IT/ILT : Where assessee, a foreign company, was awarded a project by ONGC for purpose of surveys, design, engineering, procurement, fabrication, transportation, installation and commissioning of entire facilities, in view of fact that its alleged PE in India had no role to play in design and fabrication etc. of platforms which was carried on outside India, no income from such offshore supplies of platforms could be attributed to said alleged PE

[2018] 93 taxmann.com 224 (Delhi - Trib.)

IN THE ITAT DELHI BENCH 'G'

Samsung Heavy Industries Co. Ltd.

v.

Deputy Commissioner of Income tax (International Taxation) Circle-2 Dehradun*

N. K. SAINI, ACCOUNTANT MEMBER
AND K. NARSIMHA CHARY, JUDICIAL MEMBER
IT APPEAL NO. 872 (DELHI) OF 2017
[ASSESSMENT YEAR 2008-09]
APRIL 25, 2018

Section 9 of the Income-tax Act, 1961, read with articles 5 and 7 of the DTAA between India and South Korea - Income - Deemed to accrue or arise in India (Permanent Establishment) - Assessment year 2008-09 - Assessee-company, a tax resident of South Korea, was engaged in business of heavy engineering - It was awarded a project by ONGC for purpose of surveys, design, engineering, procurement, fabrication, transportation, installation, and commissioning of entire facilities - Under contract entered by it with ONGC for aforesaid activities, assessee had to perform certain activities within India and outside India - At instance of ONGC, assessee opened a Project office in Mumbai - Assessee's case was that its alleged PE had no role to play in design, fabrication etc. of platforms which was carried on outside India and, thus, there could not be any attribution of revenue from activities carried on outside India to alleged PE of assessee in India - Assessing Officer having rejected assessee's explanation, attributed an adhoc 25 per cent of gross revenues received by assessee under project to alleged PE of assessee in India - Whether since revenue could not bring any evidence on record to show that alleged PE of assessee had any role to play in respect of offshore supplies made, no income from such offshore supplies could be attributed to said alleged PE - Held, yes - Whether, therefore, impugned addition deserved to be deleted - Held, yes [Para 23] [In favour of assessee]

CASE REVIEW

National Petroleum Construction Co. v. *DIT (International Taxation)* [2016] 66 taxmann.com 16/238 Taxman 40 (Delhi) and *Carborandum Co.* v. *CIT* [1977] 108 ITR 335 (SC) (para 23) *followed*.

CASES REFERRED TO

National Petroleum Construction Co. v. *DIT (International Taxation)* [2016] 66 taxmann.com 16/238 Taxman 40/383 ITR 648 (Delhi) (para 9), *Carborandum Co.* v. *CIT* [1977] 108 ITR 335 (SC) (para 9),

CIT v. *BKI/HAM* [2011] 15 taxmann.com 102/203 Taxman 58/[2012] 347 ITR 570 (Uttarakhand) (para 14) and *DIT (International Tax)* v. *Morgan Stanley & Co*. [2007] 162 Taxman 165/292 ITR 416 (SC) (para 15).

C.S. Aggarwal and **Ravi** *for the Appellant.* **G.K. Dhall**, CIT-DR *for the Respondent.*

ORDER

K. Narasimha Chary, Judicial Member - Aggrieved by the order dated 19-12-2016 of the Commissioner of Income-tax (Appeals)-2, Noida (for short "CIT(A))"} in Appeal No.15/CIT(A)-2/2015-16, assessee preferred this appeal.

2. Briefly stated facts are that the assessee, M/s Samsung Heavy Industries Co. Ltd a company incorporated in South Korea and a tax resident of South Korea, is engaged, inter alia, in the business of heavy engineering and had been awarded the Vasai East Development Project ("VED Project") by M/s Oil and Natural Gas Corporation Ltd. INDIA ("ONGC") for the purpose of surveys, design, engineering, procurement, fabrication, anti-corrosion and weight coating, load out, tie down/sea fastening, tow-out/sail out, transportation, installation, modifications at existing facilities and hook-up, testing, pre-commissioning, start up and commissioning of the entire facilities. Under the contract entered by it with ONGC for the aforesaid activities, the assessee had to perform certain activities within India and outside India. According to the assessee activities relating to design and engineering are performed in Malaysia, fabrication took place in Korea and Malaysia, transportation took place from Malaysia to India, the jackets arrived at the offshore site in India where the installation and commission took place at Mumbai offshore. At the instance of the ONGC, the assessee opened a Project office in Mumbai by intimating the RBI, for the purpose of coordination and communication between the parties to the contract.

