

आयकर अपीलिय अधिकरण
दिल्ली पीठ "डी", दिल्ली
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री नवीन चंद्र, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D", DELHI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

आअसं .479/दिल्ली/2023 (नि.व. 2020-21)
ITA NO.479/DEL/2023 (A.Y.2020-21)

Berlian McDermott Sdn. Bhd.
C/o Nangia & Co. LLP, A-109,
Sector-136, Noida, UP 201304
PAN: AAGCB-6291-H

..... अपीलार्थी/ Appellant

बनाम Vs.

Assistant Commissioner of Income Tax
Circle 1(1)(2), International Taxation,
New Delhi 110002

..... प्रतिवादी/ Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Salil Kapoor, Advocate,
Shri Amit Arora, CA,
Ms. Ananaya Kapoor, Advocate &
Shri Vibhu Jain, Advocate

प्रतिवादीद्वारा/ Respondent by : Shri Vijay B Vasanta, CIT-DR

सुनवाई की तिथि/ Date of hearing : 08/07/2024

घोषणा की तिथि/ Date of pronouncement : 25/07/2024

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 17.01.2023 passed u/s. 143(3) r.w.s 144C(13) of the Income Tax Act,1961 (hereinafter referred to as 'the Act'), for assessment year 2020-21.

2. Shri Salil Kapoor appearing on behalf of the assessee at the outset submitted that he is not pressing application for admission of additional grounds of appeal dated 18.07.2023 vide which the assessee has *inter alia* assailed validity of directions of the Dispute Resolution Panel (DRP) on the ground of limitation.

3. The assessee vide another application dated 27.06.2024 has raised an additional ground of appeal challenging validity of the impugned assessment order. The said additional ground of appeal reads as under:

"11. That in view of the facts and circumstances of the case and in law, the Assessing Officer has not followed the binding directions dated 02.12.2022 issued by the DRP which is in direct contradiction to the mandate of section 144C of the Act and hence the final assessment order dated 17.01.2023 passed by the Assessing Officer is illegal, bad in law and without jurisdiction."

3.1. The Id. Counsel submitted that the aforesaid additional ground is purely legal in nature and requires no fresh documentary evidence for its adjudication. The additional ground raised goes to the root of validity of assessment order therefore needs to be adjudicated first before other grounds are taken up. For the admission of additional ground of appeal, he placed reliance on the decision in the case of *NTPC vs. CIT 229 ITR 383 (SC)*.

3.2. Shri Vijay B Vasanta, representing the Department vehemently opposed admission of additional ground of appeal at this belated stage.

4. We have heard the submissions made by both the sides on the admission of aforesaid additional ground of appeal. We find that the additional ground raised by assessee is purely legal and no fresh document is required to be

adduced for its adjudication. Hence, the additional ground of appeal raised by the assessee vide application dated 27.06.2024 is admitted for adjudication.

5. The Id. Counsel for the assessee submits that the Assessing Officer (AO) has failed to follow binding directions of the DRP while passing the final assessment order. Therefore, the assessment order is liable to be quashed. The Id. Counsel submits that the Assessing Officer while passing the draft assessment order made addition of Rs. 18,47,15,426/- by holding that the assessee has PE in India and invoked the provisions of Section 44BB(1) of the Act. Against the aforesaid addition, the assessee filed objections before the DRP. The DRP after examining facts came to the conclusion that the issues involved and objection raised in the impugned assessment year are identical to assessee's case in AY 2018-19. The DRP accordingly directed the AO to follow the directions of the panel in AY 2018-19 for AY 2020-21 as well. The Assessing Officer while farming final assessment order reproduced the directions of the DRP, yet in contravention to mandatory directions upheld the addition of Rs. 18,47,15,426/- as made in the draft assessment order. He asserted that since the AO has deliberately failed to comply with mandatory directions of the DRP, this makes the assessment order unsustainable being without jurisdiction, hence liable to be quashed.

6. Per contra, Shri Vijay B Vasanta representing the Department stated that the AO inadvertently failed to follow the directions of the DRP. The issue can be restored back to the AO, to comply with the directions of DRP. The Id. DR further placed reliance on the decision in the case of *Hitachi Astemo Haryana P. Ltd. in ITA No. 1005/Del/2022* for AY 2018-19 decided on 23.11.2023, to contend that

where the AO has failed to give effect to directions of the DRP, the issue can be restored back to file of AO to comply with the directions.

7. We have heard the submissions made by rival sides and have examined the orders of authorities below. The assessee is part of consortium that entered into an agreement with Oil and Natural Gas Corporation Limited (ONGC) for Survey, Design, Engineering, Procurement, Fabrication, Transportation, Installation, Testing etc. of off shore facilities. The AO held the turnkey project can be termed as a complete contract. He concluded that the services rendered by assessee are covered by the provisions of Section 44BB of the Act, and hence, made addition of 10% of the gross receipts. Against the aforesaid addition, the assessee filed objections before the DRP. After examining facts of the case the DRP came to the conclusion that the issues involved and objections raised by the assessee in the impugned AY are identical to one raised in AY 2018-19. The DRP directed the AO to follow directions of panel in AY 2018-19 in the impugned assessment year as well. For the sake of completeness the relevant extract of the directions of the DRP are reproduced herein below:

“4.1.3 The assessee has objected to the AO's conclusion stating that as per MOU, the scope of work of the assessee was for supply only and the onshore work was the part of the scope of work of other consortium members. The other consortium members have also bifurcated their respective scope of services as per the terms of the contract and are engaged in performing the same, in strict consonance with the split scope. Scope of work of assessee was for supply only and the onshore work was part of the scope of work of consortium members shall be only towards the scope of work performed by such party which was supply in case of the Assessee, The scope of the Assessee under contract was to supply fabricated subsea structures from outside India and all other activities like project Management etc. as mentioned in Annexure- 1 to the MoU for which the Assessee was designated were only incidental and inextricably linked to such supply. All

consortium members are responsible for their respective scope of work and that none of the member works on behalf of the other member. All members including the assessee are participating as independent consortium members with separate scope of work and responsibilities. The same cannot be construed as constitution of PE of assessee by other consortium member.

4.1.4 The panel notes that the issues involved and the objections raised are identical in the case of the assessee for AY 2018-19. While adjudicating on the issue for AY 2018-19 the panel held as under:

"4.1.4 The DRP has carefully considered the submissions of the assessee as well as the finding of the AO in draft assessment order. The assessee has submitted that its scope work in relation to the said contract with the ONGC was confined to offshore supplies only. As per the MoU signed between the assessee and consortium members, the assessee along with the consortium members would jointly bid and execute the subsea installation of Vashistha and S1 development project in Eastern Offshore, India of ONGC. As per clause 7.0 of the Mol each consortium member shall be jointly and severally responsible for all obligations under the contract. Further, the leader of the consortium shall take full responsibility for timely completion of work and coordinate with other agencies in connection with the contract and any correspondence between the leader of the consortium and ONGC would be binding on all the consortium members. The consortium members along with the assessee are jointly and severally responsible for coordination with sub-contractors, overall project management, engineering designs, procurement of supplies, fabrication subsea structures etc. In view of the above arrangement through Moll between the assessee and other consortium partners and considering the fact that timely execution of the entire works contract with ONGC is a joint and collective responsibility of all consortium partners, the entire works contract is in the nature of a composite contract which includes offshore supplies of equipments as well as onshore installation of subsea structures. In other words, each consortium partner acts on behalf of the other and represent one another for execution of the said contract with ONGC. In response to the notice under section 133(6) issued by the AO, the ONGC has categorically stated that the nature of contract with the consortium partners represented by the leader of the consortium, was works contract and the value of material and services could not be segregated and even the payments were made without segregation of supply of goods and services. In view of the fact that the assessee company along with other consortium member is responsible for all the activities in connection with installation of subsea structures and that all members are jointly and severally responsible for execution of the contract, the assessee's position that it is only involved in supply of offshore goods for the

said works contract is not on sound footings. Since the entire scope of work is in the nature of composite contract and each member of the consortium represents the other, the onsite presence of even one consortium member for execution of the contract with ONGC constitutes a PE for the assessee. Hence the DRP finds no infirmity in the conclusion of the AO in holding that the assessee has a PE in India and consequently, the income attributable to the same is taxable in India as income from business and profession.

4.1.5 In ground 3 the assessee has objected to invoking the provisions of section 44BB(1) of the Act in arriving at the income chargeable to tax under the head "profit and gains of business and profession". The assessee has submitted that in order to bring revenue to tax u/s 44BB(1), the income must fall under section 44BB(2) of the Act. The revenue on account of off shore supply of goods, that is in the nature of sale is not towards any provision of service or equipment for hire and thus falls outside the ambit of section 44BB(2). The assessee has further submitted that merely because sales and services are provided under one composite contract, it cannot mean that entire revenue under the contract has to be taxed alike. The assessee has also submitted that on identical facts in the AY 2016-17 and AY 2017-16, the Assessing Officer completed assessment by holding that the Assessee has a PE in India and estimated the profits derived by the Assessee from offshore supply of goods on a Global level at the rate of 10%, Further the Id. AO attributed certain percentage of such profits for each year respectively to the PE of the Assessee in India. The assessee has also 4, claimed that vide order dated 11.03.2022 the CIT appeals (A) has upheld the methodology adopted by the AO and confirmed the estimated profit derived by the assessee from offshore supply of goods on a Global level at the rate of 10% and has attributed 35% of such profits for each year respectively to the PE of the Assessee in India. The AO is directed to consider the submissions of the assessee and pass a speaking order on the amount of income liable to tax as income attributable to the PE of the assessee during the relevant AY, keeping in view the provisions of section 44BB(2) of the Act and the methodology adopted in the earlier AYs on identical facts. Ground No. 3 is accordingly disposed of."

4.1.5 Since there is no change in factual and legal matrix, the panel finds no reason to deviate from its decision in the AY 2018-19. The AO is accordingly directed to follow the directions of the panel in AY 2018-19 for AY 2020-21 as well, mutatis mutandis. Ground numbers 1 to 3 are accordingly disposed of."

8. We find that the Assessing Officer while passing the final assessment order has failed to give effect to the directions of the DRP and has retained the addition

made u/s. 44BB of the Act, while passing the final assessment order. The impugned assessment order is in contravention of mandatory directions of the DRP; therefore, we deem it appropriate to restore this issue back to file of AO for passing fresh assessment order complying with the directions of the DRP (supra).

9. The additional ground of appeal is allowed for statistical purpose.
10. Since, we have accepted legal ground raised by the assessee by way of additional ground of appeal, the grounds of appeal raised by the assessee in appeal have become academic, hence, not deliberate upon.
11. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on Thursday the 25th day of July, 2024.

Sd/-

(NAVEEN CHANDRA)

लेखाकार सदस्य/ACCOUNTANT MEMBER

दिल्ली/Delhi, दिनांक/Dated 25/07/2024

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

NV/-

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., दिल्ली /DR, ITAT, दिल्ली
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar) ITAT, DELHI