

No agency PE under India-France DTAA even if agent is wholly dependent on foreign Co. unless transaction isn't at ALP

Summary – The Mumbai ITAT in a recent case of Delmas France., (the Assessee) held that Article 5(6) provides that even when an agent is wholly or almost wholly dependent on principal, i.e. foreign enterprise, he will not be considered an agent of independent status unless it is shown that transactions between agent and enterprise were not made under arm's length conditions

Facts

- The assessee, a non resident company engaged in shipping business, claimed exemption under article 9 of the Double Taxation Avoidance Agreement with France in respect of its freight earning.
- The claim of the assessee was declined by the Assessing Officer on the basis that the connectivity between the feeder vessels carrying the cargo from the Indian ports and the mother vessels owned/chartered by the assessee, was not furnished. It was also held that Freight earnings were assessable as business profits under article 7 of the DTAA as there existed a PE of the appellant in India.
- The Commissioner (Appeals) confirmed said order.
- On appeal, the assessee submitted that BFSSL was acting in the ordinary course of its business and rendered similar services to other foreign shipping lines and therefore, it could not constitute a dependent agent of the assessee.

Held

- The Tribunal in earlier year in assessee's own case after considering Article 5(5) and Article 5(6) of the Indo France DTAA held that article 5(6) provides that even when an agent is wholly or almost wholly dependent on principal, *i.e.* foreign enterprise, he will not be considered an agent of an independent status unless it is shown that transactions between agent and enterprise were not made at arms length conditions.
- The Tribunal has gone with the factual matrix that there are no findings by the Assessing Officer or the Dispute Resolution Panel to the effect that the transactions between the agent and the assessee were not at an arms length price which is *sine qua non* in view of the provisions of article 5(6). This means that the Tribunal had proceeded on presumption. The Tribunal is also a fact finding authority. No doubt the initial onus being upon the revenue to show that the transactions are not at arm's length price, the issue was restored to examine whether the transactions between the agent and the assessee are at arm's length price and decide the issue afresh in the light of the provisions of Article 5(6). If the Assessing Officer finds the transactions to be at arm's length price, then the said decision of the Tribunal shall prevail in the present year also.