

Grouting falls under construction activity; no PE as per India-UAE DTAA if it was carried out for less than 9 months

Summary – The Delhi ITAT in a recent case of ULO Systems LLC., (the Assessee) held that Grouting activity carried out to protect subsea pipelines, cables and structures falls under head construction activity as specified in article 5(2)(h) of Indo-UAE DTAA; where it was carried out for less than 9 months, assessee UAE company could not be said to have a PE in India

Facts

- The appellant-company was engaged in providing 'grouting and precast' solutions for subsea off-shore construction industry. It provided products and solutions to support and protect subsea pipelines, cables and structures.
- The appellant contended that the grouting activities carried out in India fell within construction activity contemplated in specific provision of article 5(2)(h) whereas the revenue authorities were of the firm belief that article 5(1) squarely applied on the facts of the case. The DRP determined the number of days spent in India during the year under consideration at 264 days.
- The appellant contended that the number of days determined by the DRP was less than the stipulated period of 9 months. Thus, following duration test in India as per article 5(2)(h) India-UAE DTAA, no PE came into existence. It was further contended that services having been rendered to different unrelated third party customers in India, and contracts not being inter connected, it could not be said that the appellant had a PE in India.
- The DRP was of the opinion that:—
 - The equipment of the assessee was in India for at least 264 days on which work for execution of construction was carried on. Thus, the assessee had equipment PE in India.
 - Even movable place of business may constitute a PE even if they are temporary in location but permanent in time.
 - The assessee should be allowed benefit of limitation clause only when such activities would be occasional but when such activities were carried on from year to year regularly and periodically, then it did raise a presumption that it was being done deliberately to avoid establishment of PE in India.
- On appeal to the Tribunal:

Held

- On the facts of the case in hand, specific article 5(2)(h) squarely applies. It is a settled legal principle in latin *maxim 'generalia specialibus non derogant'*, which means a general provision would not be applicable when specific provision is there.

- It is the settled principle of interpretation in view of Vienna Convention of 1969, that DTAA needs to be interpreted 'uberrimae fidei' which means 'with utmost good faith'. The contention of the revenue that the assessee deliberately manipulated length of projects to always keep it under 270 days is an ill-placed allegation only.
- The observation by the Assessing Officer/DRP that grouting is not a simple masonry work and involves complex aspects does not take it out of the construction activities as mentioned in article 5(2)(h) of the India UAE DTAA because there is no bifurcation of simple and complex masonry/construction work under article 5(2)(h) and any further classification [as done by the revenue] would amount to rewriting DTAA.
- When there is no option in a given case, the general article 5(1) would get attracted which means that when there is an option like in the present case, specific article will prevail.
- There are few other DTAA's, namely, Australia, Thailand, Canada, USA, Denmark etc. where relevant PE clauses are so worded that there is a specific mention for application of aggregation principle on all, or even connected sites, projects or activities for computation of threshold duration test. Whereas, India-UAE DTAA uses singular expressions 'a building, site or construction or assembly project' and, therefore, aggregation of different projects is not allowed by conscious legislative scheme.
- The establishment of PE in India is to be seen in respect of each assessment year only. Moreover, there is no bar in carrying on the activities year after year. The determination of existence of PE in India is to be made by reference to provision in DTAA.
- Considering the facts of the case in totality, in the light of India-UAE DTAA, there is no PE in India for the year under consideration.