IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D"NEW DELHI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER

A N D

SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं/.I.T.A No.952/Del/2017
निर्धारणवर्ष/Assessment Year: 2010-11

DCIT, International Taxation, Gurgaon.	**बनाम Vs.**	M/s. Aecom Asia Co. Ltd., 9th Floor, Infinity Tower C DLF Cyber City, DLF, Phase-II, Gurgaon – 122 002.
		PAN No. AAFCM9853P

A N D

C. O. No. 46/Del/2020
[in आ.अ.सं/.I.T.A No.952/Del/2017]
निर्धारणवर्ष/Assessment Year: 2010-11

M/s. Aecom Asia Co. Ltd., 9th Floor, Infinity Tower C DLF Cyber City, DLF, Phase-II, Gurgaon – 122 002.	**बनाम Vs.**	DCIT, International Taxation, Gurgaon.
PAN No. AAFCM9853P		
अपीलार्थी/Appellants		**प्रत्यर्थी/Respondents**

निर्धारितीकीओरसे **/Assessee by :**	Shri Ankit Sahani, Advocate;
राजस्वकीओरसे **/Revenue by :**	Shri Anil Kumar Sharma, Sr. D.R.;

सुनवाईकीतारीख/ Date of hearing:	26/08/2022
उद्घोषणाकीतारीख/Pronouncement on :	20/10/2022

आदेश /O R D E R

PER C.N. PRASAD, J.M. :

1. The present appeal and the cross objection are filed by the Revenueand the assessee respectively against the orderof the ld.Commissioner of Income Tax (Appeals)-42, New Delhi [hereinafter referred to CIT (Appeals)] dated 10.11.2016 for the assessment year 2010-11.

2. The Revenue in its appeal has raised the following substantive ground of appeal:-

> " Whether, on the facts and in the circumstances of the case, the ld. CIT (A) erred in deleting the addition of Rs.6,55,71,253/- (50% of Rs.13,11,42,506/-) made under section 44DA of the Income Tax Act, 1961, thereby dismissing the AO's stand that the income of Rs.13,11,42,506/- disclosed by the assessee as "Overseas Consultancy Income" and offered on gross basis as FTS Income, is normal business and professional income u/s 44DA being effectively connected to the PE/Business Connection of the assessee."

3. Brief facts are that the Appellant is a tax resident of Hong Kong having its registered office at Hong Kong. The Appellant is a provider of technical and management services for engineering solutions throughout the world. It provides fully integrated engineering, design and program management services for a broad range of markets including infrastructure, buildings etc. The Appellant, along with a consortium of members was awarded two projects namely, Chennai Metro Rail Project ('CMRL') and Kolkata

East West Metro Rail Project ('KMRL'). Under the CMRL project, two corridors with a combined length of 45 Kms. (partly underground and partly elevated) was planned to be constructed. In the first phase itself, CMRL aimed at linking important passenger hubs and terminals like Chennai Central, Chennai Egmore, Central Moffussil Bus Terminal (CMBT), Chennai Air Port, St. Thomas Mount, Govt. Estate and High Court. Further, the KMRL project was to undertake the Kolkata East West Metro Rail Project (partly underground and partly elevated) extending from Howrah to Salt Lake, Sector V, Kolkata covering a total length of 13.7 kilometers, to provide additional transport infrastructure to Kolkata. The Appellant provided both onshore and offshore services under the General Consultancy Agreement. Therefore, the entire scope of services can be divided into two portions:

- offshore services - services to be rendered from outside India by employees directly from the Home Office in Hong Kong;

- onshore services - services to be rendered in India by the Project office in India.

4. In the return of income filed by the Appellant, offshore income (i.e., Overseas Consultancy Income) was offered to tax @10% on gross basis as Fee for Technical Services ('FTS') in terms of section 115A of the Act. Income earned from the activities carried out in India by the Project office was offered to tax as business income on a net income basis. The return was selected for scrutiny assessment and the Assessing Officer ('AO') passed the assessment order making an addition of Rs.65,571,253 to the returned income treating 50% of Overseas Consultancy Income as chargeable to tax @ 40% on net income basis. The AO treated services rendered

from overseas as effectively connected to the Permanent Establishment ('PE')/PO of the Appellant in India as per section 44DA of the Act.

