

Provision of BPO services does not create service PE and hence not taxable as per DTAA.

Summary – The Pune ITAT in a recent case of Cummins Inc., (the Assessee) held that Provision of BPO services does not create service PE and hence not taxable as per DTAA

Facts

- The assessee-company was a tax resident of USA.
- During year under consideration, the assessee received pursuant to an agreement as a consideration for grant of right to render Business Process Outsourcing (BPO) services to its group entities globally.
- The DRP held that the receipt of amount by the assessee would get covered under the term 'source of income' under section 9(1)(i) and, hence, chargeable to tax. It further noticed, that the employees of the assessee-company were actively involved in the process of rendering BPO services, which resulted into existence of a service PE under Article 5(2)(1) of the DTAA.
- The Assessing Officer in the draft order treating the said amount as chargeable to tax as business income.
- On the assessee's appeal before the Tribunal:

Held

- It is to be noted that *Explanation 1* to section 9(1)(i), which states that only such part of the income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India. To the same effect is the position under the DTAA, which provides under Article 7 that the profits of an enterprise of a Contracting State shall be taxable in the other Contracting State only to such an extent as are attributable to the permanent establishment in the other State etc. The net effect of *Explanation 1* to section 9(1)(i) on one hand and Article 7 read with Article 5 under the DTAA on the other is that only such amount of business income of a non-resident can be charged to tax in India as is attributable to the carrying on of operations in India. Even if there is a business income of a non-resident, the same would escape Indian taxation net in the absence of the assessee carrying out any operations in India or having a permanent establishment in India.
- A service PE is ordinarily constituted when the foreign enterprise renders services in India to its customers and such services are rendered through its own employees or other personnel. In the instant case, there are no services whatsoever, which have been provided by the assessee in India through its employees or other personnel and hence no service PE of the assessee is established in India.
- Even though the receipt from BPO operations is in the nature of a revenue receipt and otherwise chargeable to tax, but the same cannot be so included under section 9(1)(i) in the facts and

circumstances of the instant case for the absence of any business operations carried out in India or the existence of any PE of the assessee in India under the DTAA. Therefore, the impugned order on this score is to be overturned and the addition is to be deleted.