IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.2401/Del/2023
Assessment Year: 2020-21

With

S.A. No.329/Del/2023
[Arising out of ITA No.2401/Del/2023]
Assessment Year: 2020-21

Air Liquide Global EC Germany GMBH, OLOF, Palme Strasse, 35, Frankfurt Main, Frankfurt Germany – 60439	**Vs.**	ACIT, Circle Intl. Tax 1(1)(1), New Delhi
PAN :AABCL7778E		
(Appellant)		**(Respondent)**

Assessee by	Sh. Tapas Mishra, Advocate Sh. Amit Arora, CA Sh. Shubham Jain, CA
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	14.11.2023
Date of pronouncement	07.02.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT

Captioned appeal has been filed by the assessee challenging the final assessment order dated 29.06.2023 passed under section

143(3) read with section 144C(13) of the Income-tax Act, 1961 pertaining to assessment year 2020-21, in pursuance to directions of learned Dispute Resolution Panel (DRP).

2. The core issue arising in the appeal relates to taxability of the amount received by the assessee from offshore supplies of plants and equipments.

3. Briefly the facts are, the assessee, a non-resident corporate entity, is incorporated in Federal Republic of Germany and is a tax resident of Germany. As stated, the assessee is engaged in the business of building air gas separate and renewable and low-carbon hydrogen production units and supplies external customers with efficient, sustainable, customized technology and process solutions. In the year under consideration, the assessee earned Revenue from entities in India from the provision of services as well as sale of plants and equipment. The details are as under:

Name of the	Party Date Invoice	Reference No.	Nature	Amount (Euro)	Amount (INR)	Remarks
Lurgi India International Service Pvt.ltd	25.11.2019	9000460	Technical Service	4,09,934	3,25,34,457	Amount offered to tax and can be traced to 26-AS
Indian Oil Corporation Limited	03.12.2019	90085	Technical Service	32,499	28,04,618	Amount offered to tax and can be traced to 26-AS
Air Liquide Global E&C Solutions India Pvt.Ltd	28.02.2020	91194	Technical Service	2,56,859	2,31,18,928	Amount offered to tax and can be traced to 26-AS
Air Liquide Global E&C Solutions India Pvt.Ltd	28.02.2020 9	91168	Technical Service	4,76,293	4,35,04,631	Amount offered to tax and can be traced to 26-AS
Air Liquide Global E&C Solutions India Pvt.Ltd	24.12.2019	91070	Technical Service	2,85,619.44	25,24,35,531.80	Amount offered to tax and can be traced to 26-AS
Air Liquide Global E&C Solutions India Pvt.Ltd	24.12.2019	91074	Technical Service	6,21,266.69	5,49,82,101.93	Amount offered to tax and can be traced to 26-AS
Air Liquide	11.04.2019	IT Cost	IT Cost	6,70,243	5,57,24,019.96	Represents

Global E&C Solutions India Pvt.Ltd						payment of IT cost for earlier year. The amount was duly offered to tax in FY 2018-19 to which it pertains.
Air Liquide Global E&C Solutions India Pvt.Ltd	11.04.2019	Global Function Cost	Global Function Cost	4,45,337.43	3,82,99,776.19	Represents payment of Global Function cost for earlier year. The amount was duly offered to tax in FY 2018-19 to which it pertains.
Bharat Petroleum Corporation Limited	23.12.2019	1700021 46 & 90004 444	Technical Service	32,90,651.11	25,31,66,610	Amount offered to tax and can be traced to 26-AS
Bharat Petroleum Corporation Limited	13.12.2019	9000448 5 & 9000448 7	Technical Service	80,208.09	62,63,450	Amount offered to tax and can be traced to 26-AS
Bharat Petroleum Corporation Limited	01.04.2019	P.O 4506451 785	Equipment Sale	1,10,01,430.68	897388390	Pertains to supply of goods by the non-resident Assessee to the Client and such supply is not exigible to tax in India.)

4. In the return of income filed for the assessment year under dispute, the assessee declared total income of Rs.44,16,18,330/-.

Undisputedly, except the amount of Rs.89,73,88,390/- received by the assessee from sale/supply of plant and equipments to Bharat Petroleum Corporation Limited (BPCL), all other receipts were offered to tax in India. Insofar as the receipts from sale and supply of equipment to BPCL, the assessee claimed before the Assessing Officer that such sale/supply of goods having been made from offshore on Freight On Board (FOB) basis and the sale transaction having been completed outside India, there is no taxable event in India so as to bring to tax the receipts in India. The Assessing Officer, however, was not convinced with the submissions of the assessee. He observed that the assessee as per the scope of work under the contract between the assessee and BPCL, it includes licence fee, basic design engineering fee, mandatory service as per agreements, Additional Services based on the requirements & Training Fees in addition to the cost of plants and equipments sold. He observed, one of the group entities of the assessee, i.e., namely Lurgi India International Services Pvt. Ltd. has entered into a separate contract with BPCL, in terms of which, the said entity is required to provide Catalyst Loading Supervision, mandatory service as per agreements or additional services based on the

requirement. He submitted, as per scope of work, the assessee is required to provide foreign training of plant officials and technical advisory services in India. Whereas, assessee's group entity in India is required to provide technical services to the officials in the plant in India. Therefore, there cannot be any difference between the officials of which entity are providing training, maintenance and repairs with respect to sale/supply of equipment to BPCL. He observed, the contracts are composite in nature, however, they have been artificially split into separate contracts, though, essentially, the contract involve a turnkey project. He observed, the services rendered by the assessee are covered under the provisions of section 44BB of the Act. He further observed that the assessee has a Permanent Establishment (PE) in India. Accordingly, invoking the provisions of section 44BB of the Act, he treated 10% of the receipts from sale of equipment as deemed profit and gains of the PE and brought an amount of Rs. 8,97,38,839/- to tax. Accordingly, he framed the draft assessment order. Against the draft assessment order so framed, the assessee raised objections before learned DRP. While deciding the issue, learned DRP held that the assessee is involved in building production unit in relation

to air gas separation and renewable and low-carbon hydrogen process solutions. Therefore, it would be covered under section 44BB of the Act. Accordingly, DRP upheld the decision of the Assessing Officer. While doing so, learned DRP also held that the assessee had a PE in India. In terms with the directions of learned DRP, the final assessment order was passed.

5. Before us, learned counsel appearing for the assessee submitted that in course of assessment proceedings, the assessee has furnished documentary evidences to demonstrate that supply of plant and machinery was made on FOB basis from outside India and the transfer of property in goods happened outside India. Drawing our attention to copies of purchase orders, bill of lading and the invoices issued to BPCL placed in the paper-book, learned counsel submitted, the terms of delivery as per purchase order issued by BPCL clearly mentions the terms of the delivery should be FOB Seaport. The freight charges are paid at the destination only i.e. Moji Port, Japan. The value of the invoice is on FOB basis. Thus, he submitted, when the documentary evidences clearly establish that the sale event was completed outside the territory of

India, the receipts from supply of plant and machinery cannot be taxed in India.

6. Proceeding further, he submitted, BPCL has entered into five separate contracts with the assessee. He submitted, the scope of work under each contract is distinct and separate. He submitted, the Indian entity has also entered into a separate contract with BPCL, wherein, the scope of work is totally different. Thus, he submitted, when there are independent contract for specific work to be performed, the Departmental Authorities cannot conclude that the work executed is under a composite contract. In support of such contention, he relied upon the decision of Ishikawajma-Harima Heavy Industries Ltd. Vs. Director of Income Tax [2007] 158 Taxman 259 (SC).

7. Without prejudice, he submitted, application of section 44BB of the Act is totally misplaced as the said provision can be invoked only in case of a non-resident engaged in the business of providing services or facilities or supplying plant and machinery on hire for use or to be used in prospecting for, or extraction or production of, mineral oil. He submitted, the assessee has not supplied plants and equipments on hire, but has sold them on outright basis.

Thus, he submitted, under no circumstances section 44BB can be made applicable. In support of such contention, he relied upon decisions of the Coordinate Bench in case of Baker Hughes Asia Pacific Ltd. [2014] 47 taxmann.com 1 and Bombardier Transportation GmbH Vs. DCIT [2023] 154 taxmann.com 18 (Delhi – Trib.).

8. Per contra, strongly relying upon the observations of the Assessing Officer and learned DRP, learned Departmental Representative submitted that the Catalyst and Proprietary Equipment Supply Agreement stipulates that 10% of the receipts will be paid upon successful completion of test run which, in other words, means that assessee's liability does not end with supply of plant and machinery, but end with successful completion of test run. Thus, he submitted, this indicates the composite nature of contract.

9. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. As discussed elsewhere in the order, in the year under consideration, the assessee has earned various receipts from number of entities in India, including two public sector undertakings, viz., Indian Oil

Corporation Ltd. and BPCL. Undisputedly, except the receipt amounting to Rs. 89,73,88,390/- from BPCL towards sale/supply of equipment, all other receipts have been offered to tax by the assessee in India as Fees for Technical Services (FTS) under the treaty provisions. Insofar as the receipt from sale/supply of equipment, the assessee has claimed exemption from taxation in India pleading that the sale event completed outside India and transfer of title over the goods completed outside India. Apparently, the departmental authorities have not accepted the aforesaid contention of the assessee and proceeded to tax the receipts from sale/supply of equipment under section 44BB of the Act. Keeping in perspective the aforesaid factual position, following two issues arise for our consideration:

(i) Situs of sale event.

(ii) Applicability of section 44BB of the Act

10. Insofar as situs of sale is concerned, it is observed, the assessee has entered into the following contracts with BPCL:

Contract dated	Nature of Agreement
8 July 2015	License and Guarantee Agreement
8 July 2015	Technical Advisory Service Agreement
8 July 2015	BDEP and Engineering Agreement
22 March 2016	Reactor Package Unit Service Agreement
10 June 2016	Catalyst and Proprietary Equipment Supply Agreement

11. As could be seen from the above, the assessee entered into five independent agreements with BPCL, wherein, scope of work has been specifically identified and demarcated. Insofar as agreement for supply of Catalyst and Proprietary Equipment, the purchase order clearly stipulates that the terms of delivery is FOB/FCA Japanese Seaport/Airport/Warehouse. Article 7.02 of the Agreement reads as under:

> *"7.02 Supplier shall procure all the Catalyst and Proprietary Equipment on FOB/FCA Japanese Seaport/Airport/Warehouse basis as per INCOTERMS 2010."*

12. The terms of payment as per Article 5 of the agreement says that 10% of the price has to be paid as advance and 80% of the price has to be paid upon delivery FOB/FCA Japanese Seaport/Airport/Warehouse out of an unconditional irrevocable and documentary Letter of Crodit which shall be opened within 30 days of the issuance of company's purchase order. Whereas, balance 10% will be paid upon successful completion of test run. Clause 5.02 stipulates that the payment has to be paid to supplier's account number and the bank specified in supplier's invoice. The bill of lading indicates that freight and charges are payable at the destination only. The invoice for supply of plant and

machinery shows that place of delivery is Moji Port, Japan and the value of invoice is on FOB basis.

13. Thus, the aforesaid facts clearly establish that the situs of sale of plant and equipment was in Japan and not within the territory of India. Therefore, in our view, the ratio laid down by the Hon'ble Supreme Court in case of Ishikawajma-Harima Heavy Industries Ltd. (supra) clearly applies to the facts of assessee's case and no part of the receipts in dispute is taxable in India as the sale event and transfer of title over the goods have taken place outside the territory of India.

14. Having held so, there is one other aspect to the issue. The departmental authorities have invoked section 44BB of the Act to tax the receipts on presumptive basis. On a reading of the said provision, it is very much clear that it applies to a non-resident, who is either engaged in the business of providing services or facilities in connection with prospecting for, or extraction or production of mineral oils or has supplied plant and machinery on hire, which is used or to be used in prospecting for, or extraction or production of mineral oils. In the facts of the present appeal, admittedly, the assessee is not engaged in the business of providing

services or facilities in connection with prospecting for, or extraction or production of mineral oils in India. Neither the assessee has supplied plant and machinery on hire for use or to be used in prospecting for, or extraction or production of mineral oils. The assessee has sold the plant and equipment to BPCL for setting up a plant in its facilities at Kochi. Therefore, in our opinion, the conditions of section 44BB of the Act do not apply.

15. Further, in course of hearing, a specific query was put to learned counsel for the assessee as to how the other receipts were offered to tax in India. In reply, learned counsel has specifically submitted before us that the receipts have been offered as FTS in terms with the provisions contained under India – Germany DTAA. The aforesaid contention of learned counsel for the assessee could not be controverted by the Department. If that is so, we are unable to comprehend how the department can mete out different treatments to the receipts of the assessee. In case, the Department was convinced that the assessee had a PE in India all the receipts should have been brought to tax under domestic law, either under section 44BB or section 44DA or section 9(1)(vii) of Act, as the case may be. Further, though, the departmental authorities have

concluded that the assessee had a PE in India, however, they have not established how the conditions of Article 5(1) of the tax treaty are satisfied and what is the nature of PE in India. On careful scrutiny of the assessment order and directions of learned DRP, we find that except general observations, no valid reasoning has been provided by the departmental authorities to establish existence of PE.

16. Thus, considering the totality of facts and circumstances of the case, in final analysis, we hold that the receipts from sale/supply of plant and equipment are not taxable in India. Accordingly, ground no. 1 is allowed.

17. Ground no. 2, being premature at this stage and ground no. 3 being a general ground, are dismissed.

18. In view of our decision in the main appeal, the stay application has become infructuous.

19. In the result, the appeal is allowed and the stay application is dismissed.

Order pronounced in the open court on 07th February, 2024

Sd/-	***Sd/-***
(M. BALAGANESH)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 07th February, 2024.

RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi