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No further profits can be taxed in hands of dependent agent permanent establishment, if agent has been remunerated at arm's length and income embedded therein taxed in India

The Mumbai Bench of the Income-tax Appellate Tribunal (ITAT) rendered its decision that when a dependent agent is remunerated at arm's length and the income embedded therein has been taxed in India, then no further profits can be taxed in the hands of the dependent agent permanent establishment.

Facts of the case:

- OT Africa Line Limited (the taxpayer)¹ is a company, incorporated and fiscally domiciled in the United Kingdom and is engaged in the shipping business. The taxpayer carried out its operations in India through an agent viz. an Indian company.
- During the Financial Years (FY) 2004-05 and 2006-07, corresponding to Assessment Years (AY) 2005-06 and 2007-08, the taxpayer earned freight income from India. The taxpayer claimed benefit of Article 9 of the India-UK tax treaty and did not offer the freight income to tax in India.
- During the course of audit of the income-tax return by the Assessing Officer (AO), the AO did not accept the claim of the taxpayer and held the following:
 - The provisions of Article 9 of India-UK tax treaty were not applicable to the taxpayer's case;
 - Based on the agency agreement between the taxpayer and its agent, the taxpayer had a dependent agent permanent establishment (DAPE) in India by way of the Indian company agent;
 - 10% of the freight income was attributable to the DAPE.
- On appeal, the Commissioner of Income-tax Appeals [CIT(A)] upheld the order of the AO.
- Aggrieved by the order of the CIT(A), the taxpayer filed an appeal before the Mumbai Bench of the Income-tax Appellate Tribunal (ITAT).

Decision of the ITAT:

- The ITAT noted that:
 - The case under consideration related to a DAPE;

¹ OT Africa Line Ltd. v. DDIT(IT) [2020] 116 taxmann.com 855 (Mumbai – Trib.)

- The jurisdictional High Court in the case of Set Satellite (Singapore) Pte Ltd v. DDIT² had held that if correct arm's length price is applied and paid, then nothing further would be left to be taxed in the hands of the foreign enterprise;
- In the case under consideration, the fact that the agent was remunerated at arm's length and the income embedded therein was taxed in India, was not disputed.
- In view of the above, the ITAT held that:
 - Existence of DAPE in India in the case under consideration was tax neutral, as the fact that the agent was remunerated at arm's length and the income embedded therein was taxed in India was not disputed.
 - If as a result of the DAPE no additional profits (other than the agent's remuneration) became taxable in India, the very approach to the DAPE profit attribution may seem incompatible to the position laid down in the case of Set Satellite (Singapore) Pte Ltd v. DDIT² (viz. if correct arm's length price is applied and paid then nothing further would be left to be taxed in the hands of the foreign enterprises).
- In view of the above, the ITAT held that once an agent has been paid arm's length remuneration, and the income embedded in such remuneration has been taxed in India, then no further profits could be taxed in the hands of the DAPE.

Comments:

The ruling reaffirms the principle that once an agent has been paid arm's length remuneration, and the income embedded in such remuneration has been taxed in India, then no further profits can be taxed in the hands of the DAPE.

² Set Satellite (Singapore) Pte Ltd v. DDIT [2008] 307 ITR 205 (Bom HC)



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