3. For AY 2008-09, the appellant had filed its return of income declaring loss of Rs.89,73,23,135/- which relates to the onshore activities i.e. installation and commissioning. However, learned AO by his order dated October 18, 2011 passed u/s 143(3)/144C of the Income-tax Act, 1961 ("the Act") assessed the total income of the appellant at Rs.1,76,02,16,110/- as against returned loss of Rs.89,73,23,135/- holding that there is a fixed place PE in India under Article 5(1)/ 5(2) of the treaty, attribution of revenue from activities carried on outside India to the alleged PE of the appellant in India, brushing aside the contention of the assessee that the alleged PE of the appellant had no role to play in design, fabrication, etc. of the platforms which was carried on outside India, rejecting the accounts of the appellant in respect of the operations carried on inside and outside India and audited accounts of the appellant in respect of inside Indian operations without pointing out any deficiency in the said accounts and attributing an adhoc 25% of the gross revenues, received by the assessee under the VED project during the relevant previous year, to the alleged PE of the appellant in India.

4. Aggrieved by the order of the learned AO, assessee preferred an appeal before the Income Tax Appellate Tribunal, Delhi in ITA no. 5103/Del/2011 and by order dated 27/09/2013, following its order for the Asstt. Year 2007-08, a coordinate bench of the Tribunal held that the appellant had a PE in India, but in respect of the taxability of Outside India revenues in India, the matter was remanded to the file of the Ld. AO.

5. Pursuant to the directions of the ITAT, with respect to computation of income from design & engineering, fabrication and supply of platform, which activities were performed outside India, Ld. AO held that the same is chargeable to tax in India on the basis of the findings of the ITAT in its order for AY 2007-08. In appeal, Id. Commissioner of Income Tax (Appeals) confirmed the findings of the Ld. AO. Hence this appeal by the assessee.

6. Ld. AR submitted that the entire dispute in the appeal revolves around the issue as to whether the

consideration received by the assessee, a foreign company, against an "offshore supplies" made by it from outside India is taxable in India, and if so, how much of the income can be attributed to the Permanent Establishment from such business of supplies?

7. It is the argument of the Ld. AR that the facts of the current year undisputedly are identical with the fact of the previous year, inasmuch as the Revenue argued before the Tribunal in the original proceedings for the AY 2008-09 that the decision rendered by the ITAT for Asstt. Year 2007-08 be followed as the facts for both the years are same. He submits that the Hon'ble High Court had allowed the appeal for the Asstt. Year 2007-08 holding that in order to bring offshore supplies to tax in India, apart from the PE, the evidences or material need to be placed on record to demonstrate that the PE played any role in the offshore supplies so that it fits into the governing law i.e. 'through which' offshore supplies business is wholly or partly carried on. However, the order of the ITAT for Asstt. Year 2007-08 which formed the basis of the decision rendered by this tribunal in Asstt. Year 2008-09, has been reversed by the Hon'ble High Court of Uttarakhand, while observing that that there is not even an iota of evidence to substantiate the claim of the Revenue to support attribution of gross revenues earned by the foreign enterprises, including outside India revenues to the project office, and imputing a profit margin of 25% thereon. Basing on these facts, Ld. AR prayed to allow the appeal as the same is covered by the decision of the Hon'ble High Court. This appeal also , therefore, needs to be treated similarly i.e., there is no evidence that the offshore supplies had been made by the appellant from outside through its PE which had no role to play in respect of offshore supplies made by it.

8. Further, when the Tribunal remanded the matter to the file of the assessing officer to ascertain the activities carried out by the Project Office of the appellant in India and bring material on record to demonstrate the role of the Project office in offshore supply of platforms, but the Ld. AO, despite the observations of the Hon'ble High Court and directions of the ITAT for the Asstt. Year 2008-09 did not bring on record any material whatsoever, to establish that the Project office at Mumbai had any role to play in respect of offshore activities i.e. supply of fabricated platforms that had been procured, engineered and fabricated outside India and had also been supplied from outside India.

9. In support of the contention of the assessee that the burden to establish that the assessee was carrying out offshore supply of platforms or any part thereof, through its PE in India is on the revenue, Ld. AR placed reliance on the decisions in *National Petroleum Construction Co*. v. *DIT (International Taxation)* [2016] 66 taxmann.com 16/238 Taxman 40/383 ITR 648 of the Hon'ble Delhi High Court and *Carborandum Co*. v. *CIT* [1977] 108 ITR 335 of the Hon'ble Supreme Court, and inasmuch as the Revenue has failed to discharge its aforesaid onus in this case, the impugned addition cannot be sustained.

10. Ld. AR submitted that an FAR analysis corroborated by material or evidence is a sine qua non for attribution and to fasten tax liability and the Ld. AO has proceeded merely on assumptions and surmises while attributing 60% of the revenue to the PE of the appellant.

11. He submitted that Article 7(2) of the India- Korea DTAA clearly provides that profits attributable to the Permanent Establishment are the profits that the permanent establishment might be expected to make if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed through the permanent establishment and through other parts of the enterprise.

12. He submitted that though the assessee placed enough evidence on record to demonstrate that the Project office i.e., the alleged PE of the assessee, was not involved in any core business activity in India, whatsoever. The Assessing officer has proceeded on conjectures, presumptions and surmises and held that the Indian PO represents the assessee in India and all functions carried out and risks assumed by the assessee are actually represented through its PO only.

13. There were only two employees, working for the Project office and they were neither technically capable nor equipped to carry out the work pertaining to offshore supply of platforms. Their role was limited to acting as a communication channel between the appellant and ONGC, an activity which will qualify as preparatory or auxiliary as per Article 5(4) of the India-Korea DTAA.

14. Placing reliance on the decision of the Hon'ble Uttarakhand High Court in the case of *CIT* v. *BKI/HAM* [2011] 15 taxmann.com 102/203 Taxman 58/[2012] 347 ITR 570 he argued that Article 7(1) of the India-Korea DTAA says that the profits earned through the Permanent establishment can only be brought to tax in India, and the income of the assessee cannot be taxed unless it is shown that income generating activities were carried out through the Permanent Establishment, because mere existence of a PE is not enough to fasten tax liability.

15. Since the appellant is a tax resident of Korea and as such the income earned by virtue of offshore supply of platforms is to be taxed only in Korea and not in India. In view of the decision of the Hon'ble Supreme Court in the case of *DIT (International Taxation)* v. *Morgan Stanley & Co*. [2007] 162 Taxman 165/292 ITR 416 factual and functional analysis of the activities undertaken by the project office, which is a sine-qua-non for determining a PE and attribution thereof.

16. In light of the above submissions, assessee prayed to allow the appeal of the assessee and to hold that no income from offshore supplies could be attributed to its alleged PE.

17. Record reveals that in ITA no. 5103/Del/2011 for Asstt. Year 2008-09, by order dated 27/09/2012 this Tribunal followed its order for the Asstt. Year 2007-08 and held that the assessee had a PE in India, but in respect of the taxability of outside India revenues in India, the matter was remanded to the file of the Ld. AO, with the following observations:

> "5.2. ……Tribunal vide its order dated 30th August, 2011 in ITA No. 5227/Del/2010 upheld the contention of department that assessee had PE in India. While upholding this contention, the Tribunal observed that AO's finding regarding attribution of 25% outside India revenue to the PE of the assessee in India needs proper verification as there was lack of material available on record to ascertain as' to what extent the activities of business were carried on bu the assessee through its Mumbai project office and this fact had to be determined before deciding the percentage of attribution o f the outside India activity of the assessee to its PE in India.
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> ** ** **
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> 6. Taking into consideration the entire conspectus of the case, as agreed by both the parties, we restore the matter to the file of AO as per the directions given in pars 78 of Tribunal's order for A.Y. 2007-08 (supra)."

18. However, against the findings of the ITAT in Asstt. Year 2007-08, assessee preferred an appeal before the Hon'ble High Court of Uttarakhand, and the Hon'ble High Court reversed the order of the ITAT for Asstt. Year 2007-08, with the following observations:

> "8**.** In the instant case, appellant held out that a part of the money received by it was attributable to within India activities and the remaining on account of out of India activities. Appellant was not generating any revenue by dealing with either its Indian tax identity, or its Korean tax identity. It was generating revenue by dealing with O.N.G.C. under the said contract. It confessed that a part of such revenue was earned by it for having had carried out within India activities. It asserted and continues to assert that the remaining revenue was generated by carrying out of India activities. There is no finding anywhere that the revenue earned and said to have been on account of out of India activity was earned, in fact, on account of within India activity.
>
> 9. Being a resident of Korea, appellant is governed by the Income-tax Laws applicable to the class

