

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "G", NEW DELHI  
BEFORE SH. N. K. SAINI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA A. PILLAI, JUDICIAL MEMBER**

**I.T.A. No. 5186/Del/2012  
(Assessment Year 2004-05)**

Solar Turbiness International Co. 14, Tractor Road Singapore <b>GIR/PAN:</b>	Vs.	ACIT, International Taxation, New Delhi
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by : Sh. Girish Dave, Adv.  
Respondent by : Sh. Anuj Arora, CIT DR

Date of hearing : 13.02.2017  
Date of Pronouncement: 16.03.2017

**ORDER**

**PER BEENA A. PILLAI, JM:**

1. The present appeal has been filed by assessee against order dated 01.08.2012 passed by Ld. DIT (International Taxation), Dehradun under section 148, read with 143 (3) read with 144C (13) of the Act, on the following grounds of appeal:

**Ground No. 1: Erred in re-opening the assessment under section 147**

*a. The learned Assistant Director of Income-tax ('ADIT') erred in re-opening the assessment for AY 2004-05 under section 147 of the Income-tax Act, 1961 (the*

Act') on the ground that income of the appellant has escaped assessment.

b. The learned ADIT erred in re-opening the assessment under section 147 providing reasons recorded in writing that there is failure on part of the appellant ' in offering the income from start-up and commissioning services under section 44BB of the Act and not considering the same as Fees for Technical Services under section 9(1 )(vii). The learned ADIT subsequently accepted the appellant's contention on taxability of start-up and commissioning services but erred in assessing the receipts on account of overhaul and repair services under section 44BBoftheAct.

c. The learned ADIT erred in reopening the assessment without taking cognizance of the fact that there is no nexus between reasons recorded in writing for re-opening the assessment and the conclusion drawn during the course and completion of the assessment. The learned ADIT has thereby erred in exercising his powers beyond jurisdiction.

d. The learned ADIT erred in considering the erroneous observation of the Honourable Dispute Resolution Panel ('DRP<sup>1</sup>) that the re-opening of assessment is valid in law as the learned ADIT issued notice under section 148 of the Act on the ground that income from overhauling was not disclosed in the original return of income. The learned AO erred in not appreciating the fact that the assessment was not re-opened on the above grounds but on income from startup and commissioning.

e. The learned ADIT erred in exercising his powers beyond jurisdiction by carrying out the assessment

*under section 147 despite the fact that no notice and reasons recorded in writing were issued stating income on account of receipts from overhaul and repair services have escaped assessment.*

*f. The learned ADIT erred in not appreciating the fact that there was no failure on the part of the assessee to disclose fully and truly all material facts relating to the completion of the assessment.*

**Ground No.2: Error in treating receipts from repair and overhauling services rendered outside India as taxable under deeming provisions of section 44BB of the Act**

*a. The learned ADIT erred in contending that the receipts from overhaul and repair services are taxable under section 44BB of the Act.*

*b. The learned ADIT erred in contending that the assessee has a 'Permanent Establishment' ('PE') in India on the ground that the income from start-up and commissioning services are offered to tax under section 44BB of the Act and that the appellant has filed the return of income in India.*

*c. The learned ADIT erred in concluding that the services pertaining to repair and overhauling of income are part of the composite contract for installation and commissioning services.*

*d. The learned ADIT failed to appreciate the fact that the appellant had entered into separate contracts for start-up and commissioning services and repair and overhauling services and that there is no relation between the said contracts,*

*e. The learned ADIT erred in not appreciating the fact that the repair and overhauling services were rendered outside India and the payment for the same was received outside India and thereby not taxable in India under Article 12 of India US Tax Treaty.*

*f. The learned ADIT erred in not following the finding of the Hon'ble Authority of Advance Ruling ('AAR') in appellant's own case which clearly held that the contract in connection with overhaul and repair services is not part of composite contract.*

**Ground No.3: Error in levying additional interest**

*a. The learned ADIT erred in levying additional interest under section 234B and under section 220(2) of the Act.*

*The appellant craves leave to add, alter and modify the above grounds during the course of the appeal.*

*For the above and any other grounds which may be raised at the time of hearing, it is prayed that the order of the learned ADIT be set aside.*

**2. The brief facts of the case are as under:**

A assessee is a non-resident, having a PE in India. It is into manufacturing of industrial gas turbines. Gas turbine engines, gas compressors and gas turbine powered compressors sets, mechanical drive packages and generator sets. The products from the assessee play an important role in the development of oil, natural gas and power generation projects around the world. Assessee also provides after sales services and support to customers across globe. During the

year under consideration assessee had filed its return of income on 30.10.2004 declaring a total income of Rs.1,36,42,000/-. The case was processed under section 143(1) on 19.03.2007 and a demand of Rs.16,25,858/- was determined. Subsequently the case was reopened by issue of notice under section 148 of the Act on 28.03.2011, which reads as under:

**NOTICE UNDER SECTION 148**  
**OF THE INCOME TAX ACT, 1961**

**OFFICE OF THE**  
**ASST, DIRECTOR OF INCOME TAX.**  
**INTERNATIONAL TAXATION, DEHRADUN**

DATED 20.03.2011

To

*M/s Solar Turbine International Co.*

*Whereas I have reason to believe that your income in respect of which you are assessable/chargeable to tax for the assessment year 2004-2005 has escaped/assessment within the meaning of section 147 of the Income-Tax Act 1961.*

*I, therefore, propose to assess/reassess/re complete the Income ACESS/depreciation allowance for the said assessment year an hereby required you to deliver to me within 30 days from the date of service of this notice, a return in the prescribed form*

*of your income/the income of in respect of which you are assessable for the said assessment year.*

*This notice is being issued after obtaining the necessary satisfaction of the DIT-II, Income Tax, New Delhi/DGIT, Intl. Tax, New Delhi.*

*Sd/-*

**(SMITA SINGH)**  
**Asst. Director of Income Tax**  
**International Taxation, Dehradun.**

**3.** The assessee filed e-return on 11.05.2011 in response to notice under section 148 and requested for reasons recorded for reopening which was provided to the assessee on 25.07.2011, which reads as under:

**OFFICE OF THE**  
**ASSTT. DIRECTOR OF INCOME TAX**  
**INTERNATIONAL TAXATION**  
**DEHRADUN**

**F. No. AssttDir/Enti. Tax/DDN/2011-12/227 Dated: 25.07.2011**

*To*

*M/s Solar Turbines International Co,  
14, Tractor Road,  
Singapore.*

*Sir,*

*SUB: Assessment Proceedings u/s 148 (A,Y. 2004-05)*

*Please refer to your letter dated 27.04.2011 on the above subject.*

*As requested by you, reasons for initiating proceeding u/s 148 of the I.T. Act is enclosed herewith. You are also requested to file your submissions in this regard, if any.*

*Date fixed for compliance is 08.08.2011.*

*Encl: as above*

*Yours faithfully,*

*Sd/-*

*(Mayank Kumar),*

***Asstt. Director of Income Tax  
International Taxation, Dehradun***

1. Name of Assessee : Solar Turbines International Co.  
2. Address : 14-Tractor Road, Singapore  
3. PAN/GIR No. : AAJCS3585J  
4. Assessment Year : 2004-05  
5. Whether R/NR/NOR : Non Resident

**REASONS FOR INITIATING PROCEEDING U/S 148**

*The assessee NRC has filed return of income on 30.10.2004 at the income of Rs. 13642000/-. While filing the return of income the assessee has offered the revenues of Rs. 1470616/- earned on account of startup and commissioning of turbines supplied u/s 44BB(l) of I. T. Act and the revenues of Rs. 12171384/- from troubleshooting services have been offered u/s USA as fee for technical services. Assessment u/s 143(1) has been completed on 19.03.2007 on returned income. During the year the assessee entered into contract with the following:*

- 1. Engineers India Ltd.*
- 2. Bharat Heavy Electricals Ltd.*
- 3. Cairn Energy India Pty Ltd.*
- 4. ONGC*
- 5. BG Exploration & Production Ltd.*
- 6. Bell Ceramics Ltd,*

*There is failure on part of the assessee in not treating the start up and commissioning of turbines as technical activity and wrongly taxing said receipts at lower rate u/s 44BB, when such receipts are clearly in the nature of Fees for Technical Services taxable u/s 9(l)(vii). Further, it is also observed by the Hon'ble High Court of Uttrakhand in the case of CIT vs M/s. Rolls Royce Pvt. Ltd. [2007-TII-03-*

*HC-UKHAND-INTL] that fee for technical services cannot be taxed u/s 44BB of the Income-tax Act, 1961. The Hon'ble High Court of Uttarakhand vide its order in Income Tax Appeal No. 239 of 2001 in the case of ONGC as agent of M/s Foramer France Dehradun, has held on 15-12-2005 that services which are technical in nature are not covered u/s 44BB(1) of IT Act.*

*Further the Hon'ble Finance Minister while introducing Finance Bill 2010 has clarified in the explanatory note to Finance Bill that "Combined effect of the provisions of section 44BB, 44DA and 115A is that if the income of a non-resident is in the nature of fee for technical services, it shall be taxable under the provisions of either section 44DA or section 115A irrespective of the business to which it relates. Section 44BB applies only in a case where consideration is for services and other facilities relating to exploration activity which are not in the nature of technical services. There is failure on the part of the assessee thus in taxing the u/s 44BB when they are taxable as FTS u/s 9(i)(vii) as they are clearly not eligible for benefit of section 44BB.*

*The decisions in case of Foramer France coupled with intention of legislature from the Finance Bill provide enough tangible material for Formation of Belief by the Assessing Officer to reopen the assessment. In view of this revenue of Rs. 1470616/- earned during the year under consideration on account of start up and commissioning services should be brought to tax @ 20% taking it as fee for technical services u/s 9(i)(vii). Hence, I have reasons to believed that the income of Rs. 1470616/- has escaped assessment for the year consideration.*

- 4.** Admittedly, the notice of reopening has been issued beyond a period of 4 years. At this juncture, Ld. Counsel for assessee submits that ground No.1 raised by the assessee pertains to, legality of reassessment proceedings.

**Ground No. 1:**

5. Ld. Counsel for assessee submitted that assessing officer has reopened the assessment by relying upon the decision of Hon'ble Uttarakhand High Court in the case of *ONGC as an agent of M/s. Former & France*, wherein it has been held that the services which are technical in nature are not covered under section 44 BB (1) of the Act. He submitted that decision of Hon'ble Uttarakhand High Court in the case of *Former & France (supra)*, was decided on 15.12.2005. It was contested before Ld. AO that decision in the case of *Former & France (supra)* is not applicable to the facts of the present case and that assessee had correctly assessed the income under section 44 BB of the Act.

6. In the meantime DRP for assessment year 2005-06 in assessee's own case issued directions, holding that income from start-up and commissioning service are not taxable as "*fees for technical services*" under article 12(2) DTAA but would be taxable under section 44 BB of the Act. Ld. Counsel has referred to and relied upon the order of DRP for assessment year 2005-06, passed on 01.09.2011, placed at page 116 to 126 of the paper book.

7. It has been submitted by Ld. Counsel that assessee filed objections before Ld. AO on 03.11.2011 and placed the decision of DRP for assessment year 2005-06 on record. While completing the assessment order assessing officer

made addition in respect of 'income from repair and overhauling', earned by assessee as fees from technical services under section 115 A read with Section 9(1)(vii) of the Act and dropped the issue of start up and commissioning for which the notice of reopening was issued u/s 148 of the Act. Ld. Counsel for assessee submitted that, Ld. AO reopened assessment on the ground that income earned by assessee from start-up and commissioning should be considered under section 44 DA read with 115A of the Act. But at the time of framing draft reassessment order, assessing officer accepted the income offered by assessee from start-up and commissioning under section 44 BB, however, made addition in respect of income from repair and overhauling under section 115A read with section 9(1) (vii) of the Act as fees for technical services.

**8.** He submitted that the scheme under reassessment proceedings does not allow assessing officer to make addition on some other grounds for which the notice of reopening has not been issued. Ld. Counsel placed reliance upon various judgments of the jurisdictional High Court as well as coordinate benches of this Tribunal in respect of this preposition, which are as under:

- *Oriental bank of commerce versus ACIT (2015) 228 Taxmann 25; (Del)*
- *Ranbaxy laboratories Ltd versus CIT (2011) 336 ITR 136;(Del)*
- *Cheil India (P.) Ltd versus ACIT (2012) 146 TTJ 17,(Del)*

and many more that has been placed in the paper book of case laws.

**9.** On the contrary, Ld. DR submitted in his written submissions filed before us today at the time of hearing and thereafter during the course of day that no assessment under section 143(3) of the Act has been carried out prior to the issuance of notice under section 147. Therefore, there cannot be any occasion for any regularity as the entire assessment is open to assessing officer to make addition on any issue. He placed reliance on Explanation 3 to Sec., 147 of the Act. He argued that the notice issued for reopening cannot be held invalid because the assessing officer had reasons to believe that income has escaped assessment based on which he had addressed broadly in the reasons recorded as well as in the draft assessment order passed by him. Ld. DR submitted that the reopening of assessment was based on the decision of Hon'ble Uttarakhand High Court in the case of Foramee & France(Supra). He placed reliance on the decision of this Tribunal in case of ACIT vs. Centras Warehousing Copr., reported in (2012) 144 TTJ 764. Ld. DR further submitted that Hon'ble Supreme Court reversed the decision of Formar France (supra) in the year 2015 in case of ONGC reported in (2015)59 taxmann.com1. He emphasized that Ld. AO had initiated reassessment proceedings much before the decision of Hon'ble Supreme Court and therefore was valid. However, Ld. AO has simply relied upon the directions of DRP passed

for assessment year 2005-06. Ld. DR placed reliance upon the draft assessment order passed.

**10.** We have perused the submissions advanced by both the sides in the light of the records and the judicial proceedings placed before us.

