IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 2216/MUM/2017
Assessment Year: 2012-13

Axens (Project Office),A-301, Boomerang Main Chandivali Farm Road, Near Chandivali Studio, Andheri (East) Mumbai-400059	Vs.	DCIT(IT)1(1)(2), Room No 528, 5th Floor, Air India, Bldg. Nariman Point Mumbai-400021.
PAN No. AACCH0871M		
Appellant		**Respondent**

Assessee by	:	Mr. Nitesh Joshi, AR
Revenue by	:	Mr. Avaneesh Tiwari, DR
Date of Hearing	:	16/03/2020
Date of pronouncement	:	20/03/2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2012-13. The appeal is directed against the order passed by the DCIT (IT)-2(2)(2), Mumbai (in short 'AO') u/s 143(3) r.w.s. 144C(13) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under :

1 The Assessing Officer ('AO') / Dispute Resolution Panel ('DRP') have erred in law and on facts of the case in assessing the income pertaining to offshore supplies

to tax in India and thereby determining the taxable income from contracts with IOCL at Rs. 225,042,614.

1.2 The AO/DRP have erred in treating the contracts for onshore supply and services and offshore supply and services with Indian Oil Corporation Limited ('IOCL') as a composite contracts executed in India.

2.1 Without prejudice to the above, the AO / DRP have erred in law and on facts in assuming the profit rate of 15% and applying the same on the gross income from IOCL to arrive at taxable income of assessee under the head "Income from Business and Profession'' and not considering that the incomes from offshore supplies are not attributable to the Project office/PE.

2.2 The AO / DRP have erred in law in not accepting the audited book profits of the appellant's Project Office with respect to onshore activities undertaken by the appellant in India and applying the presumptive profit rate of 15% without bringing any mistake or defects in the books of accounts maintained by the appellant and not considering that the Transfer Pricing Officer has accepted the transactions between the assessee and its Associated Enterprises as being on ALP basis.

2.3 The AO / DRP have erred in law and on facts of the case in taxing income from offshore supplies as income from business of permanent establishment without appreciating that the supplies were carried out from outside India and not connected to the activities carried out by the project office and the title of goods passed outside India and therefore the income from supplies are not taxable under the Income Tax Act, 1961 ('the Act') / India- France Tax Treaty ('Tax Treaty').

2.4 Without prejudice to above, the AO / DRP have disregarded the workings of actual profitability as per the audited books of accounts as well as the global profitability especially when the transactions between associated enterprises have been held to be on arm's length basis by the TPO.

3. The final assessment order is based on improper appreciation of facts, erroneous reference to Contract clauses and also based on assumptions and presumptions and therefore, the assessment order is bad in law and void ab initio,

4. The AO / DRP have erred in law and facts in determining the taxable income of the appellant by not following the decisions of Hon'ble Supreme Court in Ishikawajima Harima Heavy Industries Limited and other High Court decisions which are binding on the AO / DRP, erroneous consideration of the of directions of DRP and final assessment order for Assessment Year 2010-11 and 2011-12 which have been set aside by the ITAT and coming to a conclusion which is also contrary to the pro visions of the Act and the Tax Treaty.

5. The AO/DRP have erred in law and on facts in charging interest under Section 234B of the Act.

6. The AO has erred in law and on the facts of the case in initiating penalty proceedings under 271 of the Act.

3. At the outset, we may mention that the Ld. counsel for the assessee has stated that the appellant would not press ground No. 1.1,1.2, 2.3, 3, 4 ,5 and 6. In other words, it is the contentions of the Ld. counsel that the appellant would like to press ground No. 2.1, 2.2 and 2.4. Having considered the submissions of the Ld. counsel in the background of the case, we dismiss ground No. 1.1,1,2, 2.3, 3, 4 ,5 and 6 as not pressed. We take up for consideration ground No. 2.1, 2.2 and 2.4.

The appellant is a non-resident company incorporated in and tax resident of France. It is an international oil and gas engineering group and is a leader in the area of process furnaces for refining, petrochemicals and hydrogen productions. It set up a Project Office ('PO') at Vadodara, Gujarat in June 2008. The said PO is a foreign company as per the Companies Act, 1956/2013 and is subject to tax under the Act as a foreign company. It earned its business income from the projects in India as mentioned below:

- India Oil Corporation Limited ('IOCL') Paradip DCU Project ;

- IOCL Paradip DHDT Project ;
- IOCL Paradip VGO Project ;
- IOCL Vadodara VGO Project
- Bharat Petroleum Corporation Limited ('BPCL') Mahul CCR Project; and
- Nagarjuna Oil Corporation Limited ('NOCL') CDU/VDU Project, Cuddaiore, Tamil Nadu.

3.1 As mentioned earlier, the appellant has set up a PO in India, which is Permanent Establishment (PE) in India. During the year under consideration, the appellant has *inter alia* executed turnkey projects with Indian Oil Corporation ('IOCL'). The details of income arising from the contract with IOCL and treatment by the appellant in the Return of Income are summarized as under :

Sr.	Type of Income	Amount in Rs.	Remarks
1.	Onshore supply and services to IOCL	1,38,47,82,080	Offered to tax in India on a net basis as per audited Financial Statements of the PO in India
2.	Offshore services to IOCL	80,27,875	Offered to tax in India on a gross basis as Fees for Technical Services under Article 13 of the India-France Tax Treaty
3.	Offshore supply to IOCL	11,55,02,01	Not taxable as transfer of title in the equipment was outside India and consideration paid outside India.

The AO *vide* the draft assessment order dated 21.03.2016 *inter alia* held as under :

(i) The offshore supply and services are also inextricably linked to the PE in India because all offshore supply and services are mainly generated from the main

contract with IOCL and therefore, the entire amount received in connection with the contract should be taxed as a business receipt with PE and taxed accordingly.

(ii) Since the assessee has not offered profitability of the entire contract, therefore, for the purpose of taxability of the whole contract in India, an estimated profit @ 15% on the entire receipt was taken.

The appellant filed its objection on the above before the Dispute Resolution Panel (DRP). We find that the DRP by following the orders in the first round of proceedings for the preceding years i.e. AYs 2010-11 and 2011-12, on the issue of attribution of income to offshore supply of equipment under the IOCL contract upheld the stand taken by the AO in the assessment order. Based on the directions issued by the DRP, the AO made an addition of 15% on the receipts from IOCL. Thus the AO applied 15% on the total income from (i) onshore supplies and services which were already offered to tax by the appellant in its Return of Income on a net basis as part of income arising to the PO and (ii) income from offshore supply.

4. Before us, the Ld. counsel for the appellant submits that in the first round of proceedings for AYs 2010-11 and 2011-12, the AO held and the DRP thereafter confirmed that appellant's contract with IOCL is a composite contract and 15% of sale value of equipments to Indian customer is attributable to the PE (i.e. PO) in India. The appellant subsequently filed an appeal before the ITAT against the said order. During the course of hearing before the ITAT for AYs 2010-11 and 2011-12, the appellant filed additional evidences to challenge the additions/disallowances made in the assessment order. The ITAT *vide* order dated 03.08.2016 admitted the additional evidence and remanded the matter back to the file of the AO directing to look at the

issues and additional evidences and grant reasonable opportunity of being heard to the assessee to explain its case. To give effect to the order of the ITAT the AO gave an opportunity to the appellant and thereafter passed a draft assessment order dated 29.12.2017 for AYs 2010-11 and 2011-12, once again concluding that the contract with IOCL is a composite contract and that 15% of contract value is profit accruing from offshore supplies to the PE in India. Thereafter, the appellant once again filed its objections before the DRP, which *vide* direction dated 11.08.2018 held as under :

> (i) With regard to income from onshore supply and services, since no discrepancy was found by the AO in the books of account of the assessee, the profits of the assessee from onshore supplies and services has to be determined as per the books of accounts of the PO and not on an estimation basis.
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> (ii) On the offshore supply, it was held that profitability can be better accounted if the same is calculated on the basis of global profitability. The DRP noted that cost of offshore supplies has already been accounted for by the global entity in its books of account and the profit element therein can be estimated on the basis of global profitability. The DRP did not approve the action of the AO to use the profitability rates of the PO because the profit of the PO has been determined, without considering the cost of the onshore supplies. A perusal of the directions by the DRP indicates that it was of the view that ad-hoc rate of 15% cannot be applied to the offshore supplies as it has no basis.

In the assessment order passed for the later year i.e. AY 2013-14, the AO on similar set of facts held that the profit of the PO should be taken for taxation of offshore supply of equipment under the IOCL contract.

Referring to the above, the Ld. counsel submits that the details of global profitability for the calendar year 2012, three years' average global profitability and the PO profitability for the year under consideration are as under :

(i) Global profitability for calendar year 2012-1.91% *(refer page No. 119 of the Paper Book filed before the Tribunal on 22.04.2019 for the workings)*

(ii) Three years' average global profitability – 2.39% *(refer page No. 119 of the Paper Book filed before the Tribunal on 22.04.2019 for the workings).*

(iii) PO profitability for AY 2012-13 – 1.93% *(refer page No. 78 of the Paper Book filed before the Tribunal on 22.04.2019 for the audited profit and loss of the PO for the financial year ended 31.03.2012).*

Thus the Ld. counsel submits that the global profitability is a better indicator and should be adopted for attribution of income to offshore supply since the same has been accounted in the global accounts and has nothing to do with the PO and the profit of the PO has been determined without considering the cost of such offshore supplies. To sum up, the Ld. counsel submits that the income from offshore supply of equipment may be taxed @ 1.91%, being global profit for the calendar year 2012.

5. On the other hand, the Ld. Departmental Representative (DR) submits that the offshore supply and services are also inextricably linked to the PE in India because all offshore supply and services are mainly generated from the main contract with IOCL and therefore, the entire amount received in connection with the contract should be taxed as a business receipt with PE. It is further stated by him that since the appellant has not offered profitability of

the entire contract, thus for the purpose of taxability of whole contract in India, the AO has rightly estimated profit @ 15% on the entire receipt. Thus the Ld. DR supports the order passed by the AO.

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

Broadly stated, there are two issues arising in this appeal for consideration. These are (i) whether income from offshore supply of equipment to IOCL is taxable in India, and (ii) attribution of income to the offshore supply of equipment.

With regard to issue No. (i) i.e. taxability of offshore supply of equipment, as mentioned earlier, the appellant is not pressing the same in view of the acceptance of the appellant's contentions by the AO with respect to issue No. (ii). We have mentioned earlier that the appellant is not pressing ground No. 1.1, 1.2, 2.3, 3, 4, 5 & 6 raised in the grounds of appeal before the Tribunal.

It is the contentions of the appellant that the rate of taxation to be applied on income from offshore supply should be restricted to global profitability or the PO profitability rate and should be applied only on the income from offshore supply of goods as raised in ground No. 2.1, 2.2 and 2.4 before the Tribunal, in view of the stand relating to attribution of income accepted by the Department for the earlier years (i.e. AYs 2010-11 and 2011-12) and the later year (i.e. AY 2013-14) and by the AO in his letter dated 28.02.2020 filed before the Tribunal for the current assessment year.

6.1 In the instant case, the AO has applied presumptive profit rate of 15% without bringing any mistake or defects in the books of accounts maintained by the appellant.

We find that the DRP *vide* directions dated 11.08.2018 held that :

(i) With regard to income from onshore supply and services, since no discrepancy was found by the AO in the books of account of the assessee, the profits of the assessee from onshore supplies and services has to be determined as per the books of accounts of the PO and not on an estimation basis.

(ii) On the offshore supply, it was held that profitability can be better accounted if the same is calculated on the basis of global profitability. The DRP noted that cost of offshore supplies has already been accounted for by the global entity in its books of account and the profit element therein can be estimated on the basis of global profitability. The DRP did not approve the action of the AO to use the profitability rates of the PO because the profit of the PO has been determined, without considering the cost of the onshore supplies. A perusal of the directions by the DRP indicates that it was of the view that ad-hoc rate of 15% cannot be applied to the offshore supplies as it has no basis.

Further in the assessment order passed for the later year i.e. AY 2013-14, the AO on similar set of facts held that the profit of the PO should be taken for taxation of offshore supply of equipment under the IOCL contract.

In view of the above factual scenario, we set aside the order of the AO on issues relating to ground No. 2.1, 2.2 and 2.4 and direct him to adopt global profitability for attribution of income to offshore supply, since the same has been accounted in the global accounts. We direct the assessee to file the details of computation of the global profitability before the AO. Needless to

say, the AO would give reasonable opportunity of being heard to the assessee before finalizing the order. Thus the ground of appeal No. 2.1, 2.2 and 2.4 are allowed for statistical purposes.

7. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 20/03/2020.

Sd/-	Sd/-
(VIKAS AWASTHY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 20/03/2020
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai