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Tax alert: Each project site is separate for determining installation, supervisory PE

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The Delhi Bench of the Income-tax Appellate Tribunal has held that, for determining installation or supervisory permanent establishment (PE) status, under Article 5(3) and Article 5(4) of the India-Singapore tax treaty, each project site will be considered as a separate project. The taxpayer did not have a PE in India as each project site did not exceed the threshold limit of 183 days.

In a nutshell

Merely because installation and commissioning services were provided by the same sub-contractor or some of the personnel engaged in both the projects were common, it cannot be concluded that both projects were one and single.

Article 5(3) and 5(4) of the India-Singapore tax treaty refers to 'a' building site or construction, installation or assembly project continuing for a period of more than 183 days in any FYs. Use of the proposition 'A' denotes singular form.

Article 5(3) and 5(4) of the India-Singapore tax treaty does not use words that could either implicitly or explicitly, bring the provisions up on par with similar provisions in the India-Australia or India-Italy or India-USA treaties (where, treaty provisions explicitly provide that a building site of construction, installation or assembly project, together with other such site projects or activities, would constitute PE if they continue for a specific period). Thus, in the absence of any such express provision in India-Singapore treaty, words used in other treaties could not be imported.

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Background:

- The taxpayer[1] is a non-resident corporate entity and a tax resident of the Republic of Singapore. It is engaged in the business of satellite telecommunication network operations and wholesale seller of electronic and telecommunication equipment and parts.
- During the Financial Year (FY) 2017-18, corresponding to Assessment Year (AY) 2018-19, the taxpayer entered into a contract with an Indian company (A Co) for supply of equipment, required by A Co for its projects at two locations in India.
- In the course of audit proceedings, the Assessing Officer (AO) noticed that:
  - The taxpayer, in addition to sale of equipment to A Co in India, had carried out installation and commissioning of such equipment through sub-contractors. Thus, in addition to the amount received towards sale of equipment, the taxpayer had also received installation and commissioning charges.
  - The taxpayer had not offered them to tax in India.

  Accordingly, the AO held / observed as follows:
  - As per Article 5(3) of the India-Singapore tax treaty, a building site or construction, installation or assembly project, if continues for a period of more than 183 days in any FY, constitutes a permanent establishment (PE). Similarly, as per Article 5(4) of the India-Singapore tax treaty, if a person carries out supervisory activities in connection with a building site or construction or installation or assembly projects, undertaken in another state for more than 183 days in any FY, it will constitute a PE.
  - The time limit provided under Article 5(3) and 5(4) of the India-Singapore tax treaty, was applicable from the start till the end of the project activities, and not on the basis of the presence of the company's or sub-contractors' personnel during the entire duration.
  - The taxpayer had carried out installation activities at two different sites of A Co. For the first activity, installation began on 14 June 2017 and ended on 29 July 2017, whereas for the second activity, installation began on 8 November 2017 and ended on 2 February 2018. Thus, cumulatively, the activities of supervisory/installation work began on 14 June 2017 and ended on 2 February 2018, which worked out to 233 days.
  - The activities of the taxpayer in India exceeded the threshold limit of 183 days, as per Article 5(3) and 5(4) of India-Singapore tax treaty. Hence, the taxpayer had a PE in India.
  - Further, the two projects carried out for A Co in India had to be considered together, as both the projects were related to each other and were carried out for the same customer at two different locations; secondly, the nature of the projects were similar. Unlike the India-Netherlands tax treaty, the India-Singapore tax treaty did not explicitly prohibit clubbing together all project sites, rather than considering each site separately.

  Thus, the taxpayer had a PE in India. Hence, both the receipts from sale of equipment as well as installation and commissioning services, were taxable in India as business profits. Accordingly, the AO proceeded to apply the global net profit ratio for AY 2018-19 at 13.38% and attributed profit to the PE in India.
- Aggrieved, the taxpayer filed an appeal and in the course of appellate proceedings the matter reached before the Delhi Bench of the Income-tax Appellate Tribunal (ITAT).

[1] Planetcast International Pte. Ltd. vs ACIT [ITA Nos 1831, 1832/Del/2022 & 451/Del/2023] (Delhi ITAT)

Relevant provisions in brief:

Relevant extract of Article 5 of India-Singapore tax treaty

"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."

Decision of the ITAT:

The ITAT noted that:

- The core issue which required consideration was whether the taxpayer, in terms of Article 5(3) and Article 5(4) of the India-Singapore tax treaty, operated a building site or construction or installation or assembly project, for a period exceeding 183 days in the relevant year or whether the taxpayer had carried out any supervisory activity for more than 183 days in the relevant year in connection with a building site or construction or installation or assembly project, undertaken in the contracting state?
- Further, the tax authorities had reckoned the period of 183 days from the date of raising of the first invoice for supply of equipment till the date of last invoice raised by the taxpayer for both projects. Thus, a separate issue which required consideration was whether the first invoice date for supply of equipment would tantamount to commencement of installation activity for considering the period of 183 days in terms of Article 5(3) and 5(4) of India-Singapore tax treaty?

In this regard, the ITAT observed as follows:

Whether first invoice date for supply of equipment is tantamount to commencement of installation activity?

- The taxpayer had entered into two separate purchase orders with A Co. The purchase order (relating to supply of equipment being certain broadcast infrabuild unit) for first project location (say location G) was issued on 22 February 2017 and the purchase order (relating to equipment for project system integration) for the second project location (say location B) was issued on 16 March 2017.
- Once the purchase order was placed, the manufacturing process of the equipment as per specific requirement of A Co, was initiated. The taxpayer itself was not the manufacturer of the equipment but had sub-contracted the manufacturing to the original equipment manufacturer (OEM) identified by A Co. In other words, the taxpayer was merely supplier of the equipment manufactured by OEM.
- Therefore, until the manufacturing of the specified equipment was completed and delivered to the customer, i.e., A Co, the installation/commissioning services could not have commenced.
- The work of installation and commissioning services was also sub-contracted to the OEM and the employees of the OEM visited the respective project sites of A Co in India for providing installation and commissioning services.

Therefore, the first date of raising of invoice for supply of equipment could not be taken to be the date of commencement of installation and commissioning services, at the project sites.

Whether condition provided under Article 5(3) and Article 5(4) of the India-Singapore tax treaty was satisfied?

- The taxpayer had furnished evidence to demonstrate that installation and commissioning services for the second location project commenced on 14 June 2017 and ended on 29 July 2017, aggregating to 46 days.

Whereas installation and commissioning services for the first location project commenced on 8 November 2017 and ended on 2 February 2018, aggregating 87 days.

Thus, in both instances, the threshold period of 183 days as provided in Article 5(3) and 5(4) of India-Singapore tax treaty was not breached.

- The taxpayer had also demonstrated that both in terms of man days and solar days, two projects did not constitute PE in India under Articles 5(3) and 5(4) of India-Singapore tax treaty.

Whether the projects were to be construed as separate projects or as an integrated project?

- A Co had two projects in India at locations B and G. The materials on record indicated that the two projects were independent of each other and had no connection. Merely because, installation and commissioning services were provided by the same sub-contractor or because some of the personnel engaged in both projects were common, it could not be concluded that both projects were the same.
- A reading of Article 5(3) and 5(4) of the India-Singapore tax treaty indicated that the language refers to '**a**' building site or construction or installation or assembly project, continuing for a period of more than 183 days in any FYs. Here, 'a' denotes a singular form.
- Further, Article 5(3) and 5(4) of the India-Singapore tax treaty does not use any words which could either implicitly or explicitly, bring the provisions on par with similar provisions in the India-Australia or India-Italy or India-USA treaties (where, treaty provisions explicitly provide that a building site of construction or installation or assembly project, together with other such site projects or activities, if continue for specific period, would constitute as PE). Thus, in the absence of any such express provision in the India-Singapore treaty, words used in other treaties could not be imported.
- Rather there is no material difference in the language employed in Article 5(3) of the India-Netherlands tax treaty and the India-Singapore tax treaty. Therefore, provisions contained in Article 5(3) and 5(4) of the India-Singapore tax treaty could not be compared with similar provisions contained in the India-Australia or India-Italy or India-USA tax treaties.

Thus, going strictly by the language used in Article 5(3) and 5(4) of the India-Singapore tax treaty, each project site had to be construed as a separate project, for constituting an installation or supervisory PE.

Conclusion:

In view of the above, the ITAT held the following:

— Each project site did not exceed the threshold limit of 183 days.

— The project sites of A Co at B and G locations could not be considered to be either installation or supervisory PE of the taxpayer in India. Thus, the taxpayer in the year under consideration, did not have any PE in India.

— Accordingly, no profits out of sale of equipment, as well as installation and commissioning services, could be taxed in India.

Comments:

Determination of whether a PE exists in the source country jurisdiction is a fact-based exercise and has been a subject matter of litigation. Further, whether activities qualify as installation or construction or supervisory activities and the manner of computation of number of days for the same, has also been a subject of litigation. This ruling, based on facts of the case, has held / upheld the following:

- Until the manufacturing of the specified equipment was completed and delivered to the customer, i.e., A Co, the installation/commissioning services could not have commenced. Therefore, the first date of raising of

invoice for supply of equipment could not be taken to be the date of commencement of installation and commissioning services at the project sites.

- Merely because the installation and commissioning services were provided by the same sub-contractor or because some of the personnel engaged in both the projects were common, it could not be concluded that both the projects were one and the same.
- Article 5(3) and 5(4) of the India-Singapore tax treaty refers to '**a**' building site or construction, installation or assembly project continuing for a period of more than 183 days in any FYs. Here 'a' denotes singular form.
- Article 5(3) and 5(4) of India-Singapore tax treaty does not use any words which could either implicitly or explicitly bring the provisions on par with similar provisions in the India-Australia or India-Italy or India-USA treaties (where, treaty provisions explicitly provide that a building site of construction, installation or assembly project together with other such site projects or activities, if continue for a specific period, would constitute PE). Thus, in the absence of any such express provision in the India-Singapore treaty, words used in other treaties could not be imported.

Taxpayers may want to evaluate the impact of this ruling to the specific facts of their cases.

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