



While making payment for purchase of property from a non-resident, tax is to be deducted on actual sale consideration and not on stamp duty value

Background

The Hyderabad Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Shri Bhagwandas Nagla¹ (the taxpayer) held that the tax is required to be deducted from the actual consideration credited or paid and not on what the non-resident is deemed to have received from the sale of his property. Since the taxpayer has already paid taxes on the capital gains accruing to the non-resident on the actual payment made by him, the taxpayer cannot be treated as an 'assessee in default' under Section 201(1) of the Income-tax Act, 1961 (the Act). However, the taxpayer is only liable for interest under Section 201(1A) of the Act till the date of payment of taxes by him.

The Tribunal also held that the non-discrimination provision under the India-USA tax treaty (tax treaty) was not applicable, as there was no discrimination against the non-resident and the issue under reference was limited to the obligation to deduct tax at source.

Facts of the case

- The taxpayer, an individual, purchased a residential flat located in India on 31 December 2009 from two non-resident Indians for consideration of INR48.00 lakh. The instrument of transfer was executed by way the General Power of Attorney (GPA) of two non-resident Indians.
- Since the taxpayer had made a payment to a non-resident, but had not deducted tax at source before making the payment, the Assessing Officer (AO) initiated Tax Deducted

at Source (TDS) proceedings under Section 201(1) of the Act. The AO observed that the non-residents are liable to pay tax on the capital gain arising on account of the sale of immovable property.

- The taxpayer accepted its failure to deduct tax on payment to non-residents but offered to pay tax on Long Term Capital Gain (LTCG) arising in the hands of the non-resident based on actual sale consideration of INR48 lakh (after claiming the indexed cost of acquisition of the property). However, the AO observed that the sale consideration should be taken under Section 50C² of the Act at INR58.1 lakh. The AO determined the capital gain which is higher than the amount determined by the taxpayer. Thereafter, the tax was computed on such capital gains and interest was charged for the delay in payment of taxes under Section 201(1A) of the Act.
- The taxpayer filed an appeal before the Commissioner of Income-tax (Appeals) [CIT(A)] contending that by virtue of Article 26 of the India-USA tax treaty, the provisions of Section 195 of the Act are not attracted to this transaction and hence TDS proceedings raised by the AO under Section 201(1) and 201(1A) of the Act are not applicable to it. The CIT(A) dismissed the appeal on the ground of applicability of Article 26 of the tax treaty and also the computation of tax on LTCG and upheld the orders under Section 201(1) and 201(1A) of the Act.

² Section 50C of the Act - Where the consideration received or accruing as a result of the transfer of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by stamp valuation authority for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall, for the purposes of Section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

¹ Shri Bhagwandas Nagla v. ITO (ITA No. 143/Hyd/2017) – Taxsutra.com

- Aggrieved, the taxpayer filed an appeal before the Tribunal.

Tribunal ruling

Withholding of tax liability

- The liability of the taxpayer under Section 195 of the Act is different from the liability of the non-residents to admit the capital gains in their hands. Both the liabilities are independent and are mutually exclusive. Under Section 195 of the Act, the taxpayer who is making payment to a non-resident is required to deduct tax at source at the time of payment or crediting the account whichever is earlier.
- There is no dispute that the provisions of Section 195 of the Act are attracted, and the liability of the taxpayer under Section 195 of the Act is established as the non-residents are required to file their returns of income and offer the capital gains to tax. Thus, the liability of the taxpayer precedes the liability of the non-residents.
- The taxpayer's claim that he has paid the sale consideration to the GPA holder in India and therefore, is not required to make TDS is not acceptable because, at best, the GPA holder can be considered as only a conduit between the taxpayer and the owners of the property and therefore, in the true sense, the taxpayer has made the payment to the non-residents only.
- The issue raised before the Tribunal is in relation to the liability of the taxpayer to deduct tax and it is not dealing with the liability of the non-resident to pay the taxes under the provisions of the Act. Accordingly, the taxpayer is required to deduct tax from the actual consideration credited or paid by it and not on what the non-residents are deemed to have received from the sale of their property.
- The taxpayer has already paid taxes on LTCG accruing to the non-residents on the actual payment made by him. Therefore, the taxpayer cannot be treated as an 'assessee in default' under Section 201(1) of the Act. However, the taxpayer is only liable for interest under Section 201(1A) of the Act till the date of payment of taxes by him. Therefore, the taxpayer is required to deduct the tax at source under Section 195 of the Act before making the payment.

Non-discrimination clause under the tax treaty

- The underlying principle of Article 26 of the tax treaty is that the non-resident shall not be treated less favourably than the residents of the contracting state and the requirements connected with taxation shall not be more burdensome than they are for residents.

- The decision relied upon by the taxpayer in the case of Santur Developers Pvt. Ltd.³ is not applicable to the facts of the present case since in the present case the issue is with respect to the liability of the taxpayer to deduct TDS and not about the liability of the non-residents. Therefore, there is no discrimination against the NRIs.

Our comments

The issue before the Hyderabad Tribunal in the present case was whether the taxpayer is liable to deduct tax on actual sale consideration or deemed sale consideration (as per stamp duty valuation) on the purchase of property from a non-resident.

The Tribunal held that the obligation to deduct tax is applicable with respect to the amount paid or credited by the payer and not with respect to deemed consideration. The Tribunal was not dealing with the liability of the non-resident to pay the taxes under the provisions of the Act. Therefore, the taxpayer is required to deduct tax from the actual consideration credited or paid by it and not on what the non-residents are deemed to have received from the sale of their property.

The Tribunal also held that non-discrimination provisions under the tax treaty may not relieve TDS obligation of the payer as non-discrimination provisions are related only to the final tax liability of the recipient of income and do not apply to relieve the deductor's obligation.

³ ITO v. Santur Developers Pvt. Ltd (ITA No.1532/Del/2011)

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