Vessels engaged in seismic surveys by NR on High seas relating to contract with ONGC constituted its fixed place PE

Summary – The Delhi ITAT in a recent case of SeaBird Exploration FZ LLC., (the Assessee) held that Vessels engaged in seismic surveys on High seas, in connection with exploration of mineral oil/natural resources under agreement with ONGC through which it carried on its business constituted fixed place PE of applicant a U.K. tax resident in India under article 5(1) of India - UAE DTAA, thus, income arising from PE shall be subject to tax in India as business income of applicant

Where activities of applicant relating to offshore seismic data acquisition and other associated services to ONGC were in connection with exploration of mineral oils, special provisions of section 44BB would apply, and income of applicant in respect of contract with ONGC was to be computed as laid out therein

Facts

- The applicant was engaged in the business of rendering geophysical services to the oil and gas exploration industry. Its core business activity involved 4C-3D seismic data acquisition and processing, which were aimed at increasing the exploration success of its oil and gas clients and maximizing their production. In India, it is providing these services to Oil and Natural Gas Corporation Ltd. (ONGC) and other oil companies. It is in this connection that it had entered into a contract with ONGC for 4C-3D seismic data acquisition, processing and interpretation in Mumbai High Field.
- The applicant had sought a ruling from Authority For Advance Rulings for the determination of its tax liability in respect of the revenue received under the above said contract with ONGC, on the following questions:

    1. Whether, can the applicant be considered as having a Permanent Establishment ('PE') in India under article 5 of the Tax Treaty in respect of its contract with ONGC?
    2. If the answer to question 1 is not in the affirmative, can it be said that the applicant is not taxable in India on income earned from its contract with ONGC?
    3. If answer to question 1 is in the affirmative, whether on the facts and in law, can the income derived by the applicant in respect of the contract with ONGC be computed in accordance with provisions of section 44BB?

Held

Whether applicant could be said to have a PE in India, and if so, whether its income would be taxable in India?

- Irrespective of the facts of the case before this Authority in the case of *Fugro Engineers B.V.* v. *Asstt. CIT* [2008] 26 SOT 78 (Delhi), or that of *Poompuhar Shipping Corp. Ltd.* v. *ITO (IT)* [2013] 38 taxmann.com 150/[2014] 220 Taxman 58/360 ITR 257 before the High Court of Madras, as cited by the revenue, the criterion laid down therein for judging whether there was a PE or not, are applicable and of assistance in the instant case as well. The same are reinforced by the recent detailed findings on the issue in the case of *Formula One World Championships Ltd.* [2017] 80 taxmann.com 347/248 Taxman 192/394 ITR 80, decided by the Supreme Court, which actually seals the issue as to the requirements for constituting a PE when considered in the backdrop of article 5(1) of the DTAAs, depending of course on the facts of each case. When viewed in the light of these decisions, it is clear that the vessels used by the applicant on the Mumbai High Seas pass all the 3 tests for constituting a PE, namely that there is permanence of duration to the extent that is required by the business, and not meaning forever; there is a fixed place which are the vessels in the High Seas in a definite and composite geographical area, and from which its business of survey in connection with exploration is carried out; and lastly this place is at the disposal of the applicant. Thus, if article 5(1) of the India UAE Treaty alone is considered, there is PE in this case.
- The applicant, however contends that in spite of the above it cannot be considered as having a PE since it is covered by the specific clause as contained in para (2)(i) of article 5 of the India UAE DTAA requiring its period of operation to be more than 9 months to qualify it as a PE, and that a specific or special clause, as in article 5(2)(i) will take precedence over a general provision as in article 5(1). In the cases cited by it, it was finally held that insofar as sub-paras (h) and (i) of para 2 of article 5 of the DTAA are concerned, the test of permanence as required under para 1 of article 5 is substituted by a specific minimum period of nine months.
- However, the applicability of the above dictum would depend on the facts of the case, as also submitted by the applicant, that the ratio of a case must be understood having regard to the fact situation obtaining therein.
- Thus it is first to be seen whether the facts of the applicant's case fit into the sub-para under which it is seeking shelter, namely sub-para (i) of Para 2 of article 5 of the India UAE DTAA.
- It is clear that the services envisaged under this sub-para are such as are furnished through employees or personnel and may include services such as of supervision, managerial, consultancy, or general nature, which are employee or personnel oriented, and connected with some works contract or project whose term aggregates to more than nine months. In contrast to this, in the applicant's case, the services of seismic surveys are conducted on the High seas through the seismic vessels which are equipped with various equipments for collection and interpretation of data, while operating in the geographical area and in connection with exploration and extraction of mineral oils. They are not carried on mainly by employees/personnel but primarily by the vessels and equipments mounted thereon and deployed in the ocean. Such are not the services contemplated under Para 5(2)(i) of the India UAE DTAA.

- If the States signing the treaty intended to include in article 5(2)(i) the activities in connection with exploration, exploitation or extraction of mineral oil etc., the sub-para would have said so. DTAAs are not to be interpreted like laws passed by Parliament that encompass a wide range of situations, and require one to examine and debate the legislative intent, as against the literal interpretation. DTAAs are entered into between executives of two States after consciously considering the business reality specific to the two States.
- Klaus Vogel in his Commentary on Double Taxation Conventions, Third Edition (para 44, pg 294) states with regard to article 5(2), while referring to exploration of natural resources as mentioned at sub-paragraph (f), that since this sub-para does not include exploration and only refers to extraction of natural resources, and since it has not been possible to arrive at a common view on the basic questions of attribution of taxation rights and of the qualification of the income from exploration activities, the contracting States may agree upon the insertion of specific provisions. They may agree, for instance, that an enterprise of a contracting State, as regards activities of exploration of natural resources: (a) shall be deemed not to have a permanent establishment in that State; or (b) shall be deemed to carry on such activities through a permanent establishment in that other state; or (c) shall be deemed to carry on such activities through a permanent establishment in that other State if such activities last longer than a specified period of time.
- Thus it is clear that whenever two States wanted clarity with regard to taxability of income arising from activities in connection with exploration of mineral oil, subject to a duration clause, would incorporate a specific clause to that effect. For example in the India Singapore DTAA, at sub-para (j) of Para 2 of article 5, it is mentioned that a PE would be constituted if an installation or structure is used for the exploration or exploitation of natural resources but only if so used for a period of more than 120 days in any fiscal year. This is in addition to sub-para (f) where mention is made of a mine, and oil or gas well, a quarry or any other place of extraction of natural resources. This treaty goes further and prescribes at para (5) of article 5 that an enterprise shall be deemed to have a permanent establishment in a contracting state and to carry on business through that permanent establishment, if it provides services or facilities in that contracting state for a period of more than 183 days in any fiscal year in connection with the exploration, exploitation or extraction of mineral oils in that contracting state. Other examples of States that have specifically mentioned exploration of natural resources for determining the taxability of income arising therefrom, are the India USA DTAA, article 5(2)(j): 'An installation or structure used for the exploration or exploitation of natural resources, but only if so used for a period of more than 120 days in any twelve month period'; India Netherlands DTAA, article 5(2)(i): 'An installation or structure used for the exploration of natural resources provided that the activities continue for more than 183 days'; and India Japan DTAA, article 5(2)(j): 'An installation or structure used for the exploration of natural resources, but only if so used for a period of more than six months', India UK DTAA, article 5(2)(i), which mentions 'An installation or structure used for the exploration or extraction of natural resources; and so on.'

- In contrast to the above provisions in different DTAAs, in the case of the *India UAE DTAA*, no such mention has been made with regard to activities in connection with exploration or connected activities. It is therefore clear that as far as the services and activities of the applicant are concerned, there is no specific provision in paragraph 2 of article 5 of the India UAE DTAA, either mentioned or intended, that could cover the services carried out by the applicant in connection with exploration of mineral oil on the high seas, as in para (5) of article 5 of the India Singapore DTAA cited above. In these circumstances, there is no scope for getting into the debate of interplay between paras 1 and 2 of article 5 of the India UAE DTAA, or to resolve any conflict therein, as made out by the applicant, since the services rendered by the applicant are not covered by any of the sub-paras of para 2 of article 5 or any other para. If at all, and if a broad view is taken, namely that the activities undertaken by the applicant are considered as being in connection with extraction of mineral oil, then the closest provision in the India UAE DTAA would be article 5(2)(f), wherein there is no mention of any duration, and hence does not come to the help of the applicant.
- In this view of the matter, there is no option but to go back to paragraph 1 of article 5, which provides an overarching definition of 'permanent establishment'. As seen above, in this para all the ingredients necessary to constitute a permanent establishment find place in the nature of services undertaken by the applicant through its vessels and equipments under its agreement with ONGC, with no qualification of duration.
- Therefore, the applicant has a fixed place PE in India, as per para 1 of article 5, in the form of its vessels engaged in seismic surveys on the High seas, in connection with the exploration of mineral oil/natural resources under agreement with the ONGC, through which it carries on its business. It is immaterial that the period of their operation was only 113 days, as conveyed by the applicant, as a permanent establishment need not be permanent or for all times, as held in the case of *Formula One World Championships* (*supra*). Hence, the income arising from the PE shall be subject to tax in India as business income of the applicant.

Whether income derived by applicant from its PE would be computed in accordance with provisions of section 44BB ?

- The answer is yes. Since it has been examined and found that the activities of the applicant are in connection with exploration of mineral oils, the special provisions of section 44BB apply, and the income of the applicant would be computed as laid out therein. This is in line with Ruling in *Seabird Exploration FZ LLC, In re* [2010] 187 Taxman 37/320 ITR 286 (AAR), in the applicant's own case, where for similar activities it has been held that section 44BB would apply.