Sum received by NR from marketing & distribution of its TV channel rights by an Indian co. wasn't taxable in India

Summary – The Mumbai ITAT in a recent case of SPE Networks India Inc., (the Assessee) held that where assessee, a US based company, appointed an Indian Company as a non-exclusive advertising and sales agent for canvassing airtime for its channels in India, since assessee did not have PE in India, income earned by it could not be brought to tax in India

Facts

- The assessee-company was incorporated in and was a resident of USA. It was engaged in the business of operating satellite television channels, marketing and distribution of the television channels and related activities.
- For the purpose of marketing its channels assessee had appointed SET India as a non-exclusive advertising and sales agent for canvassing airtime for its channel.
- In terms of agreement, assessee granted rights to SET India to distribute TV channels in India for an agreed consideration, being 70 per cent of the revenues collected by SET India from distribution of ANIMAX channels in India.
- The assessee claimed that it did not have PE in India and thus income arising to it was not taxable in India as per article 7 of the India-US DTAA.
- The revenue authorities opined that the assessee was utilizing the services of SET India extensively for monitoring and controlling of sale of advertisements and distribution of channels, that activities of both the entities were inter laced, interconnected, inter dependent and inter linked that the agreement was not for purchase and sale of advertisement airtime, that it was a revenue sharing arrangement depending upon the gross advertisement airtime revenue, that the relationship between the assessee and SET India was that of a principal and an agent. Thus, the assessee had PE in India in terms of article 5 of India - US DTAA. Accordingly, 15 per cent of the net revenue received by assessee from SET India was to be taxed in India.
- On appeal:

Held

- The two basic issues to be decided in the case under consideration are as to whether the assessee had business connection in India and as to whether it had any PE in India. Answer to these questions would determine the taxability of income for the year under consideration. From the perusal of the agreements it becomes clear that the assessee was carrying out its operation from USA and not from India, that both the activities *i.e*. sale of advertisement inventory and distribution of AXN and ANIMAX channels were not carried out in India, that it did not have any office premises or a fixed place of business in India at its disposal, that none of its employees were based in India through

whom it could render the services in India. Thus, it can safely be held there was neither fixed base PE nor service PE in India, of the assessee, for the year under appeal.

- Though the FAA has endorsed the view of the Assessing Officer that the assessee had Agency PE, but nothing has been brought on record to prove that the agreements in between the assessee and SET India was not on Principal to Principal basis. SET India had no authority to conclude any contract on behalf of the assessee in India. On the other hand, while selling the airtime inventory distributing AXN and ANIMAX channels in India, SET India would act on its own right and not on behalf of the assessee. It was not dependent on the assessee economically or legally. It is also a fact that SET India also carried out significant marketing and estimation activities for other channels namely SET, SET Max and HBO. Therefore, SET India has to be treated as an independent entity which carried out its own business employing its own capital and bearing connected risks. It cannot be treated an agent, a dependent agent, of the assessee.
- SET India would purchase airtime from the assessee and would sell the same in India in its own right and the assessee had no control over it. The revenue earned by SET India was not on behalf of the assessee, that it was making payment to the assessee for the purchases made by it, that it was not subject to any control of the assessee as far as conducting of business in India was concerned, that the activities of SET India were not devoted wholly or almost wholly for the assessee. The revenue of the assessee was not entirely dependent on the earning of SET India, that the employees of SET India would work only for SET India and not for any other entity of the group, that the departmental authorities have not alleged that the transaction between the assessee and SET India were not at arm's length, that in the TP orders the TPO.s (AY.s. 2005-06, 2006-07, 2007-08, 2008-09 and 2010-11) have held that no TP adjustments were required to be made to the income of the assessee on account of advertisement revenue or distribution revenue.
- Regarding applicability of the provisions of section 40(a)(ia) as already held that assessee did not have any PE in India and that it had no business income arising in India. It is also a fact that it has not claimed any deduction for expenses incurred in India. Therefore, the FAA was not justified in holding that provisions of section 40 (a)(ia) were applicable in the case under consideration. As the assessee did not have business connection as well as Agency PE/Base BE and SET India was not agent of the assessee, so, the Assessing Officer had wrongly invoked the provisions of rule 10 of the Income-tax Rules, 1962.
- In the result, assessee's appeal is allowed.