IN THE INCOME TAX APPELLATE TRIBUNAL
DEHRADUN BENCH, DEHRADUN

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No. 5553/Del/2012 : Asstt. Year: 2004-05

G&T Resources (Europe) Ltd., C/o F-04 & 05, Triveni Commercial Complex, Sheikh Sarai, Phase-I, New Delhi-110017	Vs	ADIT, International Taxation, Dehradun
(APPELLANT)		**(RESPONDENT)**
PAN No. AABCG9877F		

Assessee by : None
Revenue by : Sh. T. S. Mapwal, Sr. DR

Date of Hearing: 25.04.2022		Date of Pronouncement: 29.04.2022

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order passed by the AO u/s 143(3) of the Income Tax Act, 1961 dated 23.11.2006.

2. The assessee has raised revised grounds of appeal:

"1. That, on the facts and in the circumstances of the case and in law, the learned AO has erred on facts and in law in initiating proceedings under Section 148 read together with Section 147 of the Income 1ax Act, 1961.

2. That in the absence of any new facts, other than the ones already on record based on which the Assessment Order was passed, initiating proceedings under Section 148 after expiry of four years are bad in law and void abinitio.

3. That, the learned AO having considered the facts, applied the spirit of the Boards instructions as contained in Notification 1767 in a Speaking Assessment Order erred in initiating proceedings under Section 148 after the expiry of four years merely because in a subsequent

Assessment Year, the honorable Tribunal had taken a different view.

4. That the learned AO erred in law and on facts in initiating proceedings under Section 147 by proving completely different reasons in the Draft Assessment Order and in passing the Order based on completely different reasons.

5. That the facts of case laws cited by the honorable DRP based on which the Order has been passed are completely different and not applicable to this case."

3. The assessee is a non-resident company constituted under the loss of United Kingdom, engaged in the business of providing equipments and services or facilities in connection with prospecting for extraction or production of mineral oils and filed return of income on 13.07.2004 declaring total income of Rs.10,93,706/-. The return was processed u/s 143(1) vide intimation dated 03.08.2004. Thereafter the case was selected up for scrutiny as per para 2(k) of instruction no. 9/2004 dated 20.09.2004 and accordingly notice u/s 143(2) was issued on 12.10.2004. The assessment u/s 143(3) was completed accepting the returned income.

4. As per the Assessment Order, the assessee has offered income from services performed in India u/s 44BB of the Income Tax Act, 1961 at the deemed profit of 10% and income on sale of the spares carried outside India @1% as the deemed profit which has been duly examined and accepted by the AO.

5. The assessment was concluded by the Assistant Commissioner of Income-tax (OSD), Range-I, Dehradun vide assessment order dated 22.11.2006 under section 143(3) of the Act. The assessment was reopened u/s 147 of the Income Tax Act, 1961 and notice u/s 148 was issued on

28.03.2011. In response to the notice, the assessee vide its letter dated 05.08.2011 submitted with enclosing the copy o the return that was filed on 13.07.2004 may be treated as return filed in pursuance to the notice u/s 148.

6. Post the directions of Hon'ble Dispute Resolution Panel, at an assessed income of Rs.36,68,050/- by making an addition to the returned income of Rs.10,93,796/- on account of sale of spares adjustment to the returned income.

7. Aggrieved, the Appellant filed an appeal before ITAT raising the above said grounds dated 02.01.2017.

8. Heard the arguments of both the parties and perused the material available on record.

Reasons recorded by the AO

9. During the year under consideration, the assessee derived revenues from ONGC for repair/revamping of SS Deck, Crane and Retrofitting of Crane at BHF Platform on turnkey basis. The assessee also carried out sale of spares outside India o Rs.2,86,02,831/- on turnkey basis, income of which is shown in India at 1% of gross value. The assessee has shown income from revamp and repaid at 10% of gross receipts u/s 44BB. As the assessee has a P.E. in India, and thus was liable to maintain its books of account and in absence of the books, the income from said supplies is to be estimated at 25% of gross receipts.

10. There is failure on the part of assessee in computing tax on the claim o the assesse for offering sale/supplies at a lower rate of 1% treating the said income to be outside India is not acceptable. The supplies are intricately linked to its

turnkey contract with ONGC or execution of work in India. The assessee has PE in India at the assessee was liable to maintain its books of accounts. It is a composite contract which involves and includes technical services o revamping/repair & retro filing of cranes & platform on turnkey basis. Therefore, technical services are performed by the assessee on ONGC's platform on turnkey basis which includes supply portion also as supply in intricately linked and is in fact integrated part of the execution off this contract. Thus, supply is taxable and forms part of gross contractual receipts irrespective of whether supply is done out of India or inside of India.

11. With reference to the reopening, the provisions Section 147 are as under:

"Income escaping assessment.

147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or re-compute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose

fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;
(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;

(c) where an assessment has been made, but—

(i) income chargeable to tax has been under assessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;

(ca) where a return of income has not been furnished by the assessee or a return of income has been furnished by him and on the basis of information or document received from the prescribed income-tax authority, under sub-section (2) of section 133C, it is noticed by the Assessing Officer that the income of the assessee exceeds the maximum amount not chargeable to tax, or as the case may be, the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.

Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.

Explanation 4.—For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012."

In the present case, the return of income has been filed on 30.09.2010. The P&L account for the year ending March 2010 disclosed the prior period expenses of Rs.1,08,63,174/-. The Tax Audit Report in Form 3CD which depicted this amount have been duly furnished before the AO. The computation of income including the MAT computation u/s 115JB of the Income Tax Act, 1961 along with Form 29B for the A.Y. 2010-11 reveals that the company has disallowed the prior period of expenses in the normal computation of income. Further, the same is not disallowed in the MAT computation in accordance with Form 29B.

The item of prior period expenses in the P&L account is glaring and cannot be said to be embedded under any other expense."

12. Excerpts from the Assessment Order dated 22.11.2006 are as under:

*"**4.** During the year under consideration, the assessee has offered the income from services performed in India u/s 44BB of I.T. Act at the deemed profit rate of 10% (i.e. 10% of Rs.80,77,682/-) at Rs.8,07,768/- and income on the sales of spares carried outside India at the rate of 1% of the deemed profit rate at Rs.2,86,028/- drawing the ratio from CBDT's Instruction No. 1767 dated 01.07.1987. The gross value of the spares as per the copies of invoices produced is Rs.2,86,02,831/-. The ld. AR of the assessee has furnished the copies of the contracts, copies of the letters of credits to evidence that the sales have been carried out at CIF basis outside India and has submitted that the income did not accrue to be taxed in India as per clause (a) of explanation 1 to Section 9(1)(i).*

4.1 The ld. Authority for Advance Ruling in the case of Ishikawajima Harima Heavy Industries Co. Ltd. Vs. DIT (International Taxation), Mumbai, Aar No. 618 of 2003 has ruled that if part of the work out of composite work has been executed outside India, some part of the income will be attributable to Indian operations as deemed to be reasonable.

4.2 The CBDT had laid down principle vide instruction No. 1767 dated 01.07.1987 that where the business activities are in connection with Oil Exploration & Production in India for execution of turnkey (composite) projects involving work to be carried out in India and Outside India for a lump sum consideration, the Income liable to tax in India would be 10% of receipts for inside India operations and 10% of 10% i.e.

1% for outside India operations like supply of equipment & materials etc. Though the instruction was applicable for 3 A.Ys. i.e. 1987-88, 1988-89 and 1989-90 and earlier A.Ys. but the same may be taken as guiding principle for determination of income arise out of supply of material attributable to Indian operations. The case of advance ruling is also applicable only in the case wherein the order is passed but the same is also taken as a guiding principle in the case of the assessee. In view of the above facts and circumstances, it is held that 1% of supplies is attributable to Indian operations and is therefore, liable to tax in India. In view of above facts and circumstances, the 1% of receipts in respect of supply of spares is liable to be assessed in India.

4.3 As the assessee is engaged in the business of providing services or facilities in connection with or supplying plant & machinery on hire used or to be used in the prospecting for or extraction or production of mineral oils, the revenues offered are assessed u/s 44BB of the Act."

13. Facts regarding addition on account of sale of spares carried outside India. Whether the assessee disclosed fully and truly all material facts necessary for the assessment:

14. During the subject assessment year, the Assessing Officer has clearly dealt about the provisions of Section 44BB of the I.T. Act with regard to the income from services performed in India @10% and income on the sale of spares carried outside India @ 1% of the deemed profit. The revenue authorities had duly referred to the instruction of the CBDT with regard to taxing under deemed provisions. All the facts have been disclosed before the revenue authorities and have

been duly considered during the original assessment proceedings. The assessee has disclosed the quantum of services performed and also quantum of sale of spares. The business affairs within the India and the outside India have been duly disclosed before the revenue authorities.

15. Thus, in the present case, there is no failure on the part of the Appellant to file its Return of Income. Further, the Appellant has disclosed fully and truly all material facts necessary for his assessment. The facts have been duly disclosed in the Profit and Loss Account. There is no reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that Assessment Year. Hence, keeping in view, the proviso to Section 147, the reassessment proceedings initiated u/s 147 of the Income Tax Act 1961 beyond a period of four years are bad in law and deserves to be quashed.

16. In the result, the appeal of the assessee is allowed.
Order Pronounced in the Open Court on 29/04/2022.

Sd/-
(Yogesh Kumar US)
Judicial Member

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

Dated: 29/04/2022

Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR