

No 'Agency PE' of assessee in India if Indian subsidiary did not conclude contracts on behalf of assessee-US company

Summary – The Mumbai ITAT in a recent case of Gemological Institute of America, Inc., (the Assessee) held that No 'Agency PE' of assessee would be formed in India if Indian subsidiary did not conclude contracts on behalf of assessee-US company

Facts

- The assessee-US company was engaged in the business of diamond grading and filed its Return of income as a tax resident of USA and entitled to be taxed in accordance with the provisions of the India-USA Double Taxation Avoidance Agreement (DTAA). The income so declared was on account of 'Instructor Fee' earned from a company incorporated in India.
- The Assessing officer was not satisfied as, according to him, the Indian company to whom the diamond grading services were rendered, constituted a Permanent Establishment (PE) of the assessee in India and, to that extent, the assessee's receipts from the diamond grading services would be taxable in India.
- On the assessee's appeal before the Tribunal:

Held

- The Tribunal held that the Indian company is an independent/separate legal entity which is engaged in the rendering of grading services. Further, considering the functions and the risks assumed *vis-à-vis* its business activities in India and the fact that the Indian company does not have any authority to conclude contracts and has neither concluded any contracts on behalf of the assessee-company nor has it secured any orders for the assessee-company in India, the Indian company cannot be regarded as 'agency PE' of the assessee-company in India.
- In view of the aforesaid discussion, it is to be held that the Assessing Officer has erred in invoking section 9 and/or Article 5 of the India-USA DTAA in order to say that the assessee-company has a PE in India.