



The Special Bench of the Mumbai Tribunal has set the time limit for initiating the withholding tax related proceedings, inline with existing provisions of the Act

The Special Bench (SB) of the Mumbai Income-tax Appellate Tribunal (the Tribunal) in case of M/s Mahindra & Mahindra Limited (the Taxpayer) held that:

- Where no time limit is prescribed under the Income-tax Act, 1961 (the Act) the withholding tax orders have to be passed within a reasonable time by harmoniously considering the scheme of the Act.
- The maximum time limit for initiating the proceedings against the assessee in default¹ is the same as in assessment/reassessment proceedings i.e. four years or six years depending upon the total income of the taxpayer.
- The maximum time limit for passing the order of the proceedings against the assessee in default is the same as in reassessment proceedings i.e. one year from the end of the financial year in which proceedings are initiated.

Facts of the case

- The taxpayer came out with two Euro issues of the size of USD 74.75 million and USD 100 million in November 1993 and July 1996 respectively.
- It had engaged two non resident managers for this issue to whom it paid management commission, underwriting commission, selling commission and reimbursed certain expenditure. The lead managers were paid this commission without deducting any tax thereon.

¹ 'assessee in default' is the person who does not deduct or does not pay or after deducting fails to deposit the said sum with the government.

- The Assessing Officer (the AO) considered the above payments as ‘Fees for technical services’ (FTS) under section 9(1)(vii) of the Act and under Article 13 of the India-UK Tax Treaty (the tax treaty) and held that the taxpayer was liable to deduct tax under section 195 of the Act. Accordingly, considered the taxpayer as an assessee in default on account of failure to deduct tax at source.
- The Commissioner of Income Tax (Appeals) [CIT(A)] affirmed the AO’s order.
- The Act does not prescribe any time limit for the tax authorities to invoke the relevant provisions to treat the payer as assessee in default when the tax has not been withheld by the payer
- The Act defines FTS as consideration for rendering of any managerial, technical or consultancy services. The amended tax treaty effective from 1 April 1994 requires that such services should be ‘make available’² to the receiver to qualify as FTS. The earlier Tax Treaty applicable to 1993 transaction did not have the ‘make available’ requirement in the definition of FTS.
- While filling an appeal before the Tribunal the taxpayer raised an additional ground that the order passed by the AO was barred by limitation and hence, it was void ab initio.

Issues before the Tribunal

- Whether order passed under section 195, read with section 201, of the Act after four years from the end of relevant financial years is barred by limitation, in the absence of any express provision in the Act?
- Whether management, selling and underwriting commission would get covered under the definition of FTS as provided under the Act and/or under the expression ‘make available’ provided under article 13 of the amended tax treaty?
- If the payee has already paid the tax then whether the taxpayer can be treated as an assessee-in-default?

Taxpayer’s contentions

- As pronounced in several judgements, the time limit for initiating and completing the proceedings against an assessee in default is four years and since it has lapsed no action can be taken now.
- The proceedings under section 201(1) of the Act can be applied only when the taxpayer had deducted tax and not deposited the said sum

² ‘make available’ means to provide something to one, which is capable of use by the other

with the government. Thus, the proceedings has no application where the taxpayer has not deducted tax at all.

- Since the tax authority did not assess the said payments as income in the hands of payee, the taxpayer cannot be treated as assessee in default.
- The services rendered by the non-resident managers were in the nature of financial and banking services and not FTS. Further, even if it is considered as FTS the 'make available' requirement as provided in Article 13 of the amended Tax Treaty was not fulfilled. Hence, there was no liability to deduct tax on the payments made.

Tax Department's Contentions

- The services offered by the managers were in the nature of FTS which was taxable in India. Hence, the taxpayer has failed in its liability to deduct tax thereon.
- The order passed under section 201(1) of the Act cannot be considered as an order of assessment, as pronounced in case of Blackwood Hodge (India) Pvt.Ltd³. Thus, there is no limitation of time in which order under section 201(1) can be passed.
- Where no provision for limitation is provided by the statute, it was not open to the court to introduce such limitation.
- The liability of the taxpayer to deduct tax is absolute and it is not relevant to consider that payee has already offered the tax in his assessment.

The Tribunal's Ruling

The SB of the Tribunal while allowing additional ground raised by the taxpayer on the question of limitation, held as follows:

Applicability of the provision related to assessee in default

- A payer is required to deduct tax only when the payment made is taxable in India. If the said payment is not taxable under the Act or under the tax treaty then the question of deduction of tax does not arise and the taxpayer cannot be treated as an assessee in default.
- The payment made to payee should be taxable in the hands of the payee. If no assessment was made in the hands of recipient then order treating taxpayer as assessee in default is invalid.

Time limit for passing the order

³ CIT v.Blackwood Hodge (India) Pvt. Ltd.[1971] 81 ITR 807 (Cal)

- The rule of limitation is generally provided in the Act expressly, but in their absence they are to be impliedly inferred by taking into consideration the scheme of the relevant provision of the Act. Thus, withholding tax orders have to be passed within a reasonable time by harmoniously considering the scheme of the Act. The tax department's argument for granting of unlimited time to initiate the proceedings was not accepted.
- As per the Supreme Court decision in the case of Delhi Development Authority⁴ the order passed under section 201(1) and 201(1A) of the Act, for treating the taxpayer as assessee in default, has to be treated as an assessment order. Hence, the reasonable time for initiating and completing the proceedings has to be on par with time limit available for initiating and completing the assessment/reassessment proceedings under the Act.
- Accordingly, the maximum time allowed for initiating the proceedings against assessee in default would be four or six years from the end of the relevant assessment year depending on the total income of the taxpayer and maximum time allowed for passing the order would be one year from the end of the financial year in which proceedings are initiated.
- In view of above the time allowed for the proceedings have lapsed and therefore, no proceedings can be initiated now.

Taxability of Lead manager's income

- Since the first GDR issue was in November, 1993 the taxability was examined under the erstwhile tax treaty⁵. In the absence of 'make available' clause in the erstwhile tax treaty and relying on the provision of section 9(1)(vii) read with explanation 2 of the Act, the management and selling commission paid in 1993 were held to be taxable under the Act.
- The second GDR issue was in July, 1996 when the tax treaty was amended and 'make available' clause was introduced in Article 13(4)(c) of the tax treaty. Accordingly, the tribunal relying on the amended tax treaty and decision of Mumbai Tribunal in the case of Raymonds Limited⁶ held that the management and selling commission were not taxable in India.
- The underwriter commission, being consideration for assurance does not fall under the definition of FTS but it can be treated as business income in the hands of recipient and in the absence of a permanent establishment in India of the recipient such income will not be taxed in India.

⁴ ITO v. Delhi Development Authority 252 ITR 772 (Delhi)

⁵ The Indo-UK tax treaty was amended on 6 October 1993 to include make available clause in the definition of FTS.

⁶ Raymonds Limited v. DCIT [2003] 86 ITD 791 (Mumbai)

- Since the reimbursement of expenditure does not have the character of income the question of deduction tax cannot arise.

Comments

The SB of Mumbai Tribunal has set a very important principle of time limit for initiating and completing proceeding relating to withholding tax provisions. The decision reiterates that the payer cannot be treated as an assessee in default if the payee has already offered its income to tax. This decision also brought out an important principle that unless the amounts paid is capable of being brought under the purview of the tax net, the payer cannot be treated as an assessee in default.

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