

## ITAT upheld concealment penalty on foreign co. as its liaison office was engaged in commercial activities

**Summary – The Delhi ITAT in a recent case of General Electric International Operations Company Inc., (the Assessee) held that concealment penalty be imposed where assessee claimed that its liaison office was acting as a communication channel, but it was found to be performing other business activities which could demonstrate business connection or constitution of a 'Permanent Establishment'**

### Facts

- The assessee ('GEIOC') was a group company of GE which was a diversified technology, media and financial services group.
- It had set up a liaison office (LO) in India in order to act as a communication channel between its head office and customers in India after taking requisite permission of RBI.
- Assessee had not been filing any ITR. A survey under section 133A was carried out at premises of the LO. The assessee filed the return declaring *nil* income.
- The Assessing Officer noted that apart from acting as a communication channel for different GE affiliates, the assessee was also engaged in paying salary and managing the pay rolls of the corporate audit staff (CAS) employees and, thus, it had undertaken a business activity and that it had also outsourced this salary process work to a third party.
- The Assessing Officer had worked out income of the assessee and had initiated penalty proceeding.
- The assessee contended that the it was under a *bona fide* belief that the LO only undertook activities which were within the approval granted by the RBI and, therefore, no income was taxable in India, because it did not have any business connection or PE in India under article 5 of the Tax Treaty between India and USA.
- However, the Assessing Officer imposed penalty @ 100 per cent of tax sought to be evaded.
- On appeal, the Commissioner (Appeals) confirmed penalty.
- On second appeal:

### Held

- A bare perusal section 271(1)(c) would reveal that for visiting any assessee with the penalty, the Assessing Officer or the Commissioner (Appeals) during the course of any proceedings before them should be satisfied, that the assessee has; (i) concealed his income or furnished inaccurate particulars of income. As far as the quantification of the penalty is concerned, the penalty imposed under this section can range in between 100% to 300% of the tax sought to be evaded by the assessee, as a result of such concealment of income or furnishing inaccurate particulars. The other most important feature of this section is deeming provision regarding concealment of income. The section not only covered the situation in which the assessee has concealed the income or furnished

inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way of *Explanation 1* to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or Commissioner (Appeals); and, (b) where in respect of any fact, material to the computation of total income under the provisions, the assessee is not able to substantiate the explanation and the assessee fails to prove that such explanation is *bona fide* and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to play if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Commissioner (Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in addition to this the assessee is not able to prove that such explanation was given *bona fide* and all the facts relating to same and material to the computation of the total income have been disclosed by the assessee. These two situations provided in *Explanation 1* appended to section 271(1)(c) makes it clear that when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee, for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished.

- In the instant case, explanation of the assessee is that LO did not constitute a PE under the provisions of the tax treaty and, therefore, it was under a *bona fide* belief that income for the execution of CS program by maintaining their pay rolls is not to be construed as earned by the assessee with any business connection or from any PE in India.
- This explanation was raised by the assessee but, neither the assessee could substantiate this explanation nor it appears to be a *bona fide* one, because the Commissioner (Appeals) has made reference to the outcome of survey though not used in the case of assessee because it did not file any objection before the Dispute Resolution Panel and it has admitted the income for the reasons that it does not want to continue with a protracted litigation. The Commissioner (Appeals) has made reference in respect of material found at the premises of the assessee at and how those material have been referred by his predecessor in the quantum orders of other assesseees which are of this group. The basic contention of the assessee is that activity of maintenance of pay roll cannot be construed as a business activity, though the materials referred by the Commissioner (Appeals) are not discussed in the assessment orders of the assessee, because it did not dispute the additions. The main charge against the assessee is that it was maintaining pay roll service for its alleged CAS employees. The explanation of the assessee about this "CAS" is that it is a career progression program followed globally to identify top talent within the Group and to provide them with a

platform to develop their leadership skills. The assessee is maintaining their payroll. There is no dispute about this fact. Thus, the issue is: can this activity fall within the ambit of communication channel. It cannot be, rather it is akin to any administrative set up in the line of human resources. The assessee has not elaborated this activity even in the assessment proceedings. If it was such a simple preposition, then why it is making payment of Rs. 3,60,000 per annum for outsourcing such activities. The assessee has just taken up a argument but could not buttress that argument with the material; it is part of such a huge organization whose offices are in Japan, China, and UK and in spite of that it harboured a belief that its LO is just performing as a communication channel between its HO and its customers. The department has emphasized that during the course of survey, materials were found indicating that LO was performing activities more than this communication channel. It cannot be concluded that services performed at such place of business are so remote that proper place cannot be allocated to the fixed place of the assessee's LO Office. The argument of the Assessing Officer is that had the assessee been performing this activity for any outsider, it would have earned income then how assessee can say that maintenance of pay roll services was just akin to a communication channel between the HO or its customers.

- The next fold of argument raised by the assessee was that it was under a *bona fide* belief that it has no PE, no business connection and the activity does not generate any taxable income in India and, therefore, there was no deliberate attempt at the end of the assessee. However, no material which can substantiate harbouring of such a belief was produced. The assessee had not filed the return under the garb of maintaining a liaison office, but it was found to be performing other activities which can demonstrate the business connection or constitution of a "Permanent Establishment". The assessee falls within ambit of section 271 (1)(c).