Tenet Tax & Legal Private Limited

Tenet Tax Daily
May 05, 2016

For determining service PE actual stay of employees in India is relevant and not entire contract period

Summary – The Mumbai ITAT in a recent case of Rheinbraun Engineering Und Wasser GmbH., (the Assessee) held that In order to determine as to whether assessee, a German company, rendering services in field of exploration, mining and extraction to Indian companies, had PE in India, it was continuous period of stay of its employees in India which had to be taken into consideration and not entire contract period

Facts

- The assessee-company was registered in Germany and its core business activities included consulting services in the fields of exploration, mining and extraction. During relevant year, assessee entered into agreement with three Indian companies to render various services.
- The assessee filed its return wherein amount received from Indian companies for providing technical consultancy services was offered to tax under article 12(2) of India-Germany DTAA.
- On second appeal:

Held

- In the case under consideration the basic issue to be decided is as to whether the assessee had PE in India or not. If it had rendered services in India for more than 6 months continuously, it has to be held that it had PE in India. Therefore, it would be useful to find out as what services were rendered by the assessee in India. The assessee had issued 10 invoices to three Indian parties. A close scrutiny of the invoices prove that the assessee had rendered services that were of consultancy nature and therefore same are governed by the provisions of article 12 of the DTAA.
- For computing continuous period of stay for PE purpose, actual stay of employees has to be considered and not the entire contract period. The assessee had deputed one of its employee 'D' to India and he had not stayed in India for more than 180 days. It is also a fact the in two of the contracts no supervisory charges were booked by the assessee for the year under appeal, that the assessee had offered its income under the head FTS in its return. Article 12(4) deals with FTS and talks of servies of managerial, technical or consultancy nature. Considering the above, it is held that payments received by the assessee should be assessed as per the provisions of article 12 and not as per article 7 of the India-Germany DTAA.
- In these circumstances, it is held that payments received by the assessee have to be taxed at the rate of 10 per cent and that the provisions of section 115A would not be applicable. The appeal is allowed.