

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

**BEFORE SH. SAKTIJIT DEY, VICE-PRESIDENT AND
SH. PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

ITA No.3279/Del/2023
(Assessment Year : 2021-22)

Baker Hughes Energy Technology UK Limited Stoneywood Park North, Dyce, Aberdeen-AB21 7EA, United Kingdom – 1111 PAN No. AAHCG 6037 F (APPELLANT)	Vs.	ACIT Circle – 1(1)(2), International Taxation, New Delhi (RESPONDENT)
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Assessee by	Shri Sachit Jolly & Shri Rishabh Malhotra, Adv.
Revenue by	Shri Vizay B. Vasanta, CIT-D.R.

Date of hearing:	28.02.2024
Date of Pronouncement:	05.03.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT :

Captioned appeal has been filed by the assessee challenging the final assessment order dated 31.10.2023 passed in A.Y. 2021-22 in pursuance to the direction of learned Dispute Resolution Panel-1, New Delhi.

2. Though, multiple grounds have been raised by the assessee, basically, two issues arise for consideration.

3. Firstly, whether the assessee has a Permanent Establishment ('PE') in India in terms of Article – 5 of India-United Kingdom ('UK') Double Taxation Avoidance Agreement ('DTAA'). Secondly, whether assessee's income is to be computed under section 44BB of the Income-tax Act, 1961.

4. Before we proceed to decide the issues, it is necessary to briefly deal with the facts. The assessee is a non-resident corporate entity incorporated in UK and is a tax resident of UK. As stated by the Assessing Officer, assessee is engaged in the business of supply of equipment for global oil and gas industry. It also designs and manufactures the equipments used in drilling and production of oil and gas. On 5th Nov 2018, Oil and Natural Gas Corporation ('ONGC') entered into a contract with a consortium of companies, wherein, the assessee is a part of. The other companies forming part of the consortium are McDermott international management S. DeRL, Berlian McdermottSdn Bhd, Vetco Gray Pte. Ltd. and L&T Hydrocarbon Engineering Ltd. The scope of work under the contract is well defined and demarcated between the consortium members. As per the scope of work under the contract, the assessee was required to manufacture and supply Subsea Production System (SPS) components (Sale Item) including Subsea Trees, Manifolds and Subsea and Topside Control Systems. In terms of contract, the assessee started supplying equipments and components from A.Y. 2020-21.

5. For the assessment year under dispute, assessee filed its return of income on 15th March 2022 declaring income of Rs.1,10,69,460/-.

In the course of assessment proceedings, the Assessing Officer, while verifying the details called for, noticed that in the year under consideration, the assessee has received substantial revenue from supply of equipments to ONGC. However, the assessee has not offered such receipts to tax. He therefore, issued a show-cause notice to the assessee stating that why the project office situated in India should not be treated as fixed place PE in terms of Article of DTAA. Further, why ONGC gas well located at Krishna Godavari Basin should not be treated as installation PE of assessee in India. Consequently, why the Revenue received from ONGC from supply of equipment should not be treated as business income of the assessee sourced from India hence, attributable to PE.

6. In response to the show-cause notice, the assessee furnished detailed reply stating that it has no fixed place PE by way of project office nor any installation PE at ONGC Gas well, as, it has not carried out any installation activity but was only involved in supply of equipments from outside India. The Assessing Officer however was not convinced with the submissions of the assessee. Referring to the scope of work as per the Memorandum Of Understanding (MOU), the Assessing Officer observed that the contract with ONGC is a integrated contract for offshore supply as well as onshore activities. He further observed that the consortium member is working on behalf of the assessee hence, forms the PE of the assessee in India. In this context, he also referred to the information received from ONGC in pursuance to notice issued under section 133(6) of the Act. Thus, ultimately, he concluded that the contract with ONGC is a turnkey project covering end to end activities starting from design

manufacture and installation. Proceeding further, he held that since the activities undertaken by the assessee are in relation to extraction and production of mineral oil, the assessee would be covered under the provisions of section 44BB of the Act. In the process, he computed 10% of the receipts as income of the assessee from profit and gains of business and added an amount of Rs.100,19,64,790/-. In this manner he framed the draft assessment order.

7. Against the draft assessment order so framed, assessee raised objections before learned DRP. While disposing of the objections of the assessee, learned DRP followed their directions in assessee's case in A.Y. 2020-21 and held that the receipts from offshore supply of equipments to ONGC is taxable under section 44BB of the Act. While coming to such conclusion, Learned DRP also expressed the view that the issue of existence of PE is academic in nature as applicability of section 44BB is not dependent upon existence of PE.

8. Before us, learned Counsel appearing for the assessee submitted that the contract executed with ONGC in the year 2018 continues even in the assessment year under dispute and there is no change in terms and conditions of the contract. He submitted, there is also no change in the facts and circumstances between the earlier assessment year and the impugned assessment year. He submitted, the Assessing Officer has fully misconceived the facts while concluding that the assessee had a fixed place PE as well as installation PE in India. In this context, he drew our attention to the submissions made before the Assessing Officer as also the information given by ONGC in response to notice under section 133(6)

of the Act. Finally, he submitted, the issue is squarely covered by the decision of the Tribunal in assessee's case in A.Y. 2020-21. He drew our attention to the relevant observations of the Bench both on the issue of applicability of section 44BB of the Act as well as existence of PE.

9. The learned Departmental Representative submitted, the issue in the year under consideration stands on a different footing as the Assessing Officer has brought new facts on record to identify the existence of PE in India.

10. We have considered rival submissions and perused material on record. The allegation of the Assessing Officer in the show-cause notice issued to the assessee was, the project office of the assessee in India has to be considered as fixed placed PE in terms of Article – 5 of the India – UK DTAA. He has further observed that the gas well of ONGC in Krishna Godavari basin has to be considered as installation of PE of the assessee as the assessee has carried out installation activities. However, while concluding, the Assessing Officer has observed that the consortium member is working on behalf of the assessee, hence, constitutes PE. Unfortunately, learned DRP has not given any finding on existence or otherwise of PE by holding that the issue is academic as existence of PE is not relevant for applicability of section 44BB of the Act.

11. Be that as it may, it is necessary to examine whether the assessee had any kind of PE in India. From the submissions of the assessee made before the Assessing Officer it becomes very much

clear that the assessee has very clearly and categorically stated that neither it had any project office in India nor had carried out any installation activity at the gas well of ONGC at Krishna Godavari Basin. The scope of work as per the MOU with ONGC and particularly Annexure – 1 & 2 of MOU reproduced in paragraph – 6 of final assessment order clearly indicates that the only work assigned to the assessee under the contract is manufacturing and supply of Subsea Production System (SPS) components including Subsea Trees, Manifolds and Subsea and Topside Control System. All other activities such as Project Management and Design and Engineering, Procurement, construction, fabrication, transportation, testing, support and SPS Services, Onshore fabrication, procurement of line pipes, life and field support etc. are to be undertaken by other consortium members.

12. In fact, the information given by ONGC in pursuance to notice under section 133(6) of the Act makes it very clear that the assessee was only engaged in manufacturing and supply and support of components including manufacture and supply of subsea and top side control system. Thus the material on record clearly indicate that the assessee was not in any way involved in onshore activities including installation at the site of ONGC. It appears, just to show that facts in the impugned assessment year are different from A.Y. 2020-21, the Assessing Officer has attempted to project the facts in a different manner. In the process, has completely misconceived the facts. Not a single piece of evidence has been brought on record by the Assessing Officer to establish that the assessee had any kind of PE in India in the year under consideration.

13. In fact, while dealing with identical nature of dispute in assessee's case in A.Y. 2020-21, the Co-ordinate Bench having examined the relevant facts including the terms and conditions of contract with ONGC has concluded that section 44BB will not be applicable in absence of PE. Further, the Coordinate Bench has held that the Assessing Officer has failed to specify how the PE came into existence and made the offshore supply of components attributable to PE. The Co-ordinate Bench has further held that the Assessing Officer has failed to establish how the consortium member constitutes PE in India. Referring to the decision of the Hon'ble Supreme Court in the case of ADIT vs. E-Funds (2018) 13 SCC 294, the Coordinate Bench has further held that burden of establishing existence of PE is on the Revenue, which has not been discharged. Thus ultimately, Coordinate Bench has held that since there is no PE of the assessee in India, section 44BB of the Act would not apply.

14. In our considered opinion, the facts involved relating to the issue in disputes are more or less identical to A.Y. 2020-21. In fact, DRP has merely relied upon the directions issued in A.Y. 2020-21. Since, the issue has been decided in favour of the assessee by Tribunal in A.Y. 2020-21 vide ITA No.521/Del/2023 dated 06.06.2023 and there is no discernible factual difference in the assessment year under dispute, we are inclined to follow the decision of the Co-ordinate Bench in assessee's own case (supra) and hold that section 44BB of the Act cannot be invoked to tax the receipts from offshore supply on presumptive basis as the Revenue has failed to establish existence of PE in India. Assessing Officer is directed to delete the addition.

15. In the result, appeal is allowed.

Order pronounced in the open court on 05.02.2024

Sd/-

**(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER**

Sd/-

**(SAKTIJIT DEY)
VICE-PRESIDENT**

Date:- 05.02.2024

*Priti Yadav, Sr. PS**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI