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### Sales through independent general commission agent does not result in creation of business connection in India

The Indore Bench of the Income-tax Appellate Tribunal (ITAT) rendered its decision that withholding tax is not applicable on payment made for sales conducted by a non-resident through an independent general commission agent in India

#### Facts of the case:

- RSV Global (the taxpayer)<sup>1</sup> is a partnership firm engaged in trading of various agro commodities viz. yellow peas, grains, forest products.
- During financial year (FY) 2014-15, corresponding to assessment year (AY) 2015-16, the taxpayer imported yellow peas from PKT Associates, USA ('PKT') and Ethiopian Niger seeds from AST Enterprise Inc., Dubai ('AST').
- Both PKT and AST are non-residents and sales were undertaken through Indian agencies viz. Ashapura Commodities in case of PKT and A.G. Goel & Sons in case of AST.
- The taxpayer did not withhold tax from the payments made to PKT and AST for the import of the agro commodities.
- On enquiry by the Assessing Officer (AO) in relation to the reason for non-withholding of taxes, the taxpayer submitted that taxes were not withheld as PKT and AST confirmed that they did not have a business connection in India.
- The AO did not accept the contentions of the taxpayer and held the taxpayer to be in default for not withholding taxes (while making the payments to PKT and AST). Accordingly, the AO raised a tax demand for the amount of tax and interest thereon as per the provisions of the Income-tax Act, 1961 (ITA).
- On appeal, the Commissioner of Income-tax Appeals [CIT(A)] upheld the order of the AO on the basis that the agents were working mainly or wholly on behalf of PKT / AST. In the case of PKT, 52% of the revenue of PKT's agent was received from PKT.
- Aggrieved by the order of the CIT(A), the taxpayer filed an appeal with the Indore Bench of the Income-tax Appellate Tribunal (ITAT).
- The following facts / contentions submitted by the taxpayer before the ITAT are relevant:
  - PKT or AST did not have any business connection in India and the same was confirmed by them;
  - The agents were general commission agents having independent status and worked for other traders also. Further, they did not stock goods on behalf of PKT / AST. These facts were confirmed by the agents;

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<sup>1</sup> RSV Global v. Income-tax Officer (International Taxation & TP), Bhopal [2020] 115 taxmann.com 335 (Indore – Trib.)

- Agents had no authority to conclude contracts on behalf of PKT / AST. In case of AST, though the contract was signed by their agents, the seller and the buyer had also signed for approval to bind the parties;
- The orders were secured, concluded and executed by PKT / AST;
- There was no specific contract between PKT / AST and the agent;
- There was no space provided by the agent to PKT / AST and they procured orders for PKT / AST, like they procured orders for others.
- As per Circular 23 / 1969 dated 23 July 1969 and the case of CIT v. Hindustan Shipyard Ltd.<sup>2</sup>, the taxpayer contended that:
  - It had prima facie established that PKT / AST did not have a business connection in India.
  - There must be something more than a mere transaction of sale and purchase between principal and principal.
  - No enquiry was conducted on PKT / AST and there was no evidence that there is a real and intimate connection to establish a business connection in India.
  - The onus was on Revenue to establish that PKT / AST had a business connection in India and Revenue had not established the same.

### Decision of the ITAT:

- The ITAT noted that PKT had stated that it did not have a regular agent in India and was exporting through brokers who were general commission agents having independent status. Similarly, other parties had also stated that their agents had independent status.
- As per the provisions of the ITA, if a broker, general commission agent or any other agent works mainly or wholly on behalf of the non-resident, then he is not considered to be an independent agent. The burden of proving that the agents are not securing orders mainly on behalf of the non-resident, was with the taxpayer.
- The ITAT noted that:
  - The invoices stated that the commodity was sold through the agent;
  - The agent received more than 50% of the commission from the non-resident;
  - The taxpayer had furnished various documents to demonstrate that the agent was a general commission agent.
- The ITAT relied on Circular 23 / 1969 dated 23 July 1969, and on the case of CIT v. Hindustan Shipyard Ltd.<sup>2</sup> and held that:
  - The agent may be the main client, but as per the law, non-resident was required to be the main client of the agent;
  - Receipt of 52% of revenue from the non-resident did not mean that the agent worked mainly on behalf of the non-resident.
- In view of the above, the ITAT held that the taxpayer was not required to withhold taxes from the payment made to the non-residents (i.e. PKT / AST) and accordingly, could not be considered to be in default for not withholding taxes.

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<sup>2</sup> CIT v. Hindustan Shipyard Ltd. [1977] 109 ITR 158 (AP)

**Comments:**

The ruling establishes the principle that the fact that an independent agent earns more than half of revenue from the non-resident principal by itself would not result in a business connection in India for the non-resident. The ruling will be relevant for non-residents selling goods through independent agents in India.



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