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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF JUNE, 2022

PRESENT

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

AND

THE HON'BLE MR. JUSTICE ANANT RAMANATH HEGDE

I.T.A No.60 OF 2014

C/W

I.T.A. No.59 OF 2014

IN I.T.A No.60 OF 2014

BETWEEN :

1. THE COMMISSIONER OF INCOME-TAX
TDS, NO.59, HMT BHAVAN
4TH FLOOR, BELLARY ROAD
GANGANAGARA
BANGALORE-560 032

2. THE ASST. COMMISSIONER OF
INCOME TAX, CIRCLE-16(1)
NO.59, HMT BHAVAN
4TH FLOOR, BELLARY ROAD
GANGANAGARA
BANGALORE-560 032

... APPELLANTS

(BY SHRI. K.V. ARAVIND, ADVOCATE)

AND :

M/S. BANGALORE METRO RAIL
CORPORATION LTD.,
BMTCL COMPLEX, 3RD FLOOR

K.H.ROAD, SHANTHINAGARA
BANGALORE-560 027

... RESPONDENT

(BY SHRI. K.K. CHYTHANYA, SENIOR ADVOCATE FOR
SHRI. S. SHARATH, ADVOCATE)

THIS INCOME TAX APPEAL IS FILED UNDER SEC.260-A
OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED
17.09.2013 PASSED IN ITA NO.1433/BANG/2012, FOR THE
ASSESSMENT YEAR 2011-2012. PRAYING TO 1. FORMULATE
THE SUBSTANTIAL QUESTIONS OF LAW AND ETC.

IN I.T.A No.59 OF 2014

BETWEEN :

1. THE COMMISSIONER OF INCOME-TAX
TDS, NO.59, HMT BHAVAN
4TH FLOOR, BELLARY ROAD
GANGANAGARA
BANGALORE-560 032

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THIS INCOME TAX APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 17.09.2013 PASSED IN ITA NO.1319/BANG/2012, FOR THE ASSESSMENT YEAR 2011-2012. PRAYING TO 1. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AND ETC.

THESE ITAs, HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 25.05.2022, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **P.S.DINESh KUMAR. J**, PRONOUNCED THE FOLLOWING:-

JUDGMENT

These two appeals by the Revenue, arise out of the common order dated September 17, 2013 in ITA No.1319 & 1433/Bang/2012 passed by ITAT¹, Bengaluru Bench 'C'. These appeals have been admitted to consider the following questions of law:

1. *Whether the Tribunal was correct in holding that the contract as supply contract while the services rendered such as design and testing, are covered by explanation 2 to Sec.9(1)(vii) of the Income-Tax Act?*
2. *Whether the Tribunal was correct in holding that the contract as composite contract and no segregation possible while the assessee has segregated and arrived at the percentage of technical services component, when the Tribunal itself has observed that*

¹ Income Tax Appellants Tribunal, Bengaluru

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some portion of the contract can be segregated to attract TDS, whether it was factually and legally tenable to have allowed the appeal of the assessee in entirety?

3. Whether the work taken up is ancillary to supply of rolling stock or a part of it is a rendering professional and technical service?

2. Hence, they are disposed of by this common order.

3. Heard Shri. K.V. Aravind, learned Standing Counsel for the Revenue and Shri. K.K.Chaitanya, learned Senior Advocate for the assessee.

4. The BMRCL² entered into a Contract with a consortium consisting of M/s BEML Ltd., M/s Hyundai Rotem Company, Mitsubishi Corporation and M/s Mitsubishi Electric Corporation, of which, BEML Ltd., being the consortium leader, for design manufacture, supply,

² Bangalore Metro Rail Corporation Ltd.

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testing and commissioning of passenger Rolling Stock, including training of Personnel and Supply of spares and operation. The total cost of the Contract was Rs.1672.50 Crores.

5. The Income Tax Department conducted a survey under Section 133A of the Income Tax Act and observed that a sum of Rs.182 Crores had been paid by BMRCL to the consortium. The Department was of the view that assessee ought to have deducted tax at source before making the payment. Accordingly, a show cause notice³ was issued calling upon the assessee to show cause as to why it should not be treated 'as an assessee in default' under Section 201(1) of Income Tax Act⁴ for not deducting tax at source and remitting to the Government. Assessee submitted its reply contending *inter alia* that Contract was one for

³ Dated 27.12.2011

⁴ 'IT Act' for short

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supply of Coaches and other activities such as design, testing, commissioning and training are only incidental to achieve the dominant object and therefore, it would constitute a sale of goods and hence, the provisions of Section 194C or 194J would not apply. It was also contended that assessee was not aware as to how the consortium partners had utilized the 10% of the Contract amount given as 'Mobilization Amount'.

6. The Assessing Officer, not being satisfied with BMRCL's reply, treated it as 'an assessee in default' and levied tax and interest thereon under Section 201(1A) of the IT Act. An appeal filed before the commissioner of Income Tax (Appeals), Bengaluru, by the assessee challenging the said order also stood dismissed. Feeling aggrieved, assessee filed appeals before the ITAT, Bengaluru. By the common impugned order, the ITAT has allowed assessee's appeals. The Revenue has

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presented these appeals raising the questions of law recorded hereinabove.

7. Shri. Aravind, for the Revenue, submitted that the ITAT fell in error in holding that the Contract is a composite Contract and it cannot be segregated. In support of this contention, adverting to the order under Section 201(1) and 201(1A) of the IT Act passed by the Assistant Commissioner and urged that the Contract included the design, manufacture, supply, testing, commissioning of passenger rolling stock, training of Personnel, supply of spares, operation and maintenance manuals for 150 standard guage electrical multiple units and supply of equipment, materials, labour and other facilities for successful completion of works. Therefore, the Contract includes fee for Technical services covered under Section 194(j)(1)(b) of the I.T. Act.

8. Shri. Aravind placed reliance on the following authorities:

(a) *IshikWajma-Harima Heavy Industries Ltd., Vs. Director of Income Tax*⁵.

(b) *Transmission Corporation of A.P. Ltd., Vs. Commissioner of Income Tax*⁶.

9. In substance, the argument advanced on behalf of the Revenue is, the Contract between BMRCL and BEML consisted of two parts namely, the supply and the Technical service. Therefore, Section 194(j) of the I.T. Act is applicable so far as the Technical services are concerned.

10. Shri. Chaitanya, learned Senior Advocate, opposing the appeal submitted that the specific case of both assessee and the Revenue

⁵ (2007)158 Taxman 259 (SC)

⁶ (1999)105 Taxman 742 (SC)

throughout is that it is a composite Contract. He contended that the ITAT has recorded in para 7 of its order that the Assessing Authority had held that the Contract was in the nature of a composite package. He contended that the Departmental Representative has argued before ITAT that it is an 'indivisible' Contract for supply, commissioning, testing etc.

11. Thus, in substance, Shri. Chaitanya argued that both the assessee and the Revenue have understood the Contract as an 'Indivisible Contract'. Therefore, the Revenue cannot be permitted to improve its case at this stage. He has placed reliance on the following authorities:

(a) *Oil and Natural Gas Corporation Ltd., Vs. Commissioner of Income Tax, Dehradun*⁷;

(b) *Director of Income Tax Vs. AP Moller Maersk*⁸ A.S;

⁷ (2010)322 ITR 180 (SC) (para 8)

(c) *Japan Airlines Company Ltd., Vs. Commissioner of Income Tax, New Delhi.*⁹

12. We have carefully considered rival contentions and perused the records.

13. All three questions of law are inter-linked. Hence, they are considered together.

14. Explanation (2) to Section 9(1)(vii) of the Act reads as follows:

"Explanation[2]-For the purpose of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining, or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries' "

⁸ (2017)392 ITR 186 (SC) (para 15)

⁹ (2015)60 Taxmann.com 71 (SC)

15. It was argued by Shri. Aravind that the word 'construction' contained in the explanation refers to building construction.

16. Shri. Chaitanya, pointed out that the explanation is unambiguous and refers to any construction, assembly, mining or like projects. He has also placed reliance on instruction No.1862 dated 22.10.1990 by the Ministry in which the opinion of the Attorney General for India has been recorded and it reads as follows:

"2. The question whether prospecting for, or extraction or production of, mineral oil can be termed as 'mining' operations, was referred to the Attorney General of India for his opinion. The Attorney General has opined that such operations are mining operations and the expressions 'mining project' or 'like project' occurring in Explanation 2 to section 9(1)(vii) of the Income-tax Act would cover rendering of services like imparting of training and carrying out drilling operations for exploration or exploitation off- oil and natural gas."

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17. A careful perusal of the explanation shows that fee for Technical services does not include construction, assembly and mining operation etc. In the instant case, the Contract is one for designing, manufacturing, supply, testing, commissioning of passenger rolling stock and training Personnel.

18. The total Contract is for Rs.1,672.50 Crores whereas, the training component is about Rs.19 Crores.

19. Though the consortium consists of different Companies, BEML Ltd., is the consortium leader. To a query made by the Court with regard to payment made, Shri. Chaitanya, on instructions from the BMRCL Officer present in the Court, submitted that all cheques have been issued in favour of BEML Ltd.

20. Shri. Chaitanya further submitted that the question of deduction of tax under Section 194J is held against the assessee by the Revenue only in respect of 10% of the entire project value which was given as 'Mobilization Advance'. The project is complete. Assessment for all years in respect of the remaining 90% payment is complete. In respect of 90% payment, the Revenue has not raised any objection with regard to non-compliance of Section 194J.

21. In para 14 of its order, the ITAT has recorded Revenue's contention and it reads as follows:

"14. The learned DR also placed reliance upon the following decisions in support of his contention that the project being a composite contract, it has to be considered as one indivisible contract and the tax is to be deducted at source on such contracts having regard to the dominant nature of the contract."

(Emphasis Supplied)

22. Thus, the specific case of the Revenue before the ITAT is that the Contract is a composite one. Shri.Chaitanya is right in his submission that the dominant purpose of the Contract is supply of the passenger rolling stock. Thus, having taken a specific stand before the ITAT that the Contracts is a composite one, the Revenue cannot be permitted to take a contradictory stand before this Court. In *ONGC Ltd.*¹⁰, cited by Shri. Chaitanya, it is held as follows:

"8. At the outset, we may note that although in view of the orders passed by the Committee on disputes, advising the revenue not to file appeals against Tribunal's orders, we find some substance in the objection of learned counsel for the assessee about the maintainability of revenue's appeals before the High Court but as we have heard learned counsel for the parties on merits of the appeals, at this stage, we do not propose to go into this question. We also reject at the threshold the submission of learned counsel for the revenue that the claim of the assessee qua capital account deserved to be disallowed because no agreement between the assessee and the foreign

¹⁰ (2010)322 ITR 180 (SC)

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creditors, as observed by the High Court was placed on record, because no such objection was raised by the revenue at any stage of the assessment proceedings nor had the Assessing Officer rejected the claim of the assessee on that ground."

(Emphasis Supplied)

23. In *A.P. Moller Maersk*, it is held as follows:

"15. After the arguments were concluded, additional submissions were filed by Mr. Radhakrishnan on behalf of the Revenue wherein altogether new point is raised viz. the payments made by the agents to the assessee for use of the Maersk Net System can be treated as royalty. However, this desperate attempt on the part of the Revenue cannot be allowed as no such case was sought to be projected before the High Court or even in the appeals in this Court. We have already mentioned in the beginning the issue raised by the Revenue itself which shows that the only contention raised is as to whether the payment in question can be treated as fee for technical services. Having held that issue against the Revenue, no further consideration is required of any other aspects in these appeals. These appeals are, therefore, bereft of any merit and are accordingly dismissed."

(Emphasis Supplied)

24. Shri. Aravind has relied upon *Transmission Corporation of A.P. Ltd.* The question involved in that case was deduction of income tax under Section 195 of the Act on the payments made to the non-resident Company. In the instant case, the entire payment has been made to BEML Ltd., which is a resident Company. Therefore, on facts, the said authority does not lend any support to the Revenue.

25. He has also relied upon *Ishikawajima-Hairma Heavy Industries Ltd.* The said authority also does not lend any support because, in that case, payments were made 'separately' to the Members of the Consortium.

26. In *Japan Airlines Company Ltd.*, the Revenue took a stand that deduction was required to be made under Section 194-I of the Act while making payment towards 'Landing and Parking the

Aircrafts' in Indira Gandhi International Airport. Under Section 194-I of the Act, any person responsible for paying to any other person, any income by way of "rent", shall deduct Income tax at the rate of 15% in the case of individuals or HUF and 20% in other cases. The word 'rent' has been described to mean any payment by whatever name called under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land or building (including factory building) together with furniture, fittings and the land appurtenant thereto, whether or not such building is owned by the payee. In that case, the Apex Court has held as follows:

"This reasoning is clearly fallacious. A bare reading of the definition of 'rent' contained in explanation to Section 194-I would make it clear that in the first place, the payment, by whatever name called, under any lease, sub-lease, tenancy which is to be treated as 'rent'. That is rent in traditional sense. However, second part is independent of the first part which gives much wider scope to the term

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'rent'. As per this whenever payment is made for use of any land or any building by any other agreement or arrangement, that is also to be treated as 'rent'. Once such a payment is made for use of land or building under any other agreement or arrangement, such agreement or arrangement, gives the definition of rent of very wide connotation. To that extent, High Court of Delhi appears to be correct that the scope of definition of rent under this definition is very wide and not limited to what is understood as rent in common parlance. It is a different matter that the High Court of Delhi did not apply this definition correctly to the present case as it did not notice that in substance the charges paid by these airlines are not for 'use of land' but for other facilities and services wherein use of the land was only minor and insignificant aspect. Thus it did not correctly appreciate the nature of charges that are paid by the airlines for landing and parking charges which is not, in substance, for use of land but for various other facilities extended by the AAI to the airlines. Use of land, in the process, become incidental. Once it is held that these charges are not covered by Section 194-I of the Act, it is not necessary to go into the scope of Section 194-C of the Act."

27. As recorded hereinabove, the total project cost is Rs.1672.50 Crores out of which, the service part in the form of training accounts for

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about Rs.19 Crores. Thus, the dominant purpose is supply of Rolling Stock.

28. In view of the above, the questions raised by the Revenue are not substantial questions for consideration for more than one reason.

29. Firstly because, the Revenue has taken a specific stand before the ITAT that the Contract is a composite Contract. Secondly because, the dominant purpose of the Contract is for supply of Rolling Stocks and the cost towards service component is almost negligible. Thirdly because, the word 'assembly' must include the manufacture/assembly of the Rolling Stocks by BEML Ltd., being the Consortium leader. Fourthly because, the entire payment has been made in favour of BEML Ltd. Fifthly because, Revenue has not raised any objection with regard to payment of

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90% of the Project costs, so far as deduction under Section 194J is concerned.

30. In view of the above, questions No.1 and 2 are answered in the affirmative in favour of the assessee. Question No.3 is whether the work taken up is ancillary to supply of Rolling Stock or a part of it is rendering professional and technical services. For the reasons recorded herein above, we are of the view that the work taken up is ancillary to supply of Rolling Stock and does not amount to professional or technical service.

31. Resultantly, this appeal must fail and it is accordingly ***dismissed***.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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