आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
" D" BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No. 2891/AHD/2017**
निर्धारण वर्ष/Asstt. Year: 2011-2012

M/s Joy Global(UK) Limited, (formerly known as Joy Mining Machinery Limited) C/o Joy Global (India) Ltd.,, 85/1, Topsia Road (South), Kolkata-700046. **PAN: AACCJ3893R**	Vs.	A.C.I.T., International Taxation)-2, Ahmedabad.
(Applicant)		**(Respondent)**

Assessee by	:	Shri S.N. Soparkar, Sr. Advocate with Shri Parin Shah, A.R
Revenue by	:	Shri Mohd Usman, CIT.D.R

सुनवाई की तारीख/**Date of Hearing : 01/02/2021**
घोषणा की तारीख **/Date of Pronouncement: 23/02/2021**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Assistant Commissioner of Income Tax, (International Taxation)-2, dated 13/10/2017 under s. 147 r.w.s. 143(3) & 144 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") as per the direction of the Learned

Dispute Resolution Panel-2, dated 21/09/2017 under section 144C(5) of the Income Tax Act 1961 relevant to the Assessment Year 2011-2012.

2. The assessee has raises the following grounds of appeal:

1. *That the order passed by the Learned Assistant Commissioner of Income-tax(International Taxation)-2, Ahmedabad (here-in-after referred to as 'Learned AO' or ''Ld.AO'' AO') u/s. 147 rws 143(3) rws 144C of the Income tax Act, 1961 ('Act') and the directions of the Learned Dispute Resolution Panel (here-in-after referred to as 'Learned DRP' is contrary to the provision of law and erroneous on the facts of the case and liable to be quashed.*

2. *That the proceedings initiated u/s.147 of the Act by the Ld AO is erroneous, bad in law and liable to be quashed.*

3. *That on the facts and circumstances of the case, the Ld AO and Ld DRP failed to appreciate that income from supply of equipments, initial spares and consumables from outside India cannot be taxed in India in the absence of any activity of the non-resident in India.*

4. *That the Ld AO erred in treating the contract for supply of equipment, scientific site investigation and provision for services as composite contract.*

5. *(a) That the Ld AO and Ld DRP erred in holding that the appellant*
(b) Without prejudice to the above, and even assuming but not admitting that the appellant has a PE in India, the Ld AO and Ld DRP erred in not appreciating that nothing further can be attributed to such PE on account of income from supply of equipments, initial spares and consumables in the absence of any function performed in India.

6. *(a) That the Ld AO erred in holding that business income earned by Joy UK from sale of equipment and initial spares is connected to PE of the Company in India and taxable in terms of Article 7 of India UK Treaty and Section 9(1) of the Act.*

   (b) That the Ld AO erred in arbitrarily attributing 50% of the profits from supply of equipment, initial spares and consumables to tax in India by assuming profit from such supply to be 10%

3. At the outset, Ld. A.R. for the assessee submitted that he has been instructed not to press ground no. 2 challenging the validity of the assessment order. Accordingly, we dismiss the same as not pressed.

4. The second interconnected issue raised by the assessee is that the Ld. AO/DRP erred in making the addition of Rs. 2,30,15,300.00 to the total income by holding that the income is taxable in India.

5. Briefly stated facts are that the assessee is a company incorporated under the laws of United Kingdom (U.K) and engaged in the business of manufacturing, sale and servicing of underground mining equipment and parts. The assessee in the year under consideration has supplied equipment and maintenance of spare parts to its associate concern located in India. As per the assessee the income earned by it on supply of equipment and spares is not taxable in India. However, the AO disagreed with the contention of the assessee and held that the income generated by it amounting Rs. 2,30,15,300/- is taxable in India as per the DTAA. Accordingly, the AO made the addition of Rs. 2,30,15,300/- to the total income of the assessee.

6. In appeal, the Ld. DRP confirmed the order of the AO.

7. Being aggrieved by the order of the Ld. DRP, the assessee is in appeal before us.

8. The Ld. A.R. before us submitted that the ITAT in the own case of the assessee involving identical facts and circumstances has decided the issue in favour of the assessee bearing ITA Nos. 655 & 656/Ahd/2017 for the Assessment Years 2012-13 and 2013-14 vide order dated 05/07/2017. Accordingly the Ld. A.R. contended the issue being covered in favour of the assessee, there cannot be any income chargeable to tax in India as alleged by the authorities below.

9. On the other hand the Ld. D.R vehemently supported the order of the authorities below.

10. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we find that the identical issue has been decided in favour of the assessee in its own case bearing ITA Nos. 655 & 656/Ahd/2017 vide order dated 05/07/2017.The relevant extract of the order is reproduced as below:

4. Rival submissions were heard at length and with the assistance of the ld.Senior Counsel, we have carefully perused the relevant documentary evidence brought on record in the form of a paper book in the light of Rule 18(6) of the ITAT Rules. We have also carefully perused the various judicial decisions relied upon by both sides.

5. Facts of the case are that the appellant company is incorporated under the laws of United Kingdom(UK). The appellant company is a global leader in the manufacture, sale and servicing of underground mining equipment and parts.

6. The appellant company entered into the following contract with South Eastern Coalfields Limited (SECL).

(a) Contract for supply of equipment, initial spares, consumables and maintenance spares.
(b) Contract for Scientific Site Investigation services.
(c) Contract for provisions of services.

7. The contract for Scientific Site Investigation services was subsequently assigned to Joy Mining Services India Pvt. Ltd.(JMSIPL) under the same terms and conditions as was agreed with the appellant company by SECL. Similarly contract for provision of services was also completely assigned to JMS India under the same terms and conditions as was agreed with the appellant company by SECL.

8. Profits earned by JMS India from the two contracts assigned to it by the appellant company were offered for taxation and have been taxed accordingly. To this extent, there is no dispute.

9. the bone of contention between the appellant company and the revenue relates to the profit earned from contract for supply of equipment, initial spares, consumables and maintenance spares by the appellant company.

10. The appellant company claims that the income from supply of maintenance spares have been earned from outside India where the risk and title to the goods have been transferred and, therefore, no activity has been performed by the appellant company in India for transfer of spares from outside India. The appellant company further contends that since it does not have any other income and the only income earned by it was with respect to supply of maintenance spares, there was no income which could be taxed in India, it is further stated that as far as income from services performed in India was concerned, same has been rendered by J1V1S India and the income on account of such services has been offered to tax in India by JMSIPL, This fact has also been verified by the A.O. by issue of notice u/s. 133(6) of the Act.

11. The appellant company further contends that the revenue authorities have grossly erred in treating the contractor supply of equipments, Scientific Site investigation and Provision of services as composite contract, it is the-say of the id. Senior Counsel that SECL has specifically entered into separate contract for supply of equipment and services and separate prices have been agreed for each component.

12. We find force in this contention of the id. Senior Counsel as by letter dated 02,09,2008 issued by SECL, the intention is clear to treat each contract as a separate contract. The said letter is exhibited at page 37.2 of the paper book. Further exhibits at pages 323 to 32.5 of the paper book contain Price Bid format where separate price quotes have been sought for Scientific Site Investigation, Equipment, initial spares, maintenance

spares, sea-ice cost etc, and by exhibits 326 to 328 of the paper SECL confirmed the price for each activity separately.

13. A perusal of Para 33,3 of the contract which is at page 67 of the paper book it has been specifically provided that "In case DGMS does not give approval as specified above under sub-clauses 33,1 and 33,2, this contract will not enter into force and this contract will not be effective without any obligation on the part of any party. However, the contract on Scientific Site Studies and Investigation shall come into force on signing of the contract",

14. This clause clearly proves that the contracts are separate and, therefore, here is no question of treating the contract as composite, when the parties have suo motu agreed to treat them as separate.

15. Another ground on which the income has been taxed in the hands of the appellant company is that: the A.O. and the DRP held that the appellant company has a Permanent Establishment in India. The main reason for this given by the revenue authorities read as under:-

> *"JMML has token complete responsibilities of execution of the project right from site investigation, supply, erection and installation, sernics and maintenance and training Each assignment contract signed subsequently refers to the terms of tender issued by SFC1 and submission of bid by JMML. Ever, 'he scope of work to be performed by the JMML in supply contract dated .15/10/2009 includes responsibility for overall project implementation including various services. The JMML has taken the responsibilities of approval of mining equipment as well as mining method from DGMS (Director General of Mines Safety/. As per Annexure-VI of supply, time schedule of the whole project, starting from signing of contract till commencement of first Annual Production period is given in a chart form, It is clear from this that site investigation contract (SIC) came into force weeks before supply contract. By virtue of signing site investigation contract, JMML (or its representatives) had all the access to the mining site. JMML had the mining site at its disposal and for the purpose of designing the mining method and equipment and for taking approval of DGMS so that equipment suitable to site may be manufactured, it has its place of management at the site, It is very important to note that access of JMML **was** not limited or restricted in any respect to the mining site. This **constituted a** fixed place permanent establishment for the. JMML RMT, which **carried out** site investigation activity on behalf of JMML acted as its agent to that ex**tent along** with M/s Joy Mining Services India Pvt Ltd (JMSIPL). Thus, JMML. **had fixed piece** PE in India through RMT and JMSIPL with the entire mining Site at its disposal.*

*16. In support of this contention, reliance was **placed on the** decision of the Coordinate Bench at Chennai in the case of Ansaido **Energia** SPA 310 ITR 237.*

*17. It is the say of the Id. D,R, that the appellant **company** had fixed place of business in India with the entire Mining Site at **its disoosal** through its AE which fulfills the mandate of Article 5 of India-UK **DTAA as** well as business connection u/s. 9(.I)(i) of the Act,*

*18. There is no dispute that the appellant company is a tax resident of UK and eligible to be governed by provisions of India-UK Treaty. In terms of Article 5 of India-UK Treaty, for enterprise to constitute fixed place permanent establishment, there must be a fixed place of business at the disposal of the enterprise through which the business of the enterprise **is carried** on. We find that the appellant company did not have any place of business/office/branch through which its business was carried on in India. The only income earned by the appellant company during the year under ration was from supply of maintenance spares from outside India and the risk title of such goods have passed to SECL*

from outside India, This is clear from Para 16 of the contract at page 58 of the paper book which read as under:-
Passing of Risk and Title

"Risk and title to the Goods and Maintenance Spares to be supplied the Contract shall pass to SECL upon delivery effected FOB at the foreign port of shipment."

19. And Para 17 Price and Payment Terms have been provided and it has been provided that the price for Maintenance Spares determined by SECL was calculated based on production achieved during annual production cycle.

20. The Hon'ble Supreme Court in the case of Ishikawajirna-Harima Heavy industries 283 ITR 408 had the occasion to consider the applicability of Section 9 of the Act read with Article 7 £ 12 of the DTAA between Indian and Japan wherein the appellant was a company incorporated in Japan and included; interalia, in business of construction of storage tanks,, engineering, etc,, - it entered into an agreement with Petronet L.NG Limited for setting up a Liquefied Natural Gas (LNG) receiving storage and degasification facility in India - the appellant was to develop, design, engineer and procure equipment, materials and supplies, to erect and construct some storage tanks, it was held by the Hon'ble Supreme Court that since the contract involved offshore supply and offshore services and since all activities in connection with offshore supply were carried out outside India, amounts receive/receivable by the appellant for offshore supply of equipments, materials, etc, cannot be deemed to accrue or arise in India, A similar view was decided in favour of the assessee by the Hon'ble High Court of Delhi in the case of Linde AG, Linde Engineering Division 365 ITR 1 wherein the Hon'ble High Court has held that where equipment and material was manufactured and procured outside India, income attributable to supply thereof could only be brought to tax if it was found that, said income therefrom arose through a business connection in India, The Hon'ble High Court had to consider whether appellant's income is taxable under the Act and DTAA and the Hon'ble Court held, interalia,, as under-

> *As far as obligations of 'L' and 'S' are: concerned, the Contract is on indivisible one. however,, for the purp of tax, the Contract does specify the amounts that are payable with respect to the various activities carried on L'/'S'. income may accrue or arise, at various stages and on account of varied activities. In case of a resident tax entity any income which accrues or arises from on activity outside India, would not be tax unless the some falls within the deeming provision contained in section 9(1). In these circumstances, it was not be apposite to consider the contract as a composite one for the purposes of imposition of tax under the [Para 82]*
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> *The Authority referred to the decision of the Supreme Court in the case of Vodafone. international Hold B. \/, v. Union of India [2012] 341 ITR 1/204 Taxrnan 408/17 taxmann.com 202 in support o/ its view that in law the liability for performance, of the Contract by 'L ' and Y was joint and severable, the contract must read as on indivisible one for the purposes of tax. [Para 83).*
>
> *The approach as well as the conclusion of the Authority is flawed. The Authority erred in proceeding or basis that the contract as a whole was the subject of taxation. The subject matter of taxation was not contract between the parties but the income that the petitioner derived from the Contract, Thus, the situs of object of the Contract would not be as relevant as determining the situs where the income of 'L' had accrue arisen. By virtue of section 4, income tax is charged in respect of the total income of a person, By virtue of Section 5, the scope of total income of a non-resident is limited to income which is received or deemed to be received in India and income which accrues or is deemed to accrue or arise in India. It, therefore, follows the object of inquiry would have to be to determine whether any/income of*

't.' accrued or arose in India whether any income could be deemed to accrue or arise in India. The fact that the contractual obligations were not limited to merely supplying equipment, but were for due performance of the entire Contract was not necessarily imply that the entire income which was refutable to the Contract could be deemed to accrue arise in India. [Para 84], "

21. The next" question which was considered by the Hon'ble High Court related 'to the taxability of income received/receivable by Linde -
(a) Design and engineering prepared solely for manufacture and/or procurement of equipment outside India

(b) Supply of equipment material and spares outside tndia.

22. The Hon'ble court observed as under:

83. The Authority concluded that although, payments for each item or were specified for that the amounts payable for the work to be performed by individual members of the Consortium was recognized under the Contract, the same would not alter the nature of the Contract in any manner. The Authority concluded that the Contract would have to be considered as one indivisible contract and the income from the same would be taxable in India as the object of Contract was to set up a facility in India. The Authority further held that the MOU entered into between Linde and Samsung could not be understood to be overwriting the Contract or the object of the Contract With respect to the Internal Consort/urn Agreement the Authority held (hat the same was at best only on internal arrangement between Linde and Samsung, and could not be referred to for determining the nature of the Contract The Authority was of the view that the Contract being a composite contract, a 'dissecting approach ' was not permissible. Having found that the contract was on indivisible one, the Authority concluded that it was not open for Linde to plead that the sale of equipment and machinery arid designing of the project and equipment should be treated as on offshore transaction. The Authority referred to the decision of the Supreme Court in the case of Vodafone international Holdings B. V. {supra) in support of its view that since in law the liability for performance of for the purposes of tax,

84. In our view, the approach as well as the conclusion of the Authority is flawed. First of all, the Authority erred in proceeding on the basis that the contract as a whole was the subject of taxation. The subject matter of taxation was not the Contract between the parties but the income that the petitioner derived from the contract- Thus, the situs of the object of the Contract would not be as relevant as determining the situs where the income of Uncle had accrued or arisen. By virtue of Section 4 of the Act, income tax is charged in respect of the total income of a person. By virtue of Section 5 of the Act, the scope of total income of a non-resident is limited to income which is received or deemed to be received in India and income which accrues or is deemed to accrue or arise in India. It, therefore, follows that the object of inquiry would have to be to determine whether any income of Linde accrued or arose in India or whether any income could be deemed to accrue or arise in India, The fact that the contractual obligations of Linde were not limited to merely supplying equipment but were for due performance of the entire Contract, would not necessarily imply that the entire income which was relatable to the Contract could be deemed to accrue or arise in India.

85. The principle of apportionment of income on the basis of territorial nexus is now well accepted Explanation (a) to section 9(1)(i) of the Act also specifies that only that part of income which is attributable to operations in India would be deemed to accrue or arise in India. It necessarily follows that in cases where o contract entails only a port of the

operations to be carried an in India, the- assesses would not be liable for the part of income that arises from operations conducted outside India. In such a case, the income from the venture' would have to be appropriately apportioned. The Supreme Court in the case of Ishikawajma-Haiima Heavy Industries Ltd. (supra) had considered this aspect and held that merely because a project is o turnkey project would not necessarily imply that for the purposes of taxability, the entire contract be considered as an integrated one. The taxable income in execution of a contract may arise at several stages and the same would have to be considered on the anvil of territorial nexus The decision in the case of Ishikawajma-Harima Heavy Industries Ltd. (supra) is dearly applicable to the facts of the present case as in that case a/so the contract in question was for a turnkey project what the object was to setup a Liquefied Natural Gas !l.NG) receiving, storage and degasification facility. Indisputably, insofar as obligations of parties are concerned, this contract was also an indivisible contract. The Supreme Court held that for the purposes of determining the taxability, it was necessary to enquire as to where the income sought 10 be taxed had accrued or arisen. The impugned ruling is thus clearly contrary to the decision of the Supreme Court in Ishikawajma-Harima Heavy Industries Ltd's. case (supra).

23. Heavy reliance was placed on the decision of the Hon'ble High Court of Madras in the case of Ansaldo Energia SPA 310 ITR 327. In our view the said case is clearly distinguishable on facts. In the case of Ansaldo (supra), it was held by the Madras High Court that the Indian subsidiary of Ansaldo was a legal facade which was created for taxation purposes and was not actually-engaged in executing onshore contracts. In the instant case, right from the inception and as part of the documents, separate contracts have been entered into by SECL with separate contract prices. Moreover, one has to keep in mind the most important factor and that is the contract is with SKI, a Government of India undertaking. Therefore, by any stretch of imagination, it cannot be considered as a sham transaction.

24. The AO/DRP has also held that the consideration from sale of maintenance spares is royalty connected to PE in India and taxable u/s. 44DA of the Act read with Article 13 & 7 of India -UK Treaty and further considering 60% of consideration from supply of maintenance spares as the income of the assessee to be taxed in India,

25. As mentioned elsewhere, the contract has been entered into between and independent Government organization and the appellant company where the price for the product has been determined by the Government organization and at Para 11.4 of the invites of global Bids which is at page 332 of the paper book, it has been mentioned that the Bidder should quote the price for maintenance spares on the basis of cost per ton. In our understanding of the facts, the consideration is based on rate per ton is only a mode of recovering the price of product but it should not dilute the essential character of the contract. For this proposition, we draw support from the judgment of Hon'ble Supreme Court in the case of P. J. Chemicals Ltd. 2.1.0 ITR 830 in which the Hon'ble Supreme Court has !aid down the ratio that the nature of transaction cannot be determined by the method in which consideration is computed. •

26. Assuming Yet not accepting the activities relating to SSI creates a PE of the appellant company in India, income of PE to-be taxed in India in terms of Article 1 of India-UK Treaty would be limited to extent of activity attributable to such PIT With reference to SSI Service, .IMS India has been iterated at the market value by an independent third party, a Government of India undertaking i.e SECL. Further, the entire income from SSI Service earned by JMS India has been offered to tax in India. Thus, there is nothing further which can be attributed to tax in India. For this proposition, we drive support from decision of the Hon'ble Supreme Court in the case of DIT (International Taxation) vs. Morgan Stanley and Co. Inc. 292 ITR 416.

> *27. Considering the facts in totality in the light of the judicial decisions discussed hereinabove and considering the facts in issue from all possible angles, we do not find any merit in the findings of the AO/DRP. We, therefore, set aside the findings direct the A.O to delete the impugned additions. The other issue relates to the levy of interest and denial of credit of TDS. Levy of interest is mandatory. We, therefore, direct the A.O. to charge interest as per the provisions of the law and so far as the denial of the credit of TDS is concerned, the A.O. is directed to decide the issue while giving effect to our findings.*

10.1 The Ld. DR at the time of hearing has not brought anything contrary to argument advance by the Ld. A.R for the assessee. Likewise, we also note that there was no change in the facts of the present case viz a viz the case of the earlier year as elaborated above. Respectfully following the same we allowed the grounds of appeal of the assessee. Hence the ground of appeal of the assessee is allowed.

11. In the result the appeal of the assessee is **partly allowed.**

Order pronounced in the Court on 23/02/2021 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 23/02/2021

Manish