आयकर अपीलीय अधिकरण
कोलकाता 'सी' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA

श्री अनिकेश बनर्जी, न्यायिक सदस्य
एवं
श्री गिरीश अग्रवाल, लेखा सदस्य
के समक्ष
Before

SRI ANIKESH BANERJEE, JUDICIAL MEMBER
&
SRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

I.T.A. No.: 153/KOL/2022
Assessment Year: 2018-19

Saab Technologies B.V (Formerly known as Holland Institute of Traffic Technologies B.V.).....Appellant
[PAN: AABCH 5694 R]

Vs.

DCIT, International Taxation, Circle-2(1), Kolkata.....Respondent

Appearances:

Assessee represented by: *Sh. Abhishek Kejriwal, A/R.*

Department represented by: *Sh. Rakesh Kumar Das, CIT.*

Date of concluding the hearing : February 29th, 2024
Date of pronouncing the order : April 18th, 2024

ORDER

Per Anikesh Banerjee, JM:

The instant appeal of the assessee was filed against the order of the DCIT, International Taxation, Circle-2(1), Kolkata (in brevity the 'AO') dated 13.01.2022 passed u/s 144C read with Section 143(3) of the Income Tax Act, 1961 (in brevity the 'Act') for assessment year 2018-19. The impugned order was in persuasion of the order of the Hon'ble Dispute Resolution Panel-2, New Delhi dated 27.12.2021.

2. The assessee has taken the following grounds of appeal:

"1. Ground 1: On the facts and circumstances of the case and in law, the Deputy Commissioner of Income-tax (International Taxation) Circle-2(1), Kolkata ('Ld. AO') has erred in passing the assessment order under Section 143(3) read with Section 144C of the Income-tax Act, 1961 ('the Act') and the Hon'ble Dispute Resolution Panel ('DRP'), New Delhi has erred in confirming the assessment order which is wrong and bad in law. The impugned assessment order has been passed merely based on hypothesis and conjectures without examination of appellant's arguments and submissions, and no documentary evidence or justification with respect to any of the additions was brought on record. Also, the Ld. AO did not provide sufficient opportunity of being heard to the appellant during the course of assessment proceedings and passed the assessment order without taking into account the principles of natural justice.

2. Ground 2: On the facts and circumstances of the case and in law, the Ld. AO has erred in placing reliance on the draft assessment order of the preceding assessment year i.e. AY 2017-18 and holding that since an Installation Permanent Establishment ('PE') was constituted in appellant's case for a previous assessment year in case of AAI (Delhi Phase-1) Project, an Installation PE would automatically be constituted for the current assessment year i.e. AY 2018-19 without any further examination of facts of the current assessment year.

3. Ground 3: On the facts and circumstances of the case and in law, the Ld. AO has erred in holding that the appellant has an Installation PE in respect of various projects namely (a) AAI (Delhi Phase -1) Project, (b) AA1-5 Project and (c) GOK-AMC Project, undertaken by the appellant in India as per Article 5(3) of India-Netherlands DTAA.

4. Ground 4: On the facts and circumstances of the case and in law, the Ld. AO has erred in assuming the date of signing of contract as the date of commencement of installation activities by the appellant at each site / project for computing the time threshold of six months prescribed under Article 5(3) of India-Netherlands DTAA.

5. Ground 5: On the facts and circumstances of the case and in law, the Ld. AO has erred in holding that carrying out annual maintenance activities in respect of GOK-AMC project for which the supply and installation of equipment was completed in prior years, would tantamount to carrying out installation activities for constituting Installation PE in terms of Article 5(3) of India-Netherlands DTAA.

6. Ground 6: Without prejudice to above grounds, on the facts and circumstances of the case and in law, even if it is assumed that an Installation PE of the appellant is constituted in the current year, the Ld. AO has grossly erred in attributing profits in respect of offshore supply of

equipment [related to AAI (Delhi Phase-1) Project] to the alleged Installation PE of the appellant in terms of Article 7 of India-Netherlands DTAA.

7. Ground 7: On the facts and circumstances of the case and in law, the Ld. AO has erred in disregarding the orders of this Hon'ble Bench which were pronounced in the appellant's own case for prior years namely AY 2010-11, 2012-13, 2013-14 and 2014-15. In such orders, this Hon'ble Bench held that:

• Even if an installation PE is constituted, no attribution can be done for receipts from offshore supply of equipment.

