Deloitte.

India | Tax & Regulatory | For private circulation only | 8 May 2017

Global Business Tax Alert
Sharp Insights

In the case of Hyundai Motor India Ltd v. DCIT [2017] (81 taxmann.com 5) ITAT Chennai has held that there is no liability to withhold tax on interest paid to foreign banks

Issue no: GBTA/38/2017

In this issue:

Background

- The taxpayer is engaged in the business of manufacture and sale of passenger cars within and outside India.
- The Assessing Officer (AO) during the course of assessment proceedings disallowed interest paid by the taxpayer on foreign currency borrowings under section 40(a)(i) of the Act.
- The taxpayer submitted that loan was availed from the overseas bank (a Mauritius banking company) and as such the banks' affiliates only facilitated the transaction in India. Therefore, the overseas bank does not have any Permanent Establishment (PE) in India and no income accrues or arises in India. The taxpayer also argued that interest income of the overseas bank is not taxable in India under Article 11(1) of the India-Mauritius DTAA.
- The AO observed that the entire transaction, including signing of loan agreements, was carried out in India and held that the overseas bank transacted through its PE in India and hence income accrued in India.
- The Dispute Resolution Panel (DRP) upheld the argument of the AO and confirmed the disallowance.
- Aggrieved against the order of the lower authorities, the company filed an appeal before the Tribunal.

Issue before the Tribunal

Whether the taxpayer is liable to withhold taxes in India under section 195 of the Act on interest paid to overseas banks?

Observations and Ruling of the Tribunal

- The issue before Tribunal was whether the overseas banks operated through a permanent establishment in India by virtue of which interest income attributable to such PE could be said to be taxable in India.
- For this purpose, the Tribunal analysed the provisions of Article 5 read with Article 7 of the India-Mauritius DTAA.
- Reading Article 5(4) and 5(5), the Tribunal observed that agency PE could not be said to be triggered since there is no principal-agent relationship for the overseas bank in India and the Indian affiliate office does not conclude contracts in the name of Mauritian entity.
- Further, the Tribunal also observed that Article 5(1), popularly known as Fixed PE, would be triggered only when business of the overseas bank is carried out wholly or partly in India. Since there is nothing more than affiliates of foreign entity here, it was held that there is no fixed place of business.

- The Tribunal thus held that it does not satisfy the three criterions for existence of PE, viz. physical place (existence of physical location), subjective (right to use place), functionality (carrying out business).
- The Tribunal held in favour of the taxpayer by observing that no business activity has been carried out by the overseas bank in India and as such the income is not taxable for the foreign bank in India. Consequently, there is no withholding tax liability under section 195 of the Act.

Conclusion

The above ruling assumes significance since it has been categorically held that the overseas bank does not have a PE exposure in India merely because their affiliates in India facilitate the loan/interest transaction or act as Authorized Dealers for such transactions. Further, an in-depth analysis on PE exposure has been made to bring in more clarity on this subject.

Do you know about Dbriefs?

Dbriefs are live webcasts that give valuable insights on important developments affecting your business. To register, visit the Dbriefs page

Download the report

Contacts

Ahmedabad
19th Floor, Shapath - V
SG Highway,
Ahmedabad – 380 015.
Tel: + 91 (079) 6682 7300
Fax: + 91 (079) 6682 7400

Bangalore
Deloitte Centre, Anchorage II,
100/2, Richmond Road,
Bangalore 560 025.
Tel: +91 (080) 6627 6000
Fax: +91 (080) 6627 6010

Chennai
No.52, Venkatanarayana Road,
7th Floor, ASV N Ramana Tower,
T-Nagar,
Chennai 600 017.
Tel: +91 (044) 6688 5000
Fax: +91 (044) 6688 5050

Coimbatore
Shanmugha Manram
41, Race Course,
Coimbatore
Tamil Nadu - 641018
Tel: + 91 (0422) 439 2801
Fax: +91 (0422) 222 3615

Delhi/Gurgaon
Building 10,
Tower B, 7th Floor,
DLF Cyber City,
Gurgaon 122 002
Tel : +91 (0124) 679 2000
Fax : + 91 (0124) 679 2012

Hyderabad
1-8-384 and 385, 3rd Floor,
Gowra Grand S.P.Road,
Begumpet,
Secunderabad – 500 003.
Tel: +91 (040) 6603 2600
Fax:+91 (040) 6603 2714

Kolkata
Bengal Intelligent Park Building
Alpha, 1st floor, Block EP and GP
Sector V, Salt Lake Electronics
Complex,
Kolkata - 700 091.
Tel : + 91 (033) 6612 1000
Fax : + 91 (033) 6612 1001

Mumbai
Indiabulls Finance Centre,
Tower 3, 28th Floor,
Elphinstone Mill Compound,
Senapati Bapat Marg, Elphinstone
(W),
Mumbai – 400013
Tel: + 91 (022) 6185 4000
Fax: + 91 (022) 6185 4101

Pune
106, B-Wing, 7th Floor,
ICC Trade Tower,
Senapati Bapat Road,
Pune – 411 016.
Tel: + 91 (020) 6624 4600
Fax: +91 (020) 6624 4605

Deloitte makes an impact that matters