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Indian subsidiary undertaking group's international express business in India constitutes a permanent establishment

In brief

In a recent ruling in the case of Aramex International Logistics Pvt Ltd¹ (the applicant), the Authority for Advance Ruling (AAR) has held that the Indian subsidiary of the Aramex group undertaking international express business would constitute a permanent establishment (PE) of the applicant under the Double Taxation Avoidance Agreement between India and Singapore (tax treaty).

Facts

- The Aramex group was in the business of door-to-door express shipments by air and land and performing related transport services
- Aramex International Ltd, Bermuda (Aramex Bermuda) had entered an agreement with Aramex India Pvt. Ltd.(AIPL), its wholly owned subsidiary in India, for overlooking the movement of packages within India (both inbound and outbound)

¹ Aramex International Logistics Pvt Ltd, *In re* [TS-388-AAR-2012]

- The applicant, a company incorporated in Singapore and a part of the Aramex group, subsequently entered into an agreement (dated 1 April, 2010) with AIPL for carrying on the business arrangement originally conducted through Aramex Bermuda.
- Broadly, pursuant to the above-mentioned agreement, the applicant was responsible for transportation of packages throughout the world outside India and AIPL was responsible for transportation of packages in India. The applicant charged fees to AIPL in connection with invoicing and payment functions performed by it
- The contract between the parties was entered on a principal to principal basis
- AIPL was appointed as non-exclusive service provider in India. However, AIPL was not free to engage any other service provider for rendering services outside India, except under exceptional circumstances.
- AIPL was also involved into domestic courier activities where the network of Aramex was not used. The total income of AIPL pursuant to the agreement in question was about one-third of its total income.
- Neither the applicant nor AIPL was liable to each other for negligence, misrepresentation or otherwise for loss of profits or revenues in business, anticipated savings, etc.
- Neither AIPL nor the applicant were authorised to act on behalf of each other. AIPL could not legally bind the applicant.

Issues

- Where the applicant had no office, equipment, employee or agent in India and no operations are carried out by the applicant in India, whether there exists:
 - PE of the applicant in India in connection with the international express business under the Tax Treaty or
 - any other basis to attribute or allocate income taxable in India to the applicant?
- Whether the receipts by the applicant from outbound and inbound consignments were attributable to the PE of the applicant in India?
- Without prejudice to above, if the transactions between the applicant and AIPL were on the arm's length basis, whether any income can still be attributed to a PE of the applicant in India?

Applicant's contentions

- AIPL was carrying on business on its own account and it also had some domestic business in India which was carried on without using Aramex's network.
- AIPL was not an exclusive agent of the applicant confined to business of the network.
- The applicant did not had any fixed place of business in India nor any agent in India.

- As such, AIPL did not constitute a PE of the applicant in India. Therefore, the fees receivable by the applicant from AIPL for activities conducted outside India would not be charged to tax in India.

Revenue's contentions

- The business of the Aramex group was door-to-door delivery of express shipments by air and land and related transport services. The Indian side of the business is carried on through the Indian subsidiary i.e. AIPL. The income earned by the applicant through AIPL was the income from the business in India.
- There was no commercial reason for establishing an entity in Singapore and the entity was created just to seek the benefit of the tax treaty.
- As per the agreement, AIPL was not free to engage any other service provider for rendering services outside India. It could be done so only in the situation where there was no Aramex representative in that country. Thus, there was no independent existence of AIPL.
- Without association of AIPL, the business of the Aramex group as regards articles sent to India cannot be performed.
- AIPL was formed exclusively or almost exclusively for the business of Aramex group.

AAR ruling

- Aramex group cannot successfully conduct its business of transporting and delivering articles from and in India without AIPL performing its role in India
- When a business cannot be carried on in India by a group without intervention of another entity (for eg. a subsidiary), normally that entity must be deemed to be the PE of the group in that particular country.
- In a case where a 100% subsidiary was created for the purpose of attending to the business of the group in a particular country, eg. in India, the Indian subsidiary would be taken to be a PE of the group in India.
- The business of the applicant, Aramex group in India was only carried on by AIPL. AIPL obtains orders, collects articles, transports them to a specified destination so as to be taken over by the group and then delivered to the addressees in various countries through its entities in those countries. Therefore, it can be said that AIPL was a PE of Aramex group in India.
- When the whole business in India of a multi-national company was carried on within the geographical contours of India, it was really a case of a group carrying on its business in India or that part of the business relatable to India through a fully owned subsidiary involving all its business activities.
- Merely entering into an agreement describing the subsidiary controlled legally or persuasively by the principal as an independent entity or a non exclusive agent would not bring the subsidiary within the ambit of Article 5(10)² of the India–Singapore tax treaty.

² "The fact that a company which was a resident of a contracting state controls or was controlled by a company which was a resident of the other contracting state, or which carries on business in that other contracting state (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other".

- The arrangement with AIPL was a mere camouflage to screen the fact that AIPL was really a PE of the applicant's group in India.
- Thus, the location of AIPL would be held to be a permanent place of business for Aramex group in India.
- Also, AIPL concluded contracts and secures orders in India wholly for the Aramex group. On facts it appears that AIPL had to be deemed to be a PE of Aramex group and the applicant in India.
- The AAR also confirmed its earlier ruling³, wherein on similar situation the AAR ruled that an independent agent of an American principal would be a PE of the American company in terms of Article 5 of the India-US tax treaty.
- On the question whether arm's length payment would extinguish further attribution, it had been left to the tax authorities to examine whether any further attribution was possible.

Conclusion

The AAR seems to have overlooked the independent legal status of AIPL and held it to be a PE merely on the ground that it was a subsidiary. In holding so, the AAR had made certain far reaching observations. While the ruling of the AAR was binding only on the applicant, it may have relevance to other businesses where similar arrangements were in place.

³AAR No. 542 of 2001, *In Re* [2004] 274 ITR 501 (AAR)

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