

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'F' BENCH,  
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI K.N. CHARY, JUDICIAL MEMBER**

**ITA No. 2842/DEL/2010 [A.Y: 2004-05]  
ITA No. 2843/DEL/2010 [A.Y: 2005-06]  
ITA No. 6029/DEL/2012 [A.Y: 2006-07]**

**PJSC Stroytransgaz  
Block E.P. 15, Chanakyapuri  
Dr. Hose P. Rizal Marg, New Delhi**

**Vs.**

**The Dy. D.I.T.  
Circle - 2(2)  
New Delhi**

**PAN : AAHCS 2254 E**

**ITA No. 3821/DEL/2010 [A.Y: 2004-05]  
ITA No. 3822/DEL/2010 [A.Y: 2005-06]**

**The Dy. D.I.T.  
Circle - 2(2)  
New Delhi  
Delhi**

**Vs.**

**PJSC Stroytransgaz  
Block E.P. 15, Chanakyapuri  
Dr. Hose P. Rizal Marg, New**

**PAN : AAHCS 2254 E**

**[Appellant]**

**[Respondent]**

**Date of Hearing : 04.04.2019**

**Date of Pronouncement : 15.04.2019**

**Assessee by : Shri Deepak Chopra, Adv  
Shri Harpreet Singh Ajmani, Adv**

**Revenue by : Shri Surender Pal, Sr. DR**

**ORDER****PER BENCH :-**

The above captioned cross appeals by the assessee and revenue pertain to assessment years 2004-05 and 2005-06. The assessee has also preferred an appeal for A.Y 2006-07 against the order of the CIT(A).

2. Since the underlying facts in issues in all the five appeals are common and were heard together, they are being disposed off by this common order for the sake of convenience and brevity.

3. The common grievances of the assessee can be summarised as under:

- (i) Royalty Vs. Business Income;
- (ii) Fees for Technical Services [FTS] or business profits;
- (iii) Attribution of Income and allowance of expenses incurred by the Head Office; and
- (iv) Transit Office Facility Expenses.

4. The common grievance of the Revenue relates to the direction of the CIT(A) that interest u/s 234B of the Income-tax Act, 1961 [hereinafter referred to as 'the Act']. is not chargeable.

5. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

6. Facts on record reveal that initially, the appellant company was represented by a liaison office, which assisted in identifying the business potential in India. Accordingly, the appellant company opened a Branch Office, which was established after seeking permission from Reserve Bank of India. The Branch Office (BO) commenced its activities with effect from October 1, 2003 and rendered technical and consultancy services in connection with various projects being implemented during the financial year 2003-04.

7. For the year under consideration, the appellant bifurcated its income into two being Royalty income [By the Head office] and fees for technical services (by the Branch Office in India) and accordingly, filed its return of income on November 1, 2004 declaring a total income of Rs. 67,233,870/-.

8. During the course of scrutiny assessment proceedings, the appellant company submitted a revised return of income declaring total income at Rs. 7,45,30,820/-. The reasons for revising original return of income was stated to be that the income from royalty had not been offered to tax on receipt basis as required under Article 12 under Indo Russia, Double Taxation Avoidance Agreement [DTAA].

9. During the year under consideration, the assessee company had participated in the following projects:-

- (i) Chennai Water Supply Augmentation Project;
- (ii) Iron Ore Slurry Pipeline Project; and
- (iii) Baroda-Ahmadabad Kalol Pipeline Project.

10. As mentioned elsewhere, the assessee has bifurcated its income as Royalty Income of the head office which was offered to tax on gross basis under Article 12 of the DTAA between India and Russia. As such, Royalty Income from Chennai, Trichy and Madurai Project, Iron Ore Slurry Pipeline and the Baroda Ahmadabad Kalol Project amounting to Rs. 63,060,996/- was offered to tax @ 10% on gross basis.

