

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

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 886/MUM/2023  
(Assessment Year: 2020-21)**

**M/s Kepco Plant Service &  
Engineering Co. Limited,**  
106, Banaji House, 361 DR D N Road,  
Flora Fountain, Mumbai - 400001  
[PAN: AACCK4722C]

..... **Appellant**

**Assistant Commissioner of Income  
Tax (International Tax),  
Circle-3(1)(2), Mumbai,**  
16<sup>th</sup> Floor, Air India Building, Nariman  
Point, Mumbai - 400021

Vs

..... **Respondent**

**Appearance**

For the Appellant/Assessee : Shri Rahul Yadav  
For the Respondent/Department : Shri Ajay Kumar Sharma

**Date**

Conclusion of hearing : 22.08.2023  
Pronouncement of order : 13.09.2023

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**ORDER**

**Per Rahul Chaudhary, Judicial Member:**

1. The present appeal is directed against the Final Assessment Order dated, 27/01/2023, passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'], as per directions, dated 28/12/2022, issued by the CIT (Dispute Resolution Panel-1), Mumbai-1 (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act pertaining to the Assessment Year 2020-21.
2. The Appellant has raised following grounds of appeal:
  - "1. On the facts and circumstances of the case and in law, the

*impugned assessment order passed pursuant to the directions of the Dispute Resolution Panel ("DRP"), assessing the total income of the Appellant for the subject assessment year at INR 32,57,97,260, is bad in law and deserves to be set aside.*

2. *On the facts and circumstances of the case and in law, the impugned Final Assessment Order is bad in law in as much as the findings of Ld. AO/DRP are perverse, contrary to the facts of the case, based on conjectures and surmises and founded on pre-meditated mind-set rather than on facts and evidence.*
3. *On the facts and circumstances of the case and in law, the Ld. AO/DRP erred in taxing the entire off-shore revenue amounting to INR 48,41,44,363, in the hands of the project office ("PO") of the Appellant. without appreciating that the same was attributable to activities performed offshore in Korea by the head office ("HO") and was received by the HO directly in Korea, thereby, not attributable to permanent establishment ("PE") in India and hence not taxable in India in terms of India-Korea DTAA ("DTAA")*
4. *On the facts and circumstances of the case and in law, the Ld. AO/DRP has failed to consider the evidence and submissions furnished by the Appellant in support of off-shore services and thereby erred in holding that no offshore activities were performed by the Appellant and further erred in erroneously holding that the Appellant did not furnish any evidence in support of its contention(s).*
5. *On the facts and circumstances of the case and in law, the Ld. AO/DRP erred in holding that offshore services rendered by the Appellant are provided at the PO through the employees of the Appellant, constituting service PE for the Appellant in India in terms of Article 5(3Xb) of the DTAA, and that entire offshore revenue towards such services was attributable to such PE under Article 7 of the DTAA.*
6. *Without prejudice to the above, on the facts and circumstances of the case and in law, Ld. AO/DRP erred in arbitrarily taxing the gross amount of offshore revenue. The Ld. AO ought to have taxed, and the Ld. DRP ought to have so directed to tax, only the net profits earned, and not the entire off-shore revenue, after allowing deduction for the expenditure incurred by HO/PO in respect of such off-shore revenue.*

7. *Without prejudice to the above, on the facts and circumstances of the case and in law, the Ld. AO erred in considering the figure of gross offshore revenue as INR 48,41,44,363 as per Form 26AS instead of INR 45,54,14,170, being the actual offshore revenue earned by/accrued to the Appellant during the relevant financial year.*
  8. *Without prejudice to the above, on the facts and circumstances of the case and in law, the Ld. AO erred in not allowing set-off of brought forward losses of INR 3,28,71,214 pertaining to AY 2019-20, while determining the total taxable income of the Appellant for the subject Assessment Year.*
  9. *Without prejudice to the above, on the facts and circumstances of the case and in law, the Ld. AO erred in not giving full credit of taxes withheld amounting to Rs. 3,62,62,097. Instead, the Ld. AO has only allowed a credit of INR 3,61,52,694, resulting in a short credit of taxes withheld amounting to INR 1,09,403."*
3. The relevant facts in brief are that the Appellant, i.e. Kepco Plant Service & Engineering Co. Ltd [Formerly known as Korea Plant Service & Engineering Co. Ltd] is tax resident of South Korea being a company incorporated as per the laws of South Korea. It is stated that the Appellant is a subsidiary of Korea Electric Power Corporation owned by South Korean Government. The Appellant was engaged, inter alia, in the operation and maintenance of power plants and had entered into a number of Indian companies engaged in generation of power for operation and maintenance of power plants in India in the capacity of Operation & Maintenance Contractor.
  4. For providing the operation & maintenance services, the Appellant had set up project offices in India which, admittedly, constituted 'Permanent Establishment' of the Appellant in India in terms of Article 5 of the Double Taxation Avoidance Agreement between India and South Korea (hereinafter referred to as '**Tax Treaty**'). Therefore, the Project Offices, being Permanent Establishments, were

required to be treated as an enterprises separate from the Korean - Head Office of the Appellant (hereinafter referred to as the '**Head Office**') for the purpose of determining the income of the Appellant attributable to the Project Offices liable to tax in India as well as for the purpose of transfer pricing regulations.

5. The operation & maintenance agreements provided for (a) payment to the Project Offices for the scope of work performed by the Project Offices in India; and (b) for payment to the Head Office directly for offshore services.
6. The case of the Appellant was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that payment of INR 48,41,44,363/- was made directly to the Head Office and was not disclosed in the Profit & Loss Account filed by the Appellant in respect of Indian Operations. The Assessing Officer was of the view that all the activities relating to Operation & Maintenance were carried out in India through the key personnel of the Appellant in India and, therefore, the entire Operation & Maintenance receipt were attributable to the operations in India. Accordingly, the Assessing Officer proposed an addition of INR 48,41,44,363/- in the Draft Assessment Order, dated 24/03/2022, passed under Section 144C of the Act. The Appellant filed objection before the DRP against the Draft Assessment Order, dated 24/03/2022. All the 7 objections raised by the Appellant were dismissed by the DRP vide order, dated 28/12/2022. Sequent thereto, the Assessing Officer passed the Final Assessment Order, dated 27/01/2023, under Section 143(3) read with Section 144C(13) of the Act, making an addition of INR 48,41,44,363/- in respect of Operation & Maintenance payments remitted directly to the Head Office outside India.

7. Being aggrieved by the Final Assessment Order, dated 27/01/2023 pursuant to directions given by the DRP vide order, dated 28/12/2022, the Appellant has preferred the present appeal before the Tribunal.
8. The Ld. Counsel for the Appellant appearing before us, at the outset, placed on record, copy of the decision of the Tribunal in the case of the Appellant for the Assessment Years 2017-18 and 2018-19 [ITA Nos. 1030 & 1056/Mum/2022, dated 28/06/2023] and submitted that the issue raised in the present appeal are covered by the aforesaid decision to the extent that the Tribunal has set aside the directions given by the Commissioner of Income Tax (International Taxation), Mumbai-3 to deny the benefit of Tax Treaty to the Appellant in respect of Operation & Maintenance receipts remitted directly to the Head Office outside India while exercising powers of revision under Section 263 of the Act.

Countering the aforesaid submissions, the Ld. Departmental Representative submitted that the issue before the Tribunal in the decision cited by the Ld. Counsel for the Appellant arose out of order passed under Section 263 of the Act and the Tribunal had set aside the directions issued under Section 263 of the Act to deny the benefit of Tax Treaty. However, the Tribunal had directed the Assessing Officer to examine the issue of taxability of the Operation & Maintenance receipts remitted directly to the Head Office back to the file of the Assessing Officer for adjudication afresh since the Assessing Officer had failed to carry out necessary enquiry and verification during the assessment proceedings. The Ld. Departmental Representative pointed out that for the Assessment Year 2020-21, the Assessing Officer had made the addition after making proper enquiry and verification.

In rejoinder, the Ld. Counsel for the Appellant submitted that for Assessment Year 2020-21 also the issue of taxability of Operation & Maintenance receipt remitted directly to Head Office could be remanded back to the file of Assessing Officer for fresh adjudication as it is one of the contentions of the Appellant that the Final Assessment Order passed is perverse as the additions made are contrary to the material on record.

9. After some arguments both the sides agreed that the issue relating to taxability of Operation & Maintenance receipt remitted directly to Head Office for the Assessment Year 2017-18 and 2018-19 pending before the Assessing Officer pursuant to the common order, dated 28/06/2023, passed in appeals preferred by the Appellant against the order passed under Section 263 of the Act, and the issue relating to taxability of Operation & Maintenance receipt remitted directly to Head Office for the Assessment Year 2020-21 arise from common factual matrix. The Operation & Maintenance project in India and the contracts under which Operation & Maintenance receipts are received by the Appellant are common for the Assessment Years 2017-18, 2018-19 and 2020-21. Since, the issue raised in the present appeal is already before the Assessing Officer for the prior Assessment Years (i.e. Assessment Years 2017-18 & 2018-19), we deem it appropriate to accept the contention advanced on behalf of the Appellant and direct the Assessing Officer to examine and adjudicate the issue of taxability of Operation & Maintenance receipt remitted directly to Head Office for the Assessment Year 2020-21 afresh as per law after giving the Appellant sufficient opportunity of being heard and after taking into consideration the findings returned by the Assessing Officer for the Assessment Years 2017-18 and 2018-19. All rights and contentions of both the sides are left open. The Appellant would

be at liberty to raise the claim for deduction for corresponding offshore expenses before the Assessing Officer. The Assessing Officer would be at liberty to carry out enquiry/investigation as per law. The Appellant is directed to co-operate during the assessment proceedings and furnished all relevant documents and details on which the Appellant wishes to place reliance upon forthwith. In terms of aforesaid, Ground No. 1 is allowed for statistical purposes. Accordingly, Ground Nos. 2 to 7 are disposed of as being infructuous, and Ground No. 8 is disposed of as being consequential. As regards, Ground No. 9, the Assessing Officer is directed to verify the claim of the Appellant and grant credit of taxes withheld as per law.

In result, the present appeal preferred by the Assessee is treated as allowed for statistical purposes.

Order pronounced on 13.09.2023.

**Sd/-**  
**(Prashant Maharishi)**  
**Accountant Member**

**Sd/-**  
**(Rahul Chaudhary)**  
**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 13.09.2023  
*Alindra, PS*

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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