IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI GEORGE GEORGE K., JUDICIAL MEMBER

ITA No.501/Bang/2018
Assessment year: 2014-15

M/s. Promac Engineering Industries Ltd., # 1, Anjanapura Post, Avalahalli, Bengaluru – 560 062. **PAN: AAACP 8178R**	Vs.	The Assistant Commissioner of Income Tax, Circle 5(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Tata Krishna, Advocate
Respondent by	:	Shri N.S. Shashidhar, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	03.08.2021
Date of Pronouncement	:	17.08.2021

O R D E R

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order dated 24.11.2017 of the CIT(Appeals)-5, Bengaluru for the assessment year 2014-15.

2. The following grounds of appeal have been raised by the assessee:-

> "1. The Order of the Learned Commissioner (Appeals) is not justified in law and on facts and circumstances of the case.

2. The Learned Assessing Officer is not justified in making assessment in defiance of instructions/scrutiny norms provided by the CBDT for the cases selected under CASS.

3. As regards restricting the claim of Foreign Tax Credit under Section 90 to the extent of Rs. 3,71,874/- as against Rs.1,71,80,438/- claimed by the Appellant:

3.1. The Learned Commissioner (Appeals) is not justified in upholding the action of the Learned Assessing Officer in restricting the claim of Foreign Tax Credit (FTC) relief under section 90 to Rs. 3,71,874/- as against available credit of Tanzanian tax of Rs. 1,71,80,438/- subject to maximum of Rs. 1,37,87,386/-.

3.2. The lower authorities are not justified in considering 'total revenue as per financial statements' as against 'total income' as per the provisions of the Act for the purpose of computation of the relief of FTC under section 90.

3.3. Without prejudice to above, the lower authorities are not justified in not allowing deduction of Tanzanian tax in computing the total income under the provisions of the IT Act in respect of which the Appellant is not eligible for relief.

4. As regards denying deduction under Section 80G in respect of donation of Rs. 3,78,000/-:

4.1. The Assessing Officer ought to have allowed deduction under Section 80G in respect of donations made to the extent of evidences available i.e. for Rs. 3,78,000/-.

4.2. The Learned Commissioner (Appeals) is not justified in adjudicating the aforesaid ground.

For the above reasons and for such other reasons which may be allowed by the Honourable Members to be urged at the time of hearing, it is prayed that the aforesaid appeal be allowed."

3. The assessee has also raised the following additional grounds of appeal :-

> "3.4. The lower authorities are not justified in failing to appreciate that the case of the Appellant falls under Section 90(1)(a)(ii) and hence the appellant is eligible for relief in respect of tax paid in Tanzania.
>
> 3.5 Without prejudice to the above, the lower authorities are not justified in failing to appreciate that the tax deducted at source in Tanzania is not an income that accrues or arises outside India and therefore, the same cannot be included in the total income of the Appellant."

4. The ld. AR submitted that the additional grounds were inadvertently missed out in the original grounds of appeal and the same may be admitted. The ld. DR has not put serious objection to admission of additional grounds. We admit the additional grounds placing reliance on the judgment of Hon'ble Supreme Court in the case of *National Thermal Power Company Ltd. v. CIT, 229 ITR 283 (SC)*.

5. Ground No.1 is general in nature. Ground No.2 was not pressed at the time of hearing and as such the same is dismissed as not pressed.

6. We take up for consideration the ground No.3 along with the additional grounds. The facts are that the appellant is engaged in the business of executing turnkey projects of Cement plant and Machinery and balance of Plants for power plants from the time of Design, Manufacture, Supply, Supply, Transportation, Erection Commissioner, testing and hand over the project to the respective customer and filed its return of income u/s139 declaring a taxable income of Rs.4,24,94,646/- and discharged the taxes thereon. During the year, the Company has executed one of the contracts with Lake Cement Limited, Tanzania total contract value executed with Tanzania is USD 37.61 Million i.e., equivalent to Rs.244.47 Cross (considering the exchange fluctuation of Rs 65 per USD). As part of the contract, the appellant needs to perform the following services like as Design and Engineering, Procurement, Supply, Erection, Installation &

