

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

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER  
AND SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCING)

ITA No.5712/Del/2010  
(Assessment Year : 2007-08)

Hitachi Ltd. Unit 304-306, 3 <sup>rd</sup> Floor, ABW Eelgance Tower, Jasola District Centre New Delhi - 110025  PAN : AAACH 2953 A <b>(APPELLANT)</b>	Vs.	ADIT Circle – 1(2), International Taxation, New Delhi  <b>(RESPONDENT)</b>
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Assessee by	Tarandeep Singh, Adv
Revenue by	Shri Prabhakant, CIT-DR

Date of hearing:	27/05/2021
Date of Pronouncement:	08/06/2021

**ORDER**

**PER ANIL CHATURVEDI, AM:**

This appeal filed by the assessee is directed against the order of the Asst. Director of Income Tax, Circle 1(2) – New Delhi dated 30.09.2010 passed under section 143(3) r.w.s 144C(5) of the Act for Assessment Year 2007-08.

2. The relevant facts as culled from the material on records are as under:

3. Assessee is a foreign company which in India has stated to have provided technical knowhow, technical assistance as well as services of installation engineers for supervision erection and commission of plants. It is also stated to have entered into various collaboration for high technology products including industrial plants, power plants etc. Assessee filed its return of income for A.Y. 2007-08 on 30.10.2007 declaring total income at Rs.1,58,95,266/-. Thereafter assessee filed revised return of income on 31.03.2009 declaring total income at Rs.1,61,51,304/-. The case was selected for scrutiny and thereafter notices u/s 143(2) was issued along with the questionnaire. A draft assessment order was passed u/s 144C(1) on 24.12.2009 proposing the assessment of total income at Rs.9,78,84,110/-. On the receipt of draft order, assessee filed objections before the DRP. DRP vide order dated 30.09.2010 issued directions u/s 144C(5) of the Act. Consequent to the direction of DRP, AO passed order u/s 143(3) r.w.s. 144C(5) on 15.10.2010 assessing the total taxable income at Rs.9,78,84,110/-. Aggrieved by the order of AO passed pursuant to the directions of DRP, assessee is now before us and has raised the following grounds:

- “1. *That the order of learned Asstt. Director of Income Tax (ADIT) is bad both in law and on facts of the case;*
2. *That the Learned ADIT has erred in assessing the income of the assessee at Rs.97,884,110/- as against the returned income of Rs.16,151,304/-.*
3. *That the Learned ADIT has erred in merely following the order of the previous year without considering the provisions of law and facts of the case.*

4. *That the Learned ADIT has without appreciating the facts of the case erred in not following decision of Hon'ble ITAT Delhi 'D' Bench passed in case of the assessee for A.Y. 1980-81 to 1985-86, as well as various other orders of appellant authority, which cover the matter relating to taxation of income from M/s Sumitomo Corporation, Japan for Sardar Sarovar (Narmada) power Project and Income from Bhakra Beas Management Board G&K Project.*
5. *That the Learned ADIT has without appreciating the facts of the case failed to follow directions given by the Hon'ble ITAT Delhi 'D' Bench passed in case of the assessee for A.Y. 1980-81 to 1985-86 to tax Business Profits, pursuant to Permanent Establishment, for similar projects, at a deemed profit rate of 3% of the gross amount of fee;*
6. *That the Learned ADIT has without appreciating the facts of the case and provisions of AADT between India and Japan, erred in holding fee received from M/s Sumitomo Corporation, Japan, for providing installation supervisory Engineers for Sardar Sarovar (Narmada) Power Project, taxable as "fee for technical services" as per the provisions of the AADT @ 20% of the gross amount of fee;*
7. *That the Learned ADIT has without appreciating the facts of the case, on mere surmise and guesswork alleged that in respect of receipt from Bhakra Beas Management Board the assessee may have had an internal arrangement and may have adjusted profits earned in India, and thereby erred in considering whole contractual receipts as business income and taxed on the full value.*
8. *That the learned ADIT has erred in not allowing any expenditure from Business Income earned by the assessee from Bhakra Beas Management Board G&K Project Onshore Services Contract, thus ignoring the deemed profit rate as directed by Hon'ble ITAT Delhi 'D' Bench in assessee case for A.Y. 1980-81 to 1985-86, and not giving cognizance to actual direct expenses incurred by project office in India and head office in Japan.*
9. *That without prejudice, the Learned ADIT has erred in not giving cognizance to Annual Accounts of Hitachi Ltd. Japan, placed on record, for determination of rate of profit attributable establishment in India.*

10. *That without prejudice, the Learned ADIT has erred in not applying provisions relating to presumptive basis of taxation under section 44-BB of the Income – