

This relates to a recent ruling of Delhi bench of ITAT in the case of Galileo International Inc USA pronounced on 30 November 2007 inter alia dealing with India USA DTAA, running in more than 170 pages. Galileo International USA ('Galileo' or 'assessee') was engaged in providing services to airlines, hotels etc with the help of its GALIELEO system having ability to perform across the countries as regards ticket booking, hotel reservation, information display etc. is concerned. Some of the important areas as dealt in the subject ruling are highlighted below:

- 1. Attribution beyond 'ALP':** Even where business connection (BC) under section 9(1)(i) of the Income Tax Act ('Act') stands constituted of an overseas company in India or for that matter PE (here agency PE and fixed place PE of assessee in India) stands constituted under subject DTAA, in case subject link (agent) in India gets remunerated at arm's length price (ALP) then no further attribution of income is required. In this connection, it seems that ITAT while drawing aforesaid conclusion has heavily relied upon **SC ruling in Morgan Stanley case and CBDT Circular No. 23 dated 23 July 1969.**

It seems from the subject ruling of ITAT that while applying the ratio of SC ruling in Morgan Stanley case (given in context of India USA DTAA, with **Service PE** under consideration) to the facts of instant case, an earlier ruling of Mumbai ITAT in the case of **SET Satellite (Singapore) Pte Limited 106 ITD 175** (given in context of India Singapore DTAA, with **Agency PE** under consideration) has not been discussed.

In aforesaid connection, useful reference may be made to ruling of **Mum ITAT** in the case of **Ingersoll Rand 4 ITD 654**, wherein after applying CBDT Circular No. 23 (supra) etc, it has been held that no attribution is required under section 9(1)(i) of the Act once the agent (business connection) in India is remunerated at 'ALP'.

- 2. Agency PE qua Independent status and 'ALP':** It seems from the subject ruling of ITAT that while concluding there is an Agency PE for assessee in India under Article 5 of subject DTAA, para 5 thereof which states that:

*"An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent, or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. **However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise and the transactions between the agent and the enterprise are not made under arms length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph.**"*

*has not been aptly considered in as much as following observations of ITAT at page no. 171 is concerned " Since we have held that Interglobe is a dependent agent of appellant in India, we need not discuss para(5) of Article 5 of the treaty regarding **independent agent form of PE**".*

Further, it is evidenced from the ruling of ITAT itself that both assessee's counsel and department's counsel have specifically argued on aforesaid part of Article 5 of subject DTAA. This aspect (para 5 of Article 5) assumes special importance in view of ITAT's own finding that *since remuneration at ALP is made to concerned agent, no further attribution is required.*

3. Further, as regards **methodology** to determine 'attribution of income' for purposes of section 9(1)(i) of the Act read with explanation thereto, ITAT in its subject ruling has ruled that same needs to be determined after analysing the assets used, functions performed, risks shared in **India and other relevant jurisdiction(s).**

Further, in relation to application of India UK DTAA etc., reference may be further made to recent ruling of **Delhi bench of ITAT in Rolls Royce case (2007-TIOL-408-ITAT-DEL)**, wherein it has been inter alia held on facts of the case that assessee (foreign company) has PE (fixed place and agency PE) in India and attribution @ 35% of profits (in relation to sales in India) needs to be made qua 'marketing' etc as performed on Indian soil under Article 7 of DTAA. **It seems from the ruling that besides an argument being taken by assessee's counsel that *no attribution is further required once an agent in India (relevant PE or 'BC') gets remunerated at ALP, no conclusion thereupon becomes visible from the subject ruling.***