No tax on supply of equipment by foreign Co. just because installation work was done by its Indian subsidiary

Summary – The High Court of Delhi in a recent case of Nortel Networks India International INC., (the Assessee) held that Income from supply of equipment can't be taxed in India merely because Indian subsidiary company installed it

Facts

- Assessee-company was resident of USA and part of Nortel group of companies. There was a liason office (Nortel LO) and a company (Nortel India) in India which belonged to assessee's group. NC entered into three different contracts with Indian client to supply equipments, services and software respectively. Nortel India assigned contract of supply of equipments to the assessee. Consequently, Indian client placed purchase orders directly on the assessee and also made all payments for the equipment supplied directly to the assessee. Assessee claimed that its income was not chargeable to tax in India.
- Assessing Officer held that Nortel LO and Nortel India constituted assessee's PE in India. He, accordingly, computed taxable income of assessee.

Held

- There is no material on record that would even remotely suggest that Nortel LO had acted on behalf of the assessee in negotiating and concluding agreements on its behalf. Thus, it is not possible to accept that the offices of Nortel LO could be considered as a fixed place of business of the assessee. In so far as Nortel India is concerned, there is also no evidence that the offices of Nortel India were at the disposal of the assessee. Even if it is accepted that Nortel India had acted on behalf of the asssessee, it does not necessarily follow that the offices of Nortel India constituted a fixed place business PE of the assessee. Nortel India is an independent company and a separate taxable entity under the Act. There is no material on record which would indicate that its office was used as an office by the assessee. Even if it is accepted that certain activities were carried on by Nortel India on behalf of the assessee unless the conditions of paragraph 5 of Article 7 of the Indo-US DTAA is satisfied, it cannot be held that Nortel India constituted a fixed place of business of the assessee. There was also no material on record to conclude that Nortel India or Nortel LO was either (a) sales outlet; or (b) installation PE; or (c) service PE; or (d) dependent agent PE, of assessee in India.
- The appellate authorities below has proceeded on the basis that the assessee had employed the services of Nortel India for fulfilling its obligations of installation, commissioning, after sales service and warranty services. The Tribunal also concurred with the view that since employees of group companies had visited India in connection with the project, the business of the assessee was carried

out by those employees from the business premises of Nortel India and Nortel LO. In this regard, it is relevant to observe that a subsidiary company is an independent tax entity and its income is chargeable to tax in the state where it is resident. In the present case, the tax payable on activities carried out by Nortel India would have to be captured in the hands of Nortel India. Chapter X of the Act provides an exhaustive mechanism for determining the Arm's Length Price in case of related party transactions for ensuring that real income of an Indian assessee is charged to tax under the Act. Thus, the income from installation, commissioning and testing activities as well as any function performed by expatriate employees of the group companies seconded to Nortel India would be subject to tax in the hands of Nortel India and the same cannot be considered as income of the assessee.