act and the provisions of the India-Germany DTAA. Only from those agreements it could have been determined that whether the amount paid by the assessee is reimbursement of expenditure or not. The above agreements despite repeated query were not filed by the assessee before the Commissioner (Appeals). It was stated by the appellant that the agreements are not located at present and further they were not relevant for deciding the case.
- Unless the assessee produces the agreement before the authorities it is not possible to accept that the above payments are merely reimbursement of the expenditure. The assessee has also not produced any debit notes or working of such reimbursement. In absence of basic details that the amount of expenditure paid by the assessee to its associated enterprises is only reimbursement of expenditure, argument of the assessee cannot be accepted.
- It is the duty of the assessee to make proper claim thereof by producing what was the original cost incurred by the recipient of the income globally and how the expenses have been allocated to the

assessee substantiated by agreements. If the expenditure are incurred by the assessee and same were paid by the associated enterprise on the basis of the actual charges pertaining to the assessee, then only it can qualify as a reimbursement of expenditure. When Indian subsidiary company incurs expenses or avails any service from some third party abroad and payment to such third party is routed through its holding or related company abroad, provision for deduction of tax at source apply as if assessee has made payment to such independent party *de hors* routing of payment through holding company.

- The remission of amount to the holding or related company for finally making payment to the third person will be considered as payment to third party. It cannot be termed as reimbursement of expenses to the holding company. If the contention of the assessee is accepted and the payment to third party, routed through its holding company is considered as reimbursement of expenses to the related party, then probably all the relevant provisions in this regard will become redundant. Hence, the argument of the assessee that it is merely an reimbursement of expenditure is rejected.
- To test the payment made by the assessee for SAP charges it is important to note that payment of such charges were made for use of licensed software on the Internet/ intranet and payment was also contingent on the basis of number of the user license or number of sessions for which the software was used. In the instant case the technical support would also be provided by SAP, a German company and not by the recipient of the expenditure. In view of this, the above software receipt is scientific equipment under the Act and India-Germany Tax Treaty. Hence, such payment was correctly regarded as royalty by the lower authorities according to article 12 of the DTAA. In view of this, the above payment made by the assessee to its holding company is chargeable to tax as royalty according to Act as well as according to the double taxation avoidance agreement. Therefore, on such payment assessee should have deducted tax at source under the provisions of section 195 at the beneficial rate of 10 per cent provided under the double taxation avoidance agreement. In view of this, the order passed by the Assessing Officer is correctly confirmed by the Commissioner (Appeals).