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Where the associated enterprise, which is also a dependent agent PE, is remunerated at arm's length, nothing further remains to be attributed to the PE

In brief

In the recent case of ANL Singapore Pte. Ltd.¹ (the assessee), the Income-tax Appellate Tribunal (the Tribunal) has held that where an associated enterprise (AE) which also constitutes the permanent establishment (PE) of the assessee is remunerated at arm's length price, nothing further can be attributed to the assessee's PE.

Facts

The assessee was a shipping company incorporated in, and a tax resident of, Singapore. It had earned freight and detention receipts during assessment year (AY) 2007-08. After applying section 44B of the Income-tax Act, 1961 (the Act) the assessee computed income at the rate of 7.5% for 178 voyages. It claimed non-taxability under Article 8 of the India-Singapore double taxation avoidance agreement (the tax treaty) for which it furnished a copy of its tax residency certificate. The assessee paid commission to its Indian AE, CMA CGM Global (India) Pvt. Ltd. (CMA India) for availing shipping agency services.

¹ ANL Singapore Pte. Ltd v. DDIT(IT) [TS-194-ITAT-2013(Del)-TP]

The assessing officer (AO) denied relief under Article 8 of the tax treaty in respect of freight and detention receipts earned from 98 voyages. Of this, in respect of 37 voyages, there was no evidence of a pool arrangement as claimed by the assessee, and in respect of 61 voyages, the receipts were in respect of slot hiring charges. The AO also held that the assessee had a dependent agent PE in India in the form of CMA India, according to the agency agreement with CMA India.

The assessee challenged the assessment order before the Dispute Resolution Panel (DRP), which directed the AO to allow relief according to Article 8 of the tax treaty after examining fresh evidence in respect of the 98 voyages. As the assessee failed to provide the relevant details in respect of 21 of these 98 voyages, the AO computed income from these at a rate of 10% of gross receipts.

Assessee's contention

Before the Tribunal, the assessee accepted that CMA India was a dependent agent PE under Article 5 of the tax treaty. However, the assessee contended that the commission, container controller fees and detention fees paid to CMA India were accepted at arm's length price in the transfer pricing proceedings of CMA India. Accordingly, it was contended that the business profits were not taxable under Article 7 of the tax treaty in the hands of the assessee. In this regard, reliance was placed on the High Court's decision in *Set Satellite (Singapore) Pte. Ltd*² and *Delmas, France*³, wherein it had been held that where the AE which also constituted the PE of the assessee had been remunerated at arm's length price, no further attribution was required to be made to the PE.

Revenue's contention

The revenue contended that merely because the commission paid (which was one of the assessee's expenses incurred to earn shipping income) was at arm's length, it could not be said that the assessee's business profits (according to Article 7 of the tax treaty) from shipping income attributable to the PE should not be taxed, as the

taxable entity *qua* the business profits was the assessee, and not its PE in its individual capacity. Article 7 of the tax treaty taxed the business profits earned by the enterprise of the other contracting state through a PE. Therefore, the income earned by the assessee through a PE was chargeable to tax even though the commission paid to the dependent agent PE was remunerated at arm's length. In this regard, an example was given by the revenue to support its argument, in which a product with a cost price at INR 100 was sold at INR 150 and the financial and selling expenses were INR 10 and INR 15 respectively, thereby giving a profit of INR 25 to the seller. The commission was INR 8, which formed part of the selling expenses of INR 15. Accordingly, payment of such commission at arm's length only meant that CMA India was adequately compensated. However, this did not mean that business profits of the assessee attributable to the PE would be obliterated.

Issues before the Tribunal

Can the assessee be taxed if its dependent agent PE has been remunerated at arm's length?

Tribunal Ruling

The Tribunal observed that commission was paid to CMA India, which was the assessee's AE and also its dependent agent PE. This commission was also in respect of income from 21 voyages that had been considered as chargeable to tax under Article 7 of the tax treaty. This commission had been received by CMA India at arm's length. No further attribution was required to be made to the PE. The Tribunal noted that while there was some merit in the contentions of the revenue, the ratios of the decisions in *Set Satellite*² and *Delmas, France*³ stood in the way. In these cases it had been held that where the AE that was also the PE had been compensated at arm's length, nothing further could be attributed to the PE. The assessee's contention was therefore upheld. Accordingly, income in respect of 21 voyages was held not to be chargeable to tax. In view of this, the Tribunal did not consider the taxability of income relating to 21 voyages under Article 8 of the tax treaty.

² *Set Satellite (Singapore) Pte. Ltd v. DDIT(IT) [2008] 307 ITR 205 (Bom)*

³ *Delmas, France v. ADIT(IT) [ITA No. 9001/Mum/2010]*

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