Commissioning, Drawing, Date & Documentation, Manufacturing and Inspection, Testing and Supply, Transport worthy export packing, Start up Commissioning Spares, Special Tools and Tackles, Forwarding Charges, Sea Freight up to Dares salaam Port, Comprehensive Insurance on ware house to ware house basis, Covering all Risks, including but not limited to risk associated with transit, flood, fire Storage, burglary theft, erection, testing & commissioning, Tagging/Marking and Painting/Preservation. During the year, total billing done by the Company against above mentioned project is Rs.63.32 Crores and the same is included in the total turnover of Rs.380 Crore for the year considering the Tanzanian tax laws, out of the above billing Lake Cement Limited has deducted a sum equivalent to Rs.1,71,80,438/- against the turnover of Rs.10,27,10,579/-. The Assessing Officer allowed only a sum of Rs.3,71,874/- as relief u/s. 90/90A which is arrived as below:-

Particulars		Amount
Total tax liability for the financial year	A	1,37,87,386/-
Total Income as per financial Statements	B	3,80,80,41,649/-
Income from Tanzania	C	10,27,10,579/-
Total tax payable in India attributable to Income from Tanzania	D=(A/B)*C	3,71,874/-

7. As per the TDS Certificate issued by Lake Cement Ltd., the AO considered the income from Tanzania to be Rs.10,27,10,579/- and allowed Rs.3,71,874/- as deduction U/s. 90. The assessee's contention is the AO has considered only the TDS Certificate to arrive at the income and has not considered the project revenue and project profit and loss account. Since the turnover of the company during the year from the contract with Lake Cement Limited is Rs.63.32 crores, the same is to be considered as income from Tanzania in computation of foreign tax credit. Further, it is submitted that the AO has also disallowed deduction u/s.80G to the extent

of Rs 5,22,750/-. However proof of payment is available to the extent of Rs.3,78,000/-.

8. On appeal, the CIT(Appeals) observed that the appellant claimed additional credit for foreign tax deducted at source of Rs.1,71,80,438/-. The AO has given a finding that credit can be given only to total tax payable in India attributable to income from Tanzania. The Article 23 of the DTAA clearly says that such deduction shall not, however, exceed that portion of the tax as computed before the deduction is given, which is attributable, as the case may be, to the income which may be taxed in Tanzania. Accordingly, the CIT(Appeals) confirmed the order of the AO.

9. We have heard both the parties and perused the material on record. In this case, the issue is with regard to granting of foreign tax credit in respect of tax paid in Tanzania. The contention of the ld. AR is that the assessee's case falls u/s. 90(1)(a)(ii) of the Act. In the case of section 90(1)(a)(i), relief is granted in respect of income on which income tax is paid in both the countries. Whereas, u/s. 90(1)(a)(ii) of the Act, relief is granted in respect of income tax chargeable in both the countries. In other words, under clause (i) assessee should have paid tax in both countries, whereas under clause (ii) it is enough if the income is chargeable to tax in both the countries and there is no mandate that the tax should have been paid in both the countries. He also brought to our attention Article 23 of DTAA between India & Tanzania .

10. The ld. AR also relied on the order of Tribunal in the case of *Ittiam Systems Pvt. Ltd. v. ITO in ITA Nos.2464 & 2465/Bang/2017* dated 13.01.2021 wherein it was held as follows:-

> "17. For sake of convenience it is necessary to reproduce the relevant clauses of double taxation agreement with the countries

in respect of which foreign tax credit has been claimed by assessee.

India US DTAA

18. Article 25 of the Indo - US Double Taxation Agreement deals with Relief from double taxation. Clause 2(a) is the relevant provision. It reads as under:

> 2.(a) Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in the United States, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in the United States, whether directly or by deduction. **Such deduction shall not, however, exceed that part of the income-tax (as computed before the deduction is given) which is attributable to the income which may be taxed in the United States**."
>
> (emphasis supplied)

19. A perusal of the aforesaid provision makes it clear that, if a resident Indian derives income, which may be taxed in United States, India shall allowed as a deduction from the tax on the income of the resident, an amount equal to the tax paid in United States of America, whether directly or by deduction. The conditions mandated in the treaty is that if any "income derived" and "tax paid in United States of America on such income", then tax relief/credit shall be granted in India on tax paid in United States of America.

