

ITAT holds that Permanent Establishment is not created merely on secondment of employees to Indian subsidiary

Brief facts:

The Assessee is Samsung Electronics Co. Ltd. ("Samsung") which is a company established in Korea. Principle activity of the company is manufacturing and sales of wide range of electronic items globally. Samsung has a wholly owned subsidiary in India named Samsung India Electronics Private Limited ('SIEL'). A survey was conducted by the income-tax department at the premises of SIEL. Consequently, a notice u/s 148 of the Act was issued to Samsung for initiating re-assessment proceedings for AY 2004-05 to 2009-10. On the request of Samsung the income-tax department provided the following reasons for issuance of notice u/s 148 of the Act:

- The parent company has not disclosed income by way of royalty for use of its brand name 'Samsung' on products manufactured by SIEL;
- A close analysis of the statements recorded of many seconded employees of Samsung during the survey gave an inference that SIEL is merely a dependent agent of Samsung, and therefore, Samsung has a Permanent Establishment (PE) in India;

The Hon'ble ITAT adjudicated that mere statement of employees is not reason enough for issuance of notice u/s 148. However given the fact that there was non-disclosure of royalty income by Samsung, there was a valid reason for re-assessment. Further the Hon'ble ITAT discussed at length the question whether the Assessee has a PE in India. For this it carefully examined the relevant portions of the recorded statements and relied upon Article 5 of the India-Korea DTAA which deals about the concept of PE.

The Ld. AR submitted on behalf of the Assessee that no business of the Assessee was carried out by the seconded employees and this fact was substantiated by a holistic analysis of the recorded statements. Therefore, there was no basis for the tax authorities to conclude that the seconded employees were acting in furtherance of the business of the Assessee by sitting in the premises of the Indian subsidiary i.e. SIEL.

The Hon'ble ITAT held that *"From a reading of Art.5 of the DTAA, we understand that in order to constitute a PE, there must be a fixed place of business available to the Assessee, through which the business of Assessee is wholly or partly carried on. In the preceding paragraphs we held that what the expat employees are doing is only the discharge of the functions of subsidiary towards the holding company, which is for the benefit of the business of the subsidiary to make the GBM understand the priorities and preferences of the Indian customers by providing India specific information to GBM's which in turn then carry out research and development to develop India specific products. By no stretch of imagination could it be said that it is in furtherance of the business of the Assessee de hors the business of the subsidiary.... Consequently we hold that there is no fixed place PE of the Assessee constituted through the expatriated employees. Issue is, therefore, answered in favour of the Assessee"*.

MCA Comments :

The Hon'ble ITAT has adjudicated rightly in favour of the Assessee after laying emphasis on the fact that what expat employees were doing was only the discharge of the functions of subsidiary towards the holding company, i.e. providing India specific information to the parent which in turn would help the parent to carry out and provide such R&D. This would, in turn, help the Indian company to manufacture India specific products and thereby improve its own business. Further, the Hon'ble ITAT rightly pointed out the fact that there is no question of a PE here since India – South Korea DTAA does not have a provision for a service PE.

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