

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.522/Mum/2022
(Assessment Year : 2019-20)**

&

**ITA No.523/Mum/2022
(Assessment Year : 2018-19)**

M/s. ATOMSTROYEXPORT C/o. Nuclear Power Corporation of India Ltd. 16 th Floor, Centre-1 World Trade Centre Cuff Parade Mumbai – 400 005	Vs.	Deputy Commissioner of Income Tax, International Tax Circle-1(1)(2) Mumbai
PAN/GIR No.AAFCA3658N		
(Appellant)	..	(Respondent)

Assessee by	Shri Manish Kanth
Revenue by	Shri Chetan M Kacha
Date of Hearing	21/04/2023
Date of Pronouncement	19/07/2023

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeals have been filed by the assessee against separate impugned final assessment orders dated 17/02/2022 passed u/s. 143(3) r.w.s. 144C(13) for A.Y.2018-19 and order dated 25/02/2022 for A.Y.2019-20.

2. In both the years the common issue involved is taxability of offshore supply contracts u/s.44BBB for sums amounting to Rs.30,36,37,85,419/- for A.Y.2018-19; and Rs.44,11,88,38,165 in A.Y.2019-20. The grounds raised in both the years reads as under:-

2018-19

Taxability of payment received under Offshore Supply Contracts

1) *The learned DCIT/DRP erred in holding that the amount of Rs 30,36,37,85 419 received by the appellant company from the Offshore Supply Contracts was taxable in India*

2) *The learned DCIT/DRP erred in holding that the amounts received by the appellant company from the Offshore Supply Contracts are covered by the provisions of section 44BBB and consequently liable to tax in India*

3) *The learned DCIT/DRP failed to appreciate that the receipts from the Offshore Supply Contracts are not taxable in India.*

4) *The learned DCIT/DRP erred in not granting TDS Credit of Rs. 3,81,45,216/-*

5) *The learned DCIT/DRP erred in charging interest under section 234A of Rs.1,14,88,793/-*

6) *The learned DCIT/DRP erred in charging interest under section 234B of Rs.53,99,73,271/-*

2019-20

Taxability of payment received under Offshore Supply Contracts

1) *The learned DCIT/DRP erred in holding that the amount of Rs. 44,11,88,38,165 received by the appellant company from the Offshore Supply Contracts was taxable in India*

2) *The learned DCIT/DRP erred in holding that the amounts received by the appellant company from the Offshore Supply Contracts are covered by the provisions of section 44BBB and consequently liable to tax in India.*

3) *The learned DCIT/DRP failed to appreciate that the receipts from the Offshore Supply Contracts are not taxable in India.*

4) *The learned DCIT/DRP erred in charging interest under section 234B Rs.56,35,57,382/-*

5) *The learned DCIT/DRP erred in charging interest under section 234C of Rs.8,37,04,846/- of 8,37,04,846/-*

6) *Without prejudice to above, the learned DCIT/DRP erred in levy additional tax of Rs. 1,56,97,340/- in Gross tax liability*

3. Since in both the years issue involved is common, therefore, same were heard together and are disposed of by way of this consolidated order. We will take up appeal for A.Y.2018-19 as the lead case and the decision rendered therein will apply *mutatis mutandis* in the appeal for A.Y.2019-20 also.

4. The brief facts are that the assessee is a Joint Stock Company under the Ministry of Atomic Energy, Russian Federation, incorporated under the provisions of Russian legislation, having its registered office at Moscow, Russia. In order to set up Nuclear power station in the Russian organization, the assessee entered into following offshore service agreements for setting up nuclear power plant at Kundankulam, Tamilnadu which related to setting of 6,000 MW Nuclear Power Plant by Nuclear Power Corporation of India Ltd.:

- i. Contract for Performance of Commissioning activities with CMSE, Design, Supervision during commissioning works in provision of scientific guidance of start-up of Kudankulam (KK) Power Unit 1.
 - ii. Contract for Deputation of the Contractor's Specialist at Site for KK 1 & 2
 - iii. Contract for performance of erection supervision, adjustment supervision and commissioning activities including measuring via use of CMS equipment during commissioning of reactor plant of KK Unit 2.
 - iv. Contract for performance of works on erection individual adjustment and de-erection of commissioning measurement system (CMS) equipment at KK Unit.
 - v. Contract for Deputation of the Contractor's Specialist at Site for KK 3&4
 - vi. Contract for development of the working documentation for KK3&4.
 - vii. Contract for Development of the working documentation for KK 5&6.
5. The assessee is also supplying equipment and materials to NPCIL under the following supply contracts:
- i. Delivery of Equipment and Material for KKNPP for KK 1&2
 - ii Delivery of Equipment for erection reserve for KK 1 & 2

iii. Delivery of Equipment with Long Manufacturing Cycle and First Priority Equipment from Russian Federation for KK 3 & 4.

6. The receipts for rendering services under the various agreements to NPCIL was as under:-

Sr.No.	Particulars	Amount (In Rs.)
(a)	Contract No. 77-258/1007000 dated 21-03-2011-Contract for Performance of Commissioning activities with CMSE, Design Supervision during commissioning works in provision of scientific guidance of start-up of Kudankulam ('KK') Power Unit 1	1,94,40,176
(b)	Contract No. 77-256/22800 dated 23-08-2002 -Contract for Deputation of the Contractor's Specialist at Site for KK 1 & 2	16,90,51,424
(c)	Contract No.77-258/1309800 dated 10-09-2014 - Contract for performance of erection supervision, adjustment supervision and commissioning activities including measuring via use of CMS equipment during commissioning of reactor plant of KK Unit 2.	1,44,15,680
(d)	Contract No. 77-256-1307500 dated 30-07-2013 -Contract for performance of works on erection individual adjustment and de-erection of commissioning measurement system (CMS) equipment at KK Unit 2	1,71,99,407
(e)	Contract No.77-256/1623900 dated 22-08-2017 - Contract for	23,92,00,441

	Deputation of the Contractor's Specialist at Site for KK 3&4	
(f)	Contract No.77-258/1309800 dated 10-09-2014 - Contract for performance of erection supervision, adjustment supervision and commissioning activities including measuring via use of CMS equipment during commissioning of reactor plant of KK Unit 2.	1,44,15,680
(g)	Contract No.77-258/1415800 dated 18-12-2015 - Contract for development of the working documentation for KK3&4	92,14,13,835
	Contract No,77-255/1624100 dated 31-07-2017 -Contract for Development of the working Documentation for KK 5&6	167,28,55,760
		305,35,76,723

7. Apart from that assessee has also received following money from off-shore supply of equipments and materials:-

Sr. No.	Particulars	Amount (In Rs.)
(a)	77-252/22600 dated 22-08-2002- Delivery of Equipment and Material for KKNPP for KK 1&2	2,55,60,935
(b)	77-252/1414500 dated 29-12-2014 - Delivery of Equipment for erection reserve for KK 1 & 2	5,17,99,350
(c)	77-252/1516900 dated 15-07-2015- Delivery of Equipment for erection reserve for KK 1 & 2	5,56,51,840

(d)	77-252/1522100-Delivery of Equipment for erection reserve for KK 1&2	13,90,15,556
(e)	77-253/1519400 dated 01-10-2015 - Delivery of Equipment for erection reserve for KK 1 & 2	43,12,62,092
(f)	77-253/1519500 dated 01-10-2015- Delivery of Equipment For erection reserve for KK 1 & 2	9,12,91,186
(g)	77-256/1411500 dated 10-09-2014 - Delivery of Equipment For erection reserve for KK 1 & 2	8,13,15,409
(h)	77-252/1415600 dated 11-12-2014 - Delivery of Equipment with Long Manufacturing Cycle and First Priority Equipment from Russian Federation for KK 3 & 4	2263,10,74,730
(i)	77-252/1516700 dated 11-04-2014 - Delivery of Equipment and material	3,52,37,12,742
(j)	77-252/1624200 dated 31-07-2017- Delivery of Equipment with Long Manufacturing Cycle and First Priority Equipment from Russian Federation for KK 5 & 6	3,33,31,01,579
	Total	30,36,37,85,419

8. The assessee has also earned service income from the below mentioned contract:-

Sr. No.	Particulars	Amount (In Rs.)
(a)	Contract No. 77-256-1624700- Contract for rendering consulting services to the customer during	7,29,84,980

	adjustment of separate systems and items of equipment during scheduled preventive maintenance at KK Unit 1	
(b)	Contract No. 77-256-1624800 Contract for rendering engineering services on preparation of in-core instrumentation system ICIS for 3rd fuel campaign at KKNPP Unit-1	3,43,17,770
(c)	Contract No. 77-55/1624000 For implementation of KK 5 & 6	42,92,30,830
	Total	53,65,33,580

9. In respect of various service contracts amounting to Rs.305,35,76,723/-, and income from other contracts amounting to Rs.53,65,33,580/- assessee has offered the income to tax u/s. 44BBB @10%. However, in so far as receipts from off-shore supply contracts amounting to Rs.30,36,37,85,419/- is was claimed before the Assessing Officer that is not taxable in India. Further, it was categorically submitted that the issue of taxability of receipt from offshore supply had been recurring nature which had come up before this Tribunal in assessee's own case right from A.Y.2007-08 to 2015-16, wherein this issue was decided in favour of the assessee. However, the ld. AO held that this issue is pending before the Hon'ble Bombay High Court. Thereafter, ld. AO after applying the provision of Section 44BBB of such income had taxed the gross income of Rs. 30,36,37,85,419/-.

10 The ld. DRP has also confirmed the said addition holding that earlier decision of the Tribunal has not been accepted by the department and further appeal has been filed before the Bombay High Court u/s.260A.

11. It has been admitted by both the parties that this issue has been decided in favour of the assessee in all the earlier years. We find that the Tribunal in A.Y.2007-08, 2008-09 and 2011-12 vide order dated 10/01/2017 after analyzing the entire facts of the case and the judgment of the Hon'ble Supreme Court in the case of **CIT vs. Hyundai Heavy Industries Co. Ltd reported in 291 ITR 482**; and **Ishikawajima Harima heavy Industries Ltd. vs. DIT reported in 288 ITR 408** and covering all other judgments, concluded as under:-

"15 Therefore after analyzing the various case laws, statutory provisions, DTA/ provisions and contractual terms and respectfully following judgment of Hon'ble Supreme Court in Ishikawajima- Harirna Heavy Industries Limited V/s DICT (288 ITR 408),we are inclined to hold that Offshore Supply contracts were 'carried and concluded-'outside India and hence no income therefrom deemed to accrue or arise in India as per section 9(1) and DTAA provisions and accordingly, not chargeable to tax. The receipts thereof do not form part of receipts for the purpose of computational provisions of section 44BBB. Explanation-4 could not overcome the limitation imposed by Explanation-1(a) to section 9(1)(i) and hence, the impugned income do not form part of business receipts for computation of income u/s 44BBB of the Act. We held so."

12. This judgment has been followed in subsequent years also, accordingly, consistent with the view taken, as the offshore supply is taken from the same contract, therefore, the aforesaid decision of the Tribunal will apply in this year also. Accordingly, we direct the ld. AO to exclude the amount of Rs. 30,36,37,85,419/- from the gross receipts. Accordingly, appeal of the assessee is allowed.

13. Similarly, for A.Y.2019-20 also this issue is allowed in favour of the assessee.

14. In so far as the issue of credit for TDS of Rs.3,61,45,216/-, we direct the ld. AO to examine the same and allow in accordance with law.

15. In so far as charging of interest is concerned, the same has been stated to be consequential.

16. In the result, both the appeals of the assessee are allowed.

Order pronounced on 19th July, 2023.

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai; Dated 19/07/2023

KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai