

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“I” BENCH, MUMBAI**

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &  
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No. 1181/Mum/2021  
(A.Y.2014-15)**

Kreuz Subsea Pte Ltd. C/o SRBC & Associates LLP, 16 <sup>th</sup> Floor, The Ruby, 29, Senapati Bapat Marg, Dadar (West), Mumbai – 400028	Vs.	The Deputy Commissioner of Income- tax, International Taxation-3(1)(2) Room No. X, 16 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai – 400 021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AADCL6822G		
Appellant	..	Respondent

Appellant by :	Nitesh Joshi, Gaurav Shah, Milan Kapadia
Respondent by :	Vijay Shankar, Soumendu Kumar Das

Date of Hearing	03.01.2023
Date of Pronouncement	31.03.2023

**आदेश / O R D E R**

**Per Amarjit Singh (AM):**

The present appeal filed by the assessee is directed against the order passed by the DRP-1(WZ) dated 24.01.2020 for A.Y. 2014-15. The assessee has raised the following grounds before us:

*“On the facts and circumstances of the case and in law, the Assessing Officer based on directions of Hon'ble Dispute Resolution Panel (DRP) has:*

- 1. erred in assessing total income at Rs.11,10,05,440/- as against Nil returned income*

2. *erred in double counting of overlapping days of vessels in India while computing duration of the Appellant in India and not computing the duration in India based on solar days.*
3. *erred in misinterpreting and holding that Appellant constituted a Permanent Establishment (PE) in India under Article 5(6) of India - Singapore Double Taxation Avoidance Agreement (DTAA).*
4. *erred in not applying the specific clause of Article 5(3) of India-Singapore DTAA on installation activities undertaken by the Appellant and not appreciating the fact that Appellant did not have a PE in India under Article 5(3) of India-Singapore DTAA as the duration of each of its project in India was less than 183 days during the fiscal year*
5. *erred in misinterpreting and holding that Appellant constituted a PE in India under Article 5(1) of India - Singapore DTAA*
6. *erred in violating the principal of judicial discipline in not following jurisdictional Income Tax Appellate Tribunal (ITAT's) order in the Appellant's own case for AY 2010-11-M/s. Kreuz Subsea Pte. Ltd. vs Deputy Director of Income Tax (International Taxation) (ITA No.1876/Mum/2014) and AYS 2012-13 and 2013-14-M/s. Kreuz Subsea Pte. Ltd. vs Deputy Commissioner of Income Tax (International Taxation) (ITA No. 1781 & 6621/ Mum/2016) rendered under similar facts and circumstances.*
7. *erred in incorrectly computing the Appellant's income from business at Rs. 11,10,05,440 at an arbitrary rate of 10%, on the ground that no books of accounts are maintained as against resumed income of NIL instead of applying provisions of Section 44BB of the Act*
8. *erred in including Rs.1,63,76,640 in gross revenues for AY 2014-15, received from consortium of M/s Valentine Maritime Limited & M/s Valentine Maritime Mauritius Limited, even though the same have been offered to tax in previous years.*
9. *erred in not granting credit of Rs.68,94,564 pertaining to taxes deducted at source on revenues received from consortium of M/s Valentine Maritime Limited & M/s Valentine Maritime Mauritius Limited amounting to Rs.1,63,76,640*
10. *erred in initiating penalty proceedings under Section 271(1)(c) of the Act without appreciating that the Appellant has neither concealed nor furnished inaccurate particulars of income.*

*All the above grounds are without prejudice to each other.*

*The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at the time of hearing of the appeal, so as to enable the Honorable Members to decide this appeal according to law.”*

2. The fact in brief is that assessee company incorporated under the law of Singapore has filed its return of income on 30.09.2014 declaring total income of Rs.nil. The case was subject to scrutiny assessment and

notice u/s 143(2) of the Act was issued on 16.09.2015. During the course of assessment proceedings the A.O noticed that during the year under consideration the assessee has entered into contract with Leighton Welspun Contractors Pvt. Ltd. pertaining to installation activity in connection with oil and gas. During the course of assessment the assessee has filed the various details pertaining to the contracts revenue generated from the said project along with copies of the contracts. On perusal of the contract the A.O noticed that the contract between the assessee and Leighton Welspun Contractors Pvt. Ltd. was sub-contracted with the main contract between ONGC and Leighton. ONGC was engaged in the exploration and exploitation of hydrocarbon in Western Offshore field in the Arabian Sea. The field was well developed with extensive infrastructure of well head platform, process platforms and pipelines. However, with the ageing of field, the condition of some of its existing pipeline had deteriorated. Accordingly, Leighton was awarded EPC contract for Pipeline Replacement Project for laying submarine pipelines in the Mumbai High/Bassein/Heera Fields. Leighton has further subcontracted a certain portion of work with respect of work with respect to the main contract (i.e replacement of pipelines) to the assessee vide contract dated 22.10.2013. The assessee was to primarily arrange for the following:

- *“Supply of labour, material construction plant, temporary fabrication aids and everything of a temporary nature for the execution and completion of the contract work, system.*
- *Fully equipped work barge along with diving system, crew members etc. with suitable crane and davits;*
- *Responsibility of obtaining in fields permits,*
- *Installation aids such as knee braces, bear clamps, lifting clamps;*
- *Carnage and support to lead the Applicant's equipment etc.*

The assessee had mobilised two vessels named Kreuz Supporter (Barge) and Kreuz Glorious (Barge) for the contract. The installation activity of the assessee for the contract was spread over the financial year 2013-14 and 2014-15 and details of the presence of the vessels in India was as follows:

Name of the Vessel	Date of Arrival of vessel	Date of completion of work	Date of departure of vessel	Financial year ending	No of days during PY 2013-14 (till March 2014)	No of days during PY 2014-15
KRUEZ	29.11.13	17.04.14	20.05.14	31.03.14	123	50
SUPPORTER	29.11.2014	31.03.2015	NA	31.03.2015	---	123
KRUEZ GLORIOUS	13.03.14	17.05.14	20.05.14	31.03.14	19	50
Total days					142	223

The A.O further stated that the assessee M/s Kreuz Subsea Pte Ltd. was a subcontractor and had received contract from M/s Valentine Marine Ltd. and Leighton Welspun Contractors Pvt. Ltd. for assistance in installation of stalk of Risers in the ONGC's Mumbai High field area. The A.O further stated that assessee was supposed to do the following work under the subcontract:

- “1. Mobilisation of marine spread and resources such as construction equipment, etc from Singapore to India
2. Installation engineering to be performed by the applicant outside India
3. Installation of 36 upto 47 nos stalk on risers from seabed to hanger clamp on spider deck level in ONGC's Mumbai High Field for PRP-3, HRD-II and APP.
4. Installation of 4 Nos I Tubes, 13 Nos Stalk in Risers and 6 Nos Risers with Spool and 4 Nos Riser removal in ONGC's Mumbai High Field.
5. Performing as Built Survey from top of Riser to Pipe Line touch down point in India.
6. Demobilization of marine spread and resources after completion of installation project from India to Singapore.”

The A.O further stated that the contractor M/s Leighton Welspun Contractors Pvt. Ltd. was to provide the following:

- a. *The detailed design engineering for Riser will be performed by the consultant appointed by contractor,*
- b. *Welding procedure and NDT Welder procedure qualification.*
- c. *Permanent material in accordance with installation schedule limited to pre-fabricated riser pipes in required sections complete with Monel and splash zone coating, Valves, flanges, gaskets, nuts, bolts and blinds (if required), HSS will be free issued by Contractor alongside installation barge, at site, on mutually agreed schedule Sub-Contractor shall make available Cargo Barge and or work barge as applicable (with Free Board) to receive the material immediately from supply vessel/ cargo barge. Sub-Contractor shall be responsible to arrange the loading and unloading of such material from contractors cargo barge/ supply vessel at site.*
- d. *Contractor is responsible to provide at no cost to Sub-Contractor, efficient and expeditious logistic and all agency support as required for the project at Mumbai and Delhi towards various statutory clearances of sub-contractor Vessel spread and personnel.*
- e. *Sub-Contractor's name shall be included in Contractor's existing CAR Insurance Policy Sub-Contractor's exposure to deductibles shall be limited to USD 25.000,00 per occurrences*
- f. *Contractor to obtain necessary statutory approvals required for deploying Sub- Contractor's marine spread form but not limited to Ministry of Defense (MOD), Directorate General of India Shipping, Indian Register of Shipping (IRS). Indian Customs, Immigration and Ministry of Home Affairs (MOHA) for expatriate and IOCAL personnel in Indian offshore economic zone waters, however, Sub Contractor to submit the all requires documents at least 30 days prior to arrival in Mumbai.*
- g. *Marine Warranty Surveyors, Third Party Independent Inspectors and any other required under the main contract for certifying Sub-Contractor's work spread and installation works.”*

After going through the subcontract between the assessee and M/s Leighton Welspun Contractors Pvt. Ltd. the A.O has gone through the following clauses of the subcontract:

**“General clause i.e. Para no. 2 of the sub contract**

1. *The sub contractor shall execute, complete and maintain the sub contract works in accordance with the sub contract and to the satisfaction of contractor and of the Employer.*
2. *The Sub-Contractor shall submit such installation engineering to the contractor for onward submission to the Employer for review. The installation engineering shall be reviewed for compliance with the sub contractor and returned with or without comment as appropriate.*

**Site working and Access clause i.c. Para no. 5 of the sub contract**

3. *The sub contractor shall permit the Employer and his servants, agents, employer representatives, others engaged by the employer, utility undertaking or other duly constituted authonbes, the contractor, and any other sub contractors or parties engaged in the execution of the main works to have reasonable access to the sub contract works and to such places on or off the site where any works are being executed, by the sub contractor in connection with the sub contract works, and shall serve as the basis for a claim in respect of additional compensation or extension of time.*
4. *During the carrying out of the sub contract works, contractor may employ other sub contractors in connection with its operations at the site. Sub contractor will endeavour to cooperate with such other sub contractors.*

**Site Representative clause ie. Para no. 6 of the sub contract**

1. *At all times whilst actually engaged on the sub contract works the sub contractor shall employ a competent and English speaking site representative accepted by the contractor and duly authorized by the sub contractor in writing*
2. *Such site representative shall receive on behalf of the Sub Contractor directions and instructions from the contractor or the contractor's agent appointed under the main contract*

**Instructions. Decisions and Orders clause i.e. Para no. 8 of the sub contract**

1. *Subject to Clause 9, the sub contractor shall in relation to the sub contract works forthwith comply with all instructions, decisions and orders of the employer and of the employer representatives which are notified and confirmed in writing to him by the contractor*
2. *The contractor shall have the powers in relation to the Sub Contract and the sub contract works to give instructions, decisions and orders in relation to the Sub contract works under this sub contract and the sub contractor shall have the obligations to abide by and comply therewith. In addition, the contractor shall have the authority to give instructions, decisions and orders in respect of any matter whatsoever relating to the sub contract and the sub contractor shall comply forthwith with such instructions, decisions and orders.”*

Thereafter the A.O issued show cause on 17.01.2020 to the assessee and was asked why receipt of the assessee should not be taxed as business income through permanent establishment in India and without prejudice the assessee was also show cause why receipt should not be treated as fee for technical services. In response the assessee submitted as under:

*“We refer to the notice dated 17 January 2020 issued by your goodself in case of KSS for AY 2014 15.*

*In this connection, and in continuation of our response filed on 10 December 2019 and 19December 2019, on behalf of and under the instruction of our client, we wish to submit as under:*

*As mentioned in our earlier submissions KSS executed the contract with Ms Leighton Welspun Contractors Pvt Ltd (Leighton) vide subcontract number 11154/11303/11249- SC033 dated 22 October 2013 during AY 2014-15 (FY 2013-14 ie during period 1 April 2013 to 31 March 2014) in connection with assistance for installation of stalk on risers. The details in connection with the duration of the contract is as under:*

<i>Contract party</i>	<i>Name of Vessel</i>	<i>Duration of contract during FY 2013-14</i>	<i>Number of days during FY 2013-14</i>
<i>Leighton (11154/11303/11249-SC033)</i>	<i>Kreuz Supporter</i>	<i>29-Nov-13 to 31-March-14</i>	<i>123</i>
	<i>Kreuz Glorious</i>	<i>13-Mar-14 to 31-Mar-14</i>	<i>19</i>

*Copy of the contract have already been submitted before your goodself vide our response filed on 10 December 2019*

*KSS scope of work under each of the above contracts pertains to installation activities (ie installation of nusers, spools, clamps etc) and to carry on operations in the Oil and Gas sector which are in connection with prospecting for, or extraction or production of mineral oil and natural gas*

1. *Please show cause as to why the assessee cannot be said to have a Permanent Establishment in India as per Article 5 of India-Singapore DTAA during the AY 2014-15 in respect of its contract. In view of the above, considering that the assessee have a PE in India, also please show cause as to why the consideration received by the assessee from installation activities undertaken by the assessee under all its Contracts during AY 2014-15 be not construed as business income under Article 7 of the India - Singapore Tax Treaty.*

- *KSS is a company incorporated and tax resident of Singapore and is eligible to benefits available under the India-Singapore Tax Treaty (Tax Treaty) in view of provisions of Section 90(2) of the Act As per the provisions of section 90(2) of the Income-tax Act 1961, if the provisions of the Tax Treaty are more beneficial than the provisions of the Act or vice-versa, then the more beneficial provisions shall apply to the tax payer.*

***Taxability of contractual revenues received by KSS during AY 2014-15 under the Tax Treaty***

1. *Article 7 which relates to taxation of business profits as follows:*

2. *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 are attributable to that permanent establishment.*”

- *Accordingly, business profits will be taxable in India only if the tax payer carries on business in India through a Permanent Establishment (PE) in India and the profits earned by it in India are attributable to such a PE in India. In this regard, we would like to draw your goodselfs attention to the relevant provision of Article 5 (Permanent establishment) of the Tax Treaty*

“ARTICLE 5(3)

a. *building site or construction, installation or assembly project constitutes a permanent establishment only if it continues for a period of more than 183 days in any fiscal year.*”

- *Thus, under Article 5(3) of the Tax Treaty, a tax resident of Singapore would constitute a PE in India only if an installation or construction project is carried on in India for a period exceeding 183 days.*
- *It is evident from the scope of work and various clauses of the contracts that KSS IS carrying on installation activities (ie installation of users, spool tie-ins etc) in India.*
- *Accordingly, it is submitted that KSS does not have a PE in India under Article 5(3) of the Tax Treaty as the duration of each contract did not exceed the prescribed threshold period of 183 days in AY 2014-15. This is evident from the details on contract duration already submitted with your goodself.*
- *Further, in assessee's own case for AY 2010-11 the Hon'ble Mumbai ITAT held that since the duration of each contract entered into by KSS in India was less than the threshold of 183 days (under Article 5(3) of the DTAA), revenues from the installation contracts would not be taxable under Article 5(3) read with Article 7 of the DTAA. The relevant extract of the order is as under:*

*“Thus, in our conclusion, the installation activity carried out by the assessee in terms of various contracts in India separately do not constitute PE in India under Article 5(3) as the threshold time limit of 183 days for each project is much less. Accordingly, the revenue from assessee's contract for installation activity in India is not taxable in India, either under Article 7 or under the Act, as the assessee does not have PE in India.”*

- *Similar view was adopted by the Hon'ble ITAT in assessee 's case for AY 2012-13 and AY 2013-14 as well.*
- *It is submitted that Article 5(3) is a specific article which is applicable when an assessee is carrying on installation/construction activities.*

- *It is an accepted fact that every installation or construction contract may also include an element constituting provision of services through employees/ personnel (e.g. services provided by construction workers in the construction of a building). Accordingly, the provision of services is just a part of the installation/ construction contract and may be ancillary or subsidiary to the installation/ construction contract.*
- *Where a tax payer is carrying on construction/ installation activity, such activities would be covered under the specific article for installation/ construction which is Article 5(3) of the Tax Treaty and not as per the residuary clauses of Article 5.*
- *Based on the above, the specific provisions of Article 5(3) would override/prevail over the other clauses of Article 5 having regard to the rule of construction contained in the maxim: “generalia speeialibus non derogant”. Courts have consistently applied the aforesaid rule of construction while deciding which provisions would prevail where there may appear apparent conflict in two applicable provisions. Some of the judicial precedents are as follows:*
  - *ADIT vs Valentine Maritime (Mauritius) Ltd (130 TTJ 417) (Mumbai Tribunal);*
  - *Forbes Campbell & Co. Ltd vs. CIT (1994) (119 CTR 319) (Mumbai High Court);*
  - *CIT, Dehradun and Another vs. M/s BKI/HAM (ITA No 34 of 2007) (Uttarakhand High Court),*
  - *P No 11 (1995) (228 ITR 55) (AAR),*
  - *P. No. 24 (1996) (237 ITR 798) (AAR); Brown and Roof Inc. (1999) (103 Taxman 515) (AAR),*
  - *Cal Dive Marine Construction (Mauritius) Ltd (315 ITR 334) (AAR)*
  - *Tiong Woon Project and Contracting Pte Ltd (338 CTR 386) (AAR)*
- *Thus, it is humbly submitted that the provisions of residuary clauses of Article 5 are of no relevance in the case of installation/ construction contracts and specific provisions of Article 5(3) would apply.*
- *As already discussed above, the nature of activities carried on by KSS under the above- mentioned contracts involves installation activities. Since, the duration of each of the contracts entered into by KSS has not exceeded the prescribed threshold period of 183 days during FY 2013-14, it is submitted that KSS does not have a PE in India under Article 5(3) of the Tax Treaty and hence the contractual revenues of KSS are not taxable in India under Article 5(3) read with Article 7 of the Tax Treaty.*
- *Conclusion*
  - *Accordingly, as the Article 5(3) Le Installation PE clause is more specific to KSS than residuary clauses of Article 5. Therefore, the provisions of residuary clauses other than Article 5(3) would not apply to KSS.*
  - *Further, as the threshold period of 183 days under the Tax Treaty has not been exceeded for any of the contracts entered into by KSS during*

AY 2014-15, KSS does not constitute a PE in India under more specific Article 5(3) of the Tax Treaty.

1. Without prejudice to the above, please show cause as to why the consideration received from installation activities undertaken by the assessee under all its Contracts during AY 2014-15 be not construed as Fees for Technical Services u/s, 9(1)(vii) of the Income Tax Act and also under Article 12(4) of the India- Singapore Tax Treaty.

**Revenue not taxable as FTS under the Act.**

We have provided below the definition of FTS under Explanation 2 of Section 9(1)(vii) of the Act and Tax Treaty and its non-applicability to the facts of the case of KSS

- Section 9 of the Act outlines the concept of income deemed to accrue or arise in India Section 9(1)(vii) pertains to income taxable in India by way of FTS which is deemed to accrue or arise in India. The relevant extract of section 9(1)(vii) is reproduced below:

“Section 9(1)(vii) Income by way of fees for technical services payable by-

1. the Government; or
2. a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or
- 3.....

*Explanation 2.-For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".*

As per the above definition of FTS, consideration for any construction, assembly, mining or any like project are specifically excluded from the purview of FTS.

We would like to draw your goodselfs attention to the Central Board of Direct Tax (CBDT), which is the apex body for India tax administration, **issued Instruction No 1862 stating that prospecting for, or extraction or production of, mineral oil and natural gas fall within the ambit of 'mining' or 'like project' as referred in Explanation 2 to section 9(1)(vii) of the Act. Relevant extract is reproduced as under:**

“2. The question whether prospecting for, or extraction or production of mineral oil can be termed as 'mining' operations, was referred to the Attorney General of India for his opinion. The Attorney General has opined that such operations are mining operations and the expressions 'mining project' or 'like project' occurring in Explanation 2 to section 9(1)(vii) of the Income-tax Act would cover rendering of services like imparting of training and carrying out drilling operations for exploration or exploitation of oil and natural gas.

1. In view of the above opinion, the consideration for such services will not be treated as fees for technical services for the purpose of Explanation 2 to section 9(1)(vii) of the Income-tax Act, 1961...”
- Further, we would also like to draw your attention to the case of **ONGC, acting as an agent of M/s. Foramer France (Civil Appeal No. 731 of 2007) wherein the Supreme Court of India after considering the CBDT Instruction No 1862** held that in view of specific exclusion of 'mining or like project from the definition of FTS, services rendered which were directly and inextricably linked with the prospecting, extraction or production of mineral oils, will not be considered as FTS within the meaning of Explanation to section 9(1)(vii) of the Act.
- Given that the nature of work executed by KSS pursuant to its contacts is for activities in connection with prospecting for, or extraction or production of, mineral oil and natural gas, KSS strongly contends that the consideration received for the installation activity executed by it in India is not in the nature of FTS under the Act as it squarely falls within the specific exclusion of “construction, assembly mining or like project undertaken by the recipient”
- Accordingly and as per the provisions of the Act, the activities undertaken by KSS cannot be considered as FTS.

**Revenue not taxable as FTS under the Tax Treaty**

- Without prejudice to the non taxability of consideration received by KSS as FTS under the Act, KSS submits that since the definition of FTS is narrower under the Tax treaty than under the Act provisions of the Tax Treaty are more beneficial than the provisions of the Act and hence, KSS resorts to the provisions of the Tax Treaty regarding the taxability of FTS as detailed in the ensuing paragraphs.
- Given the above, we have analyzed the term 'FTS as defined under Article 12(4) of the Tax Treaty which is reproduced as under:

“The term “fees for technical services” as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services.”

1. ....

2. **make available** technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein, or
  3. consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.
- To interpret the meaning of the term "**make available**", reliance is placed on the memorandum of Understanding (MOU) to the India-US Tax Treaty.
  - The MOU states that technology can be said to have been 'made available' when the person acquiring the service is enabled to apply the technology embedded in the services provided to him, independently. The mere fact that provision of the service may require technical input by the person providing the service would not per se mean that technology has been made available. Accordingly, the meaning of the term 'make available' is that the recipient of the service should be able to apply on his own, the technical knowledge, experience, skill, know-how, or processes employed by the service provider in rendering the service i.e the term 'make available' is akin to the concept of 'transfer and technical knowledge, experience, skill, know-how, or processes are transferred to the recipient by the service provider so that the recipient can apply the same on his own.
  - In view of the above, rendering of included services (i.e making available of FTS) leads to transfer/ imparting of technical knowledge, experience, skill, know-how, or processes to the recipient which enables the recipient to apply the same on his own- the recipient acquires a means to an end i.e he acquires the technical knowledge experience, skills, know-how or processes from the provider which acts as a means and enables him to use the same for achieving a further end.
  - From the above definition it is clear that services will fall within the category of FTS, if all of the following conditions are satisfied.
  - Services are technical or consultancy services, and
  - Services "make available" technical knowledge, skill, experience, etc or consist of the development and transfer of a technical plan or design.

*In view of the above it is submitted that under the terms of the agreement, there is no technology made available by KSS to its customers and that KSS is only providing services for subsea installation and there is no transfer of any technology, skill, experience or know-how*

*Accordingly, revenues received by KSS for the subsea installation services rendered to its customers during AY 2014-15 cannot be considered as FTS under Article 12 of the Tax Treaty*

*Further, it is submitted that your goodself has held that the revenues of KSS are not taxable as FTS under the Act and Tax Treaty as per the final assessment order passed under Section 143(3) for AY 2016-17 dated 24 October 2019 which was in pursuant to DRP directions dated 13 September 2019.*

**Conclusion:**

*As installation activities fall within the exclusionary criteria i.e. construction, assembly, mining or like project, revenues earned by KSS for provision of installation services shall not be taxable as FTS under Section 9(1)(vii) of the Act*

*Further, as KSS does not make available any technical knowledge to its contracting entities/customers i.e. due to restrictive definition of FTS under the Tax Treaty, revenues earned by KSS pursuant to its projects are not FTS under Article 12(4) of the Tax Treaty.”*

However, the A.O has not agreed with the submission of the assessee and he was of the view that the nature of services provided by the assessee were nothing but was the FTS (fees for technical services) taxable u/s 9(1)(vii) of the Act as well as under article 12(4) of the DTAA between India and Singapore. The A.O further stated that assessee has been given a subcontract by Leighton Welspun Contractors Pvt. Ltd. and other contractor for the installation of stalks on risers in the Mumbai High field area. The AO stated that the nature of services provided by the assessee was not in the nature of supervisory activity. The A.O also stated that nature of services were not connected with exploration, exploitation or extraction of mineral oil in India. The A.O further stated that the word used in the contract between assessee and the contractor was ‘installation’ but in real sense the assessee was providing the helping hand to the main contractor by doing repair work, obtaining in field permits, performing fitting/attachment of stalk on risers which cannot be termed as installation activity. Therefore, A.O was of the view that the nature of work/project being executed by the assessee did not fall under the para 3/4 or para 5 of the Article 5 of DTAA between India & Singapore. Therefore, the services provided by the

assessee were in the nature of services referred to in Article 5(6) of the DTAA. The A.O further stated that the threshold period for triggering the presence of PE in India as per Article 5(6) was 90 days in any fiscal year. However, the activities of the assessee continued in India for a period of 142 days in F.Y. 2013-14 and its income arising from projects executed in India will be taxable in India as business income as per I.T. Act as well as Article 7 of the India-Singapore DTAA. Therefore, the A.O held that the assessee had a PE in India and consequently the revenue from the projects executed in India will be taxable. The A.O further stated that since assessee had not maintained its books of account in India, therefore, the taxable profit is estimated at 10% of gross revenue of Rs.1,11,00,54,395/-.

3. The assessee has filed objections against the additions made by the A.O in the draft assessment order before the Dispute Resolution Panel (DRP). However, the DRP has dismissed the objections filed by the assessee and confirm the action of the A.O in taxing the impugned receipt. Thereafter in accordance with the direction issued by the DRP the A.O has passed final assessment order u/s 143(3) r.w.s 144C(13) of the Act on 29.04.2021 by taxing the receipt as proposed in the draft assessment order.

4. During the course of appellate proceedings before us the Id. Counsel referred the paper book comprising detail of submission made before the A.O and DRP. The Id. Counsel referred the various pages of the agreement. The Id. Counsel by referring page no. 35 of the agreement contended that under the scope of work it is categorically specified that the nature of contract was for installation of 36 up to maximum of 47 Nos stalk on Risers from sealed to hanger clamp on spider deck level, during the offshore working season 2013-14 in ONGC Mumbai High field and description of the installation was given from

serial no. 1 to 36 under the head P/L segment and sequence of installation was also provided along with field and other particulars from serial no. 1 to 30 at page 25 of the agreement. The ld. Counsel also referred page no. 24 and page no. 47 of the agreement pertaining to the basis of price determination on installation. He also referred other pages and second schedule of the agreement relating to documents forming part of the sub-contract that assessee was given the contract for installation. The ld. Counsel has also referred the order of the ITAT in the case of the assessee itself for the earlier years pertaining to assessment year 2010-11 vide ITA No. 1876/Mum/2014 wherein on similar basis it is held that installation activity carried out by the assessee in terms of various contracts in India did not constitute PE in India under Article 5(3) as the threshold time period was less than 183 days. The ld. Counsel further submitted that assessee is a resident of Singapore and has no office in India. The ld. Counsel further stated that case of the assessee is covered under Article 5(3) and not under the other articles. The ld. Counsel also submitted that since the nature of contract of the assessee was not service contract, therefore, Article 5(6) of the DTAA page 34 of the agreement as per which the assessee has to install the material and actual installation made by the assessee. He also referred page 11 of the agreement pertaining to the terms and conditions applicable to the parties to the other contract. The ld. Counsel also submitted that there is no any make available of knowledge provided by the assessee.

On the other hand, the ld. D.R referred page no. 11 of the paper book that assessee has provided only assistance in the installation of stalks on riser as helping hand. The ld. D.R further submitted that replacement of the pipeline was planned by the main contractor and not by the assessee. He also submitted that assessee has provided mere assistance and material were provided by the main contractor. The ld.

D.R submitted that make available only when the other party applied it independently there is a close connection between the service providers and the assessee therefore there is a make available of the technical knowledge in the case of the assessee. During the course of appellate proceedings before us the ld. D.R also submitted that for the A.Y. 2016-17 the assessee has opted for VSV Scheme wherein the similar issue was involved. In rejoinder the ld. Counsel submitted copy of the direct tax Vivad se Vishwas Act 2020 and referred explanation 5 of the section wherein it is clarified that making a declaration under this Act shall not amount to conceding the tax position and it shall not be lawful for the income tax authority or the declarant being a party in appeal or writ petition or special leave position to contend that the declarant or the income-tax authority as the case may be has acquiesced in the decision on the disputed issue by settling the dispute.

5. Heard both the sides and perused the material on record. The assessee is a company incorporated and a tax resident of Singapore. During the year under consideration assessee has entered into a subcontract with M/s Leighton Welspun Contractors Pvt. Ltd and the main contract was between ONGC and Leighton. Leighton has been awarded Pipeline Replacement Project for laying submarine pipeline in the Mumbai high/ Leighton Welspun Contractors Pvt. Ltd. A certain portion of the said Pipeline Replacement Project has been subcontracted by Leighton to the assessee vide subcontract dated 22.10.2013. The A.O stated that the nature of services provided by the assessee were nothing but was in the nature of fee for technical services (FTS) as per IT Act as well as Article 12(4) of India Singapore DTAA. Alternatively, the A.O also stated that assessee has completed the project by more than 90 days by rendering services, therefore, as per Article 5(6) assessee was having permanent establishment, therefore, held that 10% of the turnover of the assessee as income assessable in India. With regard to treating the

amount received by the assessee as FTS by the A.O. DRP has allowed the objection of the assessee company holding that amount received was not of the nature of fees for technical services (FTS).

With respect to the direction of the DRP and action of the A.O that assessee has a PE in India with respect to all the projects as per Article 5(6) of the DTAA that assessee was providing services through the presence of personnel, we find that A.O has not substantiated with relevant material that assessee has provided only services through the presence of personnel to attract the provision of Article 5(6) of the DTAA. In this regard, we have perused the decision of ITAT in the case of the assessee itself pertaining to assessment year 2010-11 vide ITA No. (172 TTJ 291) wherein after taking into consideration the terms of the contract pertaining to installation of Risers, Riser clamps installation of stalk surveys etc. held that assessee was engaged in construction activity and falls within Article 5(3) which provides that construction, installation or assembly project can constitute PE, only if it continues for a period of more than 183 days in any fiscal years. During the year under consideration also as per contract agreement dated 22.10.2013 at page 25 under the head scope of work (SOW) it is categorically elaborated that the sub-contract comprised of installation of 36 up to maximum of 47 of Nos Stalk- on Risers from seabed to hanger clamp on spider deck level, during the offshore working season 2013-14 in 'ONGC' Mumbai High Field. The part of the scope of work as per page no.25 of the agreement of sub-contract under the head scope of work is reproduced as under:

*"Installation of 38 up to maximum of 47 Nos Stalk On Risers from seabed to hanger clamp on spider deck level, during the offshore working season 2013-14 in ONGC's Mumbai High Field This scope shall be performed as per the technical criteria set under the Head Contract(s) signed between the Contractor (LWIN) and Client (ONGC) vide Main Contract Ref. No. MR/OW/MM/PRP 3/16/2011, MR/OW/MM/APP/10/2012 and MR/OW/MM/Heers RD Ph-II/PL/02/2013 for PRP-3, APP & HRD Project respectively and any other mutually agreed terms and conditions agreed between Contractor and Sub-Contractor Sub-Contractor is expected to know and is aware of the Company's requirements for carrying out the referred scope of work and any additional information required by the Sub-Contractor can be sought from the Contractor's office if unavailable with the Sub-Contractor:*

WORK BARGE-1 (Kreuz Supporter) STALK-ON Riser Installation (Base Scope)								
Sr. No.	P/L segment	Sequence of Installation	Face	Field	Dia, (Inch)	PL Wall Thk (mm)	Riser Wal Thk. (mm)	Thk. (mm) Splash Zone Wall Tnk (mm)
1.	6" (BCPA 2 VSEA)	BCPA-2	South	Bassein	6	12.7	14.3	18.3
2.	12" (MNP-RS 5)	RS-5	East	North	12	15.9	17.5	20.6
3.	12" (NS- MNP)	NS	West	North	12	15.9	17.5	20.6
4.	12" (IF-SC-1)	IF	East	South	12	15.9	17.5	20.6
5.	12" (SU-SHD)	SU	West	South	12	15.9	17.5	20.6
6.	12" (SU-SHD)	SHD	West	South	12	15.9	17.5	20.6
7.	12" (SQ-BHS)	SQ	West	South	12	15.9	17.5	20.6
8.	12" (SQ-BHS)	BHS	South	South	12	15.9	17.5	20.6
9.	12" (SJ-SA)	SJ	East	South	12	15.9	17.5	20.6
10.	12" (SJ-SA)	SA	West	South	12	15.9	17.5	20.6
11.	8" (S14-S15)	S1-4	East	South	8	10.3	11.1	15.9
12.	8" (S14-S15)	S1-4	West	South	8	10.3	11.1	15.9
13.	6" (NLM10-NLM8)	NLM-10	East	Neelam	6	7.9	9.5	14.3
14.	6" (NLM10-NLM8)	NLM-8	East	Nellam	6	7.9	9.5	14.3
15.	20" (ICP-MSP)	ICP	South	North	20	20.6	22.2	25.4
16.	20" (ICP-MSP)	MSP	South	North	20	20.6	22.2	25.4
17.	16" (II-SHG)	II	East	South	16	17.5	22.2	23.8
18.	16" (II-SHG)	SHG	East	South	16	17.5	22.2	23.8
19.	18" (WIS-WI7)	WIS	West	South	18	17.5	25.4	28.6
20.	18" (WIS-SJ)	WIS	North	South	18	17.5	25.4	28.6
21.	18" (WIS-WI7)	WI7	East	South	18	17.5	25.4	28.6
22.	16" (WIS-SC 1)	WIS	North	South	16	15.9	23.8	26.2
23.	16" (WIS-SC 1)	SC1	West	South	16	15.9	23.8	26.2
24.	18" (WIS-SJ)	SJ	East	South	18	17.5	25.4	28.6
25.	18" (B173AB-B193AP)	B 193 AP	North	Bassein	18	19.1	23.8	25.4
26.	12" (S16-SHG)	S16	South	South	12	15.9	17.5	20.6
27.	12" (S16-SHG)	SHG (EAST)	East	South	12	15.9	17.5	20.6
28.	12" (WI 6- WI 7)	WI 6	West	South	12	14.3	20.6	20.6
29.	12" (WI 6- WI 7)	WI 7	West	South	12	14.3	20.6	20.6
30.	12" (N 14- N15)	N 14	West	North	12	14.3	20.6	20.6
31.	12" (WN2-HV)	WN2	South	North	12	14.3	20.6	23.8
32.	12" (WN2-HV)	HV	East	North	12	14.3	20.6	23.8
33.	6" (HV-HP)	HV	West	Heera	6	7.9	9.5	15.5
34.	6" (HSB-HSD)	HSB	West	Heera	6	7.9	9.5	15.5
35.	19.75" (HB-HE)	HE	South	Heera	10	14.3	15.9	18.3
36.	16" (HSD-HRC)	HRC	West	Heera	16	15.9	17.5	22.2

WORK-BARGE 1 (STALK-ON Riser Installation (Optional Scope)								
1.	10.75" (HB-HE)	HB	West	Heera	10	14.3	15.9	18.3
2.	10" HB-HA	HB	West	Heera	10	14.3	15.9	18.3
3.	12" (HK-HRC)	HRC	West	Heera	12	14.3	15.9	21.9
4.	12" (HP-HRC)	HRC	West	Heera	12	14.3	15.9	21.9
5.	6" (HB-HK)	HB	East	Heera	6	7.9	9.5	15.5

Even in the third schedule of the sub-contract the rate of payment are specified for installation of Risers under different segment and installation of HRD stalk-on risers with clamps etc. We have also perused the copies of invoices issued by the assessee i.e Requisition No. 11227 dated 06.01.2014 Requisition No. 12218 dated 14.04.2014, Requisition No. 11506 at 04.02.2014, Requisition No. 11779 at 05.03.2014, Requisition No. 12173 dated 14.04.2014 placed in the paper book showing installation charges of Risers. Considering the above material relied upon by the lower authorities does not corroborate the adverse inference drawn as regards treating the assessee as a service PE in India under Article 5(6) of the Tax Treaty. Therefore, we consider that contracts entered by the assessee were for

installation purpose and would be covered under Article 5(3) of tax treaty. Further the similar view were adopted by ITAT in assessee's own case for A.Y. 2012-13 and 2013-14 as well vide ITA No. 1781 & 6621/Mum/2016. As per Article 5(3) of the tax treaty provides that a tax resident of Singapore constituted a PE in India only if each installation or construction project/activity is carried on in India for a period exceeding 183 days during a financial year. Further as per Article 5(3) threshold of 183 days applies to each individual installation project and as well as every contract is to be considered as a separate project. The A.O has not controverted the submission of the assessee based on different clauses of agreement and relevant supporting material stating that it has engaged in the installation work as per the contract and as a part of the installation/construction contract also include providing provisions of services which were ancillary to the installation contract. Therefore the grounds of 1 to 7 are allowed.

**Ground No. 8 & 9:**

6. Heard both the side and perused the material on this issue and the same is restored to the file of the A.O to deciding afresh after verification of the relevant record.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 31.03.2023

Sd/-

(Aby T Varkey)  
Judicial Member

Sd/-

(Amarjit Singh)  
Accountant Member

Place: Mumbai

Date 31.03.2023

Rohit: PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,  
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//  
आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**  
**आयकर अपीलीय अधिकरण/ ITAT, Bench,**  
**Mumbai.**