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Sum paid to foreign entities to download photographs from their websites won't be treated as Royalty

Summary – The Mumbai ITAT in a recent case of VJM Media (P.) Ltd., (the Assessee) held that Payments made by assessee to non-residents for downloading of photographs for exclusive one time use for publication in assessee's magazine in India did not fall within provisions of relevant article 12 of DTAA and therefore, assessee was not liable to deduct tax on payments made for same

Facts

- The assessee was engaged during the year in the business of publishing magazines.
- The Assessing Officer made disallowance of an aggregating amount of Rs. 7.59 lakhs being payments made to two entities, one located in Singapore and another in United Kingdom, for procuring images and figures to be published in assessee's magazines in India on ground that these payments were in the nature of royalty and therefore, required deduction of tax at source which was not done, and therefore disallowance was made under section 40(a)(i).
- On appeal, the Commissioner (Appeals) upheld the action of the Assessing Officer.
- On appeal to the tribunal:

Held

- It is noted that the facts have been analysed by the Commissioner (Appeals) on which both the parties unanimously agree, and therefore, the position of law shall be analysed on the admitted facts as discussed by the Commissioner (Appeals). The facts as narrated by Commissioner (Appeals) are that written terms of agreement with Singapore party and copies of bills and payments in respect of UK party show that terms of transactions with both of them are identical. The photographs of celebrities and other models, like those which the assessee has obtained through the website of these foreign parties, are generally taken by the photographers who are generally on contract with some corporate entity. These corporate entities become the owners of the photographs of these celebrities and others models by way of making payments to the celebrities, and thereby acquiring a right to use of these photographs in the manner they like. In this manner, these corporate entities become owners of such photographs. It has been analysed and held by the Commissioner (Appeals) on the basis of agreement and other terms of conditions that what has been given to the assessee is only the right to use a particular photograph, and right is limited to publication of the photographs in assessee's own magazine. The Commissioner (Appeals) has further stated that a limited right has been given to the assessee in lieu of a payment. It has been concluded by the Commissioner(Appeals) that foreign party did not sell the 'photo', and therefore it cannot be classified a business transactions, since the ownership of the photographs has not been transferred to the assessee.

- The Commissioner (Appeals) further holds that such limited rights given for the limited purpose shall fall within the definition of royalty in terms of article 12 of DTAA with Singapore. It is further held by him that article 13 of DTAA with UK is identical wherein the term royalty has similar definition as given in DTAA with Singapore. However, the views of the Commissioner (Appeals) are not completely agreeable. It is settled law that as per section 90(2), out of the provisions of DTAA and Income Tax Act, the provisions which are more beneficial to the assessee can be availed by it for the purpose of determining its tax liability. It has been argued that the definition of the term royalty given in DTAA is more restrictive in nature as compared to the definition given in the Act, though, the impugned payment would not fall even in section 9(1)(vi) read with its explanation 2(v). As per the provisions of article 12, of DTAA with Singapore, royalty includes any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information.
- Thus, to be included in the definition of 'royalty', the payment should be made for use of a copyright of the items which have been mentioned in the aforesaid Article. Even if it is presumed, although denied by the assessee, that photograph will fall in any one or more of the items mentioned in the above said definition, even, then it is mandatory on the part of the revenue before applying these provision to show that the payment was for use of 'copyright' and not 'copyrighted article'. The use of copyright and 'copyrighted article' are altogether two different things as has been held in many judgments also. The admitted fact is that the photograph has been given to the assessee for the limited purpose of its one time use in the magazine. The assessee can neither edit the photograph nor can it make copies of the photograph to be sold further or to be used elsewhere. The assessee is not permitted to make resale of these photographs to any other person for any other use. Thus, what has been permitted to the assessee is to make use of the article and not use of the copyright.
- Thus, the transactions of downloading of photographs for exclusive one time use for publication in the magazine did not fall within the provisions of relevant article 12 of DTAA and therefore, assessee was not liable to deduct tax on the payments made for the same.
- Further, in the assessment year 2009-10 also payments were made to these very parties for downloading of photos. But no disallowance has been made by the Assessing Officer in the assessment order passed under section 143 (3).
- Thus, in view of the above discussion , the impugned payments were not liable for deduction of tax at source and therefore, the disallowance made by the Assessing Officer is deleted.
- In the result, the Cross Objection filed by the assessee is allowed.