India rules on payments to non-residents

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An Indian tax tribunal has ruled that an arm's-length payment by a non-resident to its India permanent establishment absolves the non-resident from any additional tax liability.

The Mumbai Income Tax Appellate Tribunal **held** that BBC Worldwide, a broadcasting company, is allowed to pay its subsidiary arm's-length commission without being required to make any further attribution of profits.

BBC Worldwide had appointed its subsidiary, BBC India, to seek orders for the sale of advertising airtime on its channel. Once the payment from advertisers was received, the Indian subsidiary received a 15% commission. As a result, it was claimed that, without a permanent establishment (PE)in India, the subsidiary was not taxable on its airtime sales income, except to the extent of disclosed royalty income.

BBC Worldwide relied on the decision from the case of **Set Satellite** where no further tax was to be paid once commission had been paid to the subsidiary.

However, the tax authorities held that BBC Worldwide had a PE in India in accordance with article 5(4) of the India-UK tax treaty and assessed the profits attributable to the subsidiary at 10% of the gross revenue receipts.

The tax authorities also contested that BBC Worldwide did operate a PE and that the subsidiary was merely a façade.

Despite the arguments of the tax authorities, the tribunal held that BBC India's commission was fixed at an arm's-length price and was a fair transfer price. The tribunal also stated that the there was parity between this case and the case involving Set Satellite and so had been correctly relied upon because it was directly applicable.

"While internationally there are divergent theories on attribution of profits to a permanent establishment in a foreign jurisdiction, India's stance on the subject seems to be that once an arm's-length payment has been made, nothing further is attributable to the permanent establishment," said Mansi Seth, of Nishith Desai and Associates, in India.

This is not the first case that relates to the attribution of profits of Indian subsidiaries.

In 2007, **Morgan Stanley**, a global investment bank was in front of the Supreme Court contesting a decision relating to profits of its Indian subsidiary. The court ruled that the assessment of a dependent agent PE was extinguished only when two conditions were met; when a remuneration of the agent at arm's length had been performed and when a functions, assets and risk analysis had been completed.

"Attribution of income to a permanent establishment has become a topical matter in India recently," said Samir Gandhi, a transfer pricing partner at Deloitte, in India. "While revenue authorities and rulings are determining attribution on some estimated basis, it is necessary that attribution is determined applying transfer pricing principles."

Despite the debate about attribution of profits, one tax professional is pleased to see this decision has been made.

"This ruling is welcome given that it has once again upheld extinguishment of further profit attribution to the permanent establishment where the dependent agent is remunerated at an arm's length," said Rahul Mitra, transfer pricing partner at PricewaterhouseCoopers, in India.

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