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Chartered Accountants

Quarterly Insights

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International Taxation

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Judicial Decisions

Seconded employee of a foreign company to India would not trigger PE where they are not engaged in the business or the generation of income of the foreign company, in India

PCIT vs. Samsung Electronics Co. Ltd. [170 taxmann.com 417 (Delhi)]
In favour of Assessee

Brief Facts

The assessee was a company established in Korea and was a tax resident of South Korea. It had two wholly owned subsidiaries in India. A survey was conducted on the premises of the Indian subsidiary which led to reassessment proceedings for AYs 2004-05 to 2009-10. The AO held that the premises of the Indian subsidiary constituted a Fixed Place Permanent Establishment **(PE)** of the Korean Company. The AO had further held that the Indian company additionally also met the tests of a Dependent Agent Permanent Establishment (DAPE) as well as a Service PE.

The Tribunal found on fact that the seconded employees were being posted to India pursuant to a tripartite agreement entered into between the Korean company, the Indian company and the concerned employees. The Tribunal noted that although information was exchanged and plans and strategies for the Indian market were discussed, none of those statements could be interpreted as evidence of any activity of the global business of the Korea company being conducted in India. Marketing strategies and future plans pertaining to the business of the Indian subsidiary were discussed and deliberated upon by the Korean company, would not lead to a PE coming into existence.

Held

The secondment of employees which may consist of technically trained personnel or persons with experience is an arrangement, common in today's world of business. What however needs to be considered is whether the deployment of such employees is in furtherance of the business of the foreign company or intended to be utilized for the business of the Indian company. The seconded employees were engaged in assisting the Indian company in its business in India. Absence of any material that would have even tended to indicate that the functioning of the seconded employees was concerned with the business or the generation of income of the Korean company, those employees would not constitute a PE of foreign company in India.

Benefit of Article 8 of the India- Mauritius Tax Treaty would not be available to the shipping company once it was found that it does not have place of effective management in Mauritius. Once benefit of Article 8 is denied, the shipping income would get taxed in India only where there is a PE in India

Shell Global Solutions International BV vs. ACIT [TS-528-ITAT-2024(Ahd)-TP]
In favour of Revenue

Brief Facts

The assessee was a shipping company incorporated in Mauritius. It had gross receipts of freight aggregating to Rs.79.84 crores in the AY 2013-14 and Rs.78.13 crores in AY 2014-15. The assessee applied the presumptive rate of tax under section 44B and offered 7.5% of these receipts as income taxable in India. However, in the return of income, the assessee claimed benefit of Article 8 of India-Mauritius Tax Treaty and accordingly, the income from shipping activities was returned at ‘Nil’.

The assessee had carried out its activities from UAE and therefore, the AO disallowed benefit of India-

Mauritius Tax Treaty on the ground that effective place of management was not in Mauritius. The AO preceded that the assessee had a PE in India in the form of dependent agent and therefore, income earned by the assessee would be taxable in India.

Held

The benefit of Article 8 was not available to the assessee because the place of effective management was not there in Mauritius. In such a scenario, the income of a shipping business can be taxed where it maintains a PE.

The Indian agent was wholly and exclusively dependent agent of the assessee albeit, it was only agent for booking for cargo for assessee as per the tariff fixed by the assessee. Nowhere, it had the capacity to conclude the contracts of any nature. The Indian agent was doing business for other enterprises also and in as much as more than 77.60 % of the revenue or the income was from other independent parties and only 22.32% revenue was derived from the assessee. Accordingly, the Indian agent was an independent agent and not carrying out any work wholly for the assessee. Accordingly, the income earned by the assessee would not be taxable in India in absence of PE in India.

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