• Providing annual maintenance services post completion of installation work at the site or project does not tantamount to carrying out of installation activities for constitution of Installation PE in India as per Article 5(3) of India-Netherlands DTAA.

(Combined tax effect in relation to Ground 1, 2, 3, 4, 5, 6 and 7 is INR 29,28,324)

8. Ground 8: On the facts and circumstances of the case and in law, the Ld. AO has failed to examine the arguments presented by the appellant with respect to non-taxability of interest income on income tax refunds and has erred in holding that the interest income received by the appellant on its income tax refunds as taxable under the head 'Income from other sources'. (Tax effect = Nil)

(Tax effect in relation to Ground 8 is INR 8,38,310)

All the above grounds of objections are mutually exclusive and without prejudice to each other.

The Appellant prays for leave to add, alter, amend, rescind from or withdraw any of the above grounds of appeal at or before the time of hearing of the appeal."

3. The brief fact of the case is that the assessee is Saab Technologies B.V (Formerly known as HITT Holland Institute of Traffic Technology B.V.). The assessee is a Dutch company which operates in international market for safety, security and efficiency of nautical air traffic management system. During the impugned assessment year, the assessee had undertaken various independent projects in India involving activities of offshore supply of hardware, supply of software, providing installation, testing and commissioning services, providing training services, documentation and

annual maintenance activities in different projects in India like AAI-5, AAI (Delhi Phase-1), AMC-GOK projects. As per the provisions of Section 90 of the Act the appellant is liable to tax or the India-Netherland Double Tax Avoidance Agreement (in short 'DTAA') whichever are more beneficial to it. The appellant in income tax return *suo-moto* offered the income tax from the training services and documentation charges as fees for technical services as per Article 12 of the India-Netherland DTAA. But the assessee took the benefit of exemption due to the Permanent Establishment (in short 'PE') is not established in India in training charges, documentation charges related to project AAI (Delhi Phase-1) and AAI-5 project. Ld. AO had not accepted the tenure of the assessee and taken the date of signature of agreement as the date of insertion in India. But the assessee claimed that the tenure should be calculated from the issuance of the work order which is taken as the starting date till completion of work. In that case, the assessee is covered for non-payment of tax at the status of NRI. Ld. A/R followed the direction of the Article of India-Netherland DTAA. The copy of the purchase order for augmentation of advance dated 01.12.2016 the relevant paragraph related to time schedule is inserted as below:

Particulars	***Timeline***
Original agreement for end-to-end supply, installation etc. of Vessel Traffic Services (VTS) System in the Gulf of Kutch (GOK)	*22 March 2005*
Completion of original agreement in the GOK	*February 2013*
Commencement of annual maintenance activities through a separate contract in the GOK	*14 February 2013 to 13 February 2018*

3.1. Ld. A/R also agitated that the interest refund from income tax was duly taxed in India. But as per the DTAA and the Most Favoured Nation (in short 'MFN') clause provided in the protocol to the India-Netherland DTAA and availed the beneficial provision of India-Netherland DTAA and concluded that such interest income would not be taxable in India. But ld. AO had not accept the assessee's views and 10% of the profit of the project was added back to the total income of the assessee. Further, the interest

refund from income tax was also added with the total income. Being aggrieved, the assessee filed an appeal before us.

4. Ld. A/R filed a written submission and vehemently argued. Ld. AR is inviting our attention in assessment order page no. 14 where the ld. AO had calculated the PE of the assessee taking the date of signing of contract is critical to the commencement of installation services. The relevant paragraph is duly inserted as below:

> *"We have examined the assessee's above arguments and contentions and the same arc misplaced and incorrect. The date of signing of the contract is critical to the commencement of installation activities. Although, the assessee did not furnish any supporting documents/evidence, the question of Permanent Establishment up to A.Y.2018-19 in respect of AAI (Delhi Phase-1) Project has been well settled as per the facts of the order u/s 143(3) r.w.s. 144C(13) for the A.Y.2017-18 and it is found that the installation activities for the project in the above case has exceeded the threshold of 6 months prescribed under Article 5(3) of the India-Netherlands DTAA, and accordingly an installation PE for the said project has been constituted. The relevant extract of the previous assessment order is as below:*

Sl. No.	*Detail of event*	*AAI (5) - Guwahati - Site 1*	*AAI (5) - Ahmedabad - Site 2*	*AAI (Delhi Phase-1)*	*AAI-Kolkata Project*
1.	*Date of signing of contract*	*13 Aug 2014*	*13 Aug 2014*	*1 Dec 2016*	*30 Dec 2014*
2	*Date of completion of installation activities (issuance of completion certificate by AAI)*			*12 Oct 2017*	*15 Sep 2016*
Time period for which installation activities were carried out by the assessee				*315 days*	*625 days*

