

Indian Subsidiary held as PE as it was executing and concluding projects on behalf of foreign Parent Company

Summary – The Chennai ITAT in a recent case of Carpi Tech SA, (the Assessee) held that Where assessee, a Switzerland based company, received a power project from NHPC, in view of fact that all correspondences relating to prospecting of client, participation in bids, correspondence with customers, signing of contract document, execution of project and closure of project etc. were initiated or routed through business address of its subsidiary company in India, assessee's plea that it did not have PE in India in terms of article 5 of Indo-Swiss DTAA, was to be rejected

Facts

- The assessee was a Switzerland based company. It was specialised in GEO composite membrane water proofing and drainage systems. During relevant year, assessee received Tanakpur Power Project of National Hydro Electric Power Corporation Ltd. (NHPC).
- In order to carry out said project, assessee formed a subsidiary company in India namely CIWSPL represented by director 'V' who was also acting as project coordinator.
- In the course of assessment, the assessee submitted that amount received from NHPC was not taxable in India as it did not have any PE in India. The assessee further pointed out that the duration of the Tanakpur project was 40 days only *i.e.* not more than 6 months and thus it was excluded from the scope of article 5 of the DTAA between India and the Swiss Confederation.
- The Assessing Officer took a view that CIWSPL was the Indian face of assessee representing the company in all matters. To that extent the company represented by 'V' was dependent agent of the assessee, and therefore could be treated as PE.
- The DRP confirmed the order passed by Assessing Officer.
- On appeal:

Held

- In this case, the assessee made a plea that it has executed the project of NHPC at Tanakpur between 27-01-2008 to 05-03-2008, so that the number of days is only 40 days. Hence, as per provisions of article 5.2(j) of the DTAA between India and Swiss, it cannot be said to have any PE in India, since the project activity is less than six months. The above contention of the assessee has no merit. In the present case, the business of the assessee had been conducted from the address of project coordinator, 'V' and all correspondences relating to prospecting of client, participation in bids, correspondence with customers, signing of contract document, execution of the project and closure of the project *etc.* were initiated or routed through the business address of CIWSPL. 'V' is the Power of Attorney holder from the company for all the projects, as the assessee was non-resident. He

represented the non-resident assessee at site and he signed all the documents on behalf of non-resident assessee. Further, it is to be noted that :

- (i) the claim of the assessee that no PE existed in view of article 5.2(j) of the DTAA was only a subterfuge on the face of such facts;
 - (ii) the "fixed place test" is a positive one for the assessee and there was no requirement to go for special inclusion for the purpose of determination of PE;
 - (iii) even otherwise the nature of service rendered by the assessee was strictly not covered as relating to a building site, construction, installation or assembly project. The work mostly being in the nature of repair and supply of material and, therefore, the time limit of 182 days mentioned in clause (j) of article 5.2 of DTAA would not apply;
 - (iv) the contract was not one of assembly, construction or installation and no time limit has been prescribed for incidence of source country taxation of such projects.
 - (v) the examination of contract documents revealed that CIWSPL represented by 'v' was also the designated Power of Attorney holder for these projects on behalf of the non-resident assessee. 'V' had also been mentioned as the project representative at site and alternatively project coordinator in the contract documents. The contract documents were signed by 'V' on behalf of the assessee;
 - (vi) the domestic company CIWSPL was the authorized representative for the project taken by the assessee and further all expenses in India to execute the project were incurred by CIWSPL which were reimbursed by the assessee by remittance from Switzerland as well as from local account;
 - (vii) 'S' Ltd., a vendor was appointed by CIWSPL to render services locally at New Delhi and the payments to the said company was made from the account of CIWSPL through their bank account.
- On the basis of the above factual findings, a show-cause was issued by Assessing Officer requiring the assessee to explain why CIWSPL represented by 'V' or alternatively, 'V' himself be not treated as PE in terms of articles 5.1 and 5.2 of the DTAA. In reply to the above, the assessee merely took the plea of the provisions and time limit as contained in article 5.2(j) of the DTAA. It also took the plea that 'V' could not be treated as PE since he represents other companies also in the ordinary course of business.
 - Further, on the argument of the assessee 'V' was not an agent of independent status, the Assessing Officer observed that the companies claimed to have been represented by 'V' such as Litostroj Power and Koncar were at different point in time *i.e.* between 2002 & 2006 while the Tanakpur project referred to the period 2007-08 and not during the same period when 'V' was involved in undertaking the project work of the assessee. Further that in the data sheet presented before the Principal *i.e.* NHPC, 'V' has been represented as the Indian representative of the assessee. CIWSPL was also the Indian face of Carpi Tech SA, Switzerland representing the company in all practical

matters, financially compensated by the assessee. To that extent, the company represented by 'V' was dependent agent of Carpi Tech SA, the assessee, and therefore can be treated as PE.

- 'V' the agent for the assessee who is critical to all aspects of the contract through the stages of signing the contract to execution is critically functional as the Managing Director of the Indian Subsidiary, where the other two directors are 'T' and 'D' with 'V' & 'T' being the only shareholders, In the website of the assessee-company, the address for correspondence for all official transactions is the office-cum-residential address of 'V'. But for the feeble assertion that 'V' is an independent agent also acting for and on behalf of Koncar, Croatia and Litostroj Power, Slovenia, no evidence, credible or otherwise was led in this regard. As also, to refute and rebut the assertion made by the Assessing Officer that 'V' primarily represented the assessee-company almost exclusively during the period when these contracts were executed. In instant case, the activities of the assessee and the Indian entity are intertwined and the Indian entity participates in the economic activities of the assessee, the activities of the Indian entity therefore necessarily are to be analysed to determine whether there is a fixed place P.E. In fact, the name of the company itself is the same as the non-resident company but for calling it Carpi Waterproofing Specialities Private Limited. Both carrying out identical nature of jobs in India.
- Further, 'V', the Managing Director of the Indian entity is the technical head with qualifications of being a graduate Engineer and Marketing Management having experience in handling Hydro Power projects for various foreign and domestic companies. The role played by him as an agent of the non-resident company and the Indian company who render similar services cannot be easily discerned or separated. There being a unison of interest to a great extent, while as an independent agent there would be required an objectivity in execution of the tasks of the non- resident company.
- It is also noted that 'V' represented the consortium of Litostroj Power & Koncar by strength of agreement entered into on 30-07-2001. While no activities are attributable in favour of these consortium during the period he was representing assessee-company.
- It is in this context that the reference by Assessing Officer to article 5 of DTAA draws special importance. While business constitutes continuous activity in organized manner it is often a question of fact & law. "Place of business" usually means a premises of the enterprise used for carrying on the business, whether or not exclusively used for business. To constitute a PE, the business must be located at a single place for a reasonable length of time. The activity need not be permanent, endless or without interruptions. It may not be out of place to mention that functions performed by 'V' or the Indian subsidiary could not be classified as preparatory or auxiliary in character. The facts strongly indicate towards 'V' constituting a dependent agent / PE for reasons brought on record by the Assessing Officer and as discussed in foregoing paragraphs.
- There were no presence of a number of principals who exercised legal and or economic control over the agent 'V'. The principal *i.e.* the assessee has failed to demonstrate this aspect when confronted by the Assessing Officer. The principal *i.e.* the assessee was relying on the special skills and knowledge of the agent 'V' the Managing Director of the Indian entity by the same name and

rendering similar functions. 'V' acting exclusively or almost exclusively for and on behalf of the assessee during the currency of the contracts in question. To that extent it was not in furtherance of his ordinary course of business. Finally the refuge taken of article 5(2)(j) on the short period of contracts and the interregnum does not offer any solace to the assessee either. The assessee has not demonstrated it was a mere passing, transient or casual presence for its activity in India. In view of this the order of the lower authorities is confirmed. This ground of appeal is therefore dismissed.