

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'L', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "L", MUMBAI

Before Shri Shamim Yahya, AM & Shri Ravish Sood, JM

ITA No.6414/Mum/2012 : Asst.Year 2009-2010

The Asst.Commissioner of Income-tax (International Taxation) 2(2) Mumbai.	बनाम/ Vs.	M/s.Valentine Maritime (Gulf) LLC. C/o.Vinod Agnani, CAs 2004-04, Montreal, B-31 Shastri Nagar, Andheri (West) Mumbai – 400 053. PAN : AABCV1070B
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by : **Shri Jasbir Chauhan (CIT-DR)**

प्रत्यर्थी की ओर से /Respondent by : **Shri Hiro Rai**

सुनवाई की तारीख / Date of Hearing : 10.04.2017	घोषणा की तारीख / Date of Pronouncement : 24.05.2017
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आदेश / ORDER

Per Shamim Yahya, AM

This appeal by the Revenue is directed against order of learned CIT(A) dated 09.07.2012 and pertains to assessment year 2009-10.

2. The grounds of appeal read as under:-

“1. On the facts and in the circumstances of the case and in law, the Id.CIT(A) has erred in deleting the addition of Rs.1,82,76,675/- made u/s 44BB.

2. On the facts and in the circumstances of the case and in law, the Id.CIT(A) has erred in directing the Assessing Officer to treat the assessee as eligible for the benefit of DTAA between India and UAE.

3. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”

3. The facts of the case in brief are that the assessee is a foreign company incorporated in Abu Dhabi, UAE, established in 1996 to cater to oil

and gas construction industry. The assessee has undertaken following projects in India during the year under consideration.

Sr. No.	Party	Nature of services	Revenues received in USD	Remarks	Taxability	Duration of period.
1.	Arcadia Shipping Ltd.	Charter Hire of Tug Boat Smit Sumatera (For ONGC Project)	4,00,500	Amount offered to tax is NIL	Since the period of contract was less than 9 months, the income has not been offered to tax under Article 7 of the DTAA	4 th March 2008 to 22 nd May, 2008.
2.	Reliance Ports & Terminals Ltd.	Precommissioning of Crude single point mooring and subsea pipelines.	3,69,67,682	Amount offered to tax is NIL	Since the period of contract was less than 9 months, the income has not been offered to tax under Article 7 of the DTAA.	16 th January, 2008 to 14 th June, 2008.
3.	Leightton Contractors (India) Pvt. Ltd.	Charter Hire of R250 and VMLI (For ONGC project)	38,39,162	Amount offered to tax is NIL.	Since the period of contract was less than 9 months, the income has not been offered to tax under Article 7 of the DTAA.	9 th November, 2008 to 11 th June, 2009.

The assessee submitted that the assessee did not have a Permanent Establishment in India and the three contracts were for a period of less than 9 months, therefore, the total receipts are not taxable under the DTAA.

4. However, not convinced with the above submission of the assessee, the Assessing Officer held as under:-

The assessee company has entered into three contracts during the year. First let us take up the contract with Leighton Contracts (India) hereinafter referred as "Leighton" or "LCI".

1. *The assessee company has entered into a contract with LCI on 16/07/2008 to provide services of personnel, provision of survey services and provision of a barge. As per the terms of the contract, all the personnel and barge are to be mobilized from Abu Dhabi, UAE and all the costs are to be incurred by the Leighton. A letter has been written by the Leighton to the assessee on 16/07/2008 itself asking it the names and CV of the personnel to be deputed to India for the work. On going through the documents filed during the course of assessment proceedings, it is also found that the first invoice raised by the assessee company was on 19/07/2008 itself. In this invoice, the assessee company has sought advance for the execution of the project.*

2. *Hence the factual documents submitted by the assessee clearly proves beyond doubt that the work on the project started on 16/07/2008 itself when the agreement was entered into between the parties and the letter was issued by Leighton and the invoice was raised by the assessee company. Hence it is clear that the work on the contract started on 16/07/08 itself. This contract as per the assessee's submission continued till 11/06/2011 hence it has in effect has continued for more than 9 months in India.*

3. *The assessee's claim is based on the actual arrival of the vessel in the territorial waters of India. Since as per the provisions of the treaty, the actual duration of the project has to be taken into account hence there is no force in the submissions made by the assessee on this point.*

4. For clarity sake, the relevant Clause 5(2)(h) of the DTAA between India and UAE are reproduced as under:-

“A building site or construction or assembly project or supervisory activities in connection therewith, where such site, project or supervisory activity continues for a period of more than nine months.”

5. On a plain reading of this Article, it is very clear that what the treaty requires is that the site or project should continue for more than 9 months. In this case, as discussed above, as the project started on the day when the contract / agreement was signed and continued till 11/6/2009, hence it has continued for more than 9 months which clearly establishes a P.E. in India hence the income of the assessee company from this project is taxable in India.

6. For calculating the duration of the project, the project duration is being taken from the date when the actual work started. However, it may also be added here that even for negotiation and other works the employees of the assessee company must have visited India in connection with this project. That duration would however also be counted for duration of the project.

7. Moreover, the employees of the assessee company were also deputed for work under the service contract. The assessee has filed the details of barge entering India but such details regarding deployment of employees has not been provided.

8. In view of the aforesaid discussion, it is held that the assessee company has a PE in India as the project continued for more than 9 months in India as far as the project with Leighton is concerned and taxed accordingly.

9. In case of the project for Reliance Ports and terminals and Arcadia Shipping, both the projects were continuing simultaneously in India. On a perusal of the past records of the assessee, it was noticed that the assessee company has been

doing these types of projects for the several number of years in India. If we see the sequence of events, the assessee company started with the project for Reliance from January 2008 which continued uptill 28/6/2008. Then the project Arcadia shipping was started in the month of March 2008 which continued till May 2008. Later on, it started Project with Leighton which started in the month of July and continued till June 2009. This clearly indicates that the assessee company has a presence in India throughout the year almost except for some days. Still, it is claiming that it does not have a PE in India.

10. The cases such as assessee company, it is not possible to execute the contracts without permanent presence of employees or other personnel to execute work to this extent in India throughout the year. But what the assessee company is doing small contracts in order to avoid a PE and to claim exemption under the DTAA. Since it has contracts throughout the year, it is held that the assessee has a PE in India for all the projects.

11. On verification of the past records also, it is noticed that the project with Arcadia Shipping is there in atleast last three assessment years and in all the assessments, the position of the assessee company is the same that it is not taxable in India as it does not have a PE. This position cannot be allowed as the assessee has contract throughout the year. Even in case of Leighton, there was a contract last year as well.

12. In view of the aforesaid discussion, it held that the assessee company has a PE in India for all the three projects and its income is held to be taxable in India. The income of the assessee company would be taxable as per the provisions of the Act.”

5. For assessee's appeal learned CIT(A) considered the issue, however, he came to the conclusion that assessee cannot be said to be having a PE in India. The learned CIT(A) held as under:-

“4.2 During appeal, it has been argued that in case of Leighton project, the contract was signed on 16.07.2008 but the project commenced from 09.11.2008 only because the barge entered India only on 09.11.2008. Copy of the agreement has been produced. As per the agreement, nature of services are towage and assistance to Regina-250 and VML – 1 from Abu Dhabi to India and 50% of the amount is payable on signing of the agreement and initial departure period is 07.11.2008 +/- 21 days. From the above, it is evident that the towage equipment is deputed on 09.11.2008 as per the agreement and the entry document of barge. Therefore, unless barge starts its journey, it cannot be said that services as per agreement has commenced. A service cannot be said to be commence merely on signing of the agreement unless actual work towards the services begins. Therefore, it is hereby held that services of the Leighton project commenced on 09.11.2008 and continued till 11.06.2009.

4.3 The appellant has also given details of various projects during assessment years 2008-09 and 2010-11 both and details of Leighton project are as under:-

A.Y.	Party	Nature of service	Project duration	No. of months / days
2008-09	Leighton Contracts (India) Pvt.Ltd.	Charter Hire vessel Barge JU251	5 th December , 2006 to 6 th June, 2007	6 months and 1 day
2010-11	Leighton Contractors (India) Pvt.Ltd.	Towage Agreement for Towage charges of Regina 250 from PNV Channel to Abu Dhabi.	9 th November, 2008 to 11 th June, 2009	7 months and 2 days.

The other projects are with Arcadia and Reliance during the year 2009-10, Arcadia in A.Y. 2008-09 and MPSEL Ltd. in A.Y.2010-11.

4.4 From the periods of projects as above, it is evident that the appellant has not spent 9 months in India for any project or during the period of any 12 months since A.Y. 2008-09 and therefore, it cannot be said to have a PE within the meaning of Article 5(2)(h) or 5(2)(i) of the Treaty during A.Y. 2009-10. Further, in case of Arcadia project and Reliance project in A.Y. 2008-09 and 2009-10, it cannot be said that the project sites continued for a period of 9 months during the year. Therefore, on the basis of the facts as above, it cannot be said that the

appellant has a PE in India and income of the appellant cannot be taxed under section 44BB of the Act. Hence, 2nd and 3rd grounds of appeal are allowed.”

6. Against the said order, the Revenue is in appeal before us.

7. We have heard both the Counsels and perused the records. The learned Departmental Representative (DR) submitted that the same assessee was assessed u/s 44BB in earlier years. For this proposition he referred to the decision of the Tribunal in assessee's own case in ITA No.8694/Mum/2010 vide order dated January 18, 2017. Further the learned DR submitted that the assessee has undertaken several projects in India and their combined period exceeds the required period of 9 months. Further the learned DR submitted that the A.O. should have applied Article 5(1) of the Indo-UAE DTAA. He submitted that if this Article is applied the assessee was liable to pay tax of the impugned amount. For this proposition the learned DR placed reliance upon the decision of ITAT Delhi Bench in the case of Furgo Engineers v. ACIT [122 TTJ 0655] . Alternatively the learned DR submitted that if the impugned amount is not taxable u/s 44BB, then it should be taxed u/s 9(1). Per contra, the learned Counsel of the assessee submitted that the learned CIT(A) has passed a reasonable order. However, as regards the contract with Arcadia Shipping Limited regarding charter hire of tug boat, learned Counsel conceded that the same may be taxed u/s 44BB. However, as regards other two contracts, learned Counsel submitted that assessee did not have a PE for execution of these works as the period of the stay was less than the period of nine months. He submitted that the two works were totally unconnected, hence he submitted that combined period cannot be taken for

the purpose of determination of PE. For this purpose, learned DR referred to the decision of Mumbai Bench in the case of ACIT (International Taxation) v. Valentine Maritime (Mauritius) Ltd. [130 TTJ 417]. He further placed reliance upon the decision of ITAT Mumbai Bench in the case of *Kreuz Subsea Pte. Ltd. v DCIT* [172 TTJ 291]. Further, the learned Counsel submitted that the Assessing Officer has placed reliance upon Article 5(2)(h), hence he submitted that a different Article of the DTAA should not be applied for making the disallowance.

8. Upon careful consideration, we note that learned Counsel of the assessee has conceded that for the services rendered to Arcadia Shipping Limited, the same needs to be taxed u/s 44BB of the Income-tax Act. Hence, as regards the issue of taxability u/s 44BB of the services rendered to Arcadia Shipping Limited, we set aside the order of learned CIT(A) and restore that of the Assessing Officer.

9. As regards the services rendered with respect of other works, we note that the duration for each of them was less than nine months. The learned CIT(A) has given a clear finding and we find ourselves in agreement with the same. The Assessing Officer has not based his order on any cogent reasoning. He has presumed that assessee's representative might have come earlier also before the actual arrival of the barge in the Indian waters. Such hypothesis cannot be sustained. The actual period of the two projects cannot be combined as they are unconnected works. In such situation, the Assessing Officer's view that the period of the two works should be

combined cannot be sustained. This view is clearly supported by the Tribunal's decisions referred by the learned Counsel of the assessee and referred by us in the earlier part of this order.

10. As regards the learned Departmental Representative's submission that the issue should be considered by applying a different Article than the one applied by the A.O. the same is also not sustainable. The A.O. has invoked Article 5(2)(h) of the DTAA between India and UAE and has based his decision on the analysis thereof. After consideration of the same learned CIT(A) has found that the assessee cannot be held to be liable for tax as the period of the stay was less than nine months required to form a permanent establishment so as to come under the ambit of taxation under this Article. Now learned DR is agreeing that the view of the A.O. is not sustainable, however, he states that the issue should be considered under Article 5(1) of the said DTAA. We find that the above is neither the case of the A.O. nor any ground in this regard has been raised. Hence, we do not find this plea of the learned Counsel of the assessee sustainable.

11. Accordingly, in the background of aforesaid discussion and precedents, we do not find any infirmity in the order of learned CIT(A), as regards the other two works related to Reliance Ports and Terminals Limited and Leighton Contractors India Private Limited. Accordingly, we uphold the order of learned CIT(A) to this extent.

12. In the result, this appeal filed by the assessee stands partly allowed.

Order pronounced on this 24th day of May, 2017.

**Sd/-
(Ravish Sood)
JUDICIAL MEMBER**

**Sd/-
(Shamim Yahya)
ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated : 24th May, 2017.
Devdas*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)-XI, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**