

Liaison Office couldn't be treated as PE of foreign Co. if it didn't finalize & transact a business deal on its own

Summary – The High Court of Delhi in a recent case of Mitsui & Co. Ltd., (the Assessee) held that where LO did not finalize and transact a business deal on its own or in name of HO, LOs could not be regarded as permanent establishment of assessee in India and income directly or indirectly attributable to these branches/offices was not taxable in India

Facts

- The assessee, a Japanese company was an international trade house, undertaking business activities in a large number of countries.
- It had Liaison Offices ('LOs') in India which undertook several turnkey projects.
- The assessee offered income from the business of providing Engineering Consultancy for the various projects executed in India. However, it declared *NIL* income from the LOs.
- The Assessing Officer held that the LOs of the assessee in India constituted its Permanent Establishment in India inasmuch as the LOs were engaged in locating the customers, making offers to them, getting the terms of contract settled with them and ensuring the opening of letters of credit and other necessary follow up measures.
- After allowing the expenses incurred by the assessee at its offices located in India, the entire profit of the assessee from the sale of goods in India was held to be taxable in India.
- Pursuant to the direction of the Commissioner (Appeals), the Assessing Officer undertook a survey of the LO of the assessee in Delhi under section 133A and submitted a detailed report in which he observed that the assessee was carrying on business in a regular way from the LOs in India. The Assessing Officer also recorded the statement of Administrative Head (Yuki) of the LO on oath and also obtained copies of various documents found on the said premises.
- The Commissioner (Appeals) dismissed the appeal by concurring with the Assessing Officer that the LOs of the assessee in India constituted PEs.
- The Tribunal took note of the decision of the Tribunal for assessment years 1980-81 and 1981-82 holding that the LOs of the assessee were only carrying on the work of supply of information and liaison work. They were not carrying on any trade in India and therefore, could not be considered to be a PE. The Tribunal concluded that there was no clinching evidence to establish that the LO did finalize and transact a business deal on its own or in the name of the HO. The Tribunal also discussed in detail the statement of Yuki recorded during the survey undertaken on 25-1-2005. Whatever he explained of the role and activities of the LO did not show that the LO was undertaking any trade or commercial activities by itself. Further, the Tribunal found that the order of the Commissioner (Appeals) did not refer to any such direction for further inquiry being issued to the Assessing Officer under section 250(4).

Held

- The revenue has placed before the Court the remand report dated 31-1-2005 prepared by the Assessing Officer for submission to the Commissioner (Appeals) in the course of the appellate proceedings. The Court has also been taken through the statement recorded by Yuki and the answers given by him to specific queries. The Tribunal did not err in its conclusion that the evidence produced by the Assessing Officer does not show that the LOs of the assessee carried on any activity which was incidental and auxiliary in nature.
- It is urged by the revenue that the Tribunal had merely gone by the fact that the Reserve Bank of India ('RBI') had not found the assessee to be in violation of any of the conditions subject to which it was permitted to operate its LOs in India. The Independent of the above factor, the Tribunal has in fact examined in detail all the materials referred to by the Assessing Officer in its remand report as well as the order of the Commissioner (Appeals) and had given detailed reasons why none of these materials establish that the LOs were used by the assessee to carry on any business or trading activity in India. The said factual finding by the Tribunal has not been shown to be perverse.
- The Court further notes that there was no basis for the Assessing Officer to conclude that of the Tribunal in earlier year had erred in its conclusion in favour of the assessee that the LOs were not carrying on any activity which was either incidental and auxiliary in nature. With the consistent position in this regard continuing since 1977-78, in the absence of any evidence to suggest a change in the circumstances, there was no warrant for the Assessing Officer and the Commissioner (Appeals) to take a different view of the matter.