> *Regarding the AMC-GOK. project, the assesses had entered into a contract with the customer for providing annual maintenance services for a fixed period of five years. These annual maintenance services are an extension of the original installation project and accordingly, forms part of the original contract. If both the original contract and the subsequent annual maintenance contract are viewed cumulatively, these annual maintenance services fall within the ambit of installation activities for constitution of Installation PE as per Article 5(3) of the India-Netherlands DTAA. Since the*

maintenance services have been performed for a period of more than 6 months, installation PE of the assessee has been constituted in India.

For the AAI-5 Project, the assessee did not furnish any supporting documents/ evidence, and accordingly, in absence of the same it has been considered that an installation PE has also been constituted for that project also.

Further, the interest income received from the Income Tax Department is added under the head 'Income from other sources'. As the assessee constituted PE during F.Y.2017-18, the tax charged thereon shall be as per normal provisions Income Tax Act, 1961.

Computation of Total Income and tax thereon:

Subject to the above, the total income of the assessee is computed in the draft assessment order as below:

Name of the Project/ site	*Total receipts*	*Attribution of income @10%*
AAI-5 Project	*36,83.873*	*3.68,387*
AAI (Delhi Phase-1) Project	*5,75,47.260*	*57,54.726*
AMC-GOK Project	*84,51,051*	*8,45,105*
Interest Income from ITD	*19,94.836*	*19,94,836*
Total	*7,16,77,020*	*89,63,054*

Computation of Tax

Total income	*89,63,054*
Tax @40% as per Income tax Act	*35,85.222*
Surcharge @2%	*71704*
Education cess @3%	*1.07.557*
Total tax payable	*3764483*
Rounded off u/s 288B	*37,64,480*

The order is made as above in terms of provisions of section 144C (I) of the Act. The assessee is entitled to tile its acceptance of the order in terms of clause (a) or file its objections in terms of clause (b) of section I44C (2). The final assessment order is to be passed thereafter in accordance with provisions of sections 144C (3) to 144C (13) and interest as applicable under the provisions of the Act."

6. Ld. A/R in reply placed as below: -

Based on judicial pronouncements from various Indian Courts, following are the key principles that are relevant for determination of Installation PE:

Time period of 6 months must be tested for each independent site separately and cannot be combined:

A foreign enterprise may carry on multiple sites / projects in India within the same period. However, for evaluating the number of days for which activities were carried out for constitution of an installation PE, each project / site must be considered separately provided such sites / projects are unconnected to each other.

The following judgements are relevant to note in this case:

• In the case of **Valentine Maritime (Gulf) LLC 82 taxmann.com 200 (2017**), the Hon'ble **Mumbai Income tax Appellate Tribunal** (ITAT) held that the time spent on 2 projects cannot be combined for unconnected works. The relevant extract of the said judgement is as below:

"9. As regards the services rendered with respect of other works, we note that the duration for each of them was less than nine months. The learned CIT(A) has given a clear finding and we find ourselves in agreement with the same. The Assessing Officer has not based his order on any cogent reasoning. He has presumed that appellant' s representative might have come earlier also before the actual arrival of the barge in the Indian waters. Such hypothesis cannot be sustained. ***The actual period of the two projects cannot be combined as they are unconnected works. In such situation, the Assessing Officer's view that the period of the two works should be combined cannot be sustained.*** *This view is clearly supported by the Tribunal's decisions referred by the learned Counsel of the appellant and referred by us in the earlier part of this order."*

(Emphasis supplied)

• The appellant further relies on the following decisions which have upheld this principle:

a) J Ray McDermott Eastern Hemisphere Ltd. v. Joint Commissioner of Income-tax-Special Range 21, Mumbai (2010) 39 SOT 240 (MUM)

"19. *Having held that the aggregation of time on various contracts in India is not required, this is nevertheless to be examined whether time spent on a specific contract is more than nine months or not. The CIT(A) ought to have examined this aspect of the matter and given her findings on duration of each project site. We, therefore, consider it necessary to remit the matter for the limited purposes of adjudication on this aspect of the matter. Even as we do so, it is necessary to point out that what is required to be ascertained is the time spent on the contract and it is nothing to do with the dates on which invoices are raised for advances and for demobilizations and sail outs. As the UN Model Convention Commentary, incorporating OECD Model Convention Commentary, puts it, "a site exists from the date on which the contractor begins his work, including any preparatory work, in the country where the construction is to be established, e.g., if he installs a planning office for the construction" and that "in general, it continues to exist until the work is completed or permanently abandoned." These commentaries further add that "a site should not be regarded as ceasing to exist when work is temporarily discontinued." These observations very appropriately set out the right principles in the light of which the duration of a site is to be ascertained for the purpose of applying threshold limit of duration test. The date on which invoice is raised for mobilization advance, as adopted by the Assessing Officer in this case, is also not decisive for the purpose of determining the duration of the PE. On what date a requisition is made for advance has nothing to do with the actual work, or incidental preparatory work preceding, and, thus, forming integral part of, the actual core work, at site. Similarly, sail out of barge is an activity which takes place after the work at site comes to an end.The date on which sail out of barge starts or is completed is essentially a date subsequent to abandoning the work at the site. This date is also not, therefore, relevant for the purpose of deciding the date on which activity at site comes to an end. It is also important to bear in mind the fact that dates of commencement and completion of work set out in the contracts are only indicative of plans and cannot be substituted for the actual dates of commencement of work and completion of work - as evidenced by the material*

on record. The work schedule set out in the contract cannot, therefore, be decisive of the date of commencement and completion of work at site. What is really required to be seen, as we have elaborated above, is the duration for which the work-actual or preparatory, is carried out at site.

20. *While deciding the matter afresh on the question of duration of project, the CIT(A) will bear in mind the principles set out above and shall decide the matter by way of a speaking order dealing with the contentions of the assessee. With these directions and in the terms indicated above, the matter stands restored to the file of the CIT(A).*

21. *In the result, the appeal is allowed for statistical purposes in the terms indicated above."*

b) **Kreuz Subsea Pte. Ltd. v. Deputy Director of Income-tax (International Taxation) 3 (1), Mumbai (2015) 58 taxmann.com 371 (MUM-Trib)**

"11. *Lastly, coming to the contention of the department that all the projects and activities undertaken by the assessee should be considered collectively and in such a case, the aggregate working days of all the projects has far exceeded the threshold time period of 183 days. Before us, Mr. Pardiwala in support of this proposition, had relied upon the decision of Sumitomo Corpn.'s case (supra) and Valentine Maritime (Mauritius) Ltd.'s. case (supra). From the ratio of the above decisions, it emerges that the test of 183 days, that is, threshold time limit applies to each site or the project independently except where such sites or project is for a coherent whole, commercial and geographically. Unconnected or independent projects cannot be taken together and should be considered on standalone basis, even though the different contracts may have been entered into by the same customer with the contractor. Professor Klaus Vogel in his commentary on "Model tax convention", has also opined this view in the following manner:—*

"The question whether there is a PE in a specific Contracting State or not should be considered separately for each business activity performed in that State, i.e. for each individual place of business, existing there as well. In this connection, the place where the individual activity is performed may very well be relocated, for instance, where a road is being constructed in stages. If, in contrast, all building sites maintained in one State were treated as one single

PE, this would in effect be tantamount to applying the force of attraction principle. Moreover, this would violate the principle that various business activity performed by one and the same enterprise, none of which individually constitutes a PE, cannot lead to a PE if combined."

Further in the decision of Valentine Maritime (Mauritius) Ltd.'s case (supra) the Tribunal held that for the purpose of computing the threshold time limit, what is to be taken into account is the activity of a foreign enterprise on a particular site or a project and not on all the activities in a tax jurisdiction as a whole. The expression use in the relevant definition clause are 'in similar' and there is no specific mention about aggregation of number of days spent on various sites, project or activities. The proposition laid down in these decisions lay down the correct view to which we also adhere to and accordingly, we hold that each of the project of the assessee are to be viewed on standalone basis and if they are considered on standalone basis, then as discussed above in the present case, none of the contract constitute a PE in India.

12. *Thus, in our conclusion, the installation activity carried out by the assessee in terms of various contracts in India separately do not constitute PE in India under Article 5(3) as the threshold time limit of 183 days for each project is much less. Accordingly, the revenue from assessee's contract for installation activity in India is not taxable in India, either under Article 7 or under the Act, as the assessee does not have PE in India."*

The ld. AR argued that here, it is important to note that as per the OECD Commentary on Article 5 (Model Tax Convention on Income and on Capital 2017), the time limit of six months applies to each individual site or project separately. While computing the period for which installation activities are conducted on a site / project, no account should be taken of the time previously spent by the contractor on other sites or projects which are totally unconnected with it.

