

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No.1985/Del/2014
ITA Nos.2015 & 2016/Del/2015
Assessment Years: 2005-06, 2007-08 & 2010-11**

M/s Solar Turbines International Co., C/o Deloitte Haskins & Sells, Deloitte Centre, Anchorage II, #100/2, Richmond Road, Bangalore. PAN: AAJCS3585J (Appellant)	vs	Asstt. Director of Income-tax International Taxation, Dehradun. (Respondent)
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Assessee by: Shri Girish Dave, Advocate
Shri Sunil Bhatt, Advocate
Department by: Shri G.K. Dhall, CIT (Intl. Taxation)

Date of Hearing: 14.03.2019
Date of Pronouncement: 02.04.2019

ORDER

PER NARASIMHA K. CHARY, JM

Aggrieved by the separate orders dated 31.01.2014, 30.1.2015 & 30.1.2015 for the Assessment years 2010-11, 2005-06 and 2007-08 respectively passed by the Learned Dy. Commissioner of Income-tax

(International Taxation), Circle-2, Dehradun {"for short "AO"} pursuant to directions of the Dispute Resolution Panel-II, New Delhi, assessee preferred these three appeals.

2. Brief facts of the case, as could be culled out from the record, are that the assessee is a manufacturer of industrial gases turbine engines, gas compressors, and gas turbine powered compressor sets, mechanical drive packages and generator sets and also provides after sale services and support to customers across the globe. The products from the assessee play an important role in the development of aise, natural gas and power generation projects around the world.

3. For the assessment year 2005-06, the assessee filed the return of income on 29/10/2005 declaring the income from troubleshooting services and from Start-up and commissioning. It was processed under section 143(1) of the Income-tax Act, 1961 ("the Act") on 17/3/2007 and a notice under section 148 of the Act was issued on 31/3/2010 and the assessment under section 147/143(3) of the Act was concluded on 20/9/2011. Subsequently notice under section 148 of the act was issued on 27/3/2012 and was served on the assessee on 9/4/2012. By letter dated 3/5/2012 assessee submitted that the return filed in response to the notice issued under section 148 on 31/3/2010 may be considered as the return filed in response to the notice dated 27/3/2012. Assessee also sought the reasons for reopening the assessment and the reasons were furnished on 4/3/2013. Assessee filed the objections and 20/3/2013, which were disposed of by order dated 13/3/2014. On the same day, namely, 13/3/2014 learned assessing officer issued notice under section 142(1) of the Act and 143(2) of the Act. Draft assessment order was

prepared on 24/3/2014 and pursuant to the directions of the learned DRP dated 15/12/2014, the final assessment order was passed on 30/1/2015 making additions on account of the services rendered by the assessee.

4. Facts in respect of the assessment year 2007-08 are also similar but for the change in the dates. In this matter original return of income was filed under section 139(1) of the Act on 31/10/2007 and notice under section 148 of the Act was issued on 29/3/2012. By way of letter dated 3/4/2012 assessee requested for the reasons and by letter dated 7/8/2012 assessee informed the Department that they have filed the return of income for assessment year 2007-08 on 31/10/2007 and also subsequently filed a return of income pursuant to the notice under section 148 wherein there was no change in the taxable income of the assessee. In this letter assessee requested the Ld. assessing officer to take the above on record. Reasons were furnished to the assessee on 4/3/2013 and the assessee filed the objections which were disposed of by order dated 13/3/2014, on which date Ld. assessing officer issued notice under section 143(2) of the Act and 142(1) of the Act. Draft assessment order was passed on 24/3/2014 and pursuant to the directions of the ld. DRP on 15/12/2014, Ld. Assessing officer passed the final assessment order on 30/1/2015.

5. Assessee, therefore, filed these appeals challenging the orders passed under section 147 of the Act as without jurisdiction and also contending that the receipts from the repair and overhauling services performed in the United States of America received from BG exploration and production India Ltd. should not have been treated as 'Fee for

Technical Services' (FTS). They also challenge the action of the authorities in treating the sale of Indian turbines as taxable in India.

6. It is the argument of the Ld. AR that in this matter the return of income pursuant to the notice under section 148 of the Act was filed on 3/5/2012 and a notice under section 143(2) of the Act should have been issued by the learned Assessing officer by 30/9/2013 as prescribed under section 143(2) of the Act but the learned assessing officer issued a notice under section 143(2) of the Act on 13/3/2014, beyond the period of limitation. He, therefore, submits that such an error is a jurisdictional one and is incurable. He accordingly submits that any assessment made by wrongly assuming the jurisdiction cannot be sustained.

7. Ld. AR placed reliance on the decisions of the Hon'ble jurisdictional High Court in the cases of Alpine Electronics Asia PTE Ltd VS. DGIT (2012) 18 taxman.com 246 (Delhi), CIT vs. Rajeev Sharma (2010) 192 taxman 197 (Allahabad), ITO vs. DD Ahuja (2014) 45 taxmann.com 336 (Lucknow Tribunal, PCIT vs. silver line (2016) 65 taxmann.com 137 Delhi, in support of his contention.

8. Per contra, submission of the Ld. DR is that the assessee did not observe the time limit of 30 days prescribed in the notice dated 27/3/2012 under section 148 of the Act and therefore the assessee is not entitled to the benefit of time limit prescribed in proviso to section 143(2) of the Act.

9. We have gone through the record. Insofar as the dates involved in this matter, as narrated in paragraph 3 above, are concerned, absolutely there is no dispute. Only dispute involved in this matter is whether or not

there is proper compliance with the law of limitation as prescribed in the Act in issuing the notice under section 143(2) of the Act.

10. Proviso to section 143(2) of the Act clearly stipulates that no notice under section 143(2) of the Act shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished. Such date in this case is 30/9/2013 as the assessee through letter dated 3/5/2012 submitted that the return filed in response to notice dated 31/3/2010 may be considered as the return filed in response to the notice dated 27/3/2012. However, notice under section 143(2) of the Act in this matter was issued on 13/3/2014 clearly beyond the period of limitation prescribed under the proviso to section 143(2) of the Act. Inasmuch as such a letter was filed subsequent to 30/9/2005 the proviso to section 148 of the Act is not available to the revenue.

11. In the case of Alpine Electronics Asia (supra), in response to the notice under section 147, the assessee filed a letter dated 19/11/2009 stating that the return of income filed under section 139(1) of the Act should be treated as filed in response to the notice under section 147/148 of the Act. Assessee preferred objections and the same were disposed of by the learned Assessing officer, after issuing notice under section 143(2) of the Act on 23/11/2010 which was beyond the period of six months described in the proviso to section 143(2) of the Act. Hon'ble jurisdictional High Court held that it is well-settled that service of notice under section 143(2) of the Act within the statutory time limit is mandatory and is not a procedural requirement, which is inconsequential. It is further held that section 143(2) of the Act is applicable to proceedings under section 147/148, proviso to section 148 protects and

grants liberty to the revenue to serve notice under section 143(2) of the Act before passing of assessment order for returns furnished on or before 10/1/2005 and in respect of returns filed pursuant to notice under section 148 after 10/1/2005, it is mandatory to serve notice under section 143(2) of the Act within the stipulated time limit.

12. Similar is the principle laid down by the Hon'ble jurisdictional High Court in the case of Ld. PCIT vs. Sh. Jai Shiv Shanker traders (P) Ltd (2015) 64 taxmann.com 220 (Delhi) and Silver Line (supra). Same view was taken by the Hon'ble Allahabad High Court in the case of Rajeev Sharma (supra). In this set of circumstances in view of the settled position of law we are of the considered opinion that for all the returns filed pursuant to notice under section 148 after 10/1/2005, it is mandatory for the revenue to serve notice under section 143(2) of the Act within the stipulated time and any failure in this regard shall defeat the case of the revenue and result in quashing of the assessment.

