

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT  
AND  
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA No.273/Del/2011  
Assessment Year: 2006-07

**WITH**

ITA No.5800/Del/2010  
Assessment Year: 2007-08

M/s. Lahmeyer Holding GmbH (earlier known as Lahmeyer International Gmbh), Friedberger Strasse 173, 61118 Bad Vilbel, Deutschland-Germany	<b>Vs.</b>	DDIT, Circle-3(1), International Taxation, New Delhi
<b>PAN :AAACL6802E</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Sh. Satyan Sethi, Advocate Sh. A. T. Panda, Advocate
Respondent by	Ms. Sapna Bhatia, CIT (DR)

Date of hearing	18.08.2022
Date of pronouncement	16.11.2022

**ORDER**

**PER SAKTIJIT DEY, JM:**

Captioned appeals are by the same assessee. While appeal for assessment year 2006-07 arises out of order dated 08.11.2010 passed by learned Commissioner of Income Tax (Appeals)-VII,

New Delhi, the appeal for assessment year 2007-08 is against the final assessment order passed under section 144C(13) read with section 143(3) of the Income-tax Act, 1961 (for short 'the Act'), in pursuance to the direction of learned Dispute Resolution Panel (DRP). However, issues arising in the appeals are more or less common, hence, both the appeals are clubbed together and disposed of in a common order, for the sake of convenience.

**ITA No. 273/Del/2011**  
**Assessment Year: 2006-07**

2. In ground nos. 1 & 2, the assessee has challenged the decision of the departmental authorities in holding that the assessee has a Permanent Establishment (PE) in India under Article 5 of India - Germany Double Taxation Avoidance Agreement (DTAA) and taxing the amount received from contract with Andhra Pradesh Transmission Corporation (AP Transco) by applying the rate of 20%.

2.1 Briefly the facts are, the assessee is a non-resident corporate entity incorporated in Germany and is a tax resident of that country. As stated by the Assessing Officer, the assessee is an engineering consulting company which offers planning, designing and consulting services in relation to complex infrastructure

projects. The assessee had entered into contracts with Government/Semi-Government organization for executing various projects. During the year under consideration, the assessee has earned revenue from executing following contracts and offered them to tax as under:

<b><i>Project Name</i></b>	<b><i>Date of Agreement</i></b>	<b><i>Amount (Rs.)</i></b>	<b><i>Rate of Tax</i></b>
<i>Andhra Pradesh Transmission Corporation</i>	<i>15.05.1999</i>	<i>629,256</i>	<i>10%</i>
<i>J &amp; K Power Development Corp. Baglihar Project</i>	<i>17.08.1999</i>	<i>112,144,163</i>	<i>20%</i>
<i>Jai Prakash Ind. Ltd.</i>	<i>18.08.2003</i>	<i>22,023,692</i>	<i>4.18%</i>
	<b><i>Total</i></b>	<b><i>134,797,111</i></b>	

2.2 Insofar as the revenue earned from J & K Power Development Corp. Baglihar Project is concerned, there is no dispute between the parties, as, the assessee itself has admitted that it had a PE in India and offered the revenue earned to tax at the rate of 20%. However, insofar as the amount received from AP Transco, the assessee claimed that it has no PE in India and the amount, being in the nature of Fee for Technical Services (FTS), is taxable under Article 12 of India – Germany Tax Treaty. Thus, the assessee offered the income to tax on gross basis by applying the rate of 10%. The Assessing Officer, however, did not

accept assessee's claim. Relying upon assessment orders passed for assessment years 2003-04, 2004-05 and 2005-06, the Assessing Officer held that the assessee had a PE in India in terms of Article 5(2)(i) read with Article 5(1) of the Tax Treaty, hence, the FTS earned is taxable under section 44DA read with section 115A of the Act. Without prejudice, he observed, irrespective of the fact, whether the assessee has a PE in India or not, by applying the Force of Attraction Rule the income is taxable in India on gross basis by applying the rate of 20%. Accordingly, he proceeded to tax the revenue earned from AP Transco. While deciding the issue in appeal, learned Commissioner (Appeals) followed the orders passed by the first appellate authority in assessee's own case in assessment years 2004-05 and 2005-06 and upheld the addition.

2.3 Before us, learned counsel appearing for the assessee submitted, the issue is squarely covered in favour of the assessee by the decisions of the Tribunal in assessment years 2001-02 to 2005-06. In this context he drew our attention to the relevant observations of the Tribunal on the disputed issue.

