(2024) 04 ITAT CK 0015

Income Tax Appellate Tribunal (Delhi D Bench)

Case No: Income Tax Appeal No. 1065/DEL/2023

De Golyer And Macnaughton Corp.	APPELLANT
Vs	
ACIT	RESPONDENT

Date of Decision: April 2, 2024

Acts Referred:

- Income Tax Act, 1961 - Section 44BB, 250

Hon'ble Judges: Saktijit Dey, (VP); Dr. B. R. R. Kumar, (AM)

Bench: Division Bench

Advocate: Salil Kapoor, Ananya Kapoor, Sanjay Kumar

Final Decision: Allowed

Judgement

1. The present appeal has been filed by the assessee against the order of ld. CIT(A)-42, New Delhi dated 13.02.2023.

2. The assessee has raised the following grounds of appeal:

"1. That on the facts and circumstances of the case and in law, order passed by the Ld. CIT-A under section 250 of the Income-tax Act, 1961 ('the Act') is based upon assumptions, conjectures, surmises, preconceived notions and incorrect application of law and therefore bad-in-law.

2. That on the facts and circumstances of the case and in law, the Ld. CIT-A had grossly erred in upholding the assessment order passed by the Ld. Assessing Officer ('AO') wherein the Service Permanent Establishment ("PE") of the Appellant has been alleged in India under the India-US Double Taxation Avoidance Agreement ('DTAA').

2.1. The Ld. CIT-A has grossly erred in upholding the assessment order passed by the Ld. AO, wherein the service PE was constituted basis the maximum duration as mentioned in the contracts, instead of appreciating the fact that for this, the actual period of stay of employees is to be considered.

22. The Ld. CIT-A has grossly erred in reckoning the man days of the employees stay in India, instead of solar days while analyzing the threshold of constitution of Service PE.

3. That on the facts and in the circumstances of the case and in law, the Ld. CIT-A erred in not appreciating that in the absence of PE, the revenue earned from services is not taxable in India by virtue of 'make available' clause under Article 12 of the India-US DTAA.

4 That on the facts and circumstances of the case and in law, the CIT(A) has erred in upholding the levying of interest under section 234D of the Act."

3. Heard the arguments of both the parties and perused the material available on record.

4. Before us, the assessee has contended that the stay of employees of the appellant in India was less than the threshold of 90 days as provided under the India-US DTAA for creation of Service PE. It was submitted that the Assessing Officer has based his order on the finding that the contract deliverables were for a period of 90 days. As per the ld. CIT(A), the assessee has not controverted this finding. The ld. CIT(A) held that the main thrust of the assessee's submission was that the service is not taxable as FTS as the requirement of make-available clause was not satisfied. The AO has applied provisions of section 44BB of the Act. As per the provisions of paragraph 2(1) of Article 5 of the India-US DTAA, a Service PE of a foreign enterprise is established in India when services are provided by such enterprise within India through its employees for more than 90 days in any 12 months period. Before the ld. CIT(A) as well as before the Tribunal, the assessee contended that the actual period of service rendered by the employees of the appellant within India was 78 days i.e., less than 90 days. The ld. CIT(A) held that the assessee has not substantiated its contentions regarding stay in India by way of any documentary evidence such as passport etc. of the employees. The ld. CIT(A) observed that the assessee has only submitted during appeal an unsigned document specifying the period of stay of various employees. The ld. CIT(A) held that even by the details filed, it is observed that the total period of stay of various employees is much more than 90 days which shows that the assessee had a service PE in India constituted by more than 90 days cumulative stay of its employees in rendering services.

5. Before us, it was argued that given an opportunity, the complete details would be submitted to the ld. CIT(A). The ld. DR opposed to the proposal in principle. Having

considered the matter, we hold that no prejudice would be caused to the Revenue by remanding the matter to the file of the ld. CIT(A) to examine and complete the correct period of stay considering the documents specifying the period of stay.

6. In the result, the appeal of the assessee is allowed for statistical purpose.