India Japan DTAA

20. Article 23(2) of India Japan DTAA deals with elimination of double taxation. Clause 2(a) is the relevant provision. It reads as under:

> "2. Double taxation shall be avoided in the case of India as follows : (a) Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in Japan, India shall allow as a deduction from the tax on the income of that resident an amount equal to the Japanese tax paid in Japan, whether directly or by deduction. **Such deduction in either case shall not, however, exceed that part of the income-tax (as computed before the deduction is given) which is attributable, as the case**

> **may be, to the income which may be taxed in Japan.** Further, where such resident is a company by which surtax is payable in India, the deduction in respect of income-tax paid in Japan shall be allowed in the first instance from income-tax payable by the company in India and as to the balance, if any, from surtax payable by it in India."
>
> (emphasis supplied)

India Germany DTAA

21. Article 23(2) of India Germany DTAA deals with elimination of double taxation. Clause 2 is the relevant provision. It reads as under:

> "2. Tax shall be determined in the case of a resident of the Republic of India as follows : Where a resident of the Republic of India derives income or owns capital which, in accordance with the provisions of this Agreement, may be taxed in the Federal Republic of Germany, the Republic of India shall allow as a deduction from the tax on such income of that resident an amount equal to the income-tax paid in the Federal Republic of Germany, whether directly or by deduction, and as a deduction from the tax on such capital of that resident an amount equal to the capital tax paid in the Federal Republic of Germany. **Such deduction in either case shall not, however, exceed that part of the income-tax or capital tax (as computed before the deduction is given) which is attributable, as the case may be, to the income or the capital which may be taxed in the Federal Republic of Germany**."
>
> (emphasis supplied)

22. All these clauses are identically worded as Article 25(2)(a) of India US DTAA.

23. Relevant clauses for elimination of double taxation in the treaties under consideration states that, foreign tax credit shall not exceed the part of the income tax as computed before the deduction is given, "which is attributable as the case may be, to the income which may be taxed in that other State". We also note that, these clauses uses the expression 'income', which essentially means 'income' embedded in the gross receipt, and not the 'gross receipt' itself. We therefore do not agree with the computation adopted by Ld.AO.

24. In all the above clauses, for eliminating double taxation of doubly taxable income in the hands of assessee, it would be necessary to establish the taxes paid by assessee in USA, Japan, and Germany. The condition stipulated is very clear that FTC is available on taxes paid in these countries.

India- Korea DTAA

25. We note that Ld.AR relied on Article 24(3), whereas, in India Korea DTAA, Article 23 deals with Elimination of double taxation. Clause (a)(i) is the relevant provision, that reads as under:

> "Double taxation shall be eliminated as follows:
>
> (i) In India:
>
> (i) where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in Korea, India shall allow as a deduction from the tax on the income of that resident, an amount equal to the tax paid in Korea.
>
> Such deduction shall not, however, exceed that portion of the tax as computed before the deduction is given, which is attributable, as the case may be, to the income which may be taxed in India.
>
> (emphasis supplied)

26. On perusal of the said Article, we find that, in India FTC is available to the taxes paid in Korea and such credit shall not exceed the taxes payable in India on doubly taxed income.

Thus there is a difference in FTC available to assessee on taxes paid in USA, Japan and Germany vis-s-vis Korea.

27. In the present facts of the case, respective treaty countries withheld taxes against income from the source state at a particular rate. Article 25 of Indo U.S Treaty, Article 23 (2) of Indo-Japan Treaty and the Indo-Germany Treaty, allows FTC in India to the extent of tax paid in these countries, whereas, Article 23 of Indo-Korea Treaty allows FTC which shall not tax payable on such doubly taxable income in India.

28. We note that authorities below failed to understand the treaty provisions applicable in present facts with these countries regarding granting of FTC to assessee. On perusal of treaty provisions, we are of the view, that assessee is eligible for FTC in full, amounting to taxes paid in USA, Japan and Germany. We draw support from decision of Hon'ble Karnataka High Court in case of Wipro(supra).

28.1. Only in case of Korea, FTC is limited to taxes payable on such doubly taxed income in India, before any deduction. In other words, FTC is limited to or taxes paid in Korea or India, whichever is less.

30. Ld.AO is therefore directed to grant FTC in respect of taxes paid in USA, Japan and Germany. In case of taxes paid in Korea, FTC will be tax actually paid in Korea or payable in India on such doubly taxable income, which ever is lower.

Accordingly, Ground No.1-3 raised by assessee stands allowed for statistical purposes."

11. We have carefully gone through the Article 23 of India-Tanzania DTAA which provides as follows:-

"ARTICLE 23

METHODS FOR ELIMINATION OF DOUBLE TAXATION

1. The laws in force in either of the Contracting States will continue to govern the taxation of income in the respective Contracting States except where provisions to the contrary are made in this Agreement.

2. When income is subject to tax in both Contracting States, relief from double taxation shall be given as follows:

(*a*) In India:

(*i*) Where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in Tanzania, India shall allow as a deduction from the tax on the income of that resident, an amount equal to the tax paid in Tanzania.

Such deduction shall not, however, exceed that portion of the tax as computed before the deduction is given, which is attributable, as the case may be, to the income which may be taxed in Tanzania.

(*ii*) Where in accordance with any provision of the Agreement income derived by a resident of India is exempt from tax in India, India may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income.

(*b*) In Tanzania:

(*i*) Where a resident of Tanzania derives income which, in accordance with the provisions of this Agreement, may be taxed in India, Tanzania shall allow as a deduction from the tax on the income of that resident, an amount equal to the tax paid in India.

Such deduction shall not, however, exceed that portion of the tax as computed before the deduction is given, which is attributable, as the case may be, to the income which may be taxed in India.

(*ii*) Where in accordance with any provision of the Agreement, income derived by a resident of Tanzania is exempt from tax in Tanzania, Tanzania may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income."

In our opinion, Article 23 of India-Tanzania DTAA is *pari materia* with Article 23 of India-Korea DTAA. What is said in the case of India-Korea DTAA is squarely applicable to the facts of the present case. We have already referred to the observations of this Tribunal in the case of *Ittiam Systems Pvt. Ltd. (supra)* in the earlier paragraphs. Accordingly, relief u/s. 90 to be given on the amount which is lower of the following i.e., Tax paid on income outside India; or payable in India on such doubly taxable income, whichever is lower.

12. In other words, steps to compute the double taxation relief are as follows:-

(i) Compute global income i.e., aggregate of Indian income and foreign income;

(ii) Compute tax on sch global income as per the slab rates applicable as per Indian Income-tax Act;

(iii) Compute average rate of tax (i.e., global income divided by amount of tax);

(iv) Compute amount by multiplying foreign income with such average rate of tax; and

(v) Compute tax paid in foreign country.

The amount of relief shall be lower of (iv) & (v) i.e., tax paid on income outside India and tax payable under the Indian Income-tax.

13. We direct the AO to grant FTC as above. This ground is partly allowed.

14. The next ground is with regard to deduction u/s 80G of the Act at Rs.3,78,000. The ld. AR submitted that this issue though raised before the CIT(Appeals), but he failed to adjudicate the same. The evidence is available to the extent of Rs.3,78,000 for payment of donation and the assessee is entitled to donation u/s. 80G. After hearing both the parties, we remit this issue to the file of AO for fresh decision on this issue with a direction to the assessee to provide necessary evidence in support of the claim of deduction u/s. 80G of the Act.

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

Pronounced in the open court on this 17th day of August, 2021.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 17th August, 2021.

/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.