5. In the course of assessment proceedings the Assessing Officer required the assessee to show cause as to why the Overseas Consultancy Income (OCI) of Rs.13.11 crores should not be treated as income as per the provisions of section 44DA of the Income Tax Act, 1961 (the Act) as profits and gains of business or profession. The assessee made its submissions before the Assessing Officer vide letter dated 07.02.2014 stating as under:-

"1. Detail **of Overseas Consultancy income from both the projects in India viz. Chennai Metro and Kolkata Metro totalling of Rs. 131142506/- is attached.** Kindly refer pages no. 1 & 46. Page 1 is for Chennai Metro Project (Receipts in ENR 93832784/-) while page no. 46 is Kolkata Metro Project (Receipts in INR 37309721/-).

We are also submitting herewith relevant pages of the invoices including remuneration concerning the overseas input for the month of January/March 2010 are attached. These invoices are being submitted as test check. Relevant pages of invoices for remuneration having only overseas input are being attached for all other months. In case you desire, we can submit the complete invoices for the whole year. For Chennai Metro Project invoices kindly refer pages no. 2 to 45 and for Kolkata Metro Project Invoices, kindly refer pages no. 47 to 82).

Invoices where work is performed outside India are those invoices, where work is not related to Project Office in India as none of these services are performed in India in terms of Contract Agreements (already on records). The assessee has shown this income under section 115A of the Act as Fees for Technical Services other than income referred to in section 44DA of the Act.

2. **Show Cause as to why the consultancy income of Rs, 131142506/- claimed as exempt may not be treated as business income being effectively connected with PE/PO:**

In this regard, it is respectfully submitted that the consultancy income aforesaid is not claimed as exempt by the assessee.

It is treated as Fees for Technical Services (FTS) u/s 115A not connected with PE in India and taxed at 10% on gross basis u/s 115(l)(b)(BB) of the Act.

The assessee got projects in India as an overseas entity. Certain work is to be carried out in India while certain work has to be carried out outside India.

Though the work is related to the same project but is independent in nature. For the work related to projects to be carried out in India, he has to open Project Offices in India. These are permanent establishments (PE) in India as projects are long term projects. Thus PE is created only for the work to be carried out in India and not for the whole work.

As stated in the Contract Agreement, it has already been agreed that some specific tasks for example proof checking of detailed design can be provided from Consortium's home offices outside India (Appendix V Para 1.7. Location-Page No. 133). Kindly refer page no. 83.

As the remuneration is based on Man Hours/Man Day /Man Months basis for specific work with specific name of the performer and the assessee is maintaining complete records in this regard and the same is being accepted by the Contractor.

Thus all the work in the projects are not related or attributable to PE in India viz. as stated above, PE in India is for work to be carried out in India only and not for work to be performed outside India.

Work carried out outside India is not related to work carried out in the Project Office in India or PE in India as both the categories are separately worked out in the Contract Agreements in both the projects.

None of the staff who has worked overseas has visited India. They have worked from Head Office. Tax at source u/s 195 @ 10% is also being deducted for all such receipts.

All the invoices has been accepted and approved by the contractor and foil payment against all the aforesaid overseas work invoices is received by Head office at Hong Kong and not in India."

6. Not convinced with the submissions of the assessee the Assessing Officer treated the OCI as business income of the assessee under section 44DA of the Act. However, since the assessee has not provided the details of expenditure incurred in

connection with OCI earned, the Assessing Officer estimated the expenditure at 50% and allowed and the remaining income of Rs.6,55,71,253/- being 50% of Rs.13,11,42,506/- was brought to tax @ 40% observing as under:-

> "In the case of the assessee, since the entire contracts are effectively connected to the PE/Business Connection, any services rendered under these contracts even though rendered from outside India are effectively connected to such PE/Business Connection. In the present case, since AECOM Asia Company Limited is receiving FTS from India for carrying out services in relation to agreements for which PO has been established, it can be said that such FTS are effectively connected to PE/business connection in India and therefore, should be taxed as per section 44DA of the Act.
>
> **It is also Important to note that in the present case, such PE/ business connection fl.e.P.O.l was already in existence prior to current assessment year and therefore, it has an active role in earning such PTS.**
>
> 4. The income of Rs. 13,11,42,506/- disclosed as FTS in the return is now assessed as income from business and profession u/s 44DA being effectively connected to the PE/Business Connection. This is the income that has been offered to tax as FTS @10% u/s ll5A in the return of-income. Since the assessee has itself disclosed the amount of Rs. 13,11,42,506/- as FTS from India , the whole of this amount is found attributable to the operations carried out in India for the purposes of assessing income u/s 44DA. The assessee has not provided the details of the expenditure incurred in connection with FTS and in view of the same this income cannot be definitely ascertained. Hence Rule 10 of the Income Tax Rule is invoked to estimate this income of the assessee. This income of the assessee is assessed after an allowance of 50% as expenditure to the assessee. The income of the assessee shall be enhanced by an amount of Rs. 65571253 (50% of 131142506/-} to be taxed @40%. Penalty proceeding u/s 271 (1){c) for furnishing inaccurate particulars of this income is initiated."

7. The assessee preferred appeal before the ld. CIT (Appeals) and contended that the OCI received by the assessee has nothing to do with the project office in India. The off shore services are

rendered from outside India by the employees directly from the home office in Hong Kong. The assessee has offered the income from on shore services as business income. The assessee contended that the services rendered from off shore employees from home office in Kong Kong are not effectively connected with the PE of the assessee in India and, therefore, the OCI received by the assessee as FTS was rightly offered to tax in terms of the provisions of section 115A of the Act @ 10% on gross basis. The assessee placed reliance on the decision of the Delhi Bench in the case of JC Banford Excavators Ltd. Vs. DDIT in (ITA. NO. 540/Del/2011); Sumitomo Corporation Vs. DCIT [114 ITD 61 (Del.)]; Worley Parsons Services Pty. Ltd. [179 Taxman 347 (AAR)]. Considering the submissions of the assessee, the ld. CIT (Appeals) deleted the addition made under section 44DA of the Act.

8. Before us the ld. DR submits that there are no separate agreements for overseas work done and the work done by the overseas employees is not corroborated with evidences and, therefore, the matter may be restored back to the file of the Assessing Officer.

9. On the other hand, the ld. Counsel for the assessee strongly placed reliance on the order of the ld. CIT (Appeals). The ld. Counsel for the assessee submits that for the assessment years 2012-13 to 2014-15 the ld. CIT (Appeals) has given similar relief and the Department did not file appeals on account of low tax effect. The ld. Counsel submits that for the assessment years 2015-16 to 2017-18 the Assessing Officer has accepted the assessee's stand with regard to treatment of off shore income as FTS under section 115A of the Act and the copies of the assessment

orders are placed at pages 192, 193 for the assessment year 2017-18 and at pages 231 to 233 for the assessment year 2016-17.

10. The ld. Counsel further submits that the co-ordinate bench of the Tribunal in the case of Iveco Spa Vs. ADIT [72 taxmann.com 195 (Delhi–Trib.)] relying upon JCB decision has held that the royalty income arising not from the activities of the employees of the branch office i.e. PE in India cannot be effectively connected with PE in India. The ld. Counsel for the assessee submits that in assessee's case the OCI has arisen because of services rendered by the employees of the assessee at Hong Kong and not from the activities and operations carried out by the PE in India. Therefore, it is submitted that the OCI cannot be said to be effectively connected with the PE in India as per the provisions of section 44DA of the Act.

11. The ld. Counsel further submits that it is the averment of the Revenue that there is no separate agreement or contract in accordance with which the receipts have been offered to tax as FTS and in this connection the ld. Counsel placing reliance on the decision of the Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd. Vs. DIT [(2007) 288 ITR 408 (SC)] submits that the Apex court held that where separate consideration is paid for separate work undertaken the contract cannot be construed as a composite contract. The ld. Counsel for the assessee submits the High Court further held that applying the principle of composite transactions which have some operations in one territory and some in others, is essential to determine the taxability to various operations. He submits that as per the decision of the Supreme Court sufficient territorial nexus between

the rendition of services and territorial limits of India is necessary to make the income taxable in India. The ld. Counsel submits that the Supreme Court held that the entire contract would not be taxable in India and each work or service has to be viewed separately and according to which taxability of a particular income is required to be determined.

12. The ld. Counsel for the assessee submits that the Assessing Officer has alleged that there is a little reference to off shore services with contract with CMRL and KMRL. The ld. Counsel submits that reference of a little or elaborate reference in the contract with the customers cannot be any basis for holding that the OCI is effectively connected with the PE. The relevant and determinative yard-stock in this regard is whether the off shore services are giving rise to PE in India and whether the FTS is arising through such services. The ld. Counsel submitas that in fact the contract actually supports the fact that certain services can be rendered from overseas home offices and the invoices raised further corroborates the fact that such services were performed off shore for which the Indian customer paid the assessee. Therefore, the allegations are made without any basis and are, therefore, liable to be dismissed as a conjecture made by the Assessing Officer.

13. The ld. Counsel submits that it is the observation of the Assessing Officer that there is no evidence that specific or a particular work has been done from outside India. In this regard the ld. Counsel submits that assessee had enclosed certain invoices along with the time-sheets (paper book page No. 114, 116) which corroborate the fact that the employees of the assessee work from

the home country office and never visited India. The ld. Counsel submits that evidence was submitted before the Assessing Officer to show that no employee of the appellant visited India in connection with the OCI and accordingly when the employees of the appellant home office in Hong Kong never travelled to India it cannot be held that work has been rendered from India so as to attract the provisions of section 44DA of the Act.

14. The ld. Counsel further submits that assessee derived OCI on account of off shore services rendered from Hong Kong and such services do not have any link with the services which are rendered with PE/PO in India. Further neither the services rendered from overseas required any inputs from the PE in India nor does it provide any imputs to the Indian PE. It is submitted that the deliveries from the activities performed by the overseas employees from outside India are transferred to CMRL/KMRL on an as is basis and is not reviewed, edited or amended. The ld. Counsel, therefore, based upon the decision of the Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd. (supra) submits that the allegation made by the Assessing Officer that all the services rendered under a contract are effectively connected to the PE and should be taxable in India are vague and without any understanding of the law. Therefore, the ld. Counsel for the assessee submits that assessee has rightly offered OCI earned by the assessee as FTS and is taxable under section 115A of the Act and not being effectively connected to the PE in India.

15. Heard rival submissions perused orders of the authorities below. The issue in appeal has been dealt with by the ld. CIT (Appeals) considering the evidences and submissions of the

assessee and following the judgements of the Tribunal of the co-ordinate bench it has been held that the services rendered by the overseas employees of home office of the assessee from Hong Kong for the activities performed for the project CMRL/KMRL are not effectively connected to PO/PE in India and, therefore, addition made under section 44DA of the Act is liable to be deleted observing as under:-

> "6.1 I have carefully considered the facts of the case in the light of submissions filed by the appellant. The assessing officer observed that there is a little reference to the offshore services in the contract with CMRL and KMRL and therefore, questioned the delivery of services remotely from overseas. The Appellant submitted that reference of a little or elaborate reference in the contract with the customers cannot be any basis for holding that the OCI (Overseas Consultancy Income) is effectively connected with the PE. The appellant contended that the contract actually enables rendering of certain services from overseas Home Offices.
>
> 6.2 Further, assessing officer held that there is no evidence that a specific or a particular work has been done from outside India. The assessee contended that certain invoices along with the time sheets corroborating the fact of delivery of services from overseas were produced before the assessing officer during assessment proceedings. The assessee also stated that the employees of the Appellant worked from their home country office and never visited India and the evidence was submitted to the AO that no employee of the Appellant visited India in connection with the OCI (Overseas Consultancy Income). The invoices raised further corroborate the fact that such services were performed offshore for which the Indian customer paid the Appellant. A perusal of the agreement shows that it nowhere restricts the rendering of services from outside India.
>
> 6.3 Assessing officer also made observation in the assessment order that even if the Appellant has received some inputs or services from outside India, these are also related to the project office in India as the same are performed in terms of the contract agreements. This particular observation highlights that the assessing officer has put aside doubt regarding actual performance of services from overseas and held that the receipts

against the offshore services are chargeable to tax under section 44DA since the offshore services are related to the project office in India. -

6.4 Appellant submitted that offshore services rendered from the Hong Kong do not have any link with the services which are rendered by the PE/PO in India. Further, neither the services rendered from overseas required any inputs from the PE in India nor does it provide any inputs to the Indian PE. The deliverables from the activities performed by the overseas employees from outside India are transferred to CMRL / KMRL on an as-is basis and is not reviewed, edited or amended.

6.5 With the above background of facts in mind, it may be relevant to examine the application of the provisions of section 44DA in this context.' As per section 44DA, where a foreign company carries on business in India through a PE in India; and the right, property or contract in respect of which the royalties or FTS are paid, is effectively connected, with such PE or fixed place of profession, then the income will be computed as income from business or profession as per the Act. The assessing officer has justified the addition based on "relation" of services to the project office whereas the provisions require the contract/right/property to be "effectively connected" as against mere "related".

6.6 The words "effectively connected" is not defined under the Act. The assessee has relied on the ITAT judgement in the case of JC- Bamford Excavators Ltd. (supra) to clarify the meaning of "effectively connected". Relevant extracts are as under:

> *"The phrase 'effectively connected with' has neither been defined under the Act nor the DTAA. In such a situation, it becomes crucial to understand the import of such an expression. In our considered opinion, the words 'effectively connected' are akin to 'really connected'. In the context of royalties, it is in the nature of something more than the mere .possession by the PE of property or right but equal to or -a little less than the legal ownership of such property or right. But in no case the remote connection between the PE and property or right can be categorized as effectively connected.*

6.7 Further, ITAT Delhi in the case of Hon'ble jurisdictional ITAT in the case of Sumitomo Corporation vs Deputy Commissioner of lncome-tax(114 ITD 61) wherein it has been held that merely because an entity has a PE in India, all the income accruing or arising to the non-resident shall not be taxable in India and only

such income which is attributable to the PE shall be chargeable to tax in India. Further, the income producing activity should be closely connected to the PE. It may be noted that effective connection is required to tax the income as business income whereas the services are chargeable to tax on gross basis in the absence of effective connection. So, with relation to project office, the tax authority of source country is entitled to tax on gross basis. However, once the effective connection is established, it entitles the tax authority to tax on net basis in accordance with the provisions of section 44DA.

6.8 The "effective connection" comes into play if activities in. order to deliver contractual obligations stand performed through project office. Since in this Case, situs of performance of the activities is outside India, the effective connection is not there with the project office. In this case, the assessee has offered the fee for technical services on gross basis and the activities conducted outside India are not effectively connected with PE in India, therefore, the addition made under Section 44DA of the I.T. Act is liable to be deleted. In view of the discussion made above. Hence, ground of appeal is allowed."

14. On careful examination and consideration of the findings of the ld. CIT (Appeals), the evidences placed on record by the assessee, we do not see any infirmity in the order passed by the ld. CIT (Appeal) in holding that the assessee has rightly offered the OCI as fees for technical services under the provisions of section 115A of the Act and the addition made under section 44DA of the Act is liable to be deleted. Ground raised by the Revenue is rejected.

15. Coming to the cross objection filed by the assessee, we hold that since we have sustained the order of the ld. CIT (Appeals) in deleting the addition made under section 44DA of the Act the grounds raised in the cross objection became infructuous. Accordingly the cross objection is dismissed as infructuous.

16. Coming to the additional ground of appeal raised by the assessee in its cross objection with respect to allowability of deduction under section 37(1) of the Act pertaining to Education Cess, Senior & Higher Education Cess is concerned, it is the submission of the ld. Counsel that this ground is not pressed.

17. In view of the submissions of the ld. Counsel, this ground is dismissed as not pressed.

18. In the result, the appeal of the Revenue and the cross objection filed by the assessee are dismissed.

Order pronounced in the open court on : **20/10/2022.**

Sd/-	**Sd/-**
(N. K. BILLAIYA)	**(C. N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 20/10/2022.

MEHTA

Copy forwarded to

1. Appellants;
2. Respondents;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	14.10.2022
Date on which the typed draft is placed before the dictating member	17.10.2022
Date on which the typed draft is placed before the other member	20.10.2022
Date on which the approved draft comes to the Sr. PS/ PS	20.10.2022
Date on which the fair order is placed before the dictating member for pronouncement	20.10.2022
Date on which the fair order comes back to the Sr. PS/ PS	20.10.2022
Date on which the final order is uploaded on the website of ITAT	20.10.2022
Date on which the file goes to the Bench Clerk	20.10.2022
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	