# Exp. connected with PE couldn't be subject to taxation laws of contracting state

**Summary – The Delhi ITAT in a recent case of Unocol Bharat Ltd., (the Assessee) held that As per article 7 all expenses incurred for purpose of business of PE are to be allowed; there is no restriction on allowability of such expenses subject to any limitation of taxation laws of contracting State (India)**

**Facts**

- Assessee-company was a tax resident of Mauritius and was subsidiary of U.S company. It had pursued contract for various projects in India for exploring business possibilities in the field of energy sector assessee-company had PE in terms of article 5 in India.
- As noted by the Assessing Officer, assessee had not derived any income from any project in India but had incurred expenditure on employee cost travel and entertainment expenses and operating contract expenses.
- The Assessing Officer on the employee cost noted that the assessee could not furnish the details of names and address of the employees, duration of the stay of each employee in India and whether TDS had been deducted on salary paid to the said employees. Only the names and amount paid was submitted. In absence of details. The Assessing Officer held that the entire employee cost could not be allowed and after invoking the provision of section 40(*a*)(*i*), he disallowed the same.
- The Commissioner (Appeals) held that article 7(3) does not put any restriction on claim of expenses and accordingly, the expenditure was to be allowed when the same had been incurred for the purpose of the business and no restriction has been provided in the article and thus, no disallowance could be made.
- On appeal:

**Held**

- If employee has spent only a part of their time in India and his staying in India was much less than period of 180 days and even if the employees were sent by the US AE, then also in terms of article 15 of India US DTAA, the employees could not be taxed in India, because they have stayed in India for a period of less than 183 days.
- Para 3 of article 7 provides for the determination of profits of PE by allowing the deduction of expenses which are incurred for the purpose of business of the PE including executive and general administrative expenses so incurred in which the PE is situated. Accordingly, all the expenses incurred for the purpose of the business of the PE are to be allowed. There is no restriction on the allowability of such expenses subject to any limitation of the taxation laws of the contracting State (India). The phraseology used in article 7(3) is different from other treaties, for instance article 7(3) of Indo US Treaty DTAA provides that deduction of expenses which are incurred for the purpose of business of the PE would be in accordance with provisions subject to the limitation of the taxation

laws of that State. Similar phraseology has been used in India UAE DTAA after the protocol. Once in a treaty no such restriction has been provided for applying the limitation of the domestic taxation laws, then such limitation given under the Indian Income-tax Act cannot be imported in such an article. If the expenditure has been incurred on the payment of salary or reimbursement of salary of the employees, then same has to be allowed while computing the profit and loss of the PE in full and without any restriction of deductibility as per the provision of Income-tax Act.

- Thus, there is no infirmity in the order of the Commissioner (Appeals) that restriction in allowing the expenditure invoking provision of section 40(*a*)(*i*) cannot be read into Indo Mauritius DTAA and accordingly, disallowance by invoking the provision of section 40(*a*)(*i*) cannot be made. Hence, disallowance of salary paid to the employees has rightly been deleted by the Commissioner (Appeals).