> Date of signing of contract cannot be treated as date of commencement of installation activities:

The appellant submits that for the purpose of determining whether installation activities have continued for a period of more than six months, the actual date of commencement of installation activities at the site of the

customer, has to be considered and not the date of signing of contract. The date of signing of contract merely signifies that the parties have agreed to terms and conditions for carrying out the work. Assuming the date of signing of agreement as the commencement date would be incorrect and would lead to erroneous creation of an Installation PE. In this regard, the appellant places reliance on the below judgements:

• In the case of **Kreuz Subsea Pvt. Ltd. (58 taxmann.com 371) (2015), the Hon'ble Mumbai ITAT** followed the aforementioned decision of AAR and held that date of signing of contract cannot be accepted to be the date of commencement of installation activities. Relevant extract of ruling is presented as under:

"10. Now coming to the contract with Swiber BG Hydra Project, though the finding of the DRP in page 6 and 7 is that it is less than 183 days, but the AO in the final assessment order has mentioned that it has crossed 183 days as the contract was signed on 01.08.2009 and the project was completed on 12.02.2010. In this regard the observation of the AO is that, date of signing of the contract has to be reckoned for calculating the number of days. Such an observation of the Ld. AO cannot be upheld, because at the time of the signing of the contract no actual activity for the installation purpose had yet started. The date of signing of contract merely signifies that the parties have agreed to terms and conditions for carrying out the work. The actual date should be reckoned from the preparatory activities letting to the performance of the contract of the core business activity i.e., the installation activity in the present case. In support of this proposition, the reliance placed by the learned senior counsel in the case of Cal Dive Marine Construction (Mauritius) Ltd. (supra)"

• This principle was also upheld in the case of **Cal Dive Marine Construction (Mauritius) Ltd. (182 Taxman 124) (2009) (AAR)**, where the Hon'ble Authority for Advance Rulings (AAR) held that date of signing of contract cannot be considered as commencement date of installation activities for constitution of PE in India

Providing annual maintenance services after handing over the project /site to the customer would not be tantamount to carrying out installation activities for constitution of Installation PE.

The appellant submits that providing any annual maintenance services pursuant to completion of installation activities on a site/ project would not be tantamount to carrying out installation activities for constitution of Installation PE. In this regard, the appellant places reliance on the following:

• Hon'ble Kolkata ITAT in the appellant's own case **HITT Holland Institute of Traffic Technology B.V. (2017) 78 taxmann.com 101 (Kolkata ITAT)] for AY 2010-11** and later followed in subsequent years (i.e., AY 2011-12, 2012-13, 2013-14 and 2014-15) held that providing any annual maintenance services pursuant to completion of installation activities on a site/ project would not mean carrying out installation activities for constitution of Installation PE.

In the appeal filed by tax department before the Hon'ble Calcutta High Court against the aforesaid ITAT orders, the Hon'ble Calcutta HC vide its order dated 19 June 2018 admitted only one question relating to Royalty income and did not admit all other questions raised in tax department's appeal. Therefore, the aforesaid orders of ITAT are not under challenge before Hon'ble High Court on this issue.

• OECD Model Commentary (2017) - Para 55

"55. In general, a construction site continues to exist until the work is completed or permanently abandoned. The period during which the building or its facilities are being tested by the contractor or subcontractor should therefore generally be included in the period during which the construction site exists. In practice, the delivery of the building or facilities to the client will usually represent the end of the period of work, provided that the contractor and subcontractors no longer work on the site after its delivery or the purposes of completing its construction. A site should not be regarded

as ceasing to exist when work is temporarily discontinued. Seasonal or other temporary interruptions should be included in determining the life of a site. Seasonal interruptions include interruptions due to bad weather. Temporary interruption could be caused, for example, by shortage of material or labour difficulties. Thus, for example, if a contractor started work on a road on 1 May, stopped on 1 November because of bad weather conditions or a lack of materials but resumed work on 1 February the following year, completing the road on 1 June, his construction project should be regarded as a permanent establishment because thirteen months elapsed between the date he first commenced work (1 May) and the date he finally finished (1 June of the following year). **Work that is undertaken on a site after the construction work has been completed pursuant to a guarantee that requires an enterprise to make repairs would normally not be included in the original construction period.**"

(Emphasis supplied)

• Views expressed by renowned international tax commentator Klaus Vogel in his commentary "Klaus Vogel on Double Taxation Conventions"

"Repair and Maintenance work performed after such formal acceptance or taking delivery is not sufficiently connected with the original building or installation works and is therefore not counted when determining the minimum period. **Whether it constitutes a permanent establishment is a matter to be decided separately from the works accomplished prior to acceptance or taking delivery**".

