

Information on social networking site - LinkedIn, admissible as additional evidence for determination of permanent establishment

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In brief

The Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal), in the case of **GE Energy Parts Inc.** (the taxpayer or the Company), has passed an interim order admitting the information gathered by the Tax Authority from LinkedIn profiles of employees of the GE Group as additional evidence in determining whether the GE Group entities concerned have permanent establishments (PE) in India through their offices or Indian affiliate, GE India Industrial Private Limited (the Indian affiliate).

In detail

Facts

A Liaison Office (LO) of one of the overseas entities of GE Group was set up in India according to Reserve Bank of India (RBI) regulations to act as a communication channel between the foreign enterprise and its customers in India.

The Tax Authority's conducted an investigation at the LO's premises, and found that the LO was carrying out certain income-generating activities in India, which was not permissible under RBI regulations. It was also found that various expatriates were acting as business heads for the Indian operations and that certain employees were actively involved in concluding sales for the overseas entities of GE in India.

The Tax Authority's alleged that a PE of the overseas entity may have resulted as a consequence of these activities.

The Tax Authority's sought details of the expatriate employees from the Indian affiliate, but did not get an adequate response. In the absence of the necessary information, the Tax Authority's adduced the details of various expatriate employees that were available on the social networking website LinkedIn as additional evidence in this case. This evidence was not produced before the lower authorities but was presented for the first time during the proceedings before the Tribunal.

The taxpayer¹ contested the admission of such details as additional evidence.

Taxpayer's contentions

- The LinkedIn profiles of various employees filed by the Tax Authority's have no probative value whatsoever and no relevance to or bearing on the issue at hand.
- A LinkedIn profile was merely a particular employee's appraisal/ vision of himself and this does not, in any way, have the imprimatur or endorsement or approval directly or indirectly of his employer.

¹ GE Energy Parts Inc. v. ADIT [TS-400-ITAT-2014(DEL)]

- An employee's description of himself, without detailed inquiry and investigation, cannot possibly form the basis for reaching any clear, cogent and/ or reliable conclusion with regard to the precise nature of the activities of the entities concerned.
- LinkedIn is a social networking website and the information available was only in the nature of hearsay and could not be adduced as evidence.
- There was no constraint on the revenue to place such material on record either during the assessment or Commissioner of Income-tax (Appeals) proceedings and hence, it was not admissible as additional evidence under Rule 29 of the Tribunal Rules. In this regard, various judgments were relied on by the taxpayer.

Revenue's contentions

- This information was necessary to disprove the taxpayer's claims that the employees were 'worth nothing', and that they were acting as a communication channel only and undertaking very limited functions.
- The LinkedIn profiles established that these employees were highly qualified; they had international experience and had worked at high-level positions in the GE Group in India and outside India and they were responsible for the sale of GE products in India.
- The taxpayer never refuted the evidence/ details obtained by the department through the profiles of employees by filing employment contracts and other evidence to disprove it.

Tribunal's ruling

- The Tribunal admitted LinkedIn profiles as additional evidence on the basis that they had a considerable bearing on the subject of the appeal.
- The Tribunal held that the LinkedIn profiles were not in the nature of hearsay because it was the employees themselves who had given all the relevant details and these details related to them. These details were akin to statements given by a person and no third party was involved in creating them.
- The taxpayer could not be permitted to first scupper the investigations/ inquiries by not furnishing the necessary information and then claim benefit out of them.
- It was true that neither party could make out a new case by adducing additional evidence. However, where the additional evidence only supplemented the information on the basis of which a factual finding was to be arrived at, and did not supersede the information, then the Tribunal could and should look into those details.
- Admission of such evidence, though not conclusive, is binding and decisive unless it is successfully withdrawn or proved to be erroneous. Hence, the taxpayer was free to refute the information contained in the profiles by bringing on record contrary facts to dislodge the claims made in relation to the LinkedIn profiles.

The Tribunal, in its interim order, had admitted the profiles as evidence on which to decide on the existence of a PE, but has not yet concluded on the existence of a PE. The fact of whether a PE exists or not was the subject of an

ongoing appeal, which had been fixed for further hearing.

Recently, the interim order of the Tribunal has been stayed by the jurisdictional High Court, barring the Tax Authorities from producing or placing reliance on the LinkedIn profiles of past and present GE employees as evidence.

The takeaway

The use of social network platforms, like LinkedIn, by corporate employees has increased in recent times. The employees post on these platforms content such as the company they currently work for, their past employers, job profiles, job achievements and employment functions. These details are posted in the public domain and can be accessed by anyone.

Such innovative measures demonstrate the Tax Authorities additional efforts towards mining for information from open platforms and their probable use in tax assessments and appellate proceedings.

Moreover, this case also emphasises the importance of filing all information sought by the tax officer at the first stage of assessment. One of the significant reasons as to why additional evidence was admitted by the Tribunal was that the taxpayer had not filed all the sought details at the assessment stage.

As a measure of abundant caution, employers should ensure that employees do not post inaccurate/ misleading facts about their jobs, functions and related facts about the company. Appropriate screening of employees' profiles may be suggested to avoid unintended tax challenges.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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