

TAX FLASH NEWS

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A Mauritian company does not constitute a fixed or an agency PE in India

The Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Overseas Transport Co. Ltd¹ (the taxpayer) dealt with the issue of determination of a Permanent Establishment (PE) in India under the India-Mauritius tax treaty (tax treaty). The Tribunal held that the taxpayer did not constitute a fixed place PE in India under Article 5(1) of the tax treaty since there is no permanent infrastructure, office, supervisory staff, tangible and intangible assets in India. The directors of the taxpayer are staying in UAE and are exercising their control over the affairs of the taxpayer from UAE. This cannot be a ground for creation of fixed place PE in India as none of the conditions of Article 5(1) of the tax treaty are satisfied. The Tribunal also held that the taxpayer did not constitute an agency PE in India since the Indian agents are not exclusively working for the taxpayer. Further, the services provided to the taxpayer by these agents are in the ordinary course of their business.

Facts of the case

The taxpayer is a Mauritius based entity engaged in shipping business. The taxpayer had two UAE resident shareholders. The shipping activity in India was carried on by the taxpayer through two Indian agents. During the Assessment Year 1998-99, the taxpayer received gross receipt from freight, and it was claimed that it was not taxable by virtue of Article 8² of the tax treaty. In support of the claim of benefit under the tax treaty, the taxpayer also furnished Tax Residency Certificate (TRC) issued by the tax authorities in Mauritius³.

The Assessing Officer (AO) observed that the board meetings were held in UAE and hence the taxpayer was not eligible to avail the benefit under Article 8 of the tax treaty. Further, the AO held that the taxpayer had a fixed place PE under Article 5(1) and dependent agency PE in India under the tax treaty. The AO determined the income at the rate of 7.5 per cent of the receipts under the provisions of Section 44B of the Income-tax Act, 1961 and raised tax demand on the taxpayer, as its place of effective management (POEM) was in India. Aggrieved, the taxpayer filed an appeal before the Commissioner of Income-Tax (Appeals) [CIT(A)].

The CIT(A) held that Indian agents cannot be considered as dependent agents of the taxpayer as both entities have their independent business and have earned commission income from various other principals as well. Thus, the two Indian agents cannot be considered as exclusive agent of the taxpayer under Article 5(5) of the tax treaty. It was held that the taxpayer was not having a PE in India and was not taxable as per Article 7 of the Tax Treaty.

Tribunal's decision

Fixed place PE

As per the provisions of Article 5(1) of the tax treaty, the place of business must be fixed and through this fixed place of business the enterprise either wholly or partly carries on its business. Further, the place of business must be at the disposal of the enterprise. From the facts of the present case, it indicates that the taxpayer does not possess a fixed place of business to either wholly or partly carry out its business. There was no permanent infrastructure, office, supervisory staff, tangible and intangible assets in India to constitute a fixed place PE. There was nothing on record to establish that the taxpayer carries on its core business activities in India through fixed place of business. Though, the AO had alleged that POEM was in India, he had failed to prove such fact through cogent evidence.

¹ Overseas Transport Co. Ltd. v. DIT. (ITA No.3129/Mum/2002) (ITA No.7128/Mum/2004) – Taxsutra.com

² Article 8 Shipping and air transport - Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

³ The taxpayer claimed that its place of effective management is situated in Mauritius

The allegation of the AO that the directors of the taxpayer company were staying in UAE and were exercising their control over the affairs of the company from UAE, under no circumstances, creates a fixed place PE in India as none of the conditions of Article 5(1) of the tax treaty were satisfied. Thus, the taxpayer did not constitute fixed place PE in India under Article 5(1) of the tax treaty.

Dependent agent PE

On perusal of the provisions of Article 5(5)⁴ of the tax treaty it indicates that while providing services to the taxpayer, both Indian entities (Indian agents) were acting in the ordinary course of their business and are having their independent status. From the facts of the case, it indicates that one of the agents has provided services to six shipping companies including the taxpayer and received commission amount. Out of the total commission, the amount of commission that received from the taxpayer constitutes a meagre 12.14 per cent of the total income earned by such agent from various principals. Similar situation with the other agent and out of total commission the amount that was earned from the taxpayer constitutes merely 2.79 per cent of the total income earned by the said party.

Thus, the aforesaid facts clearly established that both the agents were not exclusively working for the taxpayer and were having their independent status. Further, the services provided to the taxpayer by them were in the ordinary course of their business. Accordingly, the exceptions provided under Article 5(5) of the tax treaty would be applicable. Hence, both the agents cannot be considered as dependent agents so as to constitute dependent agent PE in India. The ratio of various decisions⁵ relied on by the taxpayer were applicable to the facts of the present case. Accordingly, the Tribunal held that the taxpayer does not have a PE in India even under Article 5(5) of the tax treaty. Consequently, the taxpayer was eligible to avail the benefits of the tax treaty. More so, considering the fact that the Tax Authorities in Mauritius have issued TRC in favour of the taxpayer.

Our comments

The issue with respect to the determination of PE in India has been a subject matter of debate before the Courts/Tribunal.

With respect to the fixed place PE, the Delhi High Court in the case of National Petroleum Construction⁶ held that the word 'permanent' in the term 'permanent establishment' indicates that there should be some

degree of permanency attached to the fixed place of business before the same can be construed as a PE of an enterprise. The word permanent does not imply for all times to come but merely indicates a place, which is not temporary, interim, short-lived or transitory. The Mumbai Tribunal in the case of Renoir Consulting Ltd⁷ observed that the word 'permanent' means there must be a certain degree of permanence and a fixed place would include a movable place of business.

Some of the Courts⁸ have observed that the expression 'fixed' indicates a considerable or reasonable period in existence of the place of business in the source state and hence, in order to constitute a PE, the presence of the foreign enterprise in the source state must be more than merely temporary or transitory or tentative or for a short while.

The Supreme Court in the case of E-Funds IT Solutions⁹ had laid down certain guidelines for determination of a PE of a foreign company in India. It was observed that the principal test to ascertain whether the establishment has a fixed place in India is that such physically located premises have to be 'at the disposal' of the foreign company.

The Tribunal in the present case has held that that the taxpayer did not constitute fixed place PE in India under Article 5(1) of the tax treaty since there was no permanent infrastructure, office, supervisory staff, tangible and intangible assets in India. The directors of the taxpayer are staying in UAE and are exercising their control over the affairs of the taxpayer from UAE cannot be a ground for creation of fixed place PE in India as none of the conditions of Article 5(1) of the tax treaty were satisfied.

With respect to an agency PE, the Bombay High Court in the case of Taj TV¹⁰ held that when the entire relationship qua the distribution revenue is that of principal to principal basis and the Indian agent was acting independently, then it moves out from the conditions laid down in Article 5(4) of India-Mauritius tax treaty. However, the Delhi High Court in the case of Rolls Royce Singapore (P.) Ltd.¹¹ held the Indian agent was acting exclusively for the Singapore company, and it was prohibited from assisting any other company or person that competed with the Singapore company. Therefore, the Indian agent could not be regarded as having independent status.

The Tribunal in the present case has held that the taxpayer did not constitute an agency PE in India since the Indian agents were not exclusively working for the taxpayer. Further, the services provided to the taxpayer by the agents were in the ordinary course of their business.

⁷ Renoir Consulting Ltd. v. DDIT [TS-211-ITAT-2014(Mum)]

⁸ Golf in Dubai LLC, In re [2008] 306 ITR 374 (AAR), P No. 24 of 1996, In re [1999] 237 ITR 798 (AAR), PGS Geophysical AS v. Government of Norway (2004) IBFD Case No. 2004-01003-A, (sak nr. 2003/1311) (Supreme Court of Norway), IBFD Case No. II R 12/92 (Federal Tax Court, Munich), Sunbeam Corporation (Canada) Ltd. v. Minister of National Revenue (1963) S.C.R. 45 (Supreme Court of Canada), Golf in Dubai LLC, In re [2008] 306 ITR 374 (AAR), Cal Dive Marine

⁹ ADIT v. e-Funds IT Solution Inc [2017] 399 ITR 34 (SC)

¹⁰ CIT v. Taj TV [2020] 115 taxmann.com 305 (Bom)

¹¹ Rolls Royce Singapore (P.) Ltd. v. ADIT (ITA No. 1278/2010, 30 August 2011) (Del)

⁴ Dependent Agent PE - If the activities of such agent are exclusively devoted for and on behalf of the enterprise, it will not be considered as an agent of independent status under Article 5(5).

⁵ ADIT v. Bay Lines (Mauritius) [2018] 91 taxmann.com 110 (Mum), DDIT v. ARC Line (Mauritius) (ITA No. 1096/Mum/2010) (Mum), ARC Line (Mauritius) v. DCIT [2019] 112 taxmann.com 95 (Mum)

⁶ National Petroleum Construction v. DIT [2016] 66 taxmann.com 16 (Del)

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