(Emphasis supplied)

• The abovementioned principle has been upheld by the Hon'ble AAR in the case of **Airports Authority of India (2008) 299 ITR 102 (AAR)**, wherein the AAR observed that an earlier 'Installation PE' could not have any bearing on the contract for repairs and maintenance work to be carried out post completion of such installation.

7. Ld. A/R further, argued that **ground nos. 2, 3, 4 & 5** are taken together first and placed that.

Applicability of the principles of Installation PE in the appellant's case:

In the present case, the appellant was engaged in various projects / sites which were independent and unrelated from each other. The activities conducted by the appellant on such independent projects / sites are discussed as under (project-wise):

7.1. **AAI (Delhi Phase 1) Project**- no PE since duration is less than threshold of Installation PE.

The ld. AR submits that in this project, the installation activities were undertaken by the appellant after offshore supply of equipment and receiving the site preparedness confirmation from the customer. It is pertinent to note that there is no involvement of the appellant in preparation of the site and the same is carried out by AAI independently. The below table explains the time period for which installation activities were undertaken by the appellant for this project:

S. No.	Details of event	Date
1.	Certificate for Completion of civil and electrical works and Site Readiness received from AAI (Page no. 372 of paper book)	14 July, 2017
2.	Certificate for completion of Installation, testing, commissioning, and Site Acceptance Test received from AAI (Page no. 373 of paper book)	12 October 2017
Time period for which installation activities were carried on by the appellant		90 Days

• As per the above table, it was after 14 July 2017 that the appellant commenced installation activities for this project after receiving clearance (certificate for site readiness) from AAI and accordingly, the time period for which installation activities were carried out by the appellant was mere 90 days (within the time limit of 6 months as prescribed under Article 5(3) of India-Netherlands DTAA).

• As mentioned above, the date of signing/ award of the contract is not relevant for determining the time period for which installation activities were carried out and accordingly, reliance on the date of signing of the contract by the Ld. AO is misplaced and erroneous.

7.2. **AMC-GOK Project**: Covered matter, no PE on account of AMC services

The ld. AR argued that in 2005, the appellant was awarded a contract by the Director General of Lighthouse and Lightships (DGLL), on behalf of the Ministry of Shipping, Government of India for supply, installation, testing and commissioning of Vessel Traffic Services (VTS) System in the Gulf of Kutch (GOK) to the consortium constituted by Telecommunication Consultants India Limited (TCIL).

• The project got completed in February 2013 and after the successful implementation of VTS System, the appellant entered into a separate contract with TCIL to provide annual maintenance of the VTS system, for a period of 5 years starting from February 2013, **APB page no. 271 to 324**. The appellant sub-contracted the whole annual maintenance work to an unrelated and independent sub- contractor in India.

• A brief timeline of the events that happened in relation to this project has been explained as below:

Particulars	Timeline
Original agreement for end-to-end supply, installation etc. of Vessel Traffic Services (VTS) System in the Gulf of Kutch (GOK)	22 March 2005
Completion of original agreement in the GOK	February 2013
Commencement of annual maintenance activities through a separate contract in the GOK	14 February 2013 to 13 February 2018

• In light of the above discussion, the appellant submits that it did not perform any installation activities at the site of customer as this project was merely for providing annual maintenance services and accordingly, in the absence of installation activities, no Installation PE can be constituted in

respect of this project. In this regard, the appellant places reliance on the below judgements:

• Further, this matter is covered in favour of the appellant by the Hon'ble Kolkata ITAT in its own case for **AY 2010-11 (2017) 78 taxmann.com 101** wherein the Hon'ble ITAT observed as under-

"47. We are in complete agreement with the contentions put forth by the learned counsel for the Appellant on this aspect. Accordingly, we hold that since the VATMS equipment was already accepted and handed over to the customer in the year 2007 and no installation activity was carried out in India during the subject year, it cannot be held that the Appellant had an 'Installation PE' in India in the subject year. As far as the conclusion of the revenue that the independent contractor of the Appellant in India created a virtual presence of the Appellant in India so as to create an installation PE, given that the entire onshore maintenance contract has been performed by an independent local contractor in India, ***it cannot be said that the business of the Appellant has been carried out by the presence of the local contractor in India, so as to create its PE in India****."*

(Emphasis supplied)

7.3. **Details of AAI-5 Project**: No PE on account of threshold not being met, further income already taxed as FTS at the rate of 10%

• In this project, the installation activities were undertaken by the appellant after offshore supply of equipment and receiving the site preparedness confirmation from the customer for each site. It is pertinent to note that there is no involvement of the appellant in preparation of the site and the same is carried out by AAI independently, **APB Page No. 405 to 409**.

Details of event	AAI (5) - Guwahati - Site 1	AAI (5) - Ahmedabad - Site 2	AAI (5) - Amritsar - Site 3	AAI (5) - Jaipur - Site 4	AAI (5) - Lucknow - Site 5
Certificate for Completion of civil and electrical works and Site Readiness received from AAI	09 November 2016	07 December 2016	04 February 2016	18 December 2015	11 December 2015
Certificate for completion of Installation, testing, commissioning, and Site Acceptance Test received from AAI	22 December 2016	15 February 2017	23 March 2016	12 March 2016	24 February 2016
Time period for which installation activities were carried on by the appellant	43 days	70 days	48 days	85 days	75 days

• From the above table, it can be observed that the installation activities on all the 5 independent sites i.e., Guwahati Airport, Ahmedabad Airport, Amritsar Airport, Jaipur Airport and Lucknow Airport were completed within the time limit of 6 months as prescribed under Article 5(3) of India-Netherlands DTAA for constitution of Installation PE. Accordingly, the appellant submits that it does not have an Installation PE for this project, **APB Page No. 410 to 414**.

• Without prejudice to our above submission that no installation PE is constituted for this project, the appellant submits that during the relevant AY, it has received only payment for training services from this project and there are no receipts in the nature of supply of equipment, software, rendering of installation, testing, and commissioning services from this project during the relevant AY. The appellant has Suo-moto offered to tax payment received for training services at the rate of 10% as Fees for Technical Services (FTS) as per Article 12 of the India-Netherlands DTAA, which is higher than the amount of tax computed by the Ld. AO on the receipts from training services in the draft assessment order (attribution of 10% of profits with levy of tax@40% i.e., effective tax rate of 4%).

Our Prayer:

In light of the above facts, it is submitted that the installation activities on all the 5 independent sites i.e., Guwahati Airport, Ahmedabad Airport, Amritsar Airport, Jaipur Airport and Lucknow Airport were completed within the time limit of 6 months as prescribed under Article 5(3) of India-Netherlands DTAA for constitution of Installation PE. Therefore, the Appellant does not have an Installation PE for this project and the attribution made on this account deserve to be deleted.

It is therefore humbly prayed before your Honors to provide relief to the appellant and delete the profit attribution of INR 3,68,387 (being 10% of the total receipts) towards this project.

8. Ld. D/R vehemently argued and fully relied on the order of the Revenue authorities.

9. Ld. A/R further, argued related to the normal tax in ground no. 8 and placed that the Revenue has taxed 10% on the interest on refund. Ld. A/R submitted his argument as follows:-

"*3.6.1. During the subject AY, the appellant received interest income on income tax refunds from the Income Tax Department (ITD) on which taxes were withheld by the ITD. As per the MFN clause of India-Netherlands DTAA read with India-Italy DTAA, any interest income received by a tax resident of the Netherlands from the Indian Government shall not be taxable in India.*

3.6.2. The term 'Interest' as defined under Article 11 of India-Netherlands DTAA is as under:

"Income from debt-claims of every kind whether or not secured by mortgage, but not carrying a right to participate in the debtor's profits, and in particular, income from the Government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for

late payment shall not be regarded as interest for the purpose of this Article*".*

(Emphasis supplied)

3.6.3. Further, Article 11(2) of India-Netherlands DTAA states that Interest income would be taxable at the rate of 10% on a gross basis. APB page no. 246 to 247 of paper book for Article 11 (Interest) of India-Netherlands DTAA).

3.6.4. Hon'ble SC in the case of UOI vs. Tata Chemicals Ltd (2014) (43 taxmann.com 240) held that refund due and payable to the appellant is debt owned and payable by the Indian Government. Relevant extract reproduced as under:

"38. Refund due and payable to the appellant is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the diductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest."

(Emphasis supplied)

3.6.5. Various Courts / Tribunals have also held that interest received on income tax refund would fall within the ambit of "income from debt-claim of every kind".

3.6.6. In the context of Article 11 of India-Netherlands DTAA, it is important to note that there is a protocol which provides for most-favored nation (MFN) clause as under-

If after the signature of this convention under any Convention or Agreement between India and a third State which is a member of the OECD India should

limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate tower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention. "

3.6.7. In simple words, the abovementioned MFN clause grants a right to the tax resident of Netherlands to the take the benefit of lower tax rate or restricted scope with respect to Interest income as agreed by India with another country, being the member of OECD, after the signing of India-Netherlands DTAA.

3.6.8. The Appellant wishes to highlight that India has entered into a DTAA with Italy, being the member of OECD, in February 1993. Article 12(3) of India-Italy DTAA provides an exemption with respect to taxability of interest income as below:

"3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting.

State shall be exempt from tax in that State if:

a) the payer of the interest is the Government of that Contracting State or a local authority thereof, or

***b) the interest is paid to any agency or instrumentality (including a financial institution) which may be agreed upon in this behalf by the two Conti-acting States**."*

(Emphasis supplied)

3.6.9. In other words, any interest paid by "the Government" to a foreign enterprise shall not be chargeable to tax in India as per the provisions of Article 12 of India-Italy DTAA."

10. We heard the rival submission and considered the documents available in the record. The addition was made on the basis of non-accepting of assessee's submission related to the rejection of PE in India and the duration was more than 183 days. Ld. A/R has placed the completion certificate and the site readiness report when the assessee has taken the job in India. The relevant papers are enclosed in **APB page no. 372 & 373**. We respectfully relied on the order of the ITAT Kolkata Bench in **HITT Holland Institute of Traffic Technology B.V.** (supra which is assessee's own case and ITAT Mumbai in the case of **Kreuz Subsea Pte. Ltd** (supra). The calculation of the PE in the case of AMC and ASMGCS is below 180 days. Taking power from **Cal Dive Marine Construction (Mauritius) Ltd** (supra) the signing date cannot be the signing of contract. The project-wise date of completion and appointment are duly explained above.

In light of the above facts, providing annual maintenance services after handing over the project /site to the customer would not be tantamount to carrying out installation activities for constitution of Installation PE. Accordingly, consideration of the original contract (for installation) and the subsequent contract for providing annual maintenance services cumulatively by the Ld. AO is bad in law. Accordingly, the attribution of 10% of the receipts to the alleged Installation PE for this project by the Ld. AO in the assessment order is erroneous. The ld. DR was unable to submit any contrary judgment against the assessee. Relied on the case of ITAT Mumbai, **J Ray McDermott Eastern Hemisphere Ltd.** (supra), having held that the aggregation of time on various contracts in India is not required, this is nevertheless to be examined whether time spent on a specific contract is more than 180 days or not. The assessee in all the project is below 180 days as not considered PE.

The entire transaction was less than six months. So, in our considered view, we are bound to declare this transaction as a non-PE in India. Considering the discussion in DTAA, the assessee is non-bound to pay the tax on the

interest income of the Government which was declared by the Income Tax Department.

We set aside the appeal order. So, the addition of profit attribution of AAI (Delhi Phase-1) Project Rs. 57,54.726/-, AMC-GOK Project Rs. 8,45,105/- and AAI-5 Project Rs. 3.68,387 (being 10% of the total receipts) towards this project are quashed.

Accordingly, appeal of the assessee, ground nos. 2, 3, 4, 5 & 8 are allowed.

11. Ground no. 1 is general in nature which needs no adjudication.

12. Ground nos. 6 & 7 have not been pressed at the time of hearing.

13. In the result, **ITA No. 153/KOL/2022** is allowed.

Order pronounced on 18.04.2024 in accordance with

Rule 34(4) of the Income tax (Appellate Tribunal) Rules, 1963.

Sd/-	*Sd/-*
[**Girish Agrawal**]	[**Anikesh Banerjee**]
Accountant Member	Judicial Member

Dated: 18.04.2024

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***Saab Technologies B.V (Formerly known as Holland Institute of Traffic Technology B.V.), 7th Floor, DLF Centre, Sansad Marg, New Delhi-110 001.***
2. ***DCIT, International Taxation, Circle-2(1), Kolkata.***
3. CIT(A)-
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata