Tax & Regulatory Services

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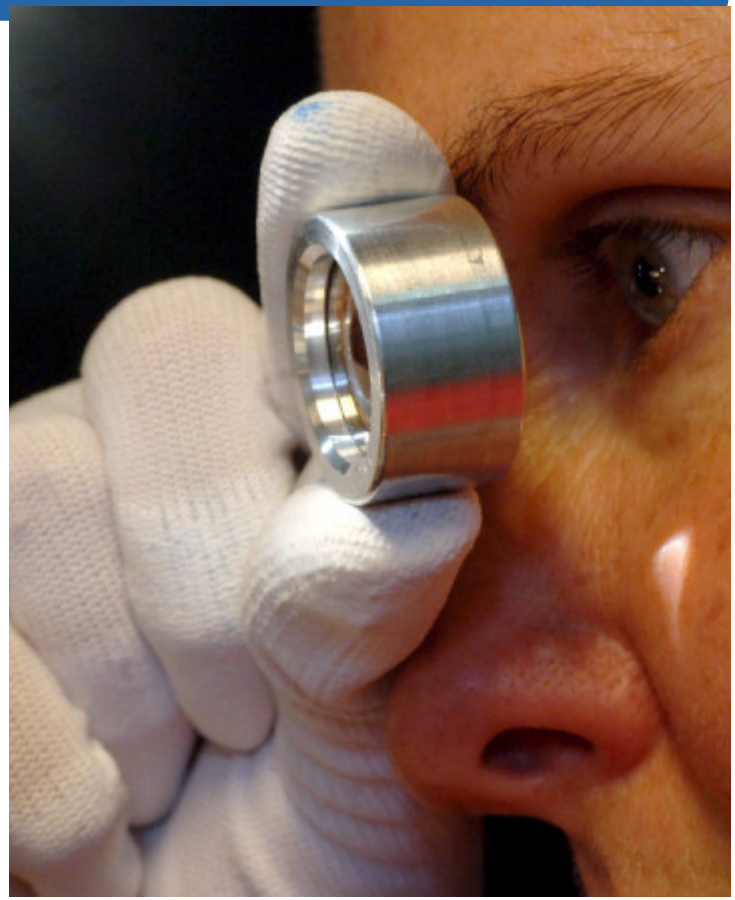
Warehouse Provider in India for a non-resident company has been held to constitute a fixed place of business under Article 5(1) of the India-Singapore tax treaty

Background

In a recent ruling in the case of Seagate Singapore International Headquarters Pvt. Ltd.[1], a tax resident of Singapore, the Authority for Advance Rulings ("AAR") has ruled that provision of demarcated space in the warehouse of independent service provider for storing goods of a non-resident would constitute a fixed place of business of the non-resident within the meaning of Article 5(1) of the India-Singapore Double Taxation Avoidance Agreement ("tax treaty"). The AAR further ruled that the business profits of the applicant from delivery of goods through such a warehouse, even though owned and operated by an independent person would be taxable in India in view of the provisions of Article 7(1) of the India-Singapore tax treaty.

Facts

Seagate Singapore International Headquarters Pvt. Ltd. ("the applicant") is a non-resident company incorporated under the laws of Singapore. The applicant was engaged in the business of manufacture and sale of Hard Disk Drives. The applicant had been supplying Disks to Original Equipment Manufacturers ("OEMs") in India. In order to minimise delays in the procurement of inputs from the applicant, the OEM proposed to put in place a Vendor Management Inventory ("VMI") model. Under the VMI model, the applicant would enter into agreements with Independent Service Providers ("ISPs") in India who would stock disks in India on behalf of the applicant and deliver them to the OEM on a 'Just-in-Time' basis.



[1] Seagate Singapore International Headquarters Pvt Ltd., *In re* [2010-TIOL-08-ARA-IT]

The typical steps involved in this arrangement are as follows:

- The OEM would raise a purchase order on the applicant pursuant to which the applicant would ship the goods to the ISPs in India;
- The ISPs would clear the goods from the customs port as the importer on record and would-store them in a bonded warehouse. The ISPs would also furnish the bond with the customs authorities of India for clearing the goods without payment of customs duty. The ownership of the goods would remain with the applicant;
- Whenever the OEM would place a 'pull request' for the goods on any ISP, it would immediately deliver the goods to the OEM and inform the applicant of such delivery having been made;
- The applicant would, at this point, raise its invoice for the goods delivered by ISP to OEM and the OEM would make the payment directly to the applicant outside India;
- The ISPs would raise their invoices on the applicant for services performed in India and would be remunerated on an arm's length basis.

Issue

The applicant sought a ruling from the AAR on the following questions:

- Whether the applicant would have a permanent establishment ("PE") in India under Article 5(1) or 5(8) of the India-Singapore tax treaty in relation to the activity of delivering goods through a customs bonded warehouse owned and operated by an ISP in India.
- If the answer to the above is in the affirmative, but considering the fact that the ISP is remunerated on an arm's length basis, would any further income be attributable to the PE of the applicant in India in terms of Article 7 of the India-Singapore tax treaty.

Applicant's contentions

- The applicant did not have a fixed place PE or agency PE within the meaning of Article 5 of the India-Singapore tax treaty and therefore the business profits derived on account of supply of goods to customers in India through ISPs would not be liable to be taxed in India.
- The applicant did not have any premises or facilities or installations owned, leased or kept at its disposal in India nor did it have any other kind of physical presence in India. It only had its goods stored in India in a warehouse owned and operated by ISPs and had restricted right of entry into the warehouse for the purpose of inspecting the goods during business hours.

Revenue's contentions

- The applicant did have a PE in India and that the warehouse of the ISPs should be treated as a PE.
- In the alternative an agency PE existed.

AAR Ruling

- The AAR analysed the Agreement between the applicant and ISP and noted that:
  - The ISP would provide earmarked space to the applicant in the warehouse with racks and electronic services.
  - The ISP would perform various warehousing services including receiving all the applicant's products and sending an electronic receipt signal to the applicant before allowing the applicant's products to be pulled from the warehouse.
  - The ISP would establish the necessary operating systems to support electronic data interchange and furnish receipt, sale advice and inventory reports.
  - The ISP would comply with the applicant's minimum security requirements.
  - The ISP would segregate the applicant's products from the other products and would undertake inventory tracking and conduct physical inventories on a monthly

basis. It would also ensure that the applicant's products are not subject to encumbrance, seizure or possession by any third party.

- The ISP would obtain and maintain sufficient insurance for the applicant's products.

- The applicant's designated agent or contractor had the authority to enter into the ISP facility for physical inventory, inspection and audit, etc.

- After reviewing the Agreement, the AAR ruled as under:

  - The fact that the fixed place of business is owned or possessed by the ISP does not detract from the position that the applicant has a distinct, earmarked and identified place which caters to its business.

  - In one sense, it is the business place of the warehouse / service provider and in another sense, it is the fixed place of business of the applicant from where sales activities are carried out.

  - The features of the Agreement indicate that there was an earmarked space in the warehouse with racks and electronic devices.

  - The Agreement also speaks of inventory control as per applicant's standards apart from storage, handling, repacking, etc. Moreover the Applicant's agent or representative has a right to enter the warehouse for the purposes of physical inventory, inspection, audit, repackaging, etc.

  - The fact that a service provider (and not the applicant's employees) carries out various operations leading to delivery of products to the customers does not rule out the application of Article 5(1) of the India-Singapore tax treaty.

  - The applicant and the ISP act in cohesion to ensure prompt product delivery to customers.

  - By merely outsourcing the operations leading to supply of products, it cannot be said that the applicant does not carry out any business in India from a fixed place. The ground realities cannot be disregarded.

  - Accordingly, the demarcated space in the warehouse of the ISP constitutes a fixed place of business within the meaning of Article 5(1) of the India-Singapore tax treaty.

  - As the AAR ruled that there is fixed PE in India, it did not discuss the issue of agency PE in India.

  - In respect of attribution of profits, the AAR relied on paras 2 and 3 of Article 7 of the tax treaty and ruled that, for the purpose of computation of profit of the PE in relation to the sales activity in India, it should be treated as a separate and distinct enterprise independent of the enterprise of which it is a PE. The amounts paid to the ISP and other expenses, if any, should be deducted from the attributable profits.

Conclusion

As per this ruling, the terms of the agreement between the non-resident and the service provider would be crucial to ascertain the applicability of Article 5(1) of the India-Singapore tax treaty and hence should be examined in detail.

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