

Period of existence of two unrelated projects by Foreign Co. couldn't be combined to determine its PE in India

Summary – The Mumbai ITAT in a recent case of Valentine Maritime (Gulf) LLC., (the Assessee) held that Actual period of two projects unconnected undertaken by a foreign company could not be combined to determine its PE in India

Facts

- The assessee was a foreign company incorporated in Abu Dhabi, UAE, to cater to oil and gas construction industry. It had undertaken three projects in India during the year under consideration. It entered into a contract with a company (LCI) to provide services of personnel, provision of survey services and provision of a barge.
- The assessee claimed that the assessee did not have a Permanent Establishment in India and the three contracts were for a period of less than 9 months and, therefore, the total receipts was not taxable under the DTAA.
- The Assessing Officer observed that the assessee-company was doing small contracts in order to avoid a PE and to claim exemption under the DTAA. Since it had contracts throughout the year, it was held that the assessee had a PE in India for all the projects and its income was held to be taxable in India.
- The Commissioner (Appeals) came to the conclusion that assessee could not be said to be having a PE in India. From the period of projects, it was evident that the assessee had not spent 9 months in India for any project or during the period of any 12 months since assessment year 2008-09 and, therefore, it could not be said to have a PE within the meaning of article 5(2)(h) or 5(2)(i).

Held

- As regards the services rendered with respect to other works, it is noted that the duration for each of them was less than nine months. The Commissioner (Appeals) has given a clear finding and the Tribunal agreed with the same. The Assessing Officer has not based his order on any cogent reasoning and he had presumed that assessee's representative might have come earlier before the actual arrival of the barge in the Indian waters. Such hypothesis cannot be sustained. The actual period of the two projects cannot be combined as they are unconnected works. In such situation, the Assessing Officer's view that the period of the two works should be combined cannot be sustained.
- As regards the department submission that the issue should be considered by applying a different article than the one applied by the Assessing Officer, the same is also not sustainable. The Assessing Officer has invoked article 5(2)(h) of the DTAA between India and UAE and has based his decision on the analysis thereof. After consideration of the same, the Commissioner (Appeals) has found that the assessee cannot be held to be liable for tax as the period of the stay was less than nine months

required to form a permanent establishment so as to come under the ambit of taxation under this Article. Now revenue is agreeing that the view of the Assessing Officer is not sustainable, however, it states that the issue should be considered under article 5(1) of the said DTAA. This is neither considered by Assessing Officer nor any ground in this regard has been raised. Hence, this plea of the assessee is not sustainable.

- Accordingly, in the background of aforesaid discussion and precedents, there is no infirmity in the order of the Commissioner (Appeals).