

Income earned by US co. on sale of off-the-shelf software in India isn't taxable in absence of its PE: ITAT

Summary – The Delhi ITAT in a recent case of Landmarks Graphics Corp., (the Assessee) held that where assessee, a US based company, did not have PE in India and its activities were not covered by deeming fiction of article 5(2) of India - USA DTAA, income earned by it from sale of software to Indian companies which was 'off the shelf' software, was not taxable in India

Facts

- The assessee, a US based company, was engaged in the business of supply, installation and commissioning, maintenance, consultancy and training of softwares which were used in connection with the prospecting for production exploration and extraction of mineral oils.
- Assessee had supplied its software to various Indian companies. The assessee had also rendered services in relation to installation and commissioning and providing training to the employees of the Indian companies to use the software.
- The assessee claimed that it did not have PE in India and, thus, income arising from sale of software was not taxable in India.
- The Assessing Officer opined that the title of goods (being software) was to pass outside India. However, owing to the fact that the installation and commissioning of the software was required to be carried in India, it was held that a part of the income from supply of software along with income from installation and training from software (calculated on notional basis) was taxable in India.
- The Commissioner (Appeals) found that the assessee did not have any office in India and that its activities were not covered by the deeming fiction of article 5(2) of India-US DTAA. Accordingly, it was held by the Commissioner (Appeals) that in the absence of PE, the business profits from sale of software could not be brought to tax in India.
- Accordingly, the Commissioner (Appeals) deleted the addition made by Assessing Officer
- On revenue's appeal:

Held

- The assessee filed its return of income claiming that it is not taxable in India by virtue of the DTAA between India & USA as it does not have any permanent establishment in India as defined under article 5(2). As per the records, the assessee has not participated in the activities for a period more than 10 to 15 days in India. The same was not refuted by the revenue at any point of time while arguing about the status of permanent establishment of the assessee.
- The Commissioner (Appeals) also held that admittedly the assessee does not have any office in India and its activities are not covered by the deeming fiction of article 5(2) of the Indo-US DTAA which is to be considered project-wise. The Commissioner (Appeals) further observed that the Assessing Officer has not considered the issue as to whether the assessee had or did not have a permanent establishment. Therefore, the Commissioner (Appeals) held that the assessee did not have a

permanent establishment in India during the previous year relevant to assessment year 2002-03. Accordingly, the Commissioner (Appeals) held that in terms of article 7(1) of the Indo-US DTAA the sale of software which are "off the shelf" software, are not taxable in India. Thus, the assessee has succeeded in establishing that there is no permanent establishment.

- In this particular case, the assessee claimed that these services have been provided in connection with the exploration, and the extraction of mineral oils in India and these revenues should be taxed in terms of provisions of section 44BB. The Commissioner (Appeals) deleted the additions made by the Assessing Officer and held that the said additions should be as per the provisions of section 44BB of the Act, but since there is no Permanent Establishment in India, the assessee cannot be taxed in India. This issue has not arisen in subsequent years wherein the Commissioner (Appeals) has rightly held that the same should be taxed as per provisions of section 44BB.
- The Assessing Officer is therefore, directed to tax the income of the assessee as per section 44BB for assessment years in question.