Tax Hotline

April 19, 2007

FOREIGN COMPANIES NOT REQUIRED TO FILE TAX RETURNS IN INDIA IF FOUND NOT TAXABLE IN INDIA

In a recent ruling, the Authority for Advance Rulings ("**Authority**") found that in the absence of a liability to tax in India due to the availability of tax treaty benefits, the non-resident assessee would not be required either to file a tax return in India or to comply with Indian transfer pricing regulations.

In its application before the Authority, M/s Vanenburg Group B.V. ("**Applicant**") had sought to determine the Indian tax impact on the transfer of an Indian company's shares in a group reorganization exercise. The Applicant, a Dutch tax resident, was transferring its shareholding in its wholly owned Indian subsidiary to its wholly owned Dutch subsidiary.

Under the Indian Income Tax Act, 1961 ("**ITA**"), the transfer of an Indian company's shares, even between two non-residents, would trigger a liability to Indian capital gains tax. However, under the India - Netherlands tax treaty ("**Treaty**"), the transfer of shares by a Dutch resident would be taxable only in the Netherlands and not in India, where the transfer takes place as a part of reorganization or where the shares are transferred to a non-resident of India.

The provisions of the Treaty being more beneficial to the Applicant than those of the ITA, it was found that the same would prevail over the ITA. Hence, the Authority concluded that the Applicant had no liability to tax in India on account of the transfer of the Indian company's shares.

Importantly, the Authority also found that in the absence of a liability to tax in India on account of relief provided by the Treaty, there would be no liability to withhold tax in India, and the provisions of section 139 of the ITA governing the filing of tax returns would also not apply. It was held that the said sections were only machinery provisions, and in the absence of a liability to tax, the machinery provision would not come into play.
The Authority also held that where there was no liability to tax in India, the transfer of the shares of the Indian company in question would not be subject to the Indian transfer pricing regulations.
This ruling is of significance to non-residents who have no liability to tax in India because of Treaty benefits, but who continue to file 'Nil' returns in India, which in some cases are required to be accompanied by audited accounts. In past, the Authority has pronounced rulings to the effect that foreign companies should in any case file a tax return and claim exemption under the tax treaty. Dispensing of the requirement to file an Indian tax return may relieve many non-residents of the cumbersome requirement to maintain separate accounts for Indian operations. The advance rulings are binding only on the Applicant and Tax Authorities with respect to the transaction undertaken by the applicant. However they do have persuasive value for other transactions.

- Annapoorna Jayaseelan & Shefali Goradia

*Source: **A.A.R. No.727 OF 2006,** Vanenburg Group B.V. Vanenburgerallee13, 3882*

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