Tenet Tax & Legal Private Limited

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Merely assisting a non-resident principal would not cause an agent to be considered as PE

Summary – The Assessee, (M/s Lubrizol Corporation USA.) is a non- resident foreign company, engaged in manufacturing of high performance chemicals and lubricants. During assessment proceedings, the assessee was asked as to why the profits made by the assessee on sale of products in India should not be brought to tax in India as the assessee is having a Permanent Establishment (PE) in the form of M/s LIL i.e. its Indian Subsidiary company. In reply, the assessee stated that under Article 5(4) of Indo-US treaty also LIL cannot be treated as agency PE since LIL does not have authority to conclude contract on behalf of the assessee. It was also stated that LIL does not secure orders on behalf of the assessee. It was further argued that in the absence of any PE, no profits can be taxed in India under Article-7. The Assessing Officer (AO)assumed the assessee's profit on sales made in India @ 5% and the same was affirmed by the DRP. After a careful examination of the facts, the Mumbai Tribunal held that the assessee did not have PE in India in the year under consideration in terms of Article 5(1), 5(2), 5(4) & 5(5) of the Indo-US Treaty and the addition made by the AO being a profit margin of 5% on the sales made by the assessee, is not sustainable.

Facts

- The assessee a non-resident foreign company was engaged in manufacturing and sales of chemicals and Lubricants. It also had an India subsidiary named 'L' in which it had 50 per cent shareholding.
- The assessing Officer noted that the assessee had entered into a sales and marketing agreement with 'L' and held that 'L' was an agency permanent establishment in India. He therefore taxed the profit earned by the assessee in India at the rate of 5 per cent on sales in terms of article 5(4) (Agency PE) of the Indo-US DTAA.
- The assessee contended that as per Article 5(4) of Indo-US treaty 'L' cannot be treated as an agency PE since 'L' (a) did not have any authority to conclude contracts on its behalf and (b) neither 'L' secured orders for the assessee. It only assisted in sale of products to Indian customers and provided information in relation to tenders and bids.
- It further contended that the ITAT for the Assessment year 2006-07 had held that the assessee did not have any PE in India.

Held

- It was not disputed that the facts of the present case are similar to the facts of the assessee's own case for Assessment year 2006-07 wherein the ITAT had held that the assessee does not have PE in India.
- With regard to the decision in *Aramex International Logistics (P) Ltd* that was relied by the Revenue authorities, it was found that in that case it has been held that if a 100 per cent

Indian subsidiary is created for the purpose of attending to the business of the group in India, the subsidiary must be taken to be a PE of the ground in India.

- The facts of the present case being entirely different and in the absence of any other distinguishing feature brought on record by the Revenue authorities, it was viewed that the decision relied on by the Revenue authorities is distinguishable and not applicable to the facts of the present case.
- Therefore, following the decision of the ITAT of the assessee's own case for assessment year 2006-07 it was held that the assessee did not have PE in India in terms of Article 5(4) of the Indo-US Treaty and, hence, the addition made by the Assessing Officer being profit margin of 5 per cent on the sales is not sustainable and, accordingly, the same should be deleted.