IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH"D", NEW DELHI

BEFORE SHRI. G. D. AGRAWAL, PRESIDENT

AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

I.T.A. No.1362/DEL/2016
Assessment Year:2012-13

KSS Engineering Ltd. C/o SRBC & Associates, CA's, 14th Floor, The Ruby, 29, Senapati Bapat Marg, Dadar (West) Mumbai	vs.	DCIT (International Taxation) Circle 2(1)(2) New Delhi
TAN/PAN:AAECK2051J		
(Applicant)		(Respondent)

I.T.A. No.699/DEL/2016
Assessment Year:2012-13

DCIT (International Taxation) Circle 2(1)(2) New Delhi	vs.	KSS Engineering Ltd. C/o SRBC & Associates, CA's, 14th Floor, The Ruby, 29, Senapati Bapat Marg, Dadar(West) Mumbai
		TAN/PAN:AAECK2051J
(Applicant)		(Respondent)

I.T.A. No.462/DEL/2017
Assessment Year:2013-14

KSS Engineering Ltd. C/o SRBC & Associates, CA's, 14th Floor, The Ruby, 29, Senapati Bapat Marg, Dadar (West) Mumbai	vs.	DCIT (International Taxation) Circle 2(1)(2) New Delhi
TAN/PAN:AAECK2051J		
(Applicant)		(Respondent)

Assessee by:	Shri Nageshwar Rao & Shri Parth, Advocates		
Department by:	Shri Gaurav Dudeja, D.R.		
Date of hearing:	03	08	2017
Date of pronouncement:	14	08	2017

O R D E R

PER BENCH:

The aforesaid cross-appeals for assessment year 2012-13 have been filed by the assessee as well as by the revenue against final assessment order dated 12/12/2015, passed by the Assessing Officer u/s. 144C(13) read with section 143(3) of the Income Tax Act, 1961, in pursuance of the direction given by the Dispute Resolution Panel (DRP) vide order dated 24/11/2015 for assessment year 2012-13; and for the assessment year 2013-14, the appeal has been preferred by the assessee against the final assessment order dated 18/11/2016, passed by the Assessing Officer u/s. 144C(13) read with section 143(3) of the Act in pursuance of the direction given by the DRP vide order dated 10/10/2016.

2. Since the issues involved in both the years are common, arising out of identical set of facts, therefore, the same were heard together and are being disposed of by way of this consolidated order.

3. As a lead case, we are taking up the appeal of the assessee in ITA No.1362/DEL/2016 for assessment year 2012-13, wherein the assessee has raised the following grounds of appeal:-

"On the facts and circumstances of the case and in law, the Assessing Officer/ Hon'ble Dispute Resolution Panel ('DRP') has:

1. erred in assessing total income at INR 16,64,78,896 as against the returned income of Nil;

2. erred in holding that Appellant constituted a PE in India under India-Malaysia Double Taxation Avoidance Agreement ('DTAA');

3. erred in stating that a barge constitutes a fixed place PE under Article 5(1) of the India - Malaysia DT AA.

4. erred in misinterpreting provisions of DTAA to hold existence of a PE by applying the provisions of Article 5(1) and concluding that the Appellant constituted PE in India without applying the specific provisions of Article 5(2)0) of the prevalent Tax Treaty;

5. failed to consider details and documents furnished (including additional evidence regarding entry and exit! departure of Barge in and from India), wrongly alleged to the contrary and erred in unjustly drawing adverse inference.

6. erred in stating that the subcontracts for carrying on installation activities would not be regarded as a 'project' as referred to in Article 5(2)0) of the DTAA

7. erred in holding that the subcontracts awarded to the Appellant are indivisible from the main contracts.

8. erred in stating that the subcontracts awarded to the Appellant are a colorable device with an intention to avoid tax incidence.

9. erred in treating presence of a holding company of the Applicant as constituting a PE of the Appellant.

10. erred in reaching incorrect conclusion by reference to provisions of DTAA which were not in existence during period under consideration.

11 erred in holding that Applicant had a PE under Article 5(2)(i) of the DTAA corresponding to Article 5(2)(f) of the applicable DTAA

12. erred in concluding that the Appellant has a PE under Article 5(3)(b) of the DT AA without appreciating the fact that the said DTAA was not applicable in the present case.

13. erred in routinely referring to conclusions reached in earlier years, provisions applicable to subsequent periods, decisions reached in the context of different fact pattern, referring to and relying upon inapplicable provisions of DTAA and Act and / or misinterpreting provisions of DTAA and Act to reach incorrect and unlawful conclusions.

14. erred in not granting credit for TDS claimed by the Appellant in its return of income and during the course of the assessment proceedings based on the original TDS certificates and Form 26AS.

15. erred in initiating penalty proceedings under section 271 (1) (c) of the Act without appreciating that the Appellant has neither concealed nor furnished any inaccurate particulars of income."

4. The brief facts as culled out from the impugned order are that the assessee is a non-resident company incorporated in Malaysia and is a tax resident of Malaysia. The assessee-company is mainly engaged in the business of providing integrated manned & unmanned subsea services provider to the Oil and Gas Industry worldwide, with in-house project management and installation expertise. It had earned revenue of

Rs.166,47,88,964/- from contract with ONGC in India for installation of certain specific items like pipelines, subsea pipelines, crossing, spools, subsea cable, etc. During the year, the assessee was awarded following five contracts:-

S. No.	Name of the contracting Party	Contract Reference No.
1	Afcons Gunanusa JV	1985/ICP-R/OPLC/AGJV/KSS/01
2	Swiber Offshore Construction Pte Ltd - MHNRD	SOC/KSS/08091 0-001
3	Consortium of Valentine Maritime Ltd and Valentine Maritime Mauritius Limited	Subcon/LMS/pkb/O95/10
4	Consortium of Valentine Maritime Ltd and Valentine Maritime Mauritius Limited	C0907/PR/11/537-AC
5	Consortium of Valentine Maritime Ltd and Valentine Maritime Mauritius Limited	C 1 004/PR/11/273/02-AC

5. The Assessing Officer, first of all required the assessee as to why receipts from ONGC contracts should not be treated as Fees for technical services (FTS) under the Income Tax Act. In response, the assessee gave a very detailed submission contending that its activity being in the nature of construction; assembly; mining, etc. and hence it falls outside the purview of FTS. Assessee's detailed submissions in this regard have been incorporated by the Assessing Officer from pages 2 to 8 of the assessment order. The second issue raised by the Assessing Officer was whether there is a Permanent Establishment (PE) of the assessee in India in terms of India-Malaysia Double Taxation Avoidance Agreement (DTAA). The assessee in response, after explaining the nature of all the contracts, submitted that they are carrying on subsea installation activities and it did not had any office or project office in India for executing the above mentioned

contracts. Therefore, it cannot be said that the assessee had any PE in India in terms of Article 5(1) and 5(2) of the DTAA. So far as the applicability of Article 5(2) (j), which specifically envisages that any installation or construction project is carried out in India for a period exceeding 9 months, then it shall constitute a PE, the assessee submitted that threshold period of 9 months applies only to individual installation project and activity and every contract has to be considered as a separate project. In this regard, detailed submissions were made and judicial decisions were relied upon, which have been incorporated by the Assessing Officer from pages 11 to 13 of the assessment order. However, the Assessing Officer held that activities of the assessee does constitute a PE in India in terms of Article 5(1) of the India-Malaysia tax treaty and, therefore, the income of the assessee has to be computed u/s. 44AB of the Act by virtue of applicability of Article 7. Accordingly, he computed the income by taking 10% of the gross receipts u/s. 44AB of the Act.

6. The Ld. DRP, after analyzing the scope of work done under various contracts as well as Article 5(1) of the India-Malaysia tax treaty, as was discussed in orders of the earlier years of the DRP, came to the conclusion that the assessee had a PE in India, because it had a fixed place of business in the form of barge through which it carried out its activities and, therefore, there is a PE in terms of para 1 of Article 5 and under Para 1 there is no requirement of time period beyond which PE will come into existence. Apart from that, the DRP also held that the assessee had a PE in terms of Article 5(2)(j) and also under Article 5(3)(a) & 5(3)(b).

7. Before us, the ld. counsel for the assessee, Shri Nageshwar Rao submitted that the Assessing Officer and the DRP have mainly referred and relied upon the order of the preceding assessment years without even taking into consideration that this year all the relevant details, as was required, had been filed which have not been considered at all. He pointed out that the reference of various clauses of Article 5 of DTAA made by the DRP, it can be seen that they have drawn conclusions based on reference to amended DTAA which was applicable to a different period, i.e., which came into effect from 1/4/2013 and not applicable for the years under consideration. While considering the applicability of Article 5(1), they have completely ignored the specific Article 5(2)(j) and concluded that barge is an independent fixed place of business. The DRP and Assessing Officer while rejecting the assessee's contention have incorrectly presumed that evidence to show entry and exit of barge into Indian territorial waters and project completion certificate was not filed. In fact, this has been duly filed vide letter dated 28/9/2015 before the Assessing Officer and it was also filed before the DRP as well as certificate from Mumbai Customs Authorities for barge's entry and exit. Apart from that, the Departmental authorities have incorrectly considered the date of contract as starting date of activities and have also further erred in clubbing the time spent on different contract, which is contrary to various decisions of the Courts. He also pointed out that against the DRP order, a rectification application under Rule 13 was also filed highlighting the mistake that *firstly,* the decision of DRP was based on DTAA, which came into force from subsequent date; and *secondly*, there is incorrect presumption that evidence to show the project completion and entry and exit of barge have not

been filed. The DRP has rejected the said petition on the ground that it is beyond the scope of Rule 13. He also brought to our notice that in assessment year 2011-12, the Tribunal has restored back the entire issue to the file of the Assessing Officer for *de-novo* adjudication after accepting the additional evidence with regard to the details of project completion and entry and exit of barge. In that year, these evidences were filed for the first time before the Tribunal, however, in the impugned assessment year, these details have been filed not only before the Assessing Officer but also before the DRP. Thus, the order of the DRP, without considering this vital piece of evidence, vitiates the entire order and, therefore, the final assessment order passed in pursuance of such DRP direction, cannot be sustained.

8. On the other hand, the Ld. D.R. submitted that like in earlier years, the matter should be restored back to the file of the Assessing Officer if the evidences, which have been filed, have not been considered by the Assessing Officer or the DRP.

9. We have heard the rival submissions and also perused the relevant finding given in the impugned orders and material referred to before us. The core issue in this appeal is, whether the assessee has a PE in India in terms of Article 5(1) or Article 5(2)(j) of India-Malaysia tax treaty. The assessee's case before us is that, whether the assessee has PE in India or not has to be seen with reference to the specific provision of 'Installation PE' clause under Article 5(2)(j) of the India-Malaysia DTAA. The assessee had carried out installation activities under 5 contracts entered into in assessment year 2012-13 with ONGC and its

main contention has been that threshold period of 9 months, as prescribed under Article 5(2)(j) of India-Malaysia tax treaty has not exceeded the period of each contracts. The commencement and completion of the project during the relevant assessment year has been stated to be as under:-

Sl. No.	Contracting Party	Contract Reference No.	Date of Commencement of the project	Date of Completion of the project	No. of days
1	Afcons - Gunanusa JV	1985/1CP-R/OPLC/AGJV/IKSS/01	01/04/11	15/05/11	45
2	Swiber Offshore Construction Pte Ud-MHNRD	SOC/KSS/080910-001	01104/11	05/06/11	66
3	Consortium of VML and VMML	Subcon/LMS/pKb/095/10	09/02111	26/05/11	107
4	Consortium of VML and VMML	CO907/PR/11/537-AC	16/10/11	25/11/11	41
5	Consortium of VML and VMML	C1004/PR/11/273/02-AC	26/01/12	20/05/12	116

10. To prove that duration of each contract is less than 9 months, the assessee had filed evidences of entry and exit of barge/vessels into Indian territorial water and project completion certificate. These details, which have been filed by the assessee, have not been considered either by the Assessing Officer or by the DRP and the DRP had decided this issue on the premise that the said details have not been filed. Apart from that, another main contention of the assessee has been that it did not had any office or project office in India for executing the above mentioned contracts and, therefore, they cannot be any fixed place PE in India in terms of Article 5(1) of India-Malaysia tax treaty. The only Article, which can be said to be relevant is, Article 5(2)(j) of India-Malaysia tax treaty which provides that PE shall include –

"a building site or construction, installation or assembly project which exists for more than nine months". Thus, it has been contented that whether the assessee constitutes a PE in India has to be seen in terms of this Article only, because admittedly assessee is doing installation activities only. This major contention of the assessee that when a specific definition of PE given in Article 5(2)(j) is applicable then same needs to be examined from that angle, has not been examined at all. In fact while dealing with the issue of PE, we find that neither the DRP nor the Assessing Officer has examined the applicability of Article 5(2)(j), *albeit* DRP has made reference to the amended article which is not applicable in the years under consideration. The assessee has explained its case with specific reference to various evidences filed; specially project completion certificate and entry and departure of barge/vessels in the Indian territorial waters. This is the most crucial evidences to examine as to whether threshold period of 9 months had exceeded or not. Apart from that, there are various judicial precedence, as to whether every single project is to be examined independently or not for the purpose of determination of duration and length of period for the purpose of PE in India. All these matters have not been analysed properly by the DRP as well as by the AO, therefore, it needs to be examined afresh. Thus, we are of the opinion that like in the earlier assessment year, the issue of determination of PE should be restored back to the file of the Assessing Officer, who shall consider all these evidences and material on record and decide the matter afresh. The assessee would be at liberty to raise all the objections and produce any such material or evidence in support of its contention. The Assessing Officer shall decide the issue after giving due opportunity of hearing to the assessee.

With this direction, the entire issue of PE, as raised in the grounds of appeal before us, is restored to the file of the Assessing Officer.

11. As regard the issue of not granting credit for TDS claimed by the assessee in its return of income and during the course of the assessment proceedings based on the original TDS certificates and Form 26AS, we direct the AO to examine this claim of the assessee and grant credit for TDS as per law. Lastly, so far ground challenging the initiation of penalty proceedings u/s 271(1)(c), we hold that it is premature and hence this ground is dismissed.

12. Accordingly, the appeal in ITA No.1362/DEL/2016 is allowed for statistical purposes.

13. Now we will take up the Revenue's appeal in ITA No.699/DEL/2016, wherein the Revenue has raised the following ground:-

1. *On the facts and circumstances of the case, the Hon'ble DRP has erred in deleting interest u/s. 234B of the IT Act, 1961 is not leviable in assessee's case because payments made to it are subject to tax deduction u/s. 195 of the Act.*

14. As regards chargeability of interest u/s. 234B of the Act, we find that the DRP has relied upon the decision of the Hon'ble Delhi High Court in the case of **DIT vs. GE Packaged Power Inc, 373 ITR 65.** This decision has been further

followed by the Hon'ble High Court in Agence France vs. ADIT. Since no contrary decision has been brought by the Department before us after the said decision of the jurisdictional High Court, therefore, we do not find any reason to deviate from the order of the DRP and accordingly, we hold that the DRP has rightly deleted the levy of interest u/s. 234B. Accordingly, the appeal of the Revenue is dismissed.

15. Now we will take up the assessee's appeal in ITA No.462/DEL/2017 for assessment year 2013-14, wherein exactly similar grounds, have been raised in assessment year 2012-13, have been raised by the assessee. For the sake of ready reference, the grounds of appeal are reproduced as under:-

That the DRP has:-

1. *erred in assessing total income at INR 3,48,26,853 as against the returned income of Nil;*

2. *erred in holding that Appellant constituted a PE in India under India-Malaysia Double Taxation Avoidance Agreement ('DT AA');*

3. *erred in stating that a barge constitutes a fixed place PE under Article 5(1) of the India - Malaysia DTAA.*

4. *erred in misinterpreting provisions of DTAA to hold existence of a PE by applying the provisions of Article 5(1) and concluding that the Appellant constituted PE in India without applying the specific provisions of Article 5(2)0) of the prevalent Tax Treaty;*

5. *failed to consider details and documents furnished (ie evidence regarding project commencement and completion*

certificate) resulting in incorrect allegations and unjust adverse inference.

6. *erred in routinely referring to conclusions reached in earlier years, provisions applicable to subsequent periods, decisions reached in the context of different fact pattern, and / or misinterpreting provisions of DTAA and Act to reach incorrect and unlawful conclusions.*

7. *erred in levying interest under section 234A of the Act of INR 3,29,850;*

8. *erred in levying interest under section 234B of the Act of INR 48,37,800;*

9. *erred in initiating penalty proceedings under section 271 (1)(c) of the Act without appreciating that the Appellant has neither concealed nor furnished any inaccurate particulars of income.*

16. At the outset, it has been admitted by both the parties that so far as the issue raised in grounds No.1 to 6 are concerned, the same are identical to the grounds raised by the assessee in assessment year 2012-13 and similar facts are permeating in this year also, therefore, in view of our directions given in the aforesaid appeal, the issues raised in these grounds are remanded back to the file of the Assessing Officer to decide the same afresh after giving due opportunity to the assessee and considering the material evidences filed by the assessee. Thus, grounds No.1 to 6 are allowed for statistical purposes.

17. So far as the issue of levy of interest u/s. 234A is concerned, no argument has been placed before us, therefore, the

same is dismissed. As regards levy of interest u/s. 234B, we have already held in the appeal for assessment year 2012-13 in the Revenue's appeal that interest u/s. 234B cannot be levied in the light of the decision of the Hon'ble jurisdictional High Court (supra) and also the fact that payment made to the assessee are subject to tax deduction u/s. 195 of the Act. Accordingly, ground No.8 is allowed.

18. Ground No.9 is premature; therefore, the same is dismissed.

19. In the result, the appeal of the assessee in ITA No.1362/DEL/2016 is allowed for statistical purposes; appeal of the Revenue in ITA No.699/DEL/2016 is dismissed and appeal of the assessee in ITA No.462/DEL/2017 is partly allowed for statistical purposes.

Order pronounced in the open Court on 14.08.2017

Sd/-	Sd/-
[G.D. AGRAWAL]	**[AMIT SHUKLA]**
PRESIDENT	**JUDICIAL MEMBER**

DATED: 14, August, 2017

JJ:1008

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

Assistant Registrar