

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI (THROUGH VIDEO CONFERENCING)**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 2343/DEL/2015 [A.Y 2011-12]

**M/s ESM Group Inc.
Suite 118 N, 300, Corporate Park
Way Amherst, New York**

Vs.

**The A.C.I.T
Circle - 1(2)(2)
International Taxation
New Delhi**

PAN: AACCE 4072 H

ITA No. 1644/DEL/2015 [A.Y 2011-12]

**The A.C.I.T
Circle - 1(2)(2)
International Taxation
New Delhi**

Vs.

**M/s ESM Group Inc.
Suite 118 N, 300, Corporate Park
Way Amherst, New York**

PAN: AACCE 4072 H

(Applicant)

(Respondent)

**Assessee By : Shri Sudhir Dash, CA
Department By : Shri N.C. Swain, CIT- DR**

**Date of Hearing : 16.02.2022
Date of Pronouncement : 21.02.2022**

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above two cross appeals by the assessee and the Revenue are preferred against the order dated 28.01.2015 framed under section 144C(13) r.w.s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to Assessment Year 2011-12.

2. The substantive grievance of the assessee is that the Assessing Officer/DRP grossly erred in concluding that the assessee has a Permanent Establishment [PE] in India in the nature of Dependent Agent PE [DAPE] as per the provisions of Article 5(4) of the India - USA DTAA.

3. The substantive grievance of the Revenue is that the DRP erred in holding that the receipts for design and drawing should be taxed u/s 44DA of the Act instead of FTS u/s 9(1)(vi) of the Act.

4. The underlying facts in both the appeals are identical. Therefore, both the appeals are disposed of by this common order for the sake of convenience and brevity.

5. The representatives of both the sides were heard at length, case records carefully perused. Relevant documentary evidences brought on record in the form of Paper Book carefully perused.

6. Briefly stated, the facts of the case are that the appellant company is an entity incorporated in the United States of America and is engaged in manufacturing and selling of products and equipments primarily for the North American Steel Industry. Products are generally used by steel companies to improve their iron desulfurization.

7. During the year under consideration, the assessee earned Revenue from Rashtriya Ispat Nigam Limited [RINL] and from Steel Authority of India Limited [SAIL]. The assessee company has undertaken the following two projects during the year:

(i) Project with SAIL for design and engineering supply of drawings and equipment's, supply of plant and equipment's including commissioning of spares, foreign supervision, training of personnel in India, ocean freight, etc.

(ii) Project with RINL for technology design, engineering of hot metal desulphurization plant SMS-2 complete in all respects for imported portion on discrete turnkey basis.

8. The assessee filed NIL return of income as it believed that no part of its income from engineering supply is taxable in India.

9. The Assessing Officer was carried away with the Service Agreement between the assessee and Rajalaxmi International Corporation [RIC] dated 01.02.2005 and formed a belief that RIC forms DAPE of the assessee.

10. A perusal of the assessment order shows that, after extracting the responsibilities from the agreement between the assessee and RIC, the Assessing Officer referring to Article 5 of the India-USA DTAA, came to the conclusion that RIC is an agent of the assessee. Referring to the agreement, the Assessing Officer was of the opinion that :

- (i) All rights of representation of the assessee remains with RIC, to whom commission is paid;
- (ii) The assessee exercises substantial degree of control over RIC;

- (iii) RIC has habitually exercised authority to conclude contracts in the name of the assessee with the clients

and finally concluded by treating RIC as DAPE in terms of Article 5(4)(i) of the DTAA and referring to the decision of the Hon'ble Delhi High Court in the case of Rolls Royce Vs DDIT, the Assessing Officer attributed Rs. 77,514/- to the income of the assessee.

11. Further, following the directions of the DRP, the Assessing Officer treated the amount received from RINL and SAIL as taxable as FTS u/s 9(1)(vii) of the Act.

12. We have given thoughtful consideration to the orders of the authorities below. The whole controversy revolves around whether RIC is DAPE. It would be pertinent to refer to the relevant article of the India - USA DTAA, which is Article 5 and the same reads as under:

"5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent, or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the

activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise and the transactions between the agent and the enterprise are not made under arms length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph."

13. A perusal of the aforesaid Article shows that a person shall not be deemed to have a PE if it carries on business through a broker, general commission agent, or any other agent of an independent status, if such person is acting in the ordinary course of his business.

14. A perusal of page 54 of the paper book shows the list of contracts entered into by RIC which is as under:

S.No	Name of the Party & Address	Date of Contract
1	Inland Refractories Co. 38600 Chester Road, Avon, Ohio 44011-02339	23/03/2009
2	TATA Steel UK Consulting Limited 30 Millbank, London, SW1P 4WY, UK	21/04/2011
3	Schenck Process India Limited Plot Nos. 67-82, Tupudana Industrial Area (New), Hatia	03/02/2012
4	Barnes Group Inc. 10367 Brecksville Road, Brecksville, OH 44141	19/07/2013
5	McKeown International Inc. 1106, South Mays, Suite 100, Round Rock, TX 78664, USA	15/01/2014

6	Technosulphur Sistema De Tratamento De Metais Liquidos S. A Rua 1° de Junho, 2,000, Bairro Vale Das Palmeiras, Sete Lagoas, Minas Gerails, CEP	01/02/2014
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15. It can be seen that RIC is also engaged with other persons. Therefore, it can be safely concluded that RIC was not dependent on the assessee for its finances. On the contrary, it was just engaged in its individual capacity vide Sales and Representative Agreement to assist the company in supply of the services/products to customers, in performing the final performance tests and in final settlement of the companies contractual obligations under contract, if required by the company. It would be apt to refer to the part of the contract which reads as under:

"Representative shall at all-time act as an independent contractor and the Company shall not exercise control over the activities and operations of Representative. Additionally, nothing in this agreement shall be construed or applied to create relationship of partners, agency, and joint ventures or of employer and employee between the Company and Representative. As an independent contractor, it is understood and agreed that the company has no obligation to Representative under federal, state or local laws regarding employee liability

and that the total commitment and liability of the company in regard to this Agreement is the payment of the Commission as defined under Schedule A. Neither party is authorized to make any commitment or representation, express or implied, on the other parties behalf unless authorized to do so in writing by such other party."

16. A perusal of the entire contract with RIC shows that RIC is an independent consultant having no rights to conclude contract on behalf of the assessee so as to construe as a permanent establishment in India. Since, in its independent professional capacity it provides similar services to other clients as mentioned elsewhere.

17. Further probe of facts show that one Shri Anand Mathur runs a consultancy business in the name and style of M/s Rajlaxmi International Corporation and the assessee seeks his service to represent it in India for its project in India. The assessee executes projects i.e supply, erection and commission of desulphurization plant on turnkey basis through international competitive bidding process.

18. The role of the RIC Shri Anand Mathur, representative, was by and large to find a project partner for the assessee to undertake the supply and erection of indigenous components. Besides, RIC is engaged

for the liasoning service of the project on behalf of the assessee who neither intended nor empowered to conclude a project on behalf of the assessee.

19. On careful appreciation of facts, we are of the considered view that RIC is an independent consultant to provide certain liasoning service. In fact, the project is executed jointly by the assessee and its consortium partner in India M/s Beekay Engineering Corporation. The two contracts are as under:

S.No	Description	Prices (Currency)	
		ESM, USA (USD)	BEEKAY (INR)
1	Design & Engineering		
	a) Imported (FOB) (Refer Table - 1)	694,494	
2	b) Indiaenous (At site) (Refer fable - 2)	-	32,00,000
	Supply of Plant & Equipment		
	a) Imported (FOB) (Refer 'fable - 3)	1,988,580	-
	b) Indiaenous (At site) (Refer fable - 4)	-	16,80,00,000
3	Supply of Refractories (At site)		
	a) Imported (FOB) (Refer 'fable - 5)		
	b) Indiaenous (At site) (Refer fable - 6)		Inch in 2b
4	Supply of Commissioning Spares		
	a) Imported (FOB) (Refer 'fable - 7)	14,300	
	b) Indiaenous (At site) (Refer Table - 8)	-	Inch in 2b .

5	Civil Engineering Work including Supplies (Refer Table - 9)		6,04,67,000
6	Supply of Fabricated Building Steel Structures at site including Sheeting, Glazing and Shop Painting (Refer Table - 10)	-	3,00,00,000
7	Erection of Building Steel Structures including Sheeting, Glazing and Final Painting (Refer Table - 10)		30,00,000
8	a) Erection of Refractories		Incl. in 9
	b) Works Contract Tax on Erection of Refractories (Refer Table-11)		Incl. in 9
9	Storage, Handling, Erection, Commissioning and P. G. tests of Plant & Equipment (Refer Table -11)		1,50,00,000
10	Foreign Supervision Charges in India during Erection, Start-up, Commissioning and P. G. Tests (Refer Table - 12)	72,000	
11	Training Charges (Refer Table - 13)	24,000	
12	Ocean Freight, Customs clearance (excluding Customs duty), Port Clearance & Inland Transportation for Imported Items for which prices are quoted	38,150	22,45,000
13	Comprehensive Marine cum Erection	-	32,00,000
14	Total Contract price (12)	2,831,524	28,51,12,000
15	CENVAT Credit	-	2,64,83,234
	Contract Price (Net of CENVAT)	2,831,524	25,86,28,766

Applying an exchange rate of 44.30 per USD whereas the value of supply by ESM is Rs. 12.54 Crores, the value of supply, services and erection done by the consortium partner Beekay Engineering Corporation is Rs. 28.51 Crore accounting for 69% of the Contract value.

