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Flash News

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No Service PE in India under the India-UAE tax treaty since the period of working of employees is less than nine months

Background

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Booz & Company (ME) FZ-LLC[1] (the taxpayer) held that the taxpayer does not have a Service Permanent Establishment (PE) in India under the India-UAE tax treaty (tax treaty) since the period (solar days) of working of employees is less than nine months. Further, the taxpayer does not have any fixed place PE since the Indian subsidiary has not earmarked any specific place under the control or disposal of the taxpayer. The Tribunal also held that since the taxpayer has provided service to an Indian company and did not receive any service from it, the question of dependent agent PE in India does not arise.

Facts of the case

- The taxpayer is a UAE based company that belongs to the Booz group. It is engaged in the business of providing management and technical consultancy services. During the year under consideration, the taxpayer provided technical/professional personnel to its Indian associated enterprise named Booz & Company India Private Limited (Booz India).
- The taxpayer received a fee of INR112.83 lakh from Booz India. However, the taxpayer did not offer the same for taxation since the tax treaty does not have any specific clause on taxability of Fees for Technical Services (FTS) and therefore the said receipt is taxable as business income. However, since the taxpayer did not have a Permanent Establishment (PE) in India, fees received are not taxable in India.
- The Assessing Officer (AO) noticed that some of the group companies of the taxpayer approached Authority for Advance Ruling (AAR) in order to determine the taxability of their receipts from Indian entities. The AAR[2] held that the taxpayer's group companies have a PE in India and income received by them from Indian companies are taxable as business profit under Article 7 of the tax treaty.
- The group of companies which obtained AAR ruling included Booz & Company (ME). The AO held that the taxpayer is a 100 per cent subsidiary of Booz & Company (ME) Ltd. Hence the AO, by following the decision of AAR, held that 'Booz India' (Indian AE) to whom services were provided is the PE of the taxpayer. Accordingly, the AO held that the income is taxable as business income of the taxpayer. The CIT(A) confirmed the order of the AO.

Tribunal's decision

- The tax department relied on the AAR ruling in respect of certain group companies. However, the taxpayer contended that the question of availability of PE has to be examined on the basis of facts available in the present case. The taxpayer contended that the AAR ruling is binding only on those parties and not on others. The Tribunal finds merit in the contentions of the taxpayer. The Tribunal held that the AAR ruling in the group concern's case should not have been taken by the tax authorities as the basis for determining the existence or otherwise of PE of the taxpayer herein.

[1] Booz & Company (ME) FZ-LLC v. DDIT (ITA No. 4063/Mum/2015 (Assessment Year 2011-12) – Taxsutra.com

[2] Booz Group Companies [2014] 362 ITR 134 (AAR)

- There is no dispute between the parties that the fees received by the taxpayer from Booz India for the provision of technical/professional personnel are in the nature of business receipts. As per Article 7 of the Indian-UAE tax treaty, the business receipts are taxable in India only if the taxpayer has a PE in India.
- On reference to Article 5[3] of the tax treaty, the Tribunal observed that the working of the employees[4] in India does not exceed nine months. Hence, Article 5(2)(i) of the tax treaty shall not apply to the facts of the present case.
- It has been observed that Booz India has also not earmarked any specific place under the control or disposal of the taxpayer. Hence, it cannot be said that the taxpayer did carry on any business in India through the fixed place of business. Since the taxpayer has provided service to Booz India and did not receive any service, the question of dependent agent PE also does not arise in India.
- Accordingly, the Tribunal held the taxpayer does not have a PE in India and consequently, the receipt is not taxable in India.

Our comments

The issue with respect to consideration of solar days vs man days for determination of service PE has been a matter of debate before the Courts. Some of the Courts[5] have held that for the purpose of determining the service PE, 'solar days' and not 'man days' are to be considered. For e.g., the day on which more than one person was present in India should be counted as one single day. Multiple counting of days could lead to absurd results for e.g., if 20 employees are present in India for 20 days then as per multiple counting the presence in India would go upto 400 days. Therefore, courts have held that multiple counting is to be avoided. However, the tax department in many cases determined the PE on the basis of 'man days'.

In line with the above decisions, the Mumbai Tribunal in the present case held that 'solar days' would be considered for the purpose of determining a service PE in India.

The Courts/Tribunal have extensively dealt with the issue with respect to taxability of services in the absence of specific FTS article in the tax treaty. Some of the Courts[6] have held that in the absence of FTS article in the tax treaty, services should be taxable under 'Business Profit' article if the taxpayer is having a PE in India. If the taxpayer does not have a PE in India, such services would not be taxed in India. However, in some of the cases, the tax department (in addition to the above point) contended that if the taxpayer does not have a PE in India, taxability of such services needs to be examined under the residuary article.

