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Sales conducted by non-resident through Indian subsidiary constitutes business connection, subject to withholding tax in India

The Indore Bench of the Indian Income-tax Appellate Tribunal (ITAT) rendered its decision that sales conducted by a non-resident through its Indian subsidiary constitutes business connection based on facts and the payments thereof, subject to withholding tax in India.

Facts of the case:

- Sanghvi Foods Private Limited (the taxpayer)¹ is in the business of manufacturing wheat products, operating cold storage facilities and windmills as different units.
- The taxpayer during Financial Years (FY) 2014-15 and 2015-16, corresponding to Assessment Years (AY) 2015-16 and 2016-17, purchased spare parts for old machines and flour milling machines from Buhler AG, Switzerland ('BAS'). The taxpayer had not withheld taxes from the payment made to BAS.
- During the course of audit by the Assessing Officer (AO), the taxpayer submitted that it had not withheld taxes, because:
 - The taxpayer had purchased capital goods being spare parts of old machines and flour milling machines;
 - The purchases were made directly from BAS on principal-to-principal basis;
 - Buhler India Private Limited (Buhler India), the subsidiary of BAS, had no authority to conclude contract on its own and accordingly, BAS did not have a business connection in India.

In view of the above, the payments were not subject to withholding tax (TDS) under the provisions of the Income-tax Act, 1961 (ITA).

- The AO called for information from Buhler India also and based on the same concluded that Buhler India was working on behalf of BAS. Further, based on communication between the taxpayer and Buhler India, the AO concluded that BAS had a business connection in India through its group company Buhler India. Thus, the AO held that the profit element in the sales made to the taxpayer, was subject to TDS.
- On appeal, the Commissioner of Income-tax Appeals [CIT(A)] noted the following from the extracts of the email correspondences between the taxpayer and Buhler India, mentioned in the AO's order:
 - The taxpayer had placed order only on reference to quotation from Buhler India;
 - Buhler India was authorised to negotiate, raise quotation, revise quotation and also confirm an order;

¹ Sanghvi Foods Pvt. Ltd. v. ITO (IT & TP) ITA No.743 and 744/Ind/2018

- The taxpayer had sought a combined quotation only from Buhler India and had confirmed the purchase order through it;
- Buhler India had authority to send quotations and take order from the taxpayer.

Based on the above, the CIT(A) upheld the AO's order and held that:

- BAS had only raised the final invoice after substantial tasks were carried out by Buhler India;
 - Buhler India had provided vital services to BAS and its role was not restricted to marketing of the product;
 - Buhler India was in lead to conclude the deal for BAS;
 - Buhler India was working mainly for BAS;
 - The taxpayer had carried out transactions through Buhler India;
 - Accordingly, BAS had a business connection in India by way of Buhler India. Reliance was placed on the decision of CIT v. Remington Typewriter Co (Bombay) Ltd²;
 - The taxpayer had failed to furnish tax residency certificate or Form 10F and therefore, reference to tax treaty was not required.
- Aggrieved by the CIT(A)'s order, the taxpayer filed an appeal before the Indore Bench of Income-tax Appellate Tribunal (ITAT).

Decision of the ITAT:

- The ITAT held the following:
 - Buhler India was involved in the transaction between BAS and the taxpayer, and its role could not be ignored at any stage;
 - Buhler India had a trading business in India and provided marketing services to BAS;
 - The activities carried out by Buhler India for BAS were covered under the definition of business connection under the ITA.
- The ITAT held that the case of Hind Energy & Coal Benefication (India) Ltd v. ITO (IT & TP)³ relied on by the tax payer was not applicable in the case under consideration, because:
 - In the case of Hind Energy & Coal Benefication (India) Ltd v. ITO (IT & TP), the agent was a third party and the agent provided services to many other companies;
 - In the facts of the case under consideration (i.e. taxpayer's case), Buhler India was a subsidiary company of BAS and the activity of supply of goods / providing confirmation / confirming orders was carried out in India by BAS through Buhler India.
- In view of the above, the ITAT held that since BAS carried out the transaction of sale of goods to the taxpayer through Buhler India, business connection was established. Accordingly, the transaction

²CIT v. Remington Typewriter Co (Bombay) Ltd 5 ITR 177 (PC)

³ Hind Energy & Coal Benefication (India) Ltd v. Income Tax Officer [2019] 110 taxmann.com 72 (Indore-Trib)

between BAS and the taxpayer was subject to tax and the profit element embedded in sale made by BAS to the taxpayer, was subject to TDS in India.

Comments:

- This ruling based on facts of the case has held that the sales made by a non-resident through its group company in India constituted a business connection in India. Accordingly, the income of non-resident was subject to tax in India and the payment to the non-resident in relation to the purchase of goods, was subject to withholding tax in India under domestic tax law.



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