IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH, JABALPUR

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA Nos.34 & 35/Jab/2014
(ASSESSMENT YEARs- 2008-09 & 2009-10)

DCIT, TDS, Jabalpur	vs	Orient Paper Mills, Prop. M/s. Orient Paper & Industries Ltd., P.O.Amlai Paper Mills, Distt.-Shahdol(M.P.)
(Appellant)		**(Respondent)**
PAN No. AAACO3279J		

Revenue By	Shri Shravan Kumar Gotru, CIT DR
Assessee By	S/Shri Gautam Jain, Adv., Abhijeet Shrivastava, AkkalDudhwewala, FCA, Rakesh Jhunjhunwala, FCA
Date of hearing	14/09/2023
Date of Pronouncement	20/09/2023

O R D E R

PER OM PRAKASH KANT, A.M.:

These two appeals by the Revenue are directed against a common order dated 31/10/2013 passed by the Learned commissioner of Income-tax(Appeals)-Raipur, Camp Jabalpur [in short the "Ld. CIT(A)"] for assessment years 2008-09 and 2009-10 respectively, in relation to order passed by the Ld. Assessing Officer under section 201(1) and 201(1A) of the Income-tax Act, 1961 (in

short "the Act") for non-deduction of tax at source on payment made to Italian company for supply of manufacturing plant of tissue paper. The issue-in-dispute involved in both these appeals being common, both these appeals were heard together and decided by way of this consolidated order for convenience.

2. Identical grounds have been raised in both the assessment years except the amount involved and therefore, for brevity, we are reproducing the grounds raised for assessment year 2008-09, as under:-

1. *"Whether on the fact and in circumstances of the case and in law, the Ld.CIT(A) has justified in deleting demand of Rs. 2,63,79,636/- raised u/s 201(1) of the IT Act for the short deduction of tax.*
2. *Whether on the fact and in circumstances of the case and in law, the Ld.CIT(A) has justified in deleting demand of Rs. 1,26,62,225/- raised u/s 201(1A) of the IT Act for non payment of tax.*
3. *Whether on the fact and in circumstances of the case and in law, the Ld.CIT(A) has justified in admitting fresh evidence in appellate proceeding in violation of rule 46A of 1.T. Rule 1962.*

4. *Whether on the fact and in circumstances of the case and in law, the Ld.CIT(A) has justified in holding that the income arises due to supplies & services from the contract assigned by the agreement dated 30/07/2007 to TESCOTEC S.P.A LUCCA, Italy arises in Italy in view of judgment of the Mumbai High Court given in the case ZuariAgro Chemicals Ltd. V/s Commissioner of Income Tax. Central-1. Bombay [2012]23 CTR 529 (BOM).*

5. *Whether on the fact and in circumstances of the case and in law. the Ld.CIT(A) has justifiedin holding that the income arises due to supplies & services from the contract assigned by the agreement dated 30/07/2007 to TESCOTEC S.P.A LUCCA. Italy arises in Italy in view of advance ruling of Authority for Advance Rulings (Income Tax). New Delhi given in the case of HESS Acc Systems B.V. [2012] 24 taxmann.com 297 (AAR-New Delhi), in the case of Roxar Maximum Reservoir Performance WLL [2012] 21 taxmann.com 128 (A.R.- New Delhi) and in the case of Linde AG. [2012] 19 taxmann.com 238 (AAR-New Delhi).”*

3. Briefly stated facts of the case are that the assessee company was engaged in the business of manufacturing of paper during the previous years corresponding to assessment years 2008-09 and 2009-10 respectively. During the concerned period, the assessee made certain payments to an Italian company namely M/s

TESCOTEC S.P.A LUCCA, Italy under the contract entered into on 30/07/2007 for supply of tissue paper manufacturing plant inclusive of freight and providing of incidental engineering and supervision services. The Assessing Officer, while verification of quarterly TDS returns, observed that the assessee did not deduct tax deducted at source (TDS) under section 195 of the Act for payments to non-residents. After analysing terms of contract, the Assessing Officer was of the view that contract was a 'composite contract' of supply and works and therefore, the assessee was liable to deduct tax at source on the payments made to non-resident. Accordingly, invoking the provisions of section 201(1), he held that the assessee as "the assessee-in-default" and raise the liability under section 201(1) of the Act for assessment years 2008-09 and 2009-10 respectively. The Assessing Officer also raised demand for corresponding interest liability invoking section 201(1A) of the Act for both the assessment years. The Assessing Officer held that the assessee company had paid an amount of Euros 69.50 lakh (Equivalent Indian Rupees Rs.47 crores) to non-resident company against the composite contract of supply and works relating to designs, manufacture, supply, installation, testing and

commissioning of plant. According the Assessing Officer, services being in the nature of installation, testing and commissioning of plant, same fall in the category of works contract and therefore, the assessee was liable to deduct tax at source on such payments. The Assessing Officer referred to clause 3 of the contract agreement relating to scope of supplies and services. He further referred to the decision of Hon'ble Supreme Court in the case of ***Hindustan Shipyard Ltd versus State of A.P. (2000) 6 SCC 579*** and observed that contract for sale of the goods is different from the contract for works in labour. The Assessing Officer observed that non-resident rendered services in India and a portion of out of the payment made to him, has accrued to him in India and therefore, under the provisions of section 195 of the Act, not only to the income portion contained therein but on the gross sums, liability to deduct TDS arises. The Assessing Officer also held that in the case of composite contract, the assessee was required to make application under section 195(2) of the Act for determination of the appropriate portion of income of nonresident chargeable to tax in India and make deduction of tax at source accordingly, but the assessee failed in doing so. The Assessing Officer observed that on application

under section 195(2) of the Act, so many questions like whether the non-resident party is having permanent establishment, or covered by the Double Taxation Avoidance Agreement (in short "DTAA") nature of services etc. would have been examined. He further observed that the assessee himself is not an authority to decide as to what portion of the income chargeable to tax in India. He further noted that the assessee has not followed the procedure provided under section 195(6) of the Act brought by the amended provisions with effect from 01/04/2008. The Assessing Officer accordingly raised liability u/s 201(1) and 201(1A) of the Act.

4. Aggrieved, the assessee preferred further appeal before the Ld. CIT(A) and filed submissions. The Ld. CIT(A) called for a remand report from the Assessing Officer, wherein the Assessing Officer reiterated that payment made towards contract agreement was in fact business income chargeable to tax in India under the provisions of section 5 read with section 9 of the Act. Before the Ld. CIT(A), the assessee filed detailed copy of the Contract Agreement and submitted that the Agreement only provides for supervision services for installations of plant and machinery in India by the Italian

company, that too, free of cost. The machinery was supplied in Italy and title in the machinery passed from the Italian company to assessee company in Italy. The custom authorities have treated the transaction as import of plant and machinery. It was further submitted that entire work of installation and commissioning of the plant and machinery in India was done by the assessee with the help of two Indian companies, for which separate payments were made and therefore, the contract was in the nature of a supply agreement only. It was further submitted that non-resident company was not having any permanent establishment in India and no business was carried out by said company in India and no services rendered by the non-resident in India except incidental supervisory services. The Ld. CIT(A) after considering the submission of the assessee rejected the finding of the Assessing Officer observing as under:

> *4.5. "I have gone through the observations of the A.O. and submissions of the appellant and also minutely studied the contract agreement dated 30.7.2007. I have also gone through all the judgments referred to by the appellant as well as the A.O. and after considering the judgments, the conclusions detailed subsequently are arrived at. The learned ARS of the appellant have vehemently contended that on the basis of their*

submissions detailed above, the appellant is not liable for deduction of tax u/s. 195 and accordingly, the liability fastened on the appellant company, is unjustified. The undisputed facts of the case are that the appellant has entered into a contract agreement with the Italian company for supply of a manufacturing facility for production of manufacture of 59 MT per day Toilet/ Facial Tissue paper (for short referred as plant) to be set up at the appellant's existing mill at Amlai, Distt. Shahdol, M.P. India for contracted price of €6,950,000 (equivalent to INR of 44,79,11,000) (wrongly taken by A.O as Rs.47,00,00,000/-). It also provides for supply of all supervisory services at the time of erection, commissioning, integration of the plant with the existing mill. The appellant has made the payment without making TDS on the ground that the impugned contract is a contract for sale and did not involve any component of income accruable to the non-resident company in India. On the other hand, the Assessing Officer is of the opinion that the impugned contract is a composite contract and the appellant was required to make TDS u/s.195(1). Alternatively, according to the A.O., the appellant should have preferred to avail the mechanism provided u/s.195(2) for determining the appropriate portion of income embedded in the transaction and made TDS accordingly. Since the appellant failed to seek the second option, it was liable to make TDS on the gross amount, which was not made. Accordingly, the A.O. has raised the demand.

