

Payments to non-residents not subject to withholding tax

The Supreme Court has set aside a Karnataka High Court decision on withholding tax obligation on cross-border payments, holding that the tax deduction at source (TDS) requirement should arise only in cases where such payments are taxable in India.

The Karnataka High Court had in the Samsung Electronics Case came out with a sweeping decision that required every cross border payment in the nature of income per se to a non-resident to be subjected to withholding tax, unless an authorisation for non deduction of tax at source was obtained from a tax officer. The High Court also ruled that it was only an assessing officer who can decide on the leviability of tax on a cross border payment.

This ruling of 2009 had created difficulties for payers as it was not practically feasible for them to approach the tax officer every time the payment had to be made without deduction of tax at source.

The Supreme Court's move to set aside the Karnataka High Court decision in the Samsung Electronics case is in line with the larger judicial opinion that payments to non-residents need not be automatically subjected to withholding tax obligation.

The aberration manifested with the Karnataka High Court judgement that every payment made to a non-resident should be subjected to withholding tax obligations stands corrected with the Supreme Court setting aside the High Court's decision.

It will also bring to end litigation on issue which affects lot of players having international transactions. The issue assumed significance given that default in TDS can lead to disallowance of expenditure in the hands of payer.

Apex court remands

Even as the Supreme Court reversed the Karnataka High Court judgement, the apex court remanded the matter to the High Court to decide whether the payment made to foreign suppliers amounted to royalty and whether the same was taxable in India. The apex court was considering a bunch of appeals relating to payments made to overseas suppliers with regard to import of software.

The appeals arose out of judgement of the Karnataka High Court on the issue of interpretation of Sec.195 of the Income Tax Act, 1961. A bench comprising of the Chief Justice of India Mr. Justice S.H.Kapadia and Mr Justice Radhakrishnan held that the issue related to the obligation of the payer to deduct and deposit TDS in relation to remittances made to foreign parties who do not have any permanent establishment in India and are therefore not taxable under the provisions of the Income Tax Act, 1961.

SOURCE: The Hindu Business Line