



SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No.
168

Planetcast International Pte. Ltd.

Vs

ACIT (IT)

Date of invoice of goods/ provision of service cannot be used for determining the duration of service PE in India

26.08.2023

Jain Shrimal & co.

Facts of the Case

- The assessee is a non-resident corporate entity and a tax resident of Republic of Singapore.
- It is primarily **engaged in Satellite telecommunication network operations** and wholesale of electronic and telecommunications equipments and parts.
- During the assessment proceedings, the A.O. noticed that the assessee has not offered the following income to tax and hence made the addition of such income as mentioned below:
 - a) The assessee **sold certain equipments** to Accenture Solutions Pvt. Ltd. in India (worth of Rs. 43,20,29,395). In addition to it, **installation and commissioning services** provided by it through sub-contractors for a consideration of Rs. 174,29,247 as installation charges.
 - b) Such services were provided at two project sites of assessee, one at Gurugram and another at Bangalore in India.

Assessee's Contention

- Assessee contended that **sale of equipment and installation of the equipment are incidental but sperate activity**, also the sale of goods were completed outside India and accordingly its income cannot be taxed in India. The Ld. Counsel placed reliance on *Ishikawajma-Harima Heavy Industries Ltd. Vs DIT (2007) 158 Taxman 259 (SC)*, where the similar view was taken by the Hon'ble SC as inferred by the Ld. Counsel.
- Drawing inference from Article 5(3), the foremost condition to constitute a PE in India is that there must be a **building site, construction or installation or assembly project and it must have continued for more than 183 days** in any fiscal year. However, installation or commissioning activities at two different project sites does not constitute prescribed activities covered herewith.
- With regards to stay of 183 days, an enterprise **must carry a supervisory activities in another state for more than 183 days** in any fiscal year, however such services were rendered as follows-
 - ✓ Bangalore project site from 14.06.2017 to 29.07.2017
 - ✓ Gurugram project site from 08.112017 to 02.02.2018,such duration cumulatively **works out to be 133 days only**, and hence the **threshold as defined in Article 5(4) was not exceeded**.
- The Ld. Counsel then, points out that the Ld. A.O. committed a fundamental error by **counting days from the date of booking the first invoice till the raising of the last invoice, which is incorrect in the eyes of law**. Hence considering the above discussion, the assessee contended that it was not forming any PE in India for above services.

Revenue's Contention

Opposing the appeal and the arguments presented by the Ld. Counsel of the assessee, the counsel for the Revenue, submitted the following:

- The Ld. A.O. argues that for all practical purposes, **both the projects have to be considered together, since they are related to each other**, carried out for the same customer at two different locations, and also the nature of the projects are similar.
- The Ld. DR believes that the **project includes preparatory and auxiliary work**, hence it should be included in the duration of the project. This would mean that the **project continued for more than the threshold limit of 183 days** in the fiscal year, hence PE has a significant role to play both in supply and installation services.
- Drawing inference from DTAA's, the **India-Singapore DTAA does not explicitly prohibit considering all the project sites together** (unlike India-Netherlands DTAA), also the Ld. A.O. believes that such supply and installation is **one integral activity**. Therefore, it shall **constitute PE in India** and consequently both the receipts from sale and installation services are taxable in India as business income.
- Accordingly, the **Ld. A.O. was of the opinion that the assessee has established a PE in India and its income from India should be taxable.**

Legal Provisions

According to **Article 5(3)** and **5(4)** of India- Singapore DTAA,

3. A building site or construction, installation or assembly project constitutes a permanent establishment only if it continues for a period of more than 183 days in any fiscal year.

4. 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 carries on supervisory activities in that Contracting State for a period of more than 183 days in any fiscal year in connection with a building site or construction, installation or assembly project which is being undertaken in that Contracting State

According to **Article 12(3)** of India- Singapore DTAA,

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use :

(a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information ;

(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8.

Ruling

- The **assessee is merely supplier of the equipment** manufactured by Original Equipment Manufacturer (OEM). Therefore, **until the manufacturing of the specified equipments are completed and have been delivered** to the customer, the **installation services could not have been commenced**.
- The employees of OEM use to visit the project sites for providing installation services since it was also sub- contracted to them, therefore the **first date of invoice for supply of equipment cannot be taken to be the date of commencement of installation services** at the project sites.
- Since the assessee placed enough evidence to prove that installation services in Bangalore and Gurugram were in **aggregate provided for 133 days only** and therefore both in terms of man days and solar days two projects under consideration **shall not constitute PE in India**, and also the threshold of 183 days shall not be breached.
- The submission of the A.O. that both the projects are integrated projects were neither backed by proper reasoning nor evidence. **Merely because the installation and commission services were being provided by the same sub-contractor** or some of its people were involved in both the projects, it **does not conclude to be one single contract**.

Ruling

- The Hon'ble Tribunal mentions categorically indicates that the **language used in Article 5(3) and 5(4) is 'a', which denotes a singular form.** It further held that “we do not find use of any words with similar provisions in India-Australia, India-Italy or India-USA treaties. Thus, **in absence of any such provision in India-Singapore treaty, words used in other treaties cannot be imported.** Rather we do not find any material difference in the language employed in Article 5(3) of India-Netherlands DTAA and India-Singapore DTAA.”
- The Hon'ble Tribunal held that the assessee in the year under consideration **did not have any PE in India.** Therefore, **no profits out of sale of equipments as well as installation and commissioning services can be taxed in India.** Hence the addition made is directed to be deleted.

Our Comments- Comparison of various treaties in respect of building, installation or construction services

India- USA DTAA	India- Italy DTAA	India- Australia DTAA	India- Singapore DTAA	India- Netherlands DTAA
<p>a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 120 days in any twelve-month period.</p>	<p>a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, project or activities, if any) continue for a period of more than six months, or where such project or supervisory activity, being incidental to the sale of machinery or equipment, continues for a period not exceeding six months and the charges payable for the project or supervisory activity exceed 10 per cent of the sale price of the machinery and equipment.</p>	<p>a building site or construction, installation or assembly project, or supervisory activities in connection with such a site or project, where that site or project exists or those activities are carried on (whether separately or together with other sites, projects or activities) for more than 6 months.</p>	<p>A building site or construction, installation or assembly project constitutes a permanent establishment only if it continues for a period of more than 183 days in any fiscal year</p>	<p>A building site or construction, installation or assembly project constitutes a permanent establishment only where such site or project continues for a period of more than six months.</p>

■ It is always **recommended to read the treaty and its provisions carefully**, as in the present case, the Hon'ble Tribunal **mentioned the singularity of noun**, while deciding whether such service of supply and installation can be treated as one or not.

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The Assessee is supplying goods and providing service to the service recipient (Accenture) through its sub-contractor in India.



The Ld. A.O. issued notice on the ground that income from supplying and providing services should be treated as business income.

The Hon'ble Tribunal held-

1. Service needs to be seen mutually exclusive of supplying of goods i.e., the projects are independent of each other.
2. Also, the threshold of stay in India is not fulfilled to constitute PE in India since the first date of invoice for the supply cannot be taken as the date of commencement of installation/ commission of service at the project site, hence no taxability in India.



Section/Article	Article 12(3), 5(3) and 5(4) of DTAA
DTAA/Country	India- Singapore DTAA
Court	Delhi Tribunal
Date of decision	14.07.2023



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