The Bangalore Tribunal[7] observed that 'other income' article provides that income which is not dealt with in any of the articles of the tax treaty, shall be taxable in 'other income' article. An item of income is said to have been dealt with other articles of the tax treaty if such income can be classified as taxable or not under any of the articles of the tax treaty. If the payments are dealt with by Article 7 of the tax treaty, Article 23 has no application. Therefore, such services cannot be taxed under 'other income' article of the tax treaty.

The AAR in the case of Lanka Hydraulic Institute Ltd.[8] observed that since there is no specific article for taxation of FTS in the tax treaty, it would be directly governed by Article 22 of the tax treaty which is a residuary article in the tax treaty. The AAR has not examined the 'Business Income' article for such income.

It is pertinent to note that the Bangalore Tribunal in the case of Spice Telecom[9] observed that since services provided by the taxpayer are not covered under the India-Mauritius tax treaty, the same are not taxable in India. Accordingly, it is also possible to argue that in the absence of FTS article, the services would not be taxed in India.

The tax department has been arguing that when FTS article is missing in the tax treaty, the taxability of services should be under the Act. The Chennai Tribunal[10] held that only for a reason that the tax treaty is silent on a particular type of income, it could not be said that such income will automatically become business income of the recipient. When the tax treaty is silent on a particular article, the provisions of the Act have to be considered.

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[3] As per Article 5(2)(i) of the tax treaty the PE includes the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve month period.

[4] The employees have worked for an aggregate period of 156 solar days (on all projects taken together)

[5] Worley Parsons Services (P) Ltd [2009] 312 ITR 317 (AAR), J. Ray Mcdermott Eastern Hemisphere ltd v. JCIT [2010] 39 SOT 240 (Mum), ADIT v. Valentine Maritime (Mauritius) Ltd. [2011] 45 SOT 34 (Mum), Clifford Chance v. DCIT [2002] 76 TTJ 725 (Mum), Electrical material Center Co. Limited v DDIT (IT(TP) A No. 1104 (Bang) 2013, dated 28 September 2017

[6] McKinsey Business Consultants v. DDIT [2015] 54 taxmann.com 300 (Mum), Bangkok Glass Industry Co. Ltd. v. ACIT [2013] 34 taxmann.com 77 (Mad)

[7] IBM India Private Limited v. DDIT [I.T. (IT) A. Nos. 489 to 498/Bang/2013]

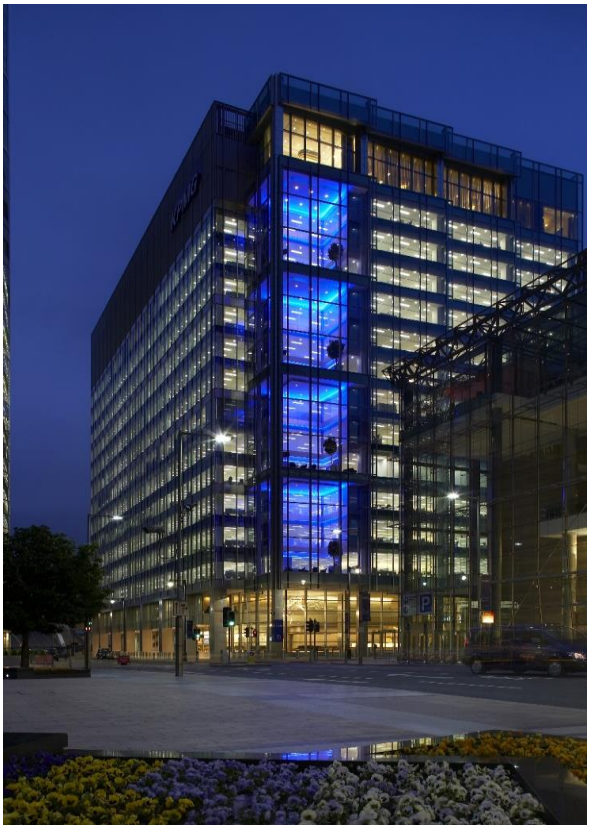
[8] Lanka Hydraulic Institute Ltd [2011] 11 taxmann.com 97 (AAR)

[9] Spice Telecom v. ITO [2008] 170 Taxman 82 (Bang)

[10] DCIT v. TVS Electronics Ltd [2012] 52 SOT 287 (Chen)

The Mumbai Tribunal in the present case dealt with the issue of taxability fees received from the Indian company for the provision of technical/professional personnel under the India-UAE tax treaty where FTS clause is missing. The Tribunal held that fees received from the Indian company are not taxable in India in the absence of a PE in India.

There is considerable litigation on the above issue, and the Courts/Tribunal have rendered contrary decisions on the same. Therefore, one needs to make an informed decision based on facts of each case, analysis of the above decisions and the language of a particular tax treaty.



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