

Profit arising to a German Co. from high sea sale of equipment to Indian Customer isn't taxable in India

Summary – The Kolkata ITAT in a recent case of Qutotec GmbH., (the Assessee) held that Profit arising to a German Co. from high sea sale of equipment to Indian customer couldn't be taxed in India even if equipment was subjected to inspection in India.

Facts

- Assessee, a German company, sold equipment to an Indian Customer on high seas. The consideration for sale of equipment was received outside India in the foreign currency;
- Significant amount was payable upon delivery of equipment on FOB basis at foreign port of shipment. The balance amount was payable on inspection of the equipment (i.e., acceptance test) by the customer;
- It was noted by the Assessing officer (AO) that assessee had a supervisory Permanent Establishment (PE) in India and it had sold equipments for various projects in the year under consideration;
- AO attributed the profits from sale of equipment to assessee's supervisory PE in India contending that sale was concluded in India as equipment was subjected to inspection in India;
- On appeal, DRP confirmed the order of the AO. Aggrieved by the order, assessee filed the instant appeal before the Tribunal.

The Tribunal held in favour of assessee as under:

- The clause of the agreement which requires payment of balance sum after acceptance test generally happens in common trade parlance and partakes the character of trade warranties. Any breach of the warranty could result in payment of damages but it would not mean that the title in the goods would pass on to buyer in India only after conducting the acceptance test. Hence, undue importance could not be given to such clause to construe that sale was concluded in India;
- As far as attribution of profit to supervisory PE was concerned, the Article 5(2)(i) of the DTAA between India and Germany reads as under:
'The term "permanent establishment" includes especially, - (i) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities continue for a period exceeding six months'
The words 'such site, project or activities' as mentioned under Article 5(2)(i) of India-Germany DTAA clearly indicate that the supervisory PE has to be examined separately for each of the projects;
- In the instant case, majority of the projects of the assessee did not have a supervisory PE in India. In that case the question of any attribution of profit from supply of equipment to the supervisory PE would not arise at all;

- Hence, no portion of receipts from sale of equipment could be taxed in India since equipment was sold by assessee outside India and it didn't have any PE in India in respect of the project for which equipment was sold.