2.4 Though, learned Departmental Representative agreed that the issue is covered in favour of the assessee, however, he relied upon the observations of the departmental authorities.

2.5 We have considered rival submissions and perused materials on record. Undisputedly, the projects from which the assessee has earned revenue in the year under consideration were continuing from preceding assessment year. We have noted, while considering identical nature of dispute arising between the parties, the Coordinate Bench in ITA No. 4960/Del/2004 and Ors. relating to assessment years 2001-02 to 2005-06, has not only held that there is no PE of the assessee in India, insofar as, the AP Transco project is concerned, but also held that Force of Attraction Rule will not apply. In this context, following observations of the Coordinate Bench would be relevant:

*“7. We have heard both the parties and perused the relevant material on record. The contention of the assessee was that the force of attraction rule is not applicable to the assessee in view of article 7(1) of the treaty between India and Germany DTAA. The contention of the assessee was that as per protocol of the treaty, the force of attraction rule in this treaty restricts the application of the rule to a case where, the PE is involved in the transaction and the transaction is restored to avoid taxation in the source state and both these contentions needs to be satisfied so as to attract the rule. The PE constituted in India by the assessee under the contract with JKSPDC-Phase-2 was not involved in any other project executed in India during the relevant previous year. For supporting this*

*statement, the assessee submitted various contracts entered into by the assessee with different independent unrelated parties. Most of these contracting parties are government or semi government or private organisations. The assessee constitutes PE on account of undertaking supervisory activities as provided in article 5(2)(i) of the treaty in relation to construction of Hydro Power Projects at Baglihar in the state of Jammu & Kashmir. In respect of the balance contracts, based on specific contract requirements, the assessee's personnel either performed service at the client's location or at its home office in Germany, wherein the assessee provided contract-wise, the location wherein the activities were undertaken. The above fact as per the assessee clearly demonstrates that owing to geographical region, the PE on account of JKSPDC Phase-II projects (executed in the state of Jammu & Kashmir) could not play a part or be involved in any project in India. These contracts have been carried out by the assessee by using different teams at a given point of time. In this regard, the details of the project managers/project engineers who visited India in connection with the execution of different contracts clearly shows that distinct PE of technician were involved in the execution of various projects in India. The teams of the project managers/project engineers, in relation to various projects, visited India in connection with the execution of these projects at different points of time. The scope of work, liabilities and risk involved in each of the contracts are independent of those stated in the other contracts executed with the different parties. Owing to Reserve Bank of India's stipulation, a separate project office is to be set up for each independent project. Further, the funds of the project office are to be used only to meet the expenses of the specific projects which has been approved and cannot be used for any other purpose in India. Therefore, the funds belonging to the project office can be used to fund or support only that project (i.e. in respect of which it has been set up) and cannot be used to fund any other projects in India. The assessee under various independent contracts entered into by it, was required to undertake specific activities as per the terms of each contracts. The activities undertaken by the assessee were independent of the others since their performance was not interlinked with each other. The location where the activities would be performed by the assessee in respect of the specific projects was dictated by the client's project site or as agreed with the clients and was undertaken outside*

India. Further, restriction on the activities which may be undertaken by project office is stipulated in the approval issued by the Government. Therefore, it cannot be said that the PE constituted in India by the assessee under Phase-II of the contracts with JKSPDC was involved in any way in the earning of income from technical services rendered by the assessee and other contracts in India. We find force in the contention of the assessee, that the PE constitute in India by the assessee under Phase-II of the contract with JKSPDC did not play any role or contributed in any manner to the execution of the other contracts or earning of FTS under other contracts and cannot thus be said to be involved with any other projects in India. Accordingly, FTS received by the assessee from rendering of technical services and other contracts cannot be said to be involved directly or indirectly in any manner to the PE constituted in India under the contract with JKSPDC- Phase-II and are formed for the purpose of deliberate avoidance of tax. Therefore, we find merit in the argument of the Ld. AR that such income by way of FTS is to be subjected to tax @ 10% under article 12 of the treaty and cannot be subject to tax @ 20% as contemplated by the Assessing Officer. As per the Revenue's contention, it is undisputed fact that the income earned by the assessee was in the nature of FTS, there is business connection and income accrues and arises or deem to accrue and arise in India. The regional existence of place of PE and the article 5(1) in the form of JKSPDC-BCS as well as there is existence of supervisory PE under article 5(2)(i) in the form of JKSPDC-BCS was not established by the Revenue from any documentary evidence on record. Similarly, the nature of business of the assessee remains unchanged and the assessee is engaged in the business of providing consultancy services to various projects in India. The assessee is an engineering consultancy services that offers wide range of planning, designing and consultancy services etc. in relation to complex infrastructure projects in. India. The assessee rendered engineering consultancy services mainly in relation to power projects.

7.1 From the perusal of the records and contradictory aspect pointed out by the Ld. DR, it can be seen that the PE in respect of JKSPDC-Baglihar Phase - II Project has rightly been offered to tax at 20% by the assessee as it is the only project which has PE. The Force of Attraction rule will not be applicable in other projects as the same do not constitute either PE or does not come under the

*purview of the DTAA. The contradictions pointed out by the Revenue do not demonstrate that the other projects constitute PE. In fact, for applying force of attraction, there should be some common link to each of the contracts /projects such as the common expats, the common nature of the contract/projects, the commonality of the location, the common contracting parties etc. which are absent in the present case. Therefore, the applicability of rule of force of attraction does not apply in the present assessee's case. Thus, the treatment given by the assessee for offering tax @20% in one project and 10% in rest of the projects was rightly done. Hence, Ground No. 1 of the assessee's appeal in ITA No. 4960/DEL/2004 for A.Y. 2001-02 is allowed.*

2.6 In the facts of the present appeal, it has been brought to our notice by learned counsel appearing for the assessee that duration of services rendered for AP Transco project in terms with the agreement is for a period of less than 6 months. The aforesaid factual position has not been controverted by the Revenue. That being the case, there is no PE in terms with Article 5(1) read with Article 5(2)(i) of the Tax Treaty. Therefore, the decision of the Coordinate Bench (supra) will squarely apply to the facts of the present appeal. That being the case, respectfully following the decision of the Coordinate Bench, we direct the Assessing Officer to delete the addition. Ground nos. 1 and 2 are allowed.

3. Ground no. 3 relates to taxability of revenue earned from contract with Jaiprakash Industries Ltd. by applying the provisions of section 44DA of the Act.

3.1 Briefly the facts are, insofar as, the revenue earned from Jaiprakash Industries Ltd. contract, the assessee claimed that the amount received being in the nature of income derived from business of civil construction or the business of erection of plant and machinery or testing or commissioning thereof in connection with a turnkey power project approved by the Central Government, provisions of section 44BBB would be applicable and accordingly, the assessee offered 10% of the revenue earned to tax. Whereas, the Assessing Officer rejecting assessee's claim held that the assessee has a PE in India, hence, the income is taxable at 20%. While deciding assessee's objections on the issue, learned DRP upheld the decision of the Assessing Officer.

3.2 Before us, learned counsel appearing for the assessee submitted, though, assessee's claim that the revenue earned is covered under section 44BBB was not accepted by the Tribunal in preceding assessment year, however, the Tribunal did not accept Revenue's stand of taxing the income under section 44DA read with section 115A either. He submitted, the Tribunal held that

the income earned, being in the nature of FTS, in absence of a PE has to be taxed at the rate of 10%.

3.3 Learned Departmental Representative, though, agreed with the submissions of the assessee, however, he relied upon the observations of the departmental authorities.

3.4 We have considered rival submissions and perused the materials on record. While deciding ground nos. 1 and 2 in the earlier part of the order, we have referred to the decision of the Tribunal in assessee's own case in assessment years 2001-02 to 2005-06. Though, on going through the decision of the Tribunal in preceding assessment years, we find that the Tribunal did not accept assessee's claim that the revenue earned from the contract with the Jaiprakash Industries Ltd. is covered under section 44BBB of the Act, however, the Tribunal held that the assessee has no PE in India and in absence of PE, the revenue earned from Jaiprakash Industries Ltd., being in the nature of FTS will be taxable at the rate of 10%.

3.5 Facts being identical in the impugned assessment year, respectfully following the decision of the Coordinate Bench, as referred to above, we direct the Assessing Officer to tax the revenue earned from the Jaiprakash Industries Ltd by applying

the rate of 10% as provided under Article 12 of India – Germany Tax Treaty. This ground is partly allowed.

4. In ground no. 4, the assessee has challenged the applicability of Force of Attraction Rules to the revenue earned from contracts with AP Transco and Jaiprakash Industries Ltd.

4.1 While deciding the earlier grounds, we have referred to the decision of the Tribunal in the preceding assessment years, wherein, it has been categorically held that Force of Attraction Rule is not applicable to the revenue earned from the AP Transco and Jaiprakash Industries Ltd. In view of the aforesaid, we decide the ground in favour of the assessee.

5. In ground no. 5, the assessee has challenged levy of interest under section 234B of the Act.

5.1 Having considered rival submissions, we find, the Coordinate Bench has decided identical issue in favour of the assessee in the preceding assessment years in the order referred to above. The relevant observations of the Tribunal in this regard are as under:

*“13. We have heard both the parties and perused all the relevant materials available on record. Interest u/s 234B and 234C is not chargeable where tax is deductible at source. The reliance placed on GE Packages Power Inc. (supra) is apt. Hence, Ground No. 3 of the assessee’s appeal in ITA No. 4960/Del/2004 for A.Y. 2001-02 is allowed.”*

5.2 Respectfully following the decision of the Coordinate Bench, referred to above, we decide the ground in favour of the assessee.

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

**ITA No.5800/Del/2015**  
**Assessment Year: 2007-08**

7. In the previous year relevant to assessment year 2007-08, the assessee has earned revenue from executing following contracts and offered them to tax as under:

<b>Project Name</b>	<b>Amount (Rs.)</b>	<b>Tax Rate</b>
<i>Jai Prakash Power Ventures Ltd. Vishnu Prayag Project</i>	779,799	10%
<i>J &amp; K Power Development Corp. Baglihar Project</i>	13,06,15,915	20.91%
<i>Jai Prakash Industries Ltd.</i>	2,08,99,878	4.182%
	15,22,95,590	

8. The issue raised in ground no. 1 concerns applicability or otherwise of section 44BBB of the Act. While deciding identical issue raised by assessee in ground no. 3 of ITA No. 273/Del/2011, we have held that, though, section 44BBB claimed by the assessee is not applicable, at the same time section 44DA as per Assessing Officer is not applicable. Following our decision therein we direct the Assessing Officer to treat the income as FTS under Article 12 of the India – Germany Tax Treaty

and tax it by applying the rate of 10%. This ground is partly allowed.

8. In ground no. 2, the assessee has challenged the taxability of income earned from contracts with Jaiprakash Industries Ltd. and Jaiprakash Power Venture Ltd. under section 44DA read with section 115A by applying Force of Attraction Rule. Insofar as contracts with Jaiprakash Industries Ltd, the issue stands decided by us in earlier part of the order while deciding ITA No.273/Del/2011. It is relevant to observe, the contract with Jaiprakash Power Venture Ltd. was undertaken in the impugned assessment year. However, the nature of work performed by the assessee is identical to the contract with Jaiprakash Industries Ltd. It is patent and obvious, the Assessing Officer has brought to tax the amount received from both the contract under section 44DA read with section 115A of the Act assuming that the assessee had PE in India for both the contracts. Of course, the Assessing Officer also applied Force of Attraction rule.

8.1 Be that as it may, the Revenue has failed to bring any material on record to demonstrate that there was PE of the assessee in respect of the project with Jaiprakash Power Venture Ltd. The assessee's contention/claim that one of its employee was

physically present in India for a limited period of 8 days has not been controverted by the Revenue with any contrary evidence. Thus, applying the ratio laid down by the Coordinate Bench in the preceding assessment years, it has to be held that the assessee did not have any PE in India in terms with Article 5(1) read with Article 5(2)(i) of the Tax Treaty. Therefore, we direct the Assessing Officer to tax the income earned from the Jaiprakash Venture Ltd. contract by applying the rate of 10% in terms of Article 12 of India – Germany DTAA. This ground is partly allowed.

9. In ground no. 3, the assessee has challenged levy of interest under section 234B and 234C of the Act.

9.1 This ground is identical to the ground no. 5 of ITA No. 273/Del/2011 decided in the earlier part of the order. Therefore, our decision therein will apply mutatis mutandis.

9.2 In the result, the appeal is partly allowed.

10. To sum up, both the appeals are partly allowed.

*Order pronounced in the open court on 16<sup>th</sup> November, 2022*

**Sd/-  
(G.S. PANNU)  
PRESIDENT**

**Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER**

Dated: 16<sup>th</sup> November, 2022.

RK/-

Copy forwarded to:

1. Appellant

2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi