

Time take to upgrade rig to make it ready to use should be considered to determine PE status

Summary – The Mumbai ITAT in a recent case of Deep Drilling (1) Pte. Ltd., (the Assessee) held that where taking into account days when fabrication, upgradation and enabling operations were carried out on rig to make it ready for drilling activities, number of days of deployment of rig in India was more than 183 days, it could be said that assessee had PE in India

Facts

- The assessee a non-resident company, incorporated in Singapore was engaged in the business of providing Jack up drilling unit and platform well operations services.
- During the year under consideration the assessee-company had entered into an agreement with Gujarat State Petroleum Corporation Ltd (GSPC) for providing Jack up drilling Unit and platform Well operations at offshore India, pursuant to exploration contract awarded by Government of India to the GSPC and earned contractual income from said contract.
- The assessee did not offer any income to tax in India for current year on ground that drilling operations in India were only undertaken for 119 days which was less than 183 days and, accordingly, assessee could not be said to have PE in India. However, the Assessing Officer observed that the drilling rig was brought into India in April and was undergoing necessary upgrades/repairs to meet the requirements of the GSPC as proposed in the bid. Hence, rig being in India for more than 183 days, the requirements of the treaty of rig being in India for 183 days was satisfied and the assessee was deemed to have a PE in India as per provisions of DTAA. Accordingly, the activities carried out by the assessee as per contract were covered by the provisions of section 44BB, but since no income had been offered for tax in India for the current assessment year additions were made to the income of assessee for furnishing inaccurate particulars of income and concealing particulars of income.
- On appeal, the Commissioner (Appeals) decided the issue in favour of the assessee. Accordingly, additions made to the total income of the assessee were deleted.
- On appeal by revenue to the Tribunal:

Held

- Reading of article 5(5) of the India Singapore DTAA makes it clear that an enterprise shall be deemed to have a permanent establishment in contracting state to carry on business through that permanent establishment if it provides services or facilities in that state for a period of more than 183 days in connection with the exploration, exploitation or extraction of minerals oils in that state. In the instant case the drilling rig of the assessee was brought into India on 26-4-2010. Thereafter as evident from the minutes of meeting held on 27-4-2010 between GSPC and the assessee, the Rig was undergoing necessary fabrication, upgradation and positioning to meet GSPC requirements and as proposed in their bid.

- A reading of the above makes it clear that immediately after arrival of the drilling rig on 26-4-2010 operations had started on the Rig to make it suitable to perform the activities contracted. It involved active participation of GSPC. For providing the service and facility in this case it was required to properly position the rig, fabricate and modify the same as per the needs of the GSPC. By no stretch of imagination it can be said that the Rig was ready for use. It was only after the aforesaid fabrication, upgradation and enabling operations were carried out that further drilling operations were commenced from 3-11-2010 and continued till the end of the financial year. Thus, the assessee was having PE in India to carry on business from the day when it commenced in India operation to fabricate, to upgrade, to prepare, to position and to enable the Rig to perform the drilling activity.
- Hence, when the rig had entered Indian waters and it was undergoing fabrication, upgradation and positioning for the drilling activity for GSPC it can be said that the PE was there in connection with the exploration, exploitation or extraction of mineral oils. The operation on the Rig to upgrade it, to prepare, and to enable it to perform the drilling activity and the actual drilling activity cannot be considered in isolation for considering whether the assessee is having a PE which could be said to be in connection with the exploration, exploitation or extraction of mineral oil in India. Thus, the day from which such fabrication, positioning and upgradation, activity started (which in the present case can be safely considered to have commenced from the 26-4-2010 as evident from the minutes of the meeting between GSPC and the assessee), the assessee was having an establishment in connection with its services and activity for GSPC.
- In the instant case the drilling rig having entered India on 26-4-2010 was ready for use but it was actually used from 3-12-2010. As evident from the fact of the case after entering into India the necessary fabrication upgradation positioning and enabling operations were being carried out on the drilling rig that were meant to make it ready for the operations as per contract.
- On account of aforesaid discussion it is found that assessee had deployed the rig in connection with the exploration activity from 26-4-2010. Hence, since service and the operation continued till the end of the financial year, the number of days of the deployment of rig was more than 183 days. Hence assessee had a PE in India. Accordingly the order of the Commissioner (Appeals) is set aside and that of the Assessing Officer is restored. In the result the appeal by the revenue stands allowed.