4.6. The precise questions involved in this case are: (a) whether the contract was a contract for supply of goods or a composite contract? (b) whether any income had accrued or arose to the non-resident company in India? (c) whether DTAA between India and Italy is applicable to this case? and, (d) whether the appellant was required to comply with the provisions of sec.195(1) of the Act? Close study of the contractagreement reveals that the contractor was required to execute the contract for engineering, manufacture, supply, supervision of erection, start-up and commissioning of complete plant and equipment for a tissue paper manufacturing plant, to be erected at Amlai, India. Thus, the contract has two parts; the first relates engineering, manufacture, and supply of the plant and the second relates to supervision of erection, start up, commissioning of the plant. As per the interpretation of the A.O., the first part i.e., engineering, manufacturing and supply of the plant is a works contract and since it was executed out of India, there accrued no income to the said non-resident company in India. However, since the second part of the contract i.e., providing services of supervision of erection, start up and commissioning of the plant was rendered in India, the profit embedded in that part of the transaction is chargeable to tax. Therefore, according to the A.O. it is a composite contract. I have carefully gone through the various terms of the contract. There is no dispute regarding that part of the contract which related to engineering, manufacture and supply of the plant. The dispute relates only to

the subsequent services offered in India. The learned AR has contended that the primary objective of the contract is to purchase customised tissue manufacturing plant and the subsequent alleged supervision, etc. services are part of the after-sales services. The price for supply of the plant was paid outside India. It was on firm CIF basis. The plant was handed over to the shipper on the strength of bill of lading. Therefore, the entire contract has attained culmination outside India and the appellant did not pay anything in India against the subsequent services. As a corollary, no income or profit has accrued or arisen to the foreign company in India and resultantly, the appellant was not required to make TDS u/s.195. I find substantial force in the appellant's submissions. As per clause 6.2 of the agreement "Machine Pre- Assembly", the contractor was required to pre-assemble the plant at their workshop prior to shipment in order to facilitate field erection. The different sections and their pre-assembling chronology are given therein. This important clause determines the completion of manufacture of the plant in Italy. The exercise referred in this clause is something akin to pre-drill exercise, that was to be supervised in India at the time of erection, start up and commissioning. The plant was delivered to the shipper in moveable packages. Copy of the bill of lading reflects contents of the goods as 'partial shipment of completeplant and machinery including apparatus, equipments and spare parts for tissue paper manufacturing plant incoterms CIF'. Therefore, all that was done in India was only re-drill

exercise of supervision of re-assembly and for which the appellant had already paid to the contractor on inclusive basis. The delivery of goods on the basis of bill of lading to the shipper in Italy also ratifies transfer of ownership to the consignee outside India. Hence, I am of the considered opinion that neither the contractor had rendered any additional service that has accrued any profit or income in India nor the appellant has made any payments in India in this respect. Accordingly, the contract was pure contract for supply of tissue manufacturing plant and not a composite contract. In this case, the erection, commissioning etc., were conducted by the appellant with the assistance of two other local contractors. The non-resident contractor has only monitored the re-assembly of the plant that was sold by him and imported by the appellant in partial packages. In the case of GE India Technology Centre Pvt.Ltd. (supra) referred to by the A.O., the erection and commissioning of the plant was not made by Indian contractors and it was admitted that the erection and commission of plant and machinery in India gave rise to income-taxable in India. The facts of present case are distinguishable. The amendments made to section 9 of the Act post Vodafone case with retrospective effect will also not be attracted, as the plant and machinery was supplied outside India and business income accrued in Italy.

4.7. The next important question that needs to be addressed is the applicability of DTAA to this case. The A.O. has kept open several questions like availability of permanent establishment,

nature of services, covered by DTAA etc. The A.R drew my attention to Article 7- Business Profit Clause 1 which reads as under :

> *"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 contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, profits of the enterprise may be taxed in other State but only so much of them as is attributable to*
>
> *(a) that permanent establishment,*
>
> *(b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent established, or 31 other business activities carried on that other State of the same or similar kind as those effected through that permanent establishment".*

I have already held that as per agreement between the Italian Company & the Indian Company, entire Plant was manufactured in Italy. The title in goods was passed to the Indian Company on handing over shipping documents in Italy. Thus, all the business activities were performed in Italy. The income arising from such business activities cannot be taxed in India under Article 7 of DTAA between India and Italy. After title in goods passed in Italy, the machine was imported in India. On this ground alone, both these appeals fully succeed. Under the circumstances, I

hold that no business was carried out by the Italian company in India. There is nothing brought on record to suggest that the foreign company has any permanent establishment in India. Consequently, I am of the considered opinion that DTAA between India and Italy applicable to the facts of the case is in full force and for the reasons detailed above, nothing could be taxed in India."

5. Before us, Ld. Counsel for the assessee has filed a Paper Book containing pages 1 to 311.

6. The ground Nos.1, 2, 4 and 5 relate to the issue whether payment made by the assessee to non-resident company are liable for deduction of tax at source (in short "TDS") under the provisions of section 195 of the Act.

7. The Ld. CIT DR, appearing on behalf of the Revenue, relied heavily on the AO's order and contended that the contract for the supply of a tissue paper manufacturing plant should be considered a composite contract. Accordingly, it was argued that income arising from erection and installation services performed by the non-resident company in India should be subject to TDS, thus, the assessee was required to deduct TDS on the gross amount of

payment unless permitted by the AO to deduct TDS on the specific portion of payment in terms of section 195(2) of the Act.

8. Conversely, Ld. Counsel for the assessee, relying on the order of the Ld. CIT(A), submitted that the contract was primarily for the supply of a manufacturing plant, and the installation work was carried out by the assessee using Indian contractors. It was emphasized that the non-resident's role was limited to supplying spares and supervising of installation, which was part of the performance guarantee under the plant supply agreement. It was further argued that no income accrued to the non-resident in India, and as such, there was no tax liability under the Act or the Double Taxation Avoidance Agreement (DTAA) between India and Italy.

9. After considering the submissions of both parties and perusing the relevant material on record, we find that the key issue in dispute is whether the contract for the supply of the manufacturing plant should be classified as a composite contract, including an element of installation or commissioning of the plant. The AO had reproduced relevant clauses from the Contract Agreement in the assessment order. Upon examination of those clauses, it was noted that the

scope of work encompassed the supply of adequate spares during commissioning and included the responsibility of supervision for erection, installation, and commissioning. It is imperative to emphasize that the entire service related to the supply was provided from outside India. The ld CIT(A) has referred to clause 6.2 of the contract agreement for pre-assembly of machine at the work shop of non-resident company before shipping to the assessee for facilitation of erection by the assessee company. The different section and their pre-assembling chronology were given therein. The entire plant was supplied in movable packages and assembled with the help of two local contractors engaged by the assessee. No documentary evidences are presented by the Assessing Officer or ld CIT(DR) to establish that plant was assembled or commissioned by the non-resident in India. In the absence of any such documentary evidence, no income can be accrued or arisen or deemed to have accrued or arisen to the non-resident in India under the provisions of the Act. Moreover, the Ld. CIT(A) examined the taxability of the non-resident under the provisions of the DTAA between India and Italy. The AO, in the Remand Report, had proposed that business income had arisen to the non-resident. However, there was no evidence to

suggest that the Italian company had established a permanent establishment in India under the DTAA. Consequently, no business income was taxable in India under the DTAA.

9.1 In conclusion, as no income accrued to the non-resident either under the Act or the DTAA, the assessee was not obligated to comply with Section 195(1) of the Act. Therefore, we uphold the well-reasoned order of the Ld. CIT(A) on the issue in dispute. Ground Nos. 1, 2, 4 and 5 raised by the Revenue are accordingly, dismissed.

10. In Ground No.3 of the appeal, the Revenue has raised the issue of admitting fresh evidences by the ld CIT(A) in violation of Rule 46A of the Income Tax Rules, 1962 (in short "the Rules").

10.1. We have heard Ld. Authorized Representatives of the parties on issue in dispute and perused the relevant material available on record. We find that in ground raised by the Revenue concerning the admission of fresh evidence by the Ld. CIT(A) in alleged violation of Rule 46A of Rules, we note that there is no reference to any fresh evidence in the Ld. CIT(A)'s order. The Ld Counsel of the assessee has referred to pages 308 to 309 of the Paper Book, which contain a copy of the Remand Report sent by the AO to the Ld. CIT(A). In the

said Remand Report, the AO noted that no new or different facts had been brought to the record by the assessee during the appellate proceedings before the ld CIT(A). Undisputedly, no details of any such fresh evidences filed before CIT(A) has been brought on record by the Revenue. Consequently, Ground No. 3 raised by the Revenue is deemed to be infructuous and is hereby dismissed

11. In the result, both the appeals filed by the Revenue are dismissed.

Order pronounced in the open Court on 20/09/2023.

Sd/-	***Sd/-***
(PAVAN KUMAR GADALE)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Amit Kumar

Copy to:
1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR
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Asstt. Registrar
Jabalpur Bench