S. No	Description	Prices (Currency)	
		Foreign (USD)	Indian (Rs)
1	Design & Engineering		
	a) Imported (CIF) (Refer Appendix - 15-1)	592,826	-
	b) Indigenous (Refer Appendix - 15 -	-	1,500,000
2	Supply of Plant & Equipment		
	a) Imported (CIF) (Refer Appendix - 15-3)	1082135	
	b) Indiaenous (FOR site) (Refer Appendix - 15-4)		251640000
3	Supply of Refractories (At site)	NA	-
	a) Imported (CIF) (Refer Appendix - 15-5)		Included
	b) Indiqenous (FOR site) (Refer Appendix - 15 - 6)		
4(a)	Supply of Commissioning Spares		
	a) Imported (CIF) (Refer Appendix - 15 - 7a)	14300	-
	b) Indiqenous (FOR site) (Refer Appendix - 15 - 8a)	-	Included
4(b)	Supply of Insurance Spares		
	i)Imported (CIF) (Refer Appendix- 15-7b)	NA	-
	ii)Indiqenous (FOR site) (Refer Appendix-15-8b)	-	NA
5	Civil Engineering Work including Supplies (Refer Appendix -15- 9)	"	NA
6	Supply of Fabricated Building Steel		NA

	Structures at site including Sheetina. Glazing and Shop Painting (Refer Appendix 15- 10)		
7	Erection of Building Steel Structures including Sheetina. Glazing and Final Painting (Refer Appendix 15 - 10)		NA
8	Storage, Handling, Erection, Commissioning and P.G(Refer Appendix -15-1 la)		15,000,000
9	a) Erection of Refractories (Refer Refer Appendix -15-1 lb)	NA	Included
10	Foreign Supervision Charges in India during Erection. Start up. Commission and PG Tests (Refer Appendix -15-12)	72,000	
11	Training Charges(Refer Appendix - 15-13)	24,000	
12	Comprehensive Insurance for Storage, Erection, Testing & Commissioning and till PRAC is issued for all the		2,000,000
13	Custom Clearing and Forwarding Operation at Chennai/ Vishakhapatnam Port. Inland Transportation for all the imported items including drawing and documents) for which prices are quoted in Foreign Currency) and Insurance after CIF delivery till delivery at site	NA	500,000
14	Total Contracts Price(l to 13)	1,785,261	270640000
15	CENVAT credit (refer clause 23.13 of GCC)		
15.1	Excise Duty including education		33,700,000
15.2	Counter veiling Duty (CVD) including Education cess	Nil	Nil
	Structures at site including Sheetina. Glazing and Shop		

15.3	Input Tax Credit(ITC) on APVAT	Nil	Nil
16	Contract Price (Net of CENVAT ITC)	1,785,261	236,940,000

Applying an exchange rate of 44.30/USD whereas the value of supply by / ESM is Rs. 7.78 Crore (USD 17,56,261 X 44.30), the value of supply, services and erection done by the consortium partner Beekay Engineering Corporation is Rs. 27.06 Crore accounting for 78% of the Contract value."

20. A perusal of the above two contracts shows that in the case of RINL, consortium partner M/s Beekay Engineering Corporation is 78% of the contract value and in the case of the contract with SAIL [Bhilai Steel Plant], the value of supply services and erection done by the consortium partner is 69%.

21. Considering the facts of the case in totality and in appreciation of the agreement with RIC, we are of the considered opinion that RIC does not constitute DAPE of the assessee under the relevant article of the India - USA DTAA.

22. We are also of the considered view that the consortium partner M/s Beekay Engineering Corporation has done its work by way of a separate contract and, therefore, the same cannot be held as installation PE of the assessee. There is no dispute that the assessee has supplied only engineering design, that too, from abroad and consideration in view thereof has also been received from outside India and since we have held that RIC is not DAPE within the meaning of Article 5 of the India - USA DTAA, there is no question of any attribution to the assessee. In light of the afore-mentioned discussion, the appeal of the assessee is allowed and that of the Revenue is dismissed.

23. In the result, the appeal of the assessee in ITA No. 2343/DEL/2015 is allowed and that of the Revenue in ITA No. 1644/DEL/2015 is dismissed.

The order is pronounced in the open court on 21.02.2022.

Sd/-

**[ASTHA CHANDRA]
JUDICIAL MEMBER**

Sd/-

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

Dated: 21st February, 2022.

VL/

Copy forwarded to:

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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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