Non-compete fee being a business income won't be taxable in India unless recipient has PE in India

Summary – The Kolkata ITAT in a recent case of Trans Global PLC., (the Assessee) held that where UK-based non-resident company was not having permanent establishment in India and received non-compete fee, same would not be taxed in India

Facts

- The assessee was UK-based company having non-resident status in India. It received non-compete premium but did not offer said amount for tax in India.
- The Director (International Taxation) held in reassessment proceedings that said amount was taxable as capital gain. He, accordingly, directed the Assessing Officer to tax said amount.
- On appeal before the Tribunal:

Held

- The assessee does not have a permanent establishment in India. The assessee received non-compete premium and claimed that the amount received on account of non-compete fee is not for transfer of any right to carry on any business or for transfer of any right to manufacture. According to assessee, this non-compete fee premium is a mere refraining from carrying on activity, which can be taxed under section 28(*va*). The assessee also pleaded that this can be assessed as business income but assessee being a non-resident having no permanent establishment in India and accordingly, in term of article 7 any business income arising to the enterprise of a contracting state is taxable only in that state unless the enterprise is carrying on business in the other contracting state through a permanent establishment situated therein. It is not the case of the revenue that the assessee is having a permanent establishment in India and as such in term of article-7, being non-compete premium received by assessee cannot be taxed in India.
- A perusal of non-compete agreement clearly shows that by any stretch of imagination it cannot be held that there is a transfer within the meaning of section 2(*47*) resulting in assessment being erroneous and prejudicial to the interest of revenue for not assessing non-compete premium as capital gains. The assessee clearly accepted that the provisions of section 28(*va*) will apply to this non-compete premium being business income but that will be taxed in UK being assessee a non-resident British Company having no permanent establishment in India in term of article-7 of DTAA.
- It is held that the said non-compete premium received by assessee is a business receipt assessable under section 28(*va*) but in term of article 7 any business income arising to the enterprise of a contracting state is taxable only in that state, assessee being a non-resident company and does not have a permanent establishment in India, liable to tax in UK only. Accordingly, the assessment

© 2016, Tenet Tax & Legal Private Limited

framed by the Assessing Officer is neither erroneous nor prejudicial to the interest of revenue and hence, the revision order is without any basis and quashed.

© 2016, Tenet Tax & Legal Private Limited