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Global Business Tax Alert
Sharp Insights

The Delhi Income Tax Appellate Tribunal ("the Tribunal") in the case of Ion Geophysical Corporation (TS-455-ITAT-2016(Del)) has held that contract revenue arising to Assessee (a US company) from 'offshore supplies' is not taxable in India, FOB/ FCA delivery terms substantiate that title 'passed outside India'.

Issue no: GBTA/41/2016

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Background

- Ion Geophysical Corporation ("IGC") (formerly known as Input Output Inc.), a tax resident of USA is engaged in business of manufacture and sale of equipment used in seismic industry. Its products included cable based/ cable less and radio controlled seismic data acquisition systems, digital and analog geophone sensors, vibroseis, vehicles and source controllers for detonator and vibrator energy sources.
- IGC entered into a contract for supply ("the Contract") of certain seismic equipment with ONGC, India. Under the contract, ION supplied the equipment, material, general stores and provided certain services related to the equipment. The supply contract included clauses for procurement of certain indigenous items and the same were procured from India and supplied to ONGC at its various locations. The contract also included installation and commissioning of equipment supplied along with necessary hardware and software by third party in respect of both indigenous and foreign items, provision of training to the employees and engineers of ONGC at supplier's premises in USA and followed by training at ONGC site at Dehradun, Jorhat and Kolkata.
- IGC filed its tax return for the Assessment Year ("AY") 2008-09 declaring NIL taxable income. However, in tax return for the AY 2009-10, IGC offered the revenues earned on account of installation and inspection at DPR of 10% under the provisions of section 44BB of the Income-tax Act, 1961 ("the Act") and training component given to ONGC engineers in India at 15% gross basis under the provisions of Article 12 of India-USA DTAA ("the DTAA"). IGC did not offered to tax the revenue earned from supply of goods from outside India under the claim that such income has not accrued/ arisen or cannot be deemed to accrue or arise in India. Further, the training receipts in respect of training imparted at IGC's premises (in USA) were also not offered to tax in India.
- The Assessing Officer ("AO") issued notice under section 148 of the Act to IGC for filing its return for the AY 2008-09 to which IGC responded that return filed originally be treated as return filed under section 148 of the Act. The AO completed the assessment proceedings concluding that the Contract was a 'composite contract' given on turnkey basis by ONGC to IGC and the offshore supply of equipment was essential material required for execution of such project. Further, the equipment was supplied by IGC to ONGC for use by IGC itself for the purposes of execution of the said contract. Accordingly, the AO computed IGC's income at 25%. In proceedings before the Dispute Resolution Panel ("DRP"), the DRP approved the AO's draft order, however, with a direction to compute profits attributable to Permanent Establishment at 15%.

Questions before the Tribunal in appeal

- Whether the Contract for supplies and installation and training is a composite contract or a pure supply contract or a divisible contract
- Whether IGC has a PE in India;
- Whether the offshore supplies made by IGC were taxable in India;
- Whether the on shore supplies made by IGC were taxable in India;
- Whether the consideration received for installation and inspection were taxable in India;
- Whether the consideration received for training services were taxable in India

Arguments by IGC before the Tribunal

On reassessment proceedings

- Submitted that IGC is tax resident of USA and does not have any PE in India. Only the Contract was signed in India. A copy of order passed under section 195(2) of the Act was furnished before the Tribunal wherein inter-alia ONGC was directed not to deduct TDS on gross value of supply of material outside India and training outside India. However, the assessment was completed under section 143(3) of the Act holding that IGC had a PE in India and supply was liable to tax on the ground that the contract is a 'composite contract'.
- That the AO duly applied his mind while issuing order under section 195(2) of the Act allowing the payment to be released without deduction of TDS in respect of supply of material outside India and training outside India. Hence, this is a case of 'change of opinion'.

On nature of contract and taxability of revenue from offshore supplies

- Based on documents filed, submitted that the multiple scope of work was agreed in one contract which is separately and distinctively identifiable from the Contract. Further, the consideration for each scope of work is separately identified and mentioned in the Contract. All the items were related to supply of equipment and installations and commissioning and training are ancillary to supply of equipment.
- The equipment being scientific equipment required proper training. The installation and trainings were, thus, part of supply equipment.
- Therefore, the Contract is not a 'Composite contract' but a pure supply contract or in the alternative a divisible contract as the payment of consideration for various activities was not dependent on the completion of other activities or whole contract.

Arguments of Revenue before the Tribunal

- Granting of certificate under section 195 of the Act cannot be equated with assessment proceedings because that is purely administrative act and has no bearing on the final assessment to be made.
- The contract is to be looked 'as it is'. Reliance placed on the order of AO passed in pursuance of directions of the DRP.

Ruling of the Tribunal

On reassessment proceedings

- Order passed under section 195 of the Act prima facie determines the income chargeable for the purposes of TDS and the same could not be equated with assessment proceedings under section 143(3). Only in case where AO had formed an opinion while framing assessment under section 143(3) that reassessment proceedings could not be initiated on mere change of opinion. [Decided in favor of Revenue]

On nature of contract and taxability of revenue from offshore supplies

- From the terms of the Contract, it is evident that the whole contract was divisible into different components and the consideration was separately contemplated in the contract itself. The AO had aggregated the income from various streams and had not adopted any specific value of the contract as a whole. Thus the Contract is not a composite contract but a divisible contract.
- If 'title in goods' was passed off shore, then, no income could be attributed from this part of the Contract in India. The consideration for equipment, installation and commissioning, third party charges, service tax charges, training, etc. are separately mentioned. Further, based on documents furnished such as dispatch instructions, packing and insurance, shipping arrangement, it is evident that the 'title in goods' passed offshore and therefore no part of the consideration could be attributed to the supplies in India.
- In relation to provisions of section 9(1)(i) of the Act, admittedly no portion of the offshore supplies involved any activities in India. Although the contract was signed in India and business connection is established, under the provisions of Article 7 of the DTAA, the business income could only be taxes if IGC had a PE in India.
- With regard to PE, revenue's stand of constitution of Installation PE under Article 5(2)(j) and (k) of the DTAA rejected as the Revenue could not establish that there has been a presence of more than 120 days of the IGC's employees in India for providing the training. In absence of PE, no income from offshore supplies was taxable in India.
- On the remaining grounds, the Tribunal remitted matter back to AO to examine taxability of revenue arising from onshore supplies and installation/ inspection activity as Revenue merely proceeded on the basis that contract was composite.

Decision

Primarily the ruling has been delivered based on the specific facts of the case holding that if the 'title to goods' is passed outside India, no income from such supplies was taxable in India. Even if business connection under section 9(1)(i) of the Act is established due to signing of contract in India, in the absence of PE under Article 7 of the India-US DTTA, no income from offshore supplies was taxable in India.

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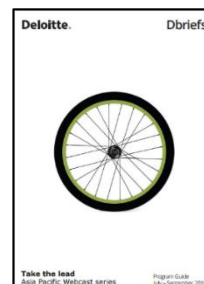

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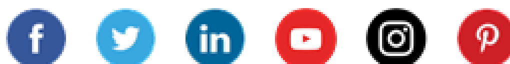

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