

IN THE INCOME TAX APPELLATE TRIBUNAL "I", BENCH MUMBAI
BEFORE SHRI C.N.PRASAD, JUDICIAL MEMBER
&
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
ITA No.6985/Mum/2018
(Assessment Year: 2015-16)

Atomstroy Export, Russia C/o Nuclear Power Corporation of India Limited 8 th Floor, South Wing Vikram Sarabhai Bhavan Anushakti Nagar Mumbai-400 094	Vs.	DCIT, (International Taxation) Range-1(1)(2) 5 th Floor Room No.528 Air India Building Nariman Point Mumbai-400 021
PAN/GIR No.AAFCA3658N		
(Appellant)	..	(Respondent)

Revenue by	Shri. V.Sreekar, DR
Assessee by	Shri. K.Gopal & Neha Paranjpe, AR's
Date of Hearing	26/11/2019
Date of Pronouncement	26 /11/2019

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the assessee is directed against final assessment order passed by the Ld. AO u/s 143(3) r.w.s. 144C (13) of the I.T.Act, 1961, dated 03/10/2018, in turn. which is arised out of directions of the Dispute Resolution Panel (DRP)- 1(WZ), Mumbai, u/s 144C(5) of the I.T.Act, 1961 and it pertains to Assessment Year (AY) 2015-16.

2. The assessee has raised the following grounds of appeal.

Taxability of payment received under Offshore supply contracts.

1. *The Learned DCIT/DRP erred in holding that the amount of Rs. 39,18,51,205 by the appellant company from the Offshore Supply Contracts was taxable in India.*
2. *The learned DCIT/DRP erred in holding that the amounts received by the appellant company from the Offshore Supply Contracts are covered by the provisions of section 44BBB and consequently liable to tax in India.*
- 3) *The learned DCIT/DRP failed to appreciate that the receipts from the Offshore Supply Contracts are not taxable in India*

Relief Claimed

Your appellant prays that:

1. *The amount received under the offshore supply contracts is not taxable in India,
The appellant craves leave to amend or after any of the above grounds or add a new ground, if and when necessary.*

3. The brief facts of the case are that the assessee is a joint stock company under the Ministry for Atomic Energy, Russian Federation, incorporated under the provision of Russian Legislature, having its registered office at Moscow, Russia. The assessee is involved in the business of Civil Construction/ erection, testing and commissioning of power projects in India. Accordingly, the assessee has computed its income under section 44BBB of the I.T.Act 1961. However, while calculating, the profits u/s 44BBB of the Act, the assessee has not included the entire gross receipts received from the Indian entity, NPCIL. The assessee, during the year under consideration had earned income of Rs. 126,80,33,897/- from Offshore service contracts, income there from were offered to tax at 10% of gross receipts, as per section 44BBB of the Act. The assessee has not offered to tax receipts from offshore supply contracts, on the ground that supplies were made outside India and the payments were also made outside India in U.S. Dollars, as per the contracts. The Ld. AO did not convinced with the argument of the assessee and after considering relevant facts, including certain judicial precedents,

came to the conclusion that the assessee earns income out of its receipts under different supply contracts, due to its business connection in India. Accordingly, Explanation (1)(a) to section 9(1)(i) of the Act, provides for reasonable attribution of income to the operations carried out by the Non Resident of India and accordingly, included amount received towards offshore supply contracts and estimated income @10%, u/s 44BBB of the I.T.Act, 1961. The assessee has filed objections against the draft assessment order before the Dispute Resolution Panel (DRP)-1, Mumbai. The DRP-1, Mumbai, vide its directions 144C (5) of the I.T.Act, 1961, confirmed the findings of the Ld. AO and dismissed, appeal filed by the assessee. Consequent to directions of the DRP, the Ld. AO has passed final assessment order u/s 143(3) r.w.s. 144C(13) of the I.T.Act, 1961 and made additions towards profit from offshore supply contracts u/s 44BBB of the I.T.Act, 1961. Aggrieved by the DRP directions, the assessee is in appeal before us.

4. The Ld. AR for the assessee, at the time of hearing submitted that this issue is squarely covered in favor of the assessee by the decision of ITAT, Mumbai in assessee's own case right from AY 2007-08 to 2013-14, where under identical facts and circumstances, the Tribunal held that amount received towards offshore Supply contracts are not liable to tax in India, because the goods were supplied in outside India and also, payments for said supplies were received in U.S. Dollars in outside India.

5. The Ld. DR, on the other hand, fairly accepted that the issue is squarely covered in favor of the assessee by the decision of ITAT for

earlier years. However, he strongly supported order of the Ld. AO, as well as the directions of the DRP.

6. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. The only issue that came up of our consideration is whether, on facts and in the circumstances of the case, amount received towards offshore supply contracts is liable to tax in India u/s 44BBB of the I.T.Act, 1961, is no longer a *res-integra*. The coordinate bench of ITAT in assessee's own case for AY 2007-08 to 2011-12 had considered an identical issue and after considering relevant facts held that offshore supply contracts were carried out and concluded outside and hence, no income there-from deemed to accrue or arise in India in terms of section 9(1)(i) of the I.T.Act, 1961 and DTAA provisions and accordingly, not chargeable to tax. The relevant findings of the Tribunal are as under:-

"15. Therefore, after analyzing the various case laws, statutory provisions, DTAA provisions and contractual terms and respectfully following judgment of Hon'ble Supreme Court in Ishikawajima-Harima Heavy Industries Limited Vs. DIT (288 ITR 408), we are inclined to hold that Offshore Supply contracts were carried and concluded outside India and hence no income there from deemed to accrue or arise in India as per Section 9(1) and DTAA provisions and accordingly, not chargeable to tax. The receipts thereof do not form part of receipts for the purpose of computational provisions of Section 43BBB. Explanation 4 could not overcome the limitation imposed by Explanation 1(a) to Section 9(1) (i) and hence, the impugned income do not form part of business receipts for computation of income u/s 44BBB of the Act. We held so."

7. We, further noted that an identical issue has been considered for AY 2014-15 in ITA No. 6945/Mum/2017, where by following the earlier order of the Tribunal, the coordinate bench held that amount received towards supply of material and equipment under offshore

supply contracts would not form part of the business receipts for the purpose of section 44BBB of the I.T.Act, 1961.

8. In this view of the matter and consistent with view taken by the coordinate bench for earlier years, we are of the considered view that amount received towards offshore supply contracts, in respect of goods supplied outside India is not liable to tax in India in terms of section 9(1) of the I.T.Act, 1961 and under DTAA provisions and accordingly, direct the AO to delete additions made towards estimation of income u/s 44BBB of the I.T.Act, 1961, in respect of offshore supply contracts.

9. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on this 26 /11/2019

Sd/-
(C.N.PRASAD)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 26/11/2019
Thirumalesh Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai