आयकर अपीलीय अधिकरण, 'एल' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL,MUMBAI "L" BENCH
सर्वश्री राजेन्द्र, लेखा सदस्य एवं राम लाल नेगी, न्यायिक सदस्य
Before S/Sh. Rajendra,Accountant Member & Ram Lal Negi,Judicial Member
आयकर अपील सं/.ITA No.2353/Mum/2006,निर्धारण वर्ष/Assessment Year-2002-03

M/s.Rheinbraun Engineering Und Wasser GmbH(Now changed to RE GmbH) C/o. A.F. Ferguson & Co. Allahabad Bank Bldg. Mumbai Samachar Marg, Fort, Mumbai-400 001. **PAN:AAACR 5788 D**	Vs.	Dy. Director of Income tax-(Intl. Taxation)-2(1) Scindia House, Ballard Pier N.M. Marg,Mumbai-400 001.
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)

आयकर अपील सं/.ITA No.2138/Mum/2006,निर्धारण वर्ष/Assessment Year-2002-03

Dy. Director of Income tax-(Intl. Taxation)-2(1) Scindia House, Ballard Pier, N.M. Marg,Mumbai-400 001.	Vs.	M/s.Rheinbraun Engineering Und Wasser Gmbh (Now changed to RE Gmbh) Mumbai-400 001.
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : Shri Percy Pardiwala/Smt. Vasanti Patel
राजस्व की ओर से/ **Revenue by : Shri Pankaj Kumar-Sr.AR**
सुनवाई की तारीख/ Date of Hearing : 02.02.2016
घोषणा की तारीख / Date of Pronouncement **: 04.03.2016**
आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश
Order u/s.254(1)of the Income-tax Act,1961(Act)

खंडपीठ के अनुसार PER BENCH:

Challenging the order dated 16.01.2006 of the CIT(A)-V,Mumbai the Assessee and the Assessing Officer (AO) have filed the above cross appeals for the year under appeal.During the course of hearing,the Authorised Representative(AR)did not press ground no.2dealing with interest levied u/s.234D of the Act as well as the Additional ground. Hence,both the grounds stand dismissed,as not pressed.

2.Assessee-company is registered in Germany and its core business activities include consulting services in the fields of exploration,mining and extraction.It filed its return of income on 10.01. 2003,declaring income of Rs.1,13,92,198/-.The Assessing Officer(AO)completed the assessment on 23.02.2005,u/s.143(3)of the Act,accepting the income returned by the assessee.However,he held that the assessee should have paid tax at higher rate.

3.Effective ground is about the rate of tax to be applied for the income received by the assessee.During the assessment proceedings,the AO found that the assessee had entered into agreements with Gujarat Industries Power Company Ltd.(GIPCL),Neveyli Lignite Corporation

Ltd.(NLC)and Mcnally Bharat Engg.Co.Ltd.(MNBECL),that it received Rs.1.13 Crores from the Indian parties under the above agreements,that it had rendered various services to the Indian Companies,that the project undertaken by the Indian parties lasted more than six months.He asked the assessee to explain as to why it should not be held that it had a Permanent Establishment(PE)in India as per Article 5(2)(i)of the Indo-German DTAA.Vide its letters dated 11.10.2004 and 15.02.2005,the assessee filed its explanation.After considering the same and after referring to the terms of the all the three agreements,the AO held that the assessee had rendered various services including supervisory activities to GIPCL,that the services were in the nature of installation or assembly projects,that the assessee had rendered supervisory services to NLC also,that the services rendered were connected with mining projects,that as per the agreement entered into with MNBECL the assessee had to render services for the finalisation of the design problem at hand,evaluation of rectification procedure. He further held that the assessee had a PE in India as per Article 5(2)(i)of the DTAA between India and Germany,that it had offered the income received from Indian parties under the head Fees for Technical Services(FTS)as per the provisions of Article 12 of the Tax-treaty,that as per Article 12(5)the receipts in question were governed by Article 7 of the Treaty,that provisions of Article 7(3)provided that such receipts were to be taxed as per the various provisions of domestic law, that section 44D of the Act dealt with such receipts,that as per section 115A the fees for technical services received by the assessee from GIPCL was to be taxed @ 30% and the fees received from the remaining two parties were to be taxes @20%.

4.Aggrieved by the order of the AO,the assessee preferred an appeal before the First Appellate Authority (FAA).Before him,it was argued that the AO had wrongly applied the provisions of section 5(2) (i)to come to the conclusion that the assessee was having a PE in India,that for attracting the provisions of Article 5(2)(i)of the DTAA the supervisory services should be rendered for a period exceeding six months,that only0ne employee of the assessee-company had visited India during the year under consideration,that he stayed in India for 64 days only,that even if the period from 07.09. 2001 to 28.02.2002 was considered it was less than six months, that the assessee had not carried out a project for the tenure of the contract,that duration of supervisory activities in respect of individual project should be considered independently,that the AO was not justified in applying the provisions of section 115A of the Act.
After considering the submissions of the assessee and the assessment order,the FAA referred to the Article 5 of the DTAA and held that three Indian Companies were engaged in the business of mining, that as per the agreement with GIPCL the assessee was solely responsible for the successful completion of entire work,that the consultancy services were not confined to the visit of one of the employees of the assessee to India,that services were for a period of five years,that as per the agreement with NLC the assessee was to provide consultancy services of mine IA for checking of structural design,that the agreement with MNBECL was for finalising design problems evaluation of the rectification procedure,that the assessee had rendered supervisory services to the three Indian companies throughout the duration of the contract.Finally,the FAA upheld the order of the AO.

5.Before us,the Authorised Representative(AR) stated that supervisory activities carried out by the assessee lasted for less than six months'period,that in two of the contracts no supervisory charges were booked,that only one employee had visited India,that he stayed in India for 64 days

only,that activities carried out by the assessee were to be taxed @ 10%,that the services provided by the assessee were governed by Article 12 of the DTAA,that designing was covered by Article 12(4)of the DTAA,that the assessee had no PE in India,that even if it had PE the Protocol will would prevail and the receipts were wrongly taxed @ 20/30%.The Departmental Representative(DR)supported the order of the FAA and contended that physical presence of the employees of the assessee was not required for supervisory activities,that Article 7 was a special provision and it would prevail over the general provision i.e.Article 12,that the AO and the FAA had rightly taxed the income of the assessee @20.30%. He relied upon the case of Birla Corporation Ltd.(153 ITD 679).

6.We have heard the rival submissions and perused the material before us.We find that the assessee had entered in to agreements with GIPCL and NLC on 14.3.1997 and 29.7.2000 respectively,that it had received Rs.1.13 Crores from the above mentioned three parties for providing technical consultancy services, that it had paid tax in respect of the said fees @ 10% referring to the Article 12(2)of the India- German DTAA,that the AO and the FAA held that the assessee had PE in India,that they were of the opinion that tax liability had to computed as per the provisions of section 115A of the Act,that they held that the assessee should have paid tax @20/30%.

7.In our opinion,in the case under consideration the basic issue to be decided is as to whether the assessee had PE in India or not.If it had rendered services in India for more than 6 months continuously,it has to be held that it had PE in India.Therefore, it would be useful to find out as what services were rendered by the assessee in India.We find that the assessee had issued 10 invoices(page no.49-58 of the Paper book)to three Indian parties,that only one invoice was issued to GIPCL,two to NLC and balance seven to MNBECL.A close scrutiny of the invoices prove that the assessee had rendered services that were of consultancy nature and therefore same are governed by the provisions of Article 12 of the DTAA.In our opinion,for computing continuous stay for PE purpose actual stay of employees has to be considered and not the entire contract period.We would like to refer to the matter of J Ray Mcderrmott Eastern Hemisphere Ltd.(54 SOT363).In that matter it was held that period of stay in India for a non resident entity has to be counted from the actual date of commencement and completion of the contract,that the date on which invoices were raised were not decisive factors to decide the existence of PE. We find that the assessee had deputed one of its employee Dr.Dittrich to India and he had not stayed in India for more than 180 days.The assessee had informed the AO that Dr.Dittrich had visited India in pursuance of the agreements entered into with NLC and MNBCEL(pg.46 of the PB).It is also a fact the in two of the contracts no supervisory charges were booked by the assessee for the year under appeal,that the assessee had offered its income under the head FTS in its return.Article 12(4)deals with FTS and talks of services of managerial,technical or consultancy nature.Considering the above,we are of the opinion that payments received by the assessee should be assessed as per the provisions of Article 12 and not as per Article 7 of the Indo-German DTAA.

There is one more aspect to the PE.Protocol to the DTAA has provided as under:

"With reference to Article 7

a. .....

b. Income derived from a resident of a Contracting State from planning, project construction or research activities as well as income from technical services exercised in that State in connection with a permanent establishment situated in the other Contracting State, shall not be attributed to that permanent establishment. ."

So,even if it is assumed that the assessee had PE in India for the year under consideration,it will not be governed by Article 7 of the tax treaty.We have gone through the order of Birla Corporation Ltd. (supra).We find that the issue in that matter was about installation and commissioning of projects and it did not deal with the issue before us.So,in our opinion the decision is of no help to adjudicate the issue.In these circumstances,reversing the order of the FAA,we hold that the payments received by the assessee from GIPCL,NLC and MNBECL have to be taxed @10% and that the provisions of section 115A would not be applicable.Effective ground of appeal is decided in favour of the assessee.

ITA No.2138/Mum/2006(Revenue's Appeal):

8.The only effective ground raised by the Assessing Officer is about deletion of interest levied u/s. 234B of the Act. While, completing the assessment, the AO had levied interest u/s.234B of the Act, that was challenged before the FAA. After considering the submissions of the assessee, he held that the issue stood decided in favour of the assessee by the decision of the Hon'ble Uttranchal High Court delivered in the case of Sedco Forex International Drilling Co. Ltd.(264 ITR 320) and Asia Satellite telecommunications Ltd. (85 ITD 478).

9.Before us, the Representatives of both the sides agreed that the Hon'ble Bombay High Court in the case of NGC Network Asia LLC (313 ITR 187) has held that where the payment is subject to tax deduction the assessee is not liable to pay advance tax. Respectfully following the above mentioned judgments of the Hon'ble High Courts we decide the effective Ground of appeal against the Assessing Officer.

As a result, appeal filed by the assessee stands partly allowed and appeal filed by the AO is dismissed.
फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है और निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 04th March, 2016.
आदेश की घोषणा खुले न्यायालय में दिनांक 04 मार्च, 2016 को की गई।

Sd/-	**Sd/-**
(राम लाल नेगी **/Ram Lal Negi)**	(राजेन्द्र **/ RAJENDRA)**
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई/Mumbai,दिनांक/Date: 04.03. 2016
व.नि.स.*Jv.Sr.PS.*
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :
1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**, L** खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai.**