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Bangalore ITAT held that disallowance u/s 40(a)(i) cannot be made if payments are made without tax deduction on basis of nil tax withholding certificate issued u/s 195(2) of the Act

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In this issue:

Upcoming Dbriefs - Register
Contacts

Bangalore ITAT in its decision rendered in the case of Carl Ziess held that no disallowance can be made u/s 40(a)(i) of the Income Tax Act, 1961 (Act) in respect of payments made without deduction of tax based on 'nil' withholding certificate obtained from the tax officer.

During the year under consideration, assessee made payments to its Head Office without deduction of tax on the basis of 'nil' tax withholding certificate obtained by it from the tax officer u/s 195(2) of the Act. During the course of assessment proceedings, assessing officer disallowed the deduction on the grounds that payments made were in the nature of fees for technical services (FTS) and thus were liable to TDS u/s 195 of the Act and since no tax has been deducted, payments made were disallowed.

On appeal, Tribunal noted that AO while granting certificate u/s 195(2) of the Act had considered all the facts and nature of services rendered and thereafter had ruled that services provided by non-resident from Singapore did not fall under the ambit of technical knowledge, skill, know-how, expertise etc. as required under the definition of FTS as per Article 12 of Indo-Singapore DTAA.

The Tribunal further pointed out that disallowance u/s 40(a)(i) can be made only where assessee has violated the provisions of Chapter-XVII B. Once assessee has obtained a certificate from the AO in accordance with the requirement of section 195(2) of the Act, the assessee cannot be penalized by invoking the provisions of section 40(a)(i) of the Act. The Tribunal thus held that once assessee has complied with the provisions of section 195 of the Act by obtaining the certificate u/s 195(2), no disallowance can be made in respect of the said amount paid to non-resident by invoking the provisions of section 40(a)(i) of the Act.

This decision has reinforced the principle that if an assessee has not withheld taxes on the basis of either an order obtained u/s 195 or on basis of a Circular issued by CBDT or an order u/s 201 not requiring the assessee to deduct tax at source, then disallowance cannot be made u/s 40(a)(i) of the Act. It may be noted that High Court¹ in another case has held that since there was no obligation to deduct tax at source on non-resident payments in light of binding Board circulars issued by CBDT, disallowance cannot be made on such payments.

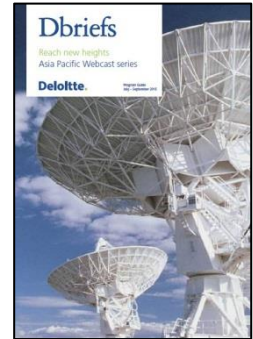
¹ CIT v. Allied Exims 363 ITR 62 (All)

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Transfer Pricing Developments in India: Range, Multiple Year Data, Advance Pricing Agreements, and Audits

On 10 September 2015 from 11:30 AM to 12:30 PM IST

Recent transfer pricing developments in India include proposals from the Government to reduce the extent of audits and litigation. The range and multiple year data concept will soon be incorporated into law. Furthermore, some high profile judgments are ensuring that the path to transfer pricing certainty slowly becomes clear in India. What does this mean for your Indian operations? Find out how companies impacted by Indian transfer pricing can navigate the regime with these updates. For more information, visit the [Dbriefs](#) page.



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