11. The branch office income was shown as technical service fees from the Iron Ore Slurry Pipeline project and from the Baroda Ahmadabad Kalol Project. The entire position can be summarized as follows:

<u>Sl No.</u>	<u>Project</u>	<u>Name of income</u>	<u>Offered to tax in hands of</u>	<u>Basis of Taxation</u>
1.	Iron Ore slurry pipeline project	Royalty income	Head Office	Gross basis @ 10% as per DTAA
2.	Iron Ore Slurry Pipeline Project	Fees for technical services	Branch Office	Gross basis as per section 115A read with section 44D @ 20%
3.	Baroda Ahemdabad Kalol	Royalty income	Head office	Gross basis @ 10% as per DTAA
4.	Baroda Ahemdabad Kalol	Fees for technical services	Branch office	Net income basis @41%
5.	Chennai Trichy Madurai Project	Royalty income	Head Office	Gross basis @ 10% as per DTAA

12. There is no dispute in so far as the Permanent Establishment [PE] is concerned since during the course of assessment proceedings itself, the assessee had accepted that since it has branch office in India it constitutes a PE in India within the meaning of Article 5 of the DTAA.

13. The bone of contention is the treatment of royalty income as business profit by the revenue authorities. The ld. counsel for the assessee vehemently stated that since technical bid preceded the financial bid and since the technical bid was provided by the Head Office of the appellant company whose principal focus of business in Russia and abroad is concerned with implementation of oil and industry projects which included design and construction of pipeline systems which included facilities for oil and gas production, oil and gas underground storage facilities, construction, modernization and renovation of mainline and booster compressor stations and other field facilities, exploration, development and operation of oil and gas fields, manufacturing of equipment and other industrial products.

14. The ld. AR further submitted that Reserve Bank of India [RBI] approval specifically prohibits the Branch Office to undertake any project execution in India. The ld. AR further

stated that the revenue authorities have not tried to understand the industry and without appreciating how the pipeline business works, they have proceeded to draw adverse conclusions. It is the say of the ld. AR that it is an erroneous conclusion that no know-how has been provided by the Head Office at the time of bidding stage.

15. In support of its contention, the ld. AR relied upon the decision of the co-ordinate bench in the case of Iveco Spa 160 ITD 348 and ZTE Corporation 159 ITD 696.

16. Per contra, the ld. DR relied upon the findings of the lower authorities.

17. As explained elsewhere, the appellant company has participated in the following three projects:

- (i) Chennai Water Supply Augmentation Project;
- (ii) Iron Ore Slurry Pipeline Project; and
- (iii) Baroda-Ahemdabad Kalol Pipeline Project

18. In the first project, the appellant company alongwith Essar Constructions and Indian Oil Corporation, formed a consortium to meet the requirement of technical qualification. In the second project, the appellant company alongwith Gammon India Limited participated in the project invited by Chennai Metropolitan Water Supply and Sewerage Board and in the third project, the appellant company entered into a joint venture agreement with Essar Construction Limited.

19. As per the Supplementary Agreement between the appellant company with consortium of the first project, as per division of work agreed between the consortium members, Indian Oil Corporation Limited [IOCL] will carry out all the residual engineering and soil surveys, soil test etc for finalizing the residual engineering and preparation of data sheets, specifications etc for procurement and construction. The total scope of IOCL has been agreed as Rs. 3.9 crores.

20. The appellant company will provide project management services for this project and will depute five specialists' manpower with appropriate experience for execution of this project and finally for the commissioning of the Gas Pipeline to the satisfaction of the client GSPL. It was agreed that the appellant shall get US dollar 405.840 for sending specialist manpower which shall be payable as per the monthly rate per specialist already agreed for the actual month the specialists are deployed. It was further agreed that the appellant would be further paid for the technical expertise and technical know-how which it has gathered over the years and additional amount of US dollar 10 lakhs on which the Indian Tax component would be paid by Essar.

21. As per the Third Supplementary dated 09.01.2003, it is mentioned that US dollars 10 lakhs is to be received by the appellant company as royalty/charges for providing technical know-how and technical service charges.

22. A close look of the contracts read with supplementary agreement shows that the appellant company was one of the partners in all the three projects which are mentioned

elsewhere and which were executed during the year under consideration. Further, the contracts show that each member was assigned specific jobs to be executed by them and since the appellant company had the expertise in the implementation of oil and gas industry, it was assigned the principal job of preparation of technical bid and because of this speciality, the appellant has laid emphasis that the US dollar Rs. 10 million received by it is for providing technical know-how and, therefore, is royalty.

23. We do not find any force in this claim of the appellant. As mentioned elsewhere, since the appellant company is one of the members of the consortium all the three projects, this amounts to paying royalty to oneself. The shares which the appellant company has received from the project executed during the year under consideration is nothing but business profit of the appellant company. The appellant company has chose to bifurcate the same into royalty income of the head office and fees for technical services for its branch office.

24. The fact of the matter is that the appellant company has received its share from the projects executed during the year under consideration. The decisions relied upon by the ld. AR are clearly distinguishable on facts and need no special mention.

25. To sum up, being a member of consortium, the appellant company cannot pay royalty to itself and, therefore, the share received from the execution of the three projects is business profit of the appellant company. Since there is no transfer of any technical know-how and even if the services are rendered in India by the head office and not by the branch office, then also, the revenue of the appellant company cannot be bifurcated as royalty and fees for technical services. Moreover, the entire payment received during the year has to be attributable to the PE in India, and, therefore, the same is taxable as business profit. Since the assessee is having PE in India, Article 12 of the DTAA between India and Russia is not applicable. Therefore, the findings of the lower authorities cannot be faulted with.

26. As mentioned elsewhere, there is no dispute that the appellant company is having a PE in India. Therefore, whatever income the appellant company has earned from the projects has been earned through its PE. Therefore, the whole of the profit of the appellant company is attributable to its PE and since the expenses have already been allowed, incurred for the purpose of the PE, therefore, there is no need to tamper with the findings of the CIT(A) in the light of Article 7(3) of the India Russia DTAA.

27. As far as the transit facility expenses which have been paid by the appellant company to the Russian Federation, part of Russian Embassy as cost of accommodation of Russian Employees is concerned, since the assessee has not filed any confirmation, neither before the Assessing Officer nor before the CIT(A), the same were disallowed.

28. Before us also, the ld. AR merely stated that since the payments have been made to sovereign [Russian Embassy], there was no occasion to deduct tax at source. There is no dispute that the impugned amount has been paid to Russian

Embassy as cost of accommodation to the Russian Employees. But the least the appellant company could have provided is the confirmation from Russian Embassy itself. We, therefore, allow one more opportunity to the appellant company to furnish the confirmations from the Russian Embassy in this regard. Ground Nos. 12 to 14 are treated as allowed for statistical purposes. All other grounds are dismissed. The appeals of the assessee are partly allowed for statistical purposes.

29. The solitary grievance of the Revenue is that the CIT(A) erred in directing that interest u/s 234B of the Act is not chargeable in this case.

30. This issue is covered in favour of the assessee and against the Revenue by the judgment of the Hon'ble Jurisdictional High Court in the case of GE Packaged Power Inc. 373 ITR 65 wherein the Hon'ble High Court has held as under:

"The primary liability of deducting tax (for the period concerned, since the law has undergone a change after the [Finance Act](#), 2012) is that of the payer. The payer will be an assessee in default, on failure to discharge the obligation to deduct tax, under [Section 201](#) of the Act. No interest is leviable on the respondent assessee under [Section 234B](#), even though they filed returns declaring NIL income at the stage of reassessment. The payers were obliged to determine whether the assessee was liable to tax under [Section 195\(1\)](#), and to what extent, by taking recourse to the mechanism provided in [Section 195\(2\)](#) of the Act. The failure of the payers to do so does not leave the Revenue without remedy; the payer may be regarded as an assessee-in-default under [Section 201](#), and the consequences delineated in that provision will visit the payer."

31. Similar view was followed by the Hon'ble High Court of Delhi in the case of ZTE Corporation 392 ITR 80. The relevant findings read as under:

"As far as the question of interest payments and section 234B is concerned, the court is of the opinion that the issue is covered by GE Packaged Power Inc [supra]. This question of law too is answered against the revenue and in favour of the assessee."

32. Respectfully following the judgment of the Hon'ble Jurisdictional High Court of Delhi [supra] this ground is dismissed.

33. To sum up, in the result the appeals of the assessee are partly allowed for statistical purposes and the appeals of the revenue are dismissed.

**The order is pronounced in the open court on 15.04.2019.**

**Sd/-**

**[K.N. CHARY]  
JUDICIAL MEMBER**

**Sd/-**

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 15<sup>th</sup> April, 2019.

VL/

Copy forwarded to:

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

Asst. Registrar,  
ITAT, New Delhi

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Date on which the fair order is placed before the Dictating Member for pronouncement	
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