of assessees as that of the appellant as prevalent in Korea. Therefore, it has a tax identity in Korea. In addition thereto, appellant has submitted to the jurisdiction of Indian Taxing Authorities by furnishing return of income and, thereby, acknowledged that it has also a tax identity in India. The question is, this identity is covered by which provision of the Agreement. In terms of paragraph 1 of Article 7, appellant will acquire its tax identity in India only when it carries on business in India through a permanent establishment situate in India. By submitting the return, appellant has held out that it is carrying on business in India through a permanent establishment situated in India. In the circumstances, the contention of the appellant, whether the Project Office of the appellant opened at Mumbai can be, or cannot be said to be a permanent establishment within the meaning of the said Agreement is of no consequence. In terms of the said Agreement, as it appears to us, if an enterprise does not have a tax identity in India in the form of a permanent establishment, it has no obligation to either submit any tax return with, or pay any tax to India. The question still remains, whether it was right on the part of the Taxing Authority to assess income-tax liability of the appellant as was assessed in the instant case. In other words, can it be said that the Agreement permitted the Indian Taxing Authority to arbitrarily fix a part of the revenue to the permanent establishment of the appellant in India? As aforesaid, appellant held out that a part of the revenue was received by it for doing certain work in India. It did not contend that even those works were done by or through its Project Office at Mumbai. On the other hand, there is not even a finding that 25 per cent of the gross revenue of the appellant was attributable to the business carried out by the Project Office of the appellant. One has to read Article 5 of the Agreement in order to understand what a permanent establishment is, in terms whereof "permanent establishment" means a fixed place of business through which business of an enterprise is wholly or partly carried on. In the instant case, according to the revenue, the Project Office of the appellant in Mumbai is the "permanent establishment" of the appellant in India through which it carried on business during the relevant assessment year and 25 per cent of the gross receipt is attributable to the said business. Neither the Assessing Officer, nor the Tribunal has made any effort to bring on record any evidence to justify the same.

10. That being the situation, we allow the appeal, set aside the judgment and order under appeal as well as the assessment order in so far as the same relates to imposition of tax liability on the 25 per cent of the gross receipt upon the appellant in the circumstances mentioned above, and observe that the questions of law formulated by us, while admitting the appeal, have not, in fact, arisen on the facts and circumstances of the case, but the real question was, whether the tax liability could be fastened without establishing that the same is attributable to the tax identity or permanent establishment of the enterprise situate in India and the same, we think, is answered in the negative and in favour of the appellant."

19. It is, therefore, clear that the Hon'ble High Court held that in the absence of any material that the offshore supplies had been made by the appellant through its project office, the revenue had erred in bringing to tax by attributing 25% of gross revenues of supplies as the profit, and the onus was on the revenue to establish that the business of offshore supplies were carried by the appellant through its PE in India. It is, therefore, clear that in view of the decision of the High Court if there existed no evidence of involvement of PE in the business of offshore supply, no liability to tax could be fastened on the appellant.

20. The submission of the ld AR that, vide pages 1-35 of Paper book, the assessee had placed on record its annual accounts, in support of the contention that the office at Mumbai had absolutely no role to play in respect of offshore supplies made and as such no income could be attributed to such supplies being the profit which has been carried through the business from such alleged PE, goes uncontroverted. As things remain, absolutely, there is no difference in facts involved in Asstt. Years 2007-08 and 2008-09. No material is brought on record to establish that the Project office at Mumbai had any role to play in

respect of offshore activities i.e. supply of fabricated platforms that had been procured engineered and fabricated outside India and had also been supplied from outside India.

21. In the case of *National Petroleum Construction Co*. (*supra*) Hon'ble Delhi High Court held that,

> "In absence of any material evidence to controvert the assessee's claim that its project office was only used as a communication channel, the same has to be accepted. Thus, the next aspect to be considered is whether acting as a communication channel would fall within the exception of clause (e) of paragraph 3 of article 5 of the DTAA."

22. Further in the case of *Carborandum Co*. (*supra*) Hon'ble Supreme Court held in the context of Section 9(1) which is pari materia to Article 7(1) that:

> "It has rightly been pointed out by the Bombay High Court in *Commissioner of Income-tax* v. *Tata Chemicals Ltd*. [1974] 94 ITR 85 (Bom) with reference to the similar or almost identical provisions in section 9(1) of the Income-tax Act, 1961, that in order to rope in the income of a non-resident under the deeming provision it must be shown by the department that some of the operations were carried out in India in respect of which the income is sought to be assessed."

23. In view of the fact that the Ld. AO did not bring on record any evidence or material in support of the contention that the office at Mumbai had any role to play in respect of offshore supplies made and, as such, such income could be attributed to such supplies being the profit which has been carried through the business from such alleged PE, and on the other hand the assessee claims to have placed on record its annual accounts, in support of the contention that the office at Mumbai had absolutely no role to play in respect of offshore supplies made and as such no income could be attributed to such supplies being the profit which has been carried through the business from such alleged PE but not properly considered by the authorities below and in view of the observations of the Hon'ble jurisdictional High Court in assessee's own case for the assessment year 2007-08 and also the decision of the Hon'ble apex court in *Carborandum Co.'s* case (*supra*) and the Hon'ble Delhi High Court in *National Petroleum Construction Co.'s* case (*supra*) we are of the considered opinion that no income from offshore supplies could be attributed to its alleged PE in Mumbai. We, accordingly, allow the grounds of appeal.

24. In the result appeal of the assessee is allowed.

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*In favour of assessee.