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News Flash

Supreme Court judgment in PILCOM upholding withholding tax as per domestic law on payment to non-resident sports associations without considering DTAA relief, does not apply to all payments to non-residents

The Supreme Court of India in the case of PILCOM[1] recently held that payment of guarantee fees to non-resident sports associations attracts withholding of tax under section 194E of the Income-tax Act, 1961 ('the Act') irrespective of any relief or benefit available to such non-resident recipient under any Double Taxation Avoidance Agreement ('DTAA'). It was held that the taxpayer on whose income the tax is withheld, can plead a case for the benefit of the DTAA on its own account and if accepted, the amount can be refunded with interest.

Summary of the facts of the case and the judgment of the Supreme Court:

- PILCOM ('the taxpayer') was a joint management committee formed by cricket boards of Pakistan, India and Sri Lanka to conduct the tournament jointly in their respective countries, to collect revenue such as sponsorship rights, TV rights, etc. and pay expenses related to the tournament, through designated bank accounts in London.
- Amongst others, PILCOM made payments from its London bank accounts to various cricket control boards/associations of other member countries who took part in the tournament held in India, Pakistan and Sri Lanka, without withholding taxes.
- The income-tax officer (ITO) was of the view that PILCOM should have withheld tax under section 194E r.w. section 115BBA on the payment to these non-resident boards/associations. Accordingly, the ITO passed an order treating the taxpayer as an assessee-in-default for non-withholding tax.
- The taxpayer was of the view that no income was accruing and arising to these boards/associations under section 115BBA and accordingly the requirement of withholding tax under section 194E was not applicable. Accordingly, the taxpayer filed an appeal against the order of the ITO. However, the appeal filed by the taxpayer was rejected by the first appellate authority and on further appeal even by the second appellate authority.
- The taxpayer then filed an appeal before the Calcutta High Court. The High Court also agreed with the views of the income-tax authorities and held that section 194E r.w. section 115BBA mandates withholding of tax at a flat rate and the requirement of the said payment being 'chargeable to tax' was not mandated by section 194E. Interestingly, although the issue of relief under DTAA was not raised before the High Court, the High Court went ahead and observed as under:

  "Although it is not argued but we feel that obligation to deduction under Section 194E is not affected by the DTAA since such a deduction is not the final payment of tax nor can be said to be an assessment of tax. The deduction has to be made and after it is done the assessee concerned gets the credit of the same and once it is found later on that income from which the deduction is made is not eligible to tax then on application being made refund with interest is always allowed. Fundamental distinction between the deduction at source by the payer is one thing and obligation to pay tax is another thing. Advantage of the DTAA can be pleaded and taken by the real assessee on whose account the deduction is made not by the payer. We are of the view that irrespective of the existence of DTAA the obligation under Section 194E has to be discharged once the income accrues under Section 115BBA."

- The above judgment and reasoning of the Calcutta High Court in context of Section 194E was upheld by the Supreme Court.

[1] Civil Appeal No. 5749 of 2012

CNK Comments:

The judgment has created some confusion on whether the provisions of the DTAA are to now be ignored while determining withholding tax on payments to non-residents.

To dispel such confusion and clarify, it may be noted that the Supreme Court judgment in case of PILCOM is very specific to the facts of its case and is to be applied only while withholding tax under section 194E r.w. section 115BBA. Section 115BBA covers taxation of only non-resident and non-citizen sportsmen and entertainers from their activities in India and non-resident sports association or institution in relation to any game or sport played in India. Unlike section 195 (which covers most of the common payments to non-residents such as purchase consideration towards sale of goods, royalties, fees for technical or professional services, interest, etc.), section 194E does not recognize the concept of payment being 'chargeable to tax' at the 'rates in force' while mandating the requirement to withhold tax.

The Supreme Court judgment in case of PILCOM also does not reverse its earlier judgment in case of G.E. India Technology Centre Pvt. Ltd.[2]. The G.E. India judgment explained the now settled position that a payment to non-resident is liable to withholding tax in India under section 195 at the 'rates in force' only if it involves income 'chargeable to tax' in India. Definition of 'rates in force' under section 2(37A) states that for the purpose of section 195, the rates provided under the Act or the DTAA will apply, as permitted by section 90 / 90A. Section 90/90A in turn provide that the provisions of the Act or DTAA, whichever are more beneficial to the taxpayer, will apply subject to the taxpayer furnishing a tax residency certificate (TRC) and other documentation.

Accordingly, going forward, the provisions of the DTAA should continue to be considered before ascertaining whether payment to a non-resident (not covered by section 194E) involves any income 'chargeable to tax' in India before determining withholding tax under section 195.

Given the confusion arising from this decision, it is likely that some tax payers may seek to adopt a conservative view and either withhold tax from all payments to non-resident without considering DTAA relief or may insist on obtaining order under section 195(2) or certificate under section 197 before granting DTAA relief. This would be against the intention of the law and may create unnecessary compliance burden on both payers and recipients of income in terms of making tax payments, filing tax returns, claiming refunds, scrutiny assessment, etc.

One hopes that the Central Board of Direct Taxes ('CBDT') will issue a suitable clarification to this effect which would be in line with the Government's objective of enhancing ease of doing business in India.

[2] (2010) 327 ITR (SC)

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