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Supervisory services without having control of physical sites couldn't constitute a PE as per DTAA with Germany

Summary – The Hyderabad ITAT in a recent case of GFA Anlagenbau Gmbh., (the Assessee) held that in terms of article 5(2)(i) of India Germany DTAA, supervisory activities by themselves cannot constitute a PE in India in India as said activities are to be in connection with a building, construction or assembly activity of non-resident in India

Facts

- The assessee was a foreign company incorporated in Germany. It was engaged in the activity of supervision, erection, commissioning of plant and machinery for steel and allied plants in India.
- During the year under consideration, the assessee had received contractual receipts from an Indian company for rendering technical and supervision services.
- The assessee had rendered services to the above mentioned resident company by engaging foreign technicians at the work sites in India and the total stay of technicians deputed by the assessee company on the projects exceeded 183 days. (220 days).
- On the basis of these particulars of stay, Assessing Officer concluded that the assessee was having Permanent Establishment within the meaning of article 5 of DTAA between India and Germany.
- The DRP held that the provisions of relevant contract agreement as well as the provisions of article 5 of DTAA between India and Germany clearly established that the assessee was having Permanent Establishment in India during the relevant period. Further with regard to the deduction of expenditure DRP held that the assessee was entitled to deduction of 50 per cent of gross receipts from all projects towards expenditure. Thus, the DRP partly accepted the objections of the assessee and gave directions under section 144C(5).
- On appeal:

Held

- The term 'Permanent Establishment' is defined in section 92F (iiia) '….includes a fixed place of business through which the business of the enterprise is wholly or partly carried on'. The supervisory activities do not constitute a fixed place of business in as much as the assessee rendered its services at the project sites of its clients and does not by itself own or operate such sites independently but rather provided under contract terms by its clients.
- In the instant case, assessee is clearly doing the supervision of project of the Indian company and has no fixed place of business. Only its technicians deputed to India in one project stayed in India for more than 180 days. Nothing was brought on record that the technicians are operating from a fixed place in the custody of assessee. As per the terms the stay and transportation are undertaken by Indian company. Applying the rationale of the Special Bench in case of *Motorola Inc.* v. *Dy. CIT*

[2005] 95 ITD 269/147 Taxman 39 (Del.) it cannot be said that the assessee has a fixed place of business for its supervisory activities.

- Now coming to the specific PE clause, namely article 5(2)(i) invoked by Assessing Officer/DRP, a literal reading of the Article leads to the conclusion that supervisory activities by themselves cannot constitute a PE as they are to be in connection with a building, construction or assembly activity of the non-resident which is not the case here as the assessee provides only supervisory activities.
- It is very clear that article 5(2)(i), though it talks about supervisory activities, does not cover the instant case as assessee do not have any building site or construction site of its own. The activities being of a technical nature clearly fall under the Fees for Technical Service (FTS) i.e., Article 12 of the India-German DTAA and is taxable at the rates specified therein.
- Furthermore article 12(5) cannot apply to remove the assessee from the article 12 and jump to article 7 read with article 5. For article 12(5) to apply, the condition precedent is for the assessee to have a Permanent Establishment through which its activities are carried out and as discussed above such a condition is not met in the instant case. Therefore article 12(5) which takes the scope of services out of FTS (Article 12) and into article 7 read with article 5 does not apply to the assessee's case.
- This can also be examined in a different angle. The Assessing Officer has not invoked the service PE concept while considering the permanent establishment of the assessee in India. Admittedly, the basis for Assessing Officer's invoking the provisions of article 5 of DTAA is on the basis of the fact that three of the technicians deputed for supervising the activities in the case of one project have stayed in India exceeding 183 days and filed their returns with ITO (International Taxation), Mumbai. Just because these three technicians stayed in India while supervising the work undertaken by the assessee in India, it cannot be considered that their place of stay can be 'fixed place of business' for the assessee.
- Had the Assessing Officer examined the total period of deputing technicians to India and also examined whether establishment where assessee had any 'permanent place' to supervise the activities, then, issue could be examined in the light of service PE considerations. However, Assessing Officer only undertook the issue of stay of technicians in India, which cannot be considered for examining the 'permanent establishment' of assessee in its supervising work. On this reason also, it is opined that Assessing Officer has not made out any case for invoking article 7 of DTAA.
- In conclusion, in light of the facts and circumstances of the instant case, it is held that the assessee's supervisory activities do not constitute a Permanent Establishment in India under the provisions of the Act as well as article 5 of the India-German Treaty. The assessee should be assessed for its supervisory activities under article 12 of the India-Germany DTAA. Therefore, this ground is decided in favour of the assessee.