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.636/Del/2021
Assessment Year: 2017-18

M/s. Jiangsu Zhongtian Technology Company, A-71, Third Floor, Gulmohar Park, Delhi	**Vs.**	ACIT, Circle- International Taxation-2(1)(2), Delhi
PAN :AADCJ5786A		
(Appellant)		**(Respondent)**

Appellant by	Sh. Kamal Sawhney, Adv. Sh. Prashant Meharchandani, Adv. Sh. Arun Bhadoria, Adv.
Respondent by	Sh. Gangadhar Panda, CIT(DR)

Date of hearing	13.10.2022
Date of pronouncement	26.12.2022

ORDER

PER SAKTIJIT DEY, JM:

The present appeal has been filed by the assessee assailing the final assessment order dated 30.04.2021 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (for short 'the Act') for the assessment year 2017-18, in

pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. The assessee has raised the following grounds in the memorandum of appeal:

1. *Whether on the facts and in the circumstances of the case, the AO is justified in passing the Assessment Order assessing the total income of the Appellant at Rs. 27,89,21,250 (Rupees Twenty Seven Crores Eighty Nine Lakhs twenty Thousand Two Hundred and Fifty only) against the nil income shown in the return.*
2. *Whether on the facts and in the circumstances of the case, the assessing officer/DRP is justified in holding that the Appellant is not entitled to benefit of CBDT circular no. 07/2016 dated March 07, 2016 when all the conditions mentioned in the circular were satisfied by the Appellant and the Appellant was entitled to such benefit.*
3. *Whether on the facts and in the circumstances of the case, the assessing officer/DRP is justified in holding that the three contracts entered into by the JV of the Appellant and SPL are in fact a single composite contract and not separate contracts, especially when the Appellant and SPL are independent parties having no relation or association with each other and have come together only for the instant contract.*
4. *Whether on the facts and in the circumstances of the case, the Assessing Officer/DRP is justified in holding that the Appellant is responsible not only for the offshore supplies but also for execution of onshore services.*
5. *Whether on the facts and in the circumstances of the case, the Assessing Officer/DRP is justified in holding that the Appellant has a permanent establishment (PE) in India under Article 5 of the DTAA between India and China.*
6. *Whether on the facts and in the circumstances of the case, the Assessing Officer/DRP is justified in holding that the Appellant has a PE in India under article 5(1) and 5(2) of the DTAA between India and China being fixed place PE or installation PE.*
7. *Whether on the facts and in the circumstances of the case the Assessing Officer/ DRP is justified in holding that the Appellant has a PE in India under article 5(5) of the DTAA between India and China being agency PE.*
8. *Whether on the facts and in the circumstances of the case, the DRP is justified in directing the Assessing Officer under section 144C(8) of the IT Act to find out the global revenue from offshore supplies and the global gross profit from such offshore supplies and apply such gross profit rate*

to the supplies to India, when the provisions of section 144C(8) prohibit the DRP from giving any directions for further enquiry to the AO.

9. *Whether on the facts and in the circumstances of the case, the Assessing Officer/DRP is justified in estimating that 25% of the profit from offshore supplies are attributable to Appellant's PE in India, especially when there is no evidence available of any activity in India with regard to offshore supplies to India.*
10. *Whether on the facts and in the circumstance of the case, the assessing officer/DRP is justified in holding that 50% of the onshore services receipts are attributable to the PE of Appellant in India, especially when the entire onshore services receipts have been offered as income by SPL, partner of JV who is independent and has no relation or association with the Appellant and also in the absence of any evidence of any onshore activity by the Appellant in India.*
11. *Whether on the facts and in the circumstances of the case, the assessing officer is justified in holding that the entire offshore receipts by the Appellant of Rs. 54,22,72,752/- (Rupees Fifty Four Crores Twenty Two Lakhs Seventy Four Thousand Seven Hundred and Fifty Two only) is the profit from the offshore supplies and there are no expenses towards earning of such income and also that 25% of such profit i.e. Rs. 13,55,68,688/- (Rupees Thirteen Crores Fifty Lakhs Sixty Eight Thousand Six Hundred and Eighty Eight only) is the profit of the PE taxable in India, especially when the receipts from offshore supplies during FY 2016-17 are only Rs. 31,40,83,9371-(Thirty One Crores Forty Lakhs Eighty Three Thousand Nine Hundred and Thirty Seven only).*
12. *Whether on the facts and in the circumstances of the case, the 'assessing officer is justified in holding that profit of Rs. 14,33,52,561/- Rupees Fourteen Crores Thirty Three Lakhs Fifty Thousand Five Hundred and Sixty One only) has been earned by the PE of the Appellant out of total onshore services receipts held attributable to the PE of Appellant by the DRP and therefore holding no expenditure has been incurred to earn such profit, especially when there is no evidence available of any onshore services being rendered by the Appellant.*
13. *Whether on the facts and in the circumstances of case, the assessing officer is justified in initiating penalty proceedings under Section 274 read with Section 270A of the IT Act.*
14. *The Appellant craves liberty to add, amend. alter, modify and/or delete any of the grounds of appeal in its hearing before your honor.*

2. The assessee has raised the following additional grounds:

16. *Without prejudice to the merits of the matter, since the Ld. AO has clearly recorded that the Appellant follows cash system of accounting,*

the amount of INR 14,33,52,561/- with respect to onshore contracts cannot be said to be the income of the Appellant.

17. *Without prejudice to the merits of the matter, Appellant's stand from the beginning has been that the amount of INR 14,33,52,561/- is not received by the Appellant but by Steel Product Limited (`SPL') and that the Ld. AO has itself recorded that SPL has paid tax on the said amount.*

18. *Without prejudice to the merits of the matter, the Appellant has received a payment of only INR 31,40,83,937/- in the concerned FY 2016-17 (AY 2017-18) under contracts for offshore supply. Moreover, the supply under the offshore contracts has also been made only for the amount of INR 31,40,83,937/- in the concerned FY 2016-17 (AY 2017-18). Even the Ld. AO has recorded that only INR 31,40,83,937/- out of the total contract consideration of INR 54,22,74,752/- can be considered for computation of the taxable income.*

19. *Without prejudice to the Appellant's arguments against the existence of Permanent Establishment (`PE'), the Ld. AO ought to recompute the attribution in light of the principles laid down by the Hon'ble Delhi High Court in the case of GE Energy Parts Inc. v. CIT-International Taxation, Delhi-I [2019] 411 ITR 243 (Delhi) and the order dated 30.05.2016 of this Hon'ble Tribunal, Delhi Bench in ZTE Corporation v. ADIT, Range-3, International Taxation and arrive at a reasonable attribution of 'profits' to the alleged PE.*

20. *Without prejudice to the Appellant's arguments against the existence of PE, the matter ought to be remanded back to the Ld. AO for determining the global profits of the Appellant for the purpose of further determining attribution because the entire turnover, as perversely done by the Ld. DRP and the Ld. AO, cannot be considered for the purpose of attribution to the alleged PE. The remand ought to be made in light of the additional evidence filed by the Appellant before this Hon'ble Tribunal and in light of the lack of effective opportunity to bring the same on record by the Ld. AO as only 5 days were given to the Appellant to file additional evidence during the peak of Covid-19 pandemic.*

21. *Without prejudice to the merits of the matter, the matter ought to be remanded back to the LD. AO to determine the proper computation of the additional/demand in light of the above additional grounds.*

3. However, the basic grievance of the assessee is against the directions of learned DRP on wrong assumption of facts. Briefly

the facts are, the assessee is a non-resident corporate entity, incorporated under the laws of Peoples Republic of China and a tax resident of China. For the assessment year under dispute, the assessee filed its return of income on 29.03.2018 declaring nil income. In the year 2014, M/s. Power Grid Corporation of India Ltd. (PGCIL) invited bids for supply and installation of fiber optic cable in Northern region, Andhra Pradesh and Telangana. Being interested to participate in the bid and considering that it has no presence in India, the assessee entered into a joint venture with an Indian entity, namely, M/s. Steel Products Limited (SPL) to participate in the bid. Ultimately, the joint venture became successful in the bid. Considering the fact that it may not be viable for the officials of the assessee to travel to India in order to file/execute the requisite tender documents on each occasion, the assessee authorized the officials of its wholly owned subsidiary in India, namely, ZTT India Private Ltd. ("ZTT") to act on its behalf, only for the purpose of executing/signing the tender documents. Being successful with the bid, the PGCIL entered into contracts with the joint venture between the assessee and M/s. Steel Products Ltd. On examining the contracts, the Assessing Officer noticed that three contracts have been entered into with PGCIL.

The first contract is for offshore supply of equipments, the second one is for rendering onshore services and third one is a maintenance contract. According to the assessee, the offshore supply of plants and equipments are not taxable in India, as the title in goods were transferred outside the territory of India, the case of the assessee before the Assessing Officer was, though, the contracts were granted to the joint venture of the assessee and SPL. The scope of work under each contract was performed by the members of JV, i.e., the assessee and SPL in their individual capacity. It was submitted by the assessee that the offshore supply contract was solely undertaken by the assessee. Whereas, the on-shore services contract required performance of all activities such as, port handling, port clearance, other incidental services, survey, planning, transportation, insurance, delivery at site, unloading, handling, storage, installation, splicing, termination, testing, training and demonstration for acceptance, commissioning, documentation, providing training for telecom equipment, project management and other ancillary activities related to the installation and commissioning of telecom equipment and accessories was solely the responsibility of SPL. It is the SPL which executed the onshore services contract.

4. As regards the maintenance contract, SPL solely undertook to provide the services. Thus, according to the assessee, it was involved only with the first contract relating to offshore supply of equipments. According to the assessee, the plants and equipments were manufactured in Israel, Germany and China and directly shipped to Indian ports through sea. After receipt of manufactured goods other activities were undertaken by SPL. Thus, it was the claim of the assessee that it had only received an amount of Rs.31,40,83,937/- towards offshore supply of plants and equipments manufactured and sold outside India. The Assessing Officer, however, was not convinced with the submissions of the assessee. He observed, though, the contracts are composite, however, they have been artificially split into three different contracts. Thus, he held that total consideration received under the contracts is to be treated as composite consideration. He observed, the total work involves a proportionate fee of technical services and consideration for supply of equipments. According to him, the equipment supply from China involves an element of technical services embedded into the contract. Based on the aforesaid conclusion, he divided the total consideration into two parts by attributing 40% towards fee for technical

services and 60% towards supply of equipment. Accordingly, out of the total consideration, he treated an amount of Rs.33,15,91,950/- as FTS. Having held so, he found that out of the aforesaid amount treated as FTS, the Indian partner has paid taxes on an amount of Rs.28,67,05,122/-. Therefore, according to him, the taxable FTS at the hands of the assessee is to the tune of Rs.4,48,86,828/-. Further, considering assessee's submission that it follows cash system of accounting and that in the year under consideration out of the total offshore receipts of Rs.54,22,74,752/-, only an amount of Rs.31,40,83,937/- was received during the year, he held that the amount chargeable to FTS out of Rs.4,48,86,828/- in the year under consideration is a proportion that bears the same ratio as Rs.31,40,83,937/- to Rs.54,22,74,752/-. Thus, ultimately, he brought to tax at the hands of the assesse as FTS an amount of Rs.2,59,98,318/-. Against the draft assessment order so proposed, the assessee raised objections before learned DRP. While disposing of the objections of the assessee, learned DRP held that insofar as the amount of Rs.54,22,74,752/- relating to offshore supply of plants and equipments is concerned, SPL was not at all involved. Therefore, such revenue is entirely relatable to the assessee.

Learned DRP observed, in such case, the global cost profit ratio has to be taken in view of extraordinary items of expenses in other geographical jurisdictions which may not have any bearing on the transaction made in India. Thus, learned DRP held, in case, global revenue of the assessee from offshore supply and global gross profit figures there from are available on a reasonable basis, 25% of such profit will be attributable to a PE in India. Learned DRP observed, in case, such figures are not available, the Assessing Officer is to take 25% of Rs.54,22,74,752/- as profit attributable to PE in India.

5. As regards onshore services, learned DRP held that total consideration received of Rs.28,67,05,122/- shall be apportioned between the assessee and SPL in 50:50 ratio, and the 50% revenue falling to the share of assessee shall be attributable to the PE. In other words, he directed the Assessing Officer to attribute Rs.14,33,52,561/- as income from onshore services attributable to the PE. In terms with the directions of learned DRP, the Assessing Officer completed the assessee.

6. Before us, learned counsel appearing for the assessee submitted, while disposing of the objections of the assessee, learned DRP has misconceived the facts by assuming that the

assessee has received the entire amount of Rs.54,22,74,752/- in the year under consideration towards offshore supply. He submitted, learned Departmental Representative has wrongly assumed that even for onshore services the assessee has received 50% of the amount. He submitted, in the draft assessment order, the Assessing Officer has given a categorical factual finding that in the year under consideration, the assessee had received an amount of Rs.31.40 crores for offshore supplies. Whereas, in respect of onshore service, the Assessing Officer has given a finding that the Indian partner, i.e., SPL has paid taxes on an amount of Rs.28.67 crores. He submitted, ignoring all these facts, learned DRP has directed the Assessing Officer to attribute 25% of the entire offshore contract value of Rs.54.22 crores as attributable to PE. Similarly, even though, the assessee had not received any amount out of Rs.28.67 crores, the DRP has directed to attribute 50% of such amount to the assessee to demonstrate that the assessee has not received any amount for onshore services. In this regard, learned counsel drew our attention to a copy of the undertaking furnished by SPL stating that it had performed the entire services under the onshore contract without the involvement of the assessee and had duly offered to tax the

amount of Rs.28.67 received towards such contract. Thus, he submitted, as the DRP has not appreciated the facts properly, the directions given are legally unsustainable and matter should be restored back to the Assessing Officer for fresh adjudication.

7. Further, he submitted, as regards attribution of profits to the PE, a direction be given to the Assessing Officer to follow legal principles on the issue by taking into consideration the global profits. In this context, he relied upon the following decisions:-

1. ZTE Corporation Vs. ADIT, ITA No.5870/Del/2012 and Ors., dated 30.05.2016.
2. GE Energy Parts Inc. Vs. CIT, [2019] 411 ITR 243 (Del.)

8. Thus, learned counsel submitted that the issue may be restored back to the Assessing Officer to consider all the issues, including attribution of profit as global accounts are available with the Assessing Officer.

9. Learned Departmental Representative relied upon the observations of learned DRP. However, he submitted that the matter can be restored to the Assessing Officer to verify assessee's claim of factual inconsistencies in the directions of the DRP.

10. We have considered rival submissions and perused the material on record. We have also examined the decisions cited before us. It is evident, from the initial stage of assessment the assessee claimed that though three separate contracts were awarded to the joint venture, namely, offshore supply of equipment contract, onshore services contract and maintenance contract, however, the role of the two JV partners for execution of contracts were well defined. The assessee had submitted that it had the sole responsibility of offshore supply of equipments, whereas, the Indian partner, i.e., SPL was solely responsible for the onshore services and maintenance contract. It is another matter that the Assessing Officer had rejected assessee's claim and held that contracts are composite in nature and the composite consideration has to be divided in the proportion of 40% and 60% towards FTS and equipment supply. Thus, the Assessing Officer had held that 60% of the receipt from offshore supply contract has to be apportioned towards supply of equipments and balance amount towards FTS. In this context, the Assessing Officer has given a factual finding that the assessee follows cash system of accounting and in the year under consideration it had received an amount of Rs.31,40,83,937/-

towards offshore supply of plants and equipments. However, while disposing of the objections of the assessee, learned DRP has completely misconceived facts and ignoring the factual finding of the Assessing Officer has directed the Assessing Officer to attribute 25% of the offshore supply contract receipts of Rs.54,22,74,752/-, though the assessee had received an amount of Rs.31.40 crores in the year under consideration. Similarly, in respect of onshore services and maintenance contracts the Assessing Officer in the draft assessment order has given a clear factual finding that the Indian partner, namely, SPL has offered an amount of Rs.28,67,05,122/- to tax and had excluded the said amount from being taxed at the hands of the assessee. In fact, in an undertaking given by SPL, a copy of which is placed in the paper book, the aforesaid factual position is well demonstrated. However, ignoring such vital piece of evidence and facts brought on record and forming part of the draft assessment order, learned DRP has directed the Assessing Officer to apportion 50% of the said amount to the assessee and which shall be attributed to the PE of the assessee. Thus, the aforesaid facts clearly reveal that learned DRP has completely misconceived the facts, accordingly, decided the objections of the assessee with improper application

of mind to the facts and materials on record. One more factor which needs deliberation is, while disposing of the objections of the assessee, learned DRP had specifically directed the Assessing Officer to consider the global gross profit figure and attribute 25% of such profit to the PE in India. Though, the global accounts of the assessee are very much available with the Assessing Officer, however, while finalizing the assessment in pursuance to the directions of learned DRP, the Assessing Officer has not consider the global profit and straightway attributed 25% of Rs.54.22 crores to the PE. Thus, in our view, due to factual inconsistencies and non-consideration of facts on record by learned DRP, the impugned assessment order deserves to be set aside. Accordingly, we set aside the impugned assessment order and restore the matter back to the Assessing Officer for deciding the issues relating to taxability of receipts from offshore supplies and onshore services afresh by properly considering the facts brought on record. We further direct the Assessing Officer to decide the issue of attribution of profit to PE by taking note of the profit rate as per the global accounts, keeping in view the ratio laid down in the decisions referred to earlier in the order. Needless to mention, the Assessing Officer must provide reasonable opportunity of

being heard to the assessee before deciding the appeal. Grounds are allowed for statistical purposes.

11. In the result, appeal is allowed for statistical purposes.

Order pronounced in the open court on 26th December, 2022

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 26th December, 2022.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi