

**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.1799/Del/2022
Assessment Year: 2018-19

M/s. Vetco Gray Pte. Ltd., Plot No. 2834, APIIC Industrial Area, Near Light House, Vakalpudi, Kakinada, East Godavari, Kakinada, Andhra Pradesh	Vs.	DCIT, Circle-3(1)(1), Intl. Taxation, New Delhi
PAN :AADCV3121H		
(Appellant)		(Respondent)

Appellant by	Sh. Sachit Jolly, Advocate Sh. Sohun Dua, Advocate
Respondent by	Ms. Rashmita Jha, CIT(DR)

Date of hearing	05.01.2023
Date of pronouncement	15.03.2023

ORDER

PER SAKTIJIT DEY, JM:

The present appeal has been filed by the assessee assailing the final assessment order dated 18.07.2022 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (in short 'the Act') pertaining to assessment year 2018-19,

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

2. Though, the assessee has raised multiple grounds, however, at the time of hearing, learned counsel appearing for the assessee restricted his argument primarily to the issues raised in ground nos. 10 and 11.

3. Briefly the facts are, the assessee is a non-resident corporate entity, incorporated under the laws of Singapore and a tax resident of Singapore. As stated by the Assessing Officer, the assessee is engaged in the business of offshore supply of equipment, providing services in connection therewith and supplying plant and machinery on hire basis to be used in prospecting for, extraction, production of mineral oil. The assessee entered into two separate contracts with the Oil and Natural Gas Commission (ONGC). One of the contracts is for supply of sub-sea production system comprising of various plants and equipments from offshore on Freight on Board (FoB) basis. The second contract is for services of equipments and installation and commissioning of supplied items. In the year under consideration, the assessee had earned receipts from India in respect of following activities:

- (i) Offshore supply of equipment;
- (ii) Rent/Leasing of equipment; and
- (iii) Provision of services and repairs

4. In the return of income filed for the impugned assessment year, the assessee offered total income of Rs.5,55,35,152/-. The income declared comprised of the receipts from onshore activities offered to tax under section 44BB of the Act. Insofar as the receipts from offshore supply of plants and equipments, the assessee did not offer them to tax, pleading that no part of such activity is carried out in India, either through any Permanent Establishment (PE) or even otherwise, as, the title over the goods passed overseas outside the territory of India. The Assessing Officer observed that such receipts claimed to be from offshore supplies amounted to Rs.180,80,40,576/-. The Assessing Officer observed, though, the supply of plants and equipments is integrally connected to the installation and commissioning activity, hence, part of composite contract, however, they have been artificially split into two contracts. He observed, though, there is an installation PE in Indian, however, the assessee has not offered to tax receipts from offshore supply of plants and equipments. Therefore, he issued a show-cause notice to the

assessee requiring it to explain, why the receipts from offshore supply should not be brought to tax under the provisions of section 44BB of the Act. Though, the assessee vehemently opposed to the proposed action of Assessing Officer by filing detailed submissions, however, the Assessing Officer was not convinced. Ultimately, he proceeded to tax the receipts from offshore supply of equipments by applying the provisions of section 44BB of the Act at 10% on gross basis. Accordingly, he determined the income from offshore supply at Rs.18,08,04,057/- which was brought to tax by applying the rate of 40%.

5. Against the draft assessment order so proposed the assessee raised objections before learned DRP. Though, before learned DRP, the assessee made detailed submissions to the effect that there is no PE in India and, even if there is a PE, the offshore supplies of plants and equipments are not connected to the activities of the PE, hence, not taxable in India, however, learned DRP did not find merit in the submissions of the assessee. Ultimately, learned DRP upheld the decision of the Assessing Officer. Accordingly, the draft assessment order on the disputed issue was finalized.

6. Before us, learned counsel appearing for the assessee submitted that the contracts with ONGC were executed more than 10 years back and terms of the contract have remained unchanged through the years. He submitted, though, fresh contracts have been executed in the year 2015, however, the terms of the contracts are identical. He submitted, from assessment years 2010-11 onwards, the assessee is carrying on identical nature of business in India and is following consistent revenue, recognition policy of offering income from onshore activity under section 44BB of the Act. Whereas, in respect of offshore supply of equipment, the assessee has claimed that the amount is not taxable in India, as, it is not connected to the activities of the PE. He submitted, in assessment proceedings beginning from assessment year 2010-11 till 2016-17, the Assessing Officer has followed consistent practice of apportioning 1% of the gross receipts from offshore supply of plant and equipment as profit attributable to the service/installation PE. He submitted, the aforesaid decision of the Assessing Officer in assessment years 2010-11 to 2016-17, though, was not totally in favour of the assessee, however, the assessee has accepted to avoid protracted litigation, hence, assessment orders have become

final. He submitted, though the same approach was adopted by the Assessing Officer in assessment year 2017-18, however, by exercising jurisdiction under section 263 of the Act, the revisionary authority set aside the assessment order with a direction to tax the receipts from offshore supply of equipment under section 44BB of the Act. He submitted, the order passed under section 263 of the Act was set aside by Tribunal while deciding the assessee's appeal in ITA No.733/Del/2022 by order dated 20.12.2022. He submitted, despite consistency in view taken on the issue in past assessment years and there being no change in factual position in the impugned assessment year, still, the departmental authorities have ignored the position taken in the earlier assessment years and taxed the receipts from offshore supply of equipment under section 44BB of the Act. He submitted, though, this fact was specifically brought to the notice of learned DRP, however, learned DRP has completely overlooked the submissions of the assessee in this regard.

7. Drawing our attention to Article 7 of India – Singapore DTAA, learned counsel submitted that as per paragraph 1 of Article 7, only so much of profit of the enterprise situated in the other Contracting States can be brought to tax in India as is

directly or indirectly attributable to the Permanent Establishment situated in the Contracting States. He submitted, as per paragraph 6 of Article 7, the profits to be attributed to the PE shall be determined by the same method year by year unless there is good and sufficient reason to the contrary. He submitted, assessee's income from offshore supply of equipment is being assessed to tax applying a particular method since past many assessment years. Whereas, he submitted, without providing any good and sufficient reason to depart from the methodology applied in the past assessment years, the department has adopted a new method of attributing profit to the PE. He submitted, this approach is contrary to Article 7(6) of the DTAA, hence, unacceptable. Thus, he submitted, since, a particular position has been accepted, both by the Revenue and the assessee in past assessment years with regard to taxability of income from offshore supply of equipment, same has to be followed in the impugned assessment year as well, as, the Revenue has failed to furnish any valid ground to depart from the earlier practice. Thus, he submitted, the profit attributable to PE in respect of offshore supply of equipment has to be determined at 1% of the receipts.

8. Strongly supporting the decision of the Assessing Officer and learned DRP learned Departmental Representative submitted that it is now established that the offshore supply of equipment is directly connected to the service and installation activity carried out through the PE. He submitted, once it is established that the assessee has a PE in India and the offshore supply of equipment is connected to the installation activity, hence, linked to the PE, the only provision under which it can be taxed is section 44BB of the Act. He submitted, merely because in past assessment years erroneous position has been taken by the Assessing Officer regarding the attribution of profit at 1% of receipts to the PE, in respect of offshore supply of equipment, that error cannot be allowed to be perpetuated in all assessment years to come as the principle of *res-judicata* do not apply to income tax proceeding. Thus, he submitted, there is no reason to interfere with the decision of the Assessing Officer and learned DRP.

9. We have considered rival submissions and perused the materials on record. The limited issue arising for consideration in terms of submission made by the parties before us is with regard to attribution of profit to PE qua the offshore supply of plants and equipments. Both the Assessing Officer and learned DRP have

held that offshore supply of equipment, being integrally connected to the service and installing activity undertaken by the PE in India, assessee's income has to be computed under section 44BB of the Act. It is evident from facts and materials placed before us, the assessee is carrying on the activities of offshore supply of equipments as well as providing services and installation activity onshore from past several assessment years. The assessee in the past years has taken stand that the receipts from onshore activity are taxable under section 44BB of the Act. Insofar as receipts from offshore supplies are concerned, assessee claimed it as exempt from taxation in India as the sales were effected outside the territory of India and activities are not connected to the PE. However, the Assessing Officer, while completing the assessment in assessment years 2010-11 to 2017-18 had not accepted the position taken by the assessee and devised a mechanism to attribute 1% of the receipts from the offshore supplies of equipment to the PE in India. The aforesaid position regarding taxability of offshore supply of equipment has been accepted both by the assessee and the Revenue over the years till assessment year 2016-17. For the first time, the department attempted to make a departure when the assessment order for assessment year

2017-18 was revised under section 263 of the Act. However, while deciding assessee's appeal against order under section 263 of the Act, the Tribunal set aside the order passed under section 263 of the Act and restored the assessment order attributing the profit to the PE at the rate of 1% of the receipts from offshore supply of equipment. Since, the assessee is a tax resident of Singapore and is holding a valid TRC, it is entitled to benefits under India – Singapore DTAA. Article 7 of the treaty provides mechanism for taxability of business profit. For ease of reference Article 7 in its entirety is reproduced hereunder.

“ARTICLE 7

BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as it directly or indirectly attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment. In any case where the correct amount of profits attributable to a permanent establishment is incapable of determination or the determination thereof presents exceptional difficulties, the profits attributable to the permanent establishment may be estimated on a reasonable basis.

3. *In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the taxation laws of that State.*

4. *Insofar as it has been customary in the Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.*

5. *No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.*

6. *For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.*

7. *Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.*

8. *For the purpose of paragraph 1, the term "directly or indirectly attributable to the permanent establishment" includes profits arising from transactions in which the permanent establishment has been involved and such profits shall be regarded as attributable to the permanent establishment to the extent appropriate to the part played by the permanent establishment in those transactions, even if those transactions are made or placed directly with the overseas head office of the enterprise rather than with the permanent establishment."*

10. As could be seen from paragraph 1 of Article 7, the profits of an enterprise of a Contracting State shall be taxable in that State unless the enterprise carries on business in the other Contracting State through a PE situated therein. Meaning thereby, the

business profits of the assessee shall be taxable only in Singapore unless the assessee carries on business through a PE in India, The second limb of paragraph 1 provides that in case there is a PE in the other Contracting State, only so much of the profit directly or indirectly attributable to the PE can be taxed in India. Paragraph 6 of Article 7 provides that the profit attributable to the PE shall be determined by adopting the same method year on year basis unless there is good and sufficient reason to the contrary. In the facts of the present appeal, undisputedly, in the past assessment years the Assessing Officer has taken a consistent approach of attributing 1% of the receipts from offshore supplies as profits of the PE in India. Thus, in terms of Article 7(6), profits attributable to the PE have been consistently computed by adopting a particular method. In the impugned assessment year, the Assessing Officer has made a departure by discarding the earlier method and adopting a new method of computing profit under section 44BB of the Act. While doing so, the Assessing Officer, as it appears, has not taken note of the method of determination of profit attributable to the PE adopted in the past assessment years. In fact, in course of proceedings before learned DRP, the assessee has made a specific submission

in this regard and has urged learned DRP to take note of the methodology applied in past assessment years with regard to attribution of profit on offshore supplies to the PE. Unfortunately, learned DRP has completely ignored the submissions of the assessee and has proceeded to accept the view of the Assessing Officer without saying how the factual position is different from the past assessment years. Thus, it is manifest, both the Assessing Officer and learned DRP have failed to provide any good and sufficient reason while departing from the methodology adopted by the department in respect of attribution of profit to the PE on receipts from offshore supply of equipment in past assessment years. Therefore, the decision of the departmental authorities militate against the specific provision contained under Article 7(6) of the tax treaty.

11. That being the fact, the decision taken by the departmental authorities in computing profit of the assessee under section 44BB of the Act is unsustainable, as, it is not consistent with the position taken on the issue in past assessment years. Therefore, while deleting the addition made by the Assessing Officer, we direct him to attribute 1% of the receipts from offshore supply of equipment as profit of the PE and accordingly compute the

income of the assessee. Ground nos. 10 and 11 are allowed, whereas, all other grounds having not been pressed, are dismissed.

12. Insofar as levy of interest under section 234A and 234B is concerned, this being consequential in nature, is not required to be adjudicated upon.

13. Ground no. 15, being premature at this stage, is dismissed.

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

Order pronounced in the open court on 15th March, 2023

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 15th March, 2023.

RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi