Duration of running each project undertaken by a Mauritian Co. to be seen separately for determination of PE in India

Summary – The Mumbai ITAT in a recent case of J. Ray Mc Dermott Eastern Hemisphere Ltd., (the Assessee) held that For purpose of determination of Permanent Establishment, each project of a non-resident company has to be considered separately for computing work duration in number of days to test time limit of 9 months

Where project of assessee did not have work duration of more than 9 months during year, a back-up-cum-support office simpliciter would not constitute PE of assessee

Insurance claim for recovery of cost of installation of off-shore platform, even if received outside India, would be a business receipt taxable in India only on existence of PE in India

Where part of business operations of assessee were carried out outside India, only part of income reasonably attributable to operations carried on in India shall be deemed to accrue or arise in India

Facts - I

- The assessee a company incorporated in Mauritius was engaged in India in transportation, installation and construction of off-shore platforms for the purpose of mineral oil exploration. It filed its return of income showing total income at *nil* and along with the return a note was given in which it was mentioned that the company did not have a permanent establishment in India as defined in article 5 of the Tax Treaty between India and Mauritius. The company was engaged in the execution of installation contracts in India which were for a duration of less than 9 months and hence income under all the contracts was not taxable in India as stipulated in article 7 of the Treaty.
- During the course of assessment proceedings, the Assessing Officer analysed the various contracts executed by the assessee at different locations and by treating all of the contracts executed in India as one held that the assessee had a PE in India.
- On appeal, the Commissioner (Appeals), reversed the stand of the Assessing Officer and held that in view of article 5(2)(i), the assessee did not have a PE in India during the year under consideration for any of its projects.
- On revenue's appeal to Tribunal:

Held - I

- Having gone through the order of the lower authorities, the order of the Tribunal for assessment year 1997-98 as well as submissions made by both the sides, it is noted that similar issue came up before the Tribunal in assessee's own case for assessment year 1997-98 wherein the Tribunal

decided this issue in favour of the assessee *vide* order dated 22-3-2010 in IT Appeal No. 8084 of 2004.

- After discussing the law and facts of the case in detail in this regard, it was held by the Tribunal that for the purpose of computation of number of days for examining threshold limit of 9 months, each of the building site or construction, or assembly project or supervisory activities in connection therewith is to be viewed independently on stand-alone basis and thus, no aggregation is required to be done for computing number of days.
- Thus, though a clear principle was laid down by the Tribunal in the aforesaid order, but since facts were not properly thrashed out by the lower authorities in assessment year 1997-98 in the first round, therefore the matter was sent back to the file of the Commissioner (Appeals) for examination of facts. Accordingly, the Commissioner (Appeals) decided the matter afresh *vide* his order dated 27-1-2011, wherein he held that if all the projects of the assessee are examined independently, each of them had work duration of less than 9 months and accordingly it was held that assessee did not have a PE in India.
- The revenue filed an appeal against the order of the Commissioner (Appeals). The tribunal *vide* order dated 12-10-2012 in IT Appeal No. 2089 of 2011 for assessment year 1997-98 upheld the order of the Commissioner (Appeals), on facts also. Thus, the clear position emerging from the orders of the Tribunal in assessee's own case is that each project of the assessee has to be considered separately for computing number of days of the work duration.
- In the facts of the instant case it is noted that only one project was carried out during the year *i.e.* contract number D4522, the duration of which was for 3 months only. Thus, in view of legal position as has been decided by the Tribunal in assessee's own case as well as on the facts of the year before instant court, it is found that the assessee had no PE in India in the year under consideration in terms of article 5(2)(i) of Indo-Mauritius treaty. Thus, there is no force in the ground raised by the revenue and the factual findings of the Commissioner (Appeals) are upheld, respectfully following the order of the Tribunal for assessment year 1997-98. Thus, grounds raised by the revenue are dismissed.
- In the result appeal of the revenue is dismissed.

Facts - II

- Pursuant to survey operation carried out at the office of group company located at Mumbai it was concluded by the Assessing Officer that Liaison Office of the group company was kept by the assessee company for its business. On the basis of statements and papers found during the course of survey in the form of invoices, correspondence, lease of employees *etc.,* it was concluded by the Assessing Officer that it was Liaison Office of the company which was involved in the full-fledged business activities, and therefore it constituted PE of the assessee.

- On appeal, the Commissioner (Appeals) upheld the findings of the Assessing Officer by holding that assessee had a PE in India during the year.
- On appeal to the Tribunal:

Held - II

Whether office of group company in India, a separate legal entity constituted a PE of assessee in India?

- It is noted that the Assessing Officer himself did not go through all the documents impounded during the course of survey, but based his decision on the basis of facts brought on record by way of a gist/report of some of the documents found to be relevant by the survey team. Before instant court also, only gist/survey team's report has been filed. Under these circumstances, there is no option but to express opinion on the basis of gist/report prepared by the survey officials. Perusal of these papers suggests, that these were miscellaneous documents which were exchanged by persons who were co-ordinating the activities carried out at the site. There was a list of messages which were received and passed on further which included fax messages or other radio messages. There is also a list of the employees who were working in the project office. According to the Assessing Officer, it shows that this office was used for the appointment and recruitment of employees.
- Having gone through the gist/survey report prepared by the survey team with regard to the documents found during the course of survey, it is opined that none of the documents shows that any substantive business was done from the said office. These documents have been maintained in routine while providing back office support services or co-ordination/facilitating point or services of auxiliary nature.
- Further, from the statement of the persons recorded by the survey team who were available at the said office premises, it is clearly noted that the work performed by these persons was of the nature of providing back office operations and support services. Nothing has been brought before court to show that services provided by these persons were in any manner of a substantive nature which could be described as part of decision-making process.
- From the documents impounded during the course of survey and the information gathered under sections 133(6) and 131 it is evident that the impugned premises were used as project office of the assessee company for providing requisite auxiliary services in the nature of back office support services. It is noted that despite carrying out an invasive action of survey, nothing could be brought on record by the department to show that whether any contracts were negotiated and concluded by the aforesaid team of employees in India nor any such documents could be brought on record to show that the said office in India was in the decision-making process or involved in doing substantive business in any other manner. In this regard, article 5(3) of the Indo-Mauritius treaty clearly lays down the situations where a set-up shall not constitute permanent establishment. It clearly lays down that any fixed place maintained by the assessee

for the purpose of supply of information or for similar activities which has a preparatory or auxiliary character for the enterprise shall not constitute a Permanent Establishment.

- Thus, analysis of the facts of the case of the assessee and relevant provisions of different article of Indo-Mauritius Treaty read with different judgments clearly suggest that the office maintained by the assessee was in the form of an auxiliary unit to provide back-up support and other auxiliary services for the purpose of maintaining co-ordination and aid to the functioning of the project and therefore it does not constitute a PE.

Whether assessee's case can simultaneously fall in article 5(2)(c), when assessee's case has already been held to be falling under article 5(2)(i)?

- The admitted facts on record are that the only activities carried out by the assessee in India are through various construction projects meant for exploration and production of mineral oil, and further admitted facts are that no other business activities have been carried out which could be called as independent business activities yielding separate/independent business profits. Thus, the aforesaid activity of the construction project needs to be considered primarily under article 5(2)(i)which includes a building site or construction or assembly project or supervisory activities in connection therewith, where such site, project or supervisory activity continues for a period of more than nine months.
- It has been already held in the own case of the assessee by the Tribunal in assessment year 2007-08 and by the Assessing Officer as well as Commissioner (Appeals) in impugned year that case of the assessee has to be examined in article 5(2)(i). In earlier years also, wherever the duration of the project has exceeded a period of 9 months, the same has been treated as permanent establishment in India and its corresponding income has been offered to tax and accepted by the Assessing Officer also. Thus, there is no doubt that the case of the assessee falls in article 5(2)(i).
- So long as the assessee is engaged in India in the business of aforesaid construction project only, its case can be examined only under article 5(2)(i); because that happens to be the most proximate clause under which it could be examined and has been rightly done so all along in all preceding years by the revenue also. Thus, the issue of determination of its 'PE' through any other clause does not arise unless and until any other activity is taken up by the assessee which is having an independent identity or economic substance and yielding separate business profits. In other words, if the impugned 'office' is found to be engaged in doing any independent business leading to earning of separate income and profit base, only then its status as 'PE' could be examined under article 5(2)(c). In the facts of the instant case no such material has been brought on record nor any such pleading has been raised by the Assessing Officer or the Commissioner (Appeals) or even by the revenue. The office found to be existed in the aid of the project(s) of the assessee. Thus, the determintion of the projects being 'PE' or otherwise could be examined only under article 5(2)(i) and nowhere else.

- In view of the facts PE of the assessee should be determined, keeping in view work carried out at its project sites. It has already been held that the work duration was less than 9 months. Thus, since the project of the assessee did not have work duration of more than 9 months during the year as per the facts as discussed in detail in earlier part of the order, an activity of the maintenance of back-up cum support office 'simpliciter' shall not constitute 'PE' of the assessee.

Facts - III

- The assessee a company incorporated in Mauritius was engaged in India in transportation, installation and construction of off-shore platforms for the purpose of mineral oil exploration. It filed its return of income showing total income at *nil*.
- During the course of assessment proceedings, it was noted by the Assessing Officer that the assessee had shown income under the head other income being the amount of insurance claim received. The Assessing Officer held that since assessee company had executed contracts only in India since its inception, the impugned amount related to Indian operations and since the assessee company had a PE in India, thus, amount was taxable in India. It was further noted by the Assessing Officer that since insurance claim receipts had not been dealt with in any of the articles of the Treaty, therefore, article 7 would apply on such items of income. The Assessing Officer also refused to grant benefit of any expenses on the ground that all the allowable expenses had been considered while determining the profits under section 44BB.
- On appeal, the Commissioner (Appeals) held that the insurance claim receipt was reimbursement of the damage/loss/cost incurred by the assessee company and said amount was business income as per article 7 of the Indo-Mauritius Treaty, and could be taxed only under section 44BB.
- On appeal to the Tribunal:

Held - III

- The facts clearly suggest that impugned amount is recovery of the expenses/cost incurred by the assessee with respect to the operations carried out in the impugned projects in the territorial jurisdiction of India. Thus, clearly speaking these receipts are part and parcel of the business operations of the assessee carried out in India. Thus, taxability of the impugned receipts has to be examined as per section 44BB as well as article 7 of the Indo-Mauritius Treaty which deals with taxability of business profits. Article 7 clearly lays down that existence of PE in India is a mandatory condition for taxing business profits of residents of Mauritius in India.
- Thus, in view of the aforesaid legal position, the said amount can be brought to tax only if the assessee has a PE in India for the concerned project. But the facts were not complete and clear. Further, there is no clarity as to the fact whether impugned receipts were with regard to which project and pertain to which period and whether the said project constituted a PE in the impugned period or not. The assessee has admitted the legal position that in case work duration

of a project exceeds 9 months, then income from the said project would be liable to be taxed under section 44BB. Therefore, this issue is remitted back to the file of the Assessing Officer to examine complete and correct facts. If these receipts pertain to project which did not constitute any PE in India then these receipts would not be taxable. In case said project constituted a PE in India at the relevant point of time then Assessing Officer is required to find out further whether the expenses/cost (for which recovery has been made by way of impugned insurance claim) were claimed as expenses or not. In case no claim was made of the expenses, then recovery thereof cannot be brought to tax at this stage. In other words, if the impugned expenses were originally an item of balance and were not debited in the profit and loss account, then their recovery shall not give rise to any income much less a taxable income. Thus, with these directions and observations, this issue is sent back to the file of the Assessing Officer who shall give adequate opportunity of hearing to the assessee and shall decide this issue afresh after considering all the facts and circumstances of the case. The assessee is free to raise all the legal and factual issues before the Assessing Officer. This ground may be treated as partly allowed for statistical purposes.