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Tax alert: Access to CRS located outside India by Indian travel agents does not constitute PE

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The Delhi Bench of the Income-tax Appellate Tribunal has rendered its decision that access to computer reservation system (CRS) located outside India, granted by the taxpayer to travel agents in India, does not constitute fixed place permanent establishment (PE) or dependent agent PE in India.

Background:

- The taxpayer[1] is a company incorporated in and a tax resident of the United States of America (USA). The primary business activity of the taxpayer in India is its travel network (Travel Network) which facilitates the booking of airline reservations for and on behalf of participating airlines.
- It had entered into a participating carrier distribution and service agreement (PCDSA) with various airlines wherein the taxpayer, through its computer reservation system (CRS), had agreed to facilitate booking of tickets and provide other related services. The taxpayer had also entered into subscriber agreements with travel agencies in countries outside India, who had locations in multiple countries (which may also include India), who were allowed to access the taxpayer's CRS. Such global subscriber agreements were generally entered into by the taxpayer in the country in which the global subscriber had its headquarters.
- Under the PCDSA, the taxpayer earned booking fees from various participating airlines when travel reservations were made using its CRS. Activities in India were about providing end-to-end flight booking services through Indian travel agents via CRS for the airlines concerned.

  The taxpayer claimed that it did not have any office/place of business in India, nor did it have any employees based in India. It only availed certain marketing support from the branch office of its group company in India. Hence, the taxpayer did not constitute a Permanent Establishment (PE) in India. In absence of a PE of the taxpayer in India, business income earned by the taxpayer could not be subject to tax in India under Article 7 [related to business profits] of the India-USA tax treaty.

  The taxpayer had claimed that in view of the belief that it did not have any PE in India, it electronically filed its return of income for the Financial Year (FY) 2012-13, corresponding to Assessment Year (AY) 2013-14, adopting a position that its revenues derived were not taxable in India.
- During the course of audit proceedings, the Assessing Officer (AO) held that, amongst others, the taxpayer had a fixed place PE under Article 5(1) of the India-USA tax treaty and constituted dependent agent PE under Article 5(4) of the India-USA tax treaty.

  Accordingly, the AO attributed 100% of profits from fee earned by the taxpayer from customers in India, to the PE of the taxpayer in India.

[1] Sabre GLBL Inc. vs ACIT [ITA No. 216 & Others] (Delhi ITAT)

- The Dispute Resolution Panel (DRP) upheld the AO's order, amongst others, with the following key observations:
  - The CRS gateway was nothing but a business vehicle. In the virtual business setting such a gateway was the fixed place of business as revenue accrued out of it, and also, interests and stakes resided there.
  - The usage permission to access specific CRS of the taxpayer by the travel agents for booking tickets of the airlines, constituted PE of the taxpayer.
  - Further, the travel agents were not exclusive to the taxpayer but the gateway of the taxpayer, once accessed, made them agents of the taxpayer for the set of transactions then in process resulting thereby in a PE.

  Based on the above and relying on an earlier ruling[2] of the Delhi High Court (HC), the DRP held that the taxpayer constituted a PE in India. However, the DRP restricted the attribution of the total profits earned from booking fee to 15% on the basis of earlier rulings[3].
- Aggrieved, both the taxpayer and the Revenue filed an appeal before the Delhi Bench of the Income-tax Appellate Tribunal (ITAT).

Decision of the ITAT:

The ITAT noted that the question to be determined was if the AO and DRP were justified in following the decision[4] of the Delhi Bench of the ITAT for earlier years in taxpayer's own case, to hold that there was a fixed place PE and an agency PE of the taxpayer in India. The taxpayer had submitted that after the year 2005 the case of the taxpayer was on different pedestal as there was change in business model.

In this regard, the ITAT noted /observed the following:

Fixed place PE

- On examination of business model prior to year 2005, following was noted:
  - The taxpayer had entered into participating carrier agreement (PCA) with various airlines for providing distribution services through CRS for which taxpayer received booking fee. Then, the taxpayer entered into marketing and distribution (MD) agreement with Indian joint venture (say ABC). ABC in turn entered into subscriber agreements with various Indian travel agents to provide them with access to CRS including access equipment, communication link and support services.
  - ABC also installed computers, printers etc. at travel agent premises in India and the title of ownership of such equipment remained with ABC. The taxpayer remunerated ABC for providing distribution and marketing services at the rate of 60% of booking fees.
  - Further, cost of computer and printers etc. installed by ABC at the premises of agent was also partially reimbursed by the taxpayer to ABC. The cost of communication links was however borne by ABC.
- After year 2005, there was change in the business model, as follows:
  - The taxpayer had entered into PCDSA with various airlines etc. for facilitating booking of tickets and providing related services through CRS. It earned booking fees from various participating airlines for such services.

[2] Director of Income-tax vs Galileo International Inc. [2011] 336 ITR 264 (Delhi HC)

[3] Sabre Inc. vs DCIT [2009] 2009 taxmann.com 1020 (Delhi ITAT), Director of Income-tax vs Galileo International Inc. [2011] 336 ITR 264 (Delhi HC) and Amadeus Global Travel Distribution S.A. vs DCIT [2011] 113 TTJ 767/ 11 taxmann.com 153 (Delhi ITAT)

[4] Sabre Inc. vs DCIT [2009] 2009 taxmann.com 1020 (Delhi ITAT)

- The taxpayer also entered into subscriber agreements with global travel agencies who had presence/affiliates in multiple countries including India and granted them access to taxpayer's CRS.
- The taxpayer was not responsible for providing of any computer, printers, communication lines etc., to Indian subsidiary of global travel agents.

- Also, on comparison of facts of earlier ruling[5] (which was followed in taxpayer's own case for earlier years) with the case of the taxpayer after 2005, there was a substantial difference in the operations as compared to earlier years. The access to taxpayer's CRS was no longer directly distributed to Indian travel agencies after MD agreement was cancelled. Instead, the taxpayer entered into subscriber agreement with travel agencies in countries outside India.
- Upon perusal of one such agreement with global subscriber, it was noted that:
  - There was no longer any arrangement to provide any computer or printer, or a software installed in the computer at the premises of travel agents in India. Nor was there any financing of such equipment.
  - The agent was allowed to access taxpayer's CRS mainframe located in USA through nodes and network which were independently sourced by travel agents on their own and taxpayer in no way insisted, assisted, provided or facilitated in providing such communication link.
  - Taxpayer had no office or employee in India.
- Thus, the Revenue was not right in following the decision of earlier years.
- Further, the taxpayer had rightly submitted that principles of res judicata were not applicable in assessment and the burden was on the Revenue to establish the existence of PE which the Revenue had failed to discharge.

Agency PE

- With regard to the agency PE, it was noted that the business model post 2005 did not have an intermediary in the form ABC. Further, there was no exclusiveness of the entities who had entered into global subscriber agreements. They were unrelated parties acting in their ordinary course of business with no exclusiveness to each other. There was no entity which was habitually procuring contracts for the taxpayer or to bind the taxpayer for the contracts to be entered by that entity independently.

  Hence, there was no agency PE in India.

Conclusion

In view of the above, the ITAT allowed the taxpayer's appeal and dismissed the Revenue's appeal.

Comments:

Constitution of a PE or otherwise is a combination of factual or legal analysis.

This ruling, based on the facts of the case, has held that the access to CRS of the taxpayer in USA by the travel agents in India do not constitute fixed place PE or dependent agent PE in India. While arriving at the conclusion, the ITAT has considered the change in the business model of the taxpayer after year 2005 and has distinguished the Delhi High Court ruling in case of *Director of Income-tax vs. Galileo International Inc. [2009] 180 Taxman 357 (Delhi)*, which had been consistently followed by the ITAT in taxpayer's own case for earlier years.

Further, the ruling has upheld the following:

- Principles of res judicata are not applicable in assessment; and

[5] Director of Income-tax vs Galileo International Inc. [2011] 336 ITR 264 (Delhi HC)

- The burden is on the Revenue to establish the existence of PE.

Taxpayers may want to evaluate the impact of this ruling to the specific facts of their cases.

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