13. We, therefore, while respectfully following the decisions of the Hon'ble jurisdictional High Court and Allahabad High Court find that the impugned orders for Assessment years 2005-06 and 2007-08 cannot be sustained and accordingly they are quashed. Since the assessee got the relief on the point of law of limitation, we do not propose to delve deeper into the merits of the case since it becomes only academic. ITA Nos. 2015 and 2016/Del/15 are, accordingly, allowed.

14. Now coming to the Assessment year 2010-11, the issue involved is whether the receipts in respect of the repair and overhauling charges from BG Exploration India Private Limited and Oil India Limited are

taxable in the hands of the assessee as 'Fee for Technical Services' (FTS).

15. At the outset, it is brought to our notice that in respect of Assessment years 2006-07, 2008-09 and 2009-10, there was no assessment, whereas in respect of Assessment year 2010-11 in ITA No. 3475/del/2013 in the case of Oil and Natural Gas Corporation Limited (Solar Turbines Intl. Co), a coordinate bench of this Tribunal held the issue in favour of the assessee. Further the Ld. AR relied upon the decision in AAR No.931 of 2010 dated 30/5/2012 in assessee's own case and it covers the Assessment year 2011-12. The counsel submits that in respect of assessment year 2012-13 learned DRP allowed the relief to the assessee and for the Assessment years 2013-14 and 2014-15, learned Assessing Officer himself allowed the relief.

16. Learned DR does not dispute the factual position submitted on behalf of the assessee as above.

17. On a perusal of record, we find that in ITA No. 3475/Del/2013, a coordinate Bench of this Tribunal considered the taxability of the payments made by the Oil And Natural Gas Corporation to the assessee herein in terms of a contract for overhauling of Indian work including dismantling, stripping and inspection of companies, finalisation of scope of work, replacement of spares and assembling and testing including shop level charges as per the scope of work. After considering the facts in detail in the light of the contentions raised by either of the parties, the Tribunal reached a conclusion that in view of the fact that the assessee had no permanent establishment in India and is a tax resident of USA, in view of Article 12 of Double Taxation Avoidance Agreement between

India and the USA, such receipts were in consideration for rendering of the service of dismantling, stripping, assembling and testing of gas turbines as per standards of the OEM and, therefore, the same is not chargeable to tax in India. To reach such a conclusion, the Tribunal placed reliance on the decision of the AAR in CGG Veritas and also the order of the ld. Assessing Officer for the Assessment years 2012-13 and 2013-14. In the ruling in AAR No. 931 of 2010 dated 30/5/2012 in assessee's own case, it is held in favour of the assessee that the test of making available technical knowledge in terms of paragraph 4 of Article 12 of the DTAA is not satisfied. In ITA No. 3475/Del/2013, the Tribunal found that the test of 'make available' in Article 12 of the DTAA between India and USA is not satisfied. It is therefore clear that the impugned receipts in the hands of the assessee are not taxable as 'Fee for Technical Services' (FTS) as contemplated under Article 12 of the DTAA between India and USA and at the same time since the assessee does not have any permanent establishment in India such receipts cannot be taxed as business income.

18. In this set of circumstances, we find that the authorities below have committed error in taxing the repair and overhauling receipts by the assessee from BG Exploration India Private limited and Oil India Limited as 'Fee for Technical Services' (FTS) and also in holding that the assessee is making available drawings under data, technical expertise, skill and knowledge and that the "make available" clause of Article 12(4) of agreement for avoidance of double taxation of income. We accordingly allow the appeal and direct the learned Assessing Officer to delete the additions made on this score.

19. In the result, all the three appeals of the assessee are allowed.

Order pronounced in the Open Court on 2nd April, 2019.

Sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

sd/-

**(K.NARASIMHA CHARY)
JUDICIAL MEMBER**

Dated: 2nd April, 2019.

VJ

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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