

Sum received for supply of equipment with user guide on how to install and use it, couldn't be taxable as royalty

Summary – The High Court of Bombay in a recent case of Haldor Topsoe, (the Assessee) held that where contract for supply of equipment and spare parts included stipulations for giving information so as to guide Indian party to install equipment at site and thereafter to use it, payment to assessee-Danish company would not be royalty.

Facts

- The assessment of assessee-Danish company was completed under section 143(3) by making additions on account of revenue received from Indian client Madras Fertilizer.
- The assessee claimed that certain receipts constituting fees for technical services was not taxable as per Article III(3) of the Old Indo-Danish Tax Treaty based on the argument that it does not have a permanent establishment in India.
- However, the revenue had taxed these particular receipts either as royalty or something other than technical fees along with royalty and management charges at the rate of 20 per cent of the gross amount.
- The revenue contended that:
 - The definition of the term 'royalty' for the purpose of clause (vi) is too wide and broad and includes the services which have been rendered by the assessee to the Indian resident.
 - The payment received from the Indian resident in DM was also for transfer of rights, imparting of any information concerning the working or the use or the process or marketing of the property.
 - This was not a case of mere supply of equipments by a foreign party to an Indian resident for which the price was received and in the contract, there was a reference to a manual or a guide for installation and use of the buyer.
 - The product might be specialized or the equipment might not have something to do with the business of the Indian company but it was not making payment only for acquisition of the equipment but the rights in the nature enumerated in *Explanation 2* which was really an Explanation to clause (vi) of sub-section (1) of section 9.
- On the other hand the respondent submitted that:
 - The findings recorded by the Tribunal were pure findings of fact. They were based on the factual materials. The Tribunal had followed its order for the earlier assessment years in relation to identical transaction and identical contract. There was nothing by which this Court could take a different view on facts.
 - Further, the widest possible of the meaning 'royalty' does not include the handing over of any written guide or manual or giving information for the purposes of installation and use of the equipment at the site of the Indian resident.

Held

- The Tribunal in the case of the very assessee, for prior assessment years 1988-89 to 1990-91 decided an identical issue.
- The Tribunal perused the contract between the parties, the payment made thereunder and concluded with the same would not fall within the definition of the term 'royalty'.
- None can agree with the view that the widest possible meaning of the term 'royalty' and as found in the definition of the term in the *Explanation (2)* would include the transaction under which payment has been made for supply of converters. The agreement has been referred to by the Tribunal in detail. The Tribunal found that the agreement postulates the payment for the said equipment. The technical information that is provided is related to data plant specification flow sheet which are issued in the installation of the plant. The Tribunal found that there is no transfer of rights in the nature contemplated by clauses (i) to (v) of the *Explanation 2* so as to be termed as 'royalty'. Thus, the equipment was supplied to the Indian party and for which the Indian party made payment. The contract in relation to such a contract included stipulations for giving all information so as to guide the Indian party to install the equipment at site and thereafter to use it. It is in these circumstances, it is to be held that this is a mixed question and a finding of fact has been rendered considering the peculiar facts and circumstances. The assessee's case and the contract of the assessee with the Indian party - Madras Fertilizers Ltd. has been considered in arriving at the finding. The view taken for the present year is thus consistent with the nature of the transaction and the stipulations thereof. Such a finding of fact, therefore, is a possible one. There is no perversity or error of law apparent on the face of the record. Therefore, on the facts and circumstances of the case and in law, the Tribunal is right in holding that the payments for the equipments and spare parts amounting to DM 7,15,000 is not a receipt of income accruing or arising to the assessee by virtue of the provisions of section 9(1)(vi).
- In respect of another payment the Assessee did not provide something more than required as information to guide the Indian resident and hence the payment does not fall within the definition of the term 'royalty'. All the clauses of *Explanation 2* would denote that mere imparting of any information concerning technical, commercial, industrial or scientific knowledge, expertise of skill by itself has not been brought into the definition. If the transferring of all or any rights in respect of a patent, invention, model, design, secret formula or process or trade mark of the property including granting of licence is admittedly not an act performed in the present case, similarly the imparting of any information concerning the working of or use of the patent, invention, model, design, secret formula or process or trade mark or similar property is not what is found out in the Assessee's case, then, the basic information to guide the Indian resident with regard to the installation and use of the equipment at site and any sum paid therefor would fall within this definition.

Payments of DM 13,30,000 towards supply of equipments is not royalty

- Another payment of DM 13,30,000 was found to be made towards the supply of equipments and that too on 'principal to principal' basis. The payment cannot be said to be falling within the provision of section 9(i).
- In respect of another payment the Assessee did not provide something more than required as information to guide the Indian resident and hence the payment does not fall within the definition of the term 'royalty'. All the clauses of Explanation 2 would denote that mere imparting of any information concerning technical, commercial, industrial or scientific knowledge, expertise of skill by itself has not been brought into the definition. If the transferring of all or any rights in respect of a patent, invention, model, design, secret formula or process or trade mark of the property including granting of licence is admittedly not an act performed in the present case, similarly the imparting of any information concerning the working of or use of the patent, invention, model, design, secret formula or process or trade mark or similar property is not what is found out in the Assessee's case, then, the basic information to guide the Indian resident with regard to the installation and use of the equipment at site and any sum paid therefor would fall within this definition.