**11.** There is no doubt that the reopening has been done by assessing officer beyond 4 years. On perusal of the reasons recorded (hereinabove reproduced), it is clear that assessing officer had reasons to believe that income received by assessee from start-up and commissioning has escaped assessment as the same according to him should have been taxed as FTS under section 44DA read with 115 A of the Act. Further on perusal of the assessment order it is observed that Ld. AO had made detailed analysis of the issue, and then accepted the income from setup and commissioning, as disclosed by the assessee, under section 44 BB of the Act. He proceeded to make addition in respect of income earned by the assessee from repairs and overhauling as FTS under section 115A read with section 9(1)(vii) of the Act which was not at all the subject matter in the reasons recorded for reopening. In fact assessing officer dropped the ground which formed the basis of reopening. In the draft assessment order the assessing officer has recorded his views in respect of the receipts on account of start-up and commissioning services as under:

*“the receipts on account of start-up and commissioning services, which has been offered to tax under section 44 BB by assessee in return of income filed, is considered to be taxable under section 44 BB in view of the directions of Ld. DRP in the case of the assessee for AY 2005-2006.”*

*In view of the above income of the assessee company is computed (in RS) hereunder as:-*

<i>Cross receipts form Trouble Shooting Services as shown by the assessee</i>	<i>1,22,35,773/-</i>
<i>Receipts from repair and overhauling service as discussed above.</i>	<i>26, 70,47, 533/-</i>
<i>TOTAL (Taxable as FTS@20% +SC)</i>	<i>27, 92,83, 306/-</i>
<i>income from Startup and commissioning services under section 44BB(10% of Rs. 1,45,34,288/-)</i>	<i>14,53429/-</i>
<i>TOTAL INCOME</i>	<i>28,07, 16,7 35/-</i>
<i>TOTAL INCOME ROUNDED OFF</i>	<i>28,07,16,740/-</i>

The decisions relied upon by Ld. DR are distinguishable to the facts before us. IN the decision of this Tribunal in case of ACIT vs. Central Warehousing Corpn(supra), the reason for reassessment was supported by the decision of Hon’ble Supreme Court which had attained finality.

Further in the decision of Hon’ble Supreme Court in case of Raymond woolen Mills Vs. ITO reported in 236 ITR 34, the issue before the Hon’ble Court was only to see whether there was prima facie some material on the basis of which Department could reopen the case. In our considered view

the principle applied by Hon'ble Supreme Court supports contentions of assessee. In the case of assessee before us reason for which the assessment has been reopened was eventually dropped by Ld. AO himself and he made additions on different issues, without there being sufficient material in hand, no reasons were recorded in respect of the additions made and no new notice was issued to assessee on that issue.

**12.** Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd. vs. CIT (*supra*) has observed as under:

*“evidently, therefore, what Parliament intended by the use of words “and also” is that the assessing officer, upon the formation of reason to believe under section 147 and the issuance of notice under section 148 (2) must assess or reassess: (i). ‘such income’; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The words ‘such income’ referred to the income chargeable to tax which has escaped assessment and in respect of which the assessing officer has formed a reason to believe that it has escaped assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in*

*respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the assessing officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under this section as having escaped assessment. If upon issuance of notice under section 148 (2), assessing officer accepts the objection of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. Parliament when it enacted the provisions of section 147 w.e.f. 01/04/1989 clearly stipulated that assessing officer has to assess or reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax which came to his notice during the proceedings. In the absence of the assessment or reassessment the former, he cannot independently assess the latter.*

*Section 147 has this effect that assessing officer has to assess or reassess the income (“such income”) which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe that escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so a fresh notice under section 148 would be necessary, legality of which would be tested in the event of a challenge by the assessee.”*

**13.** Similar view has been taken by Hon’ble Delhi High Court in the case of *Oriental bank of commerce versus ACIT (supra)*. From the above discussion and respectfully following the ratio laid down by Hon’ble Delhi High Court in the case of *Ranbaxy Laboratories Ltd., vs. CIT (supra)* and *Oriental Bank of commerce vs. ACIT (supra)*, we are of the considered opinion that if no addition has been made in respect of the reasons recorded for reopening this assessment, it was not open for Ld. AO to make addition on some other ground without issuing a fresh notice under section 148. Accordingly the

notice dated 28.03.2011 cannot be sustained in the eyes of law and is quashed.

**14.** As we have decided the appeal on ground No. 1 being legal issue, and has quashed the assessment proceedings, we do not find it necessary to decide the appeal on merits.

In the result the appeal filed by the assessee stands allowed.

Order pronounced in the open court on 16<sup>th</sup> March, 2017.

Sd/-

Sd/-

**(N.K. SAINI)**  
ACCOUNTANT MEMBER  
Date: 16.03.2017  
**@m!t**

**(BEENA A. PILLAI)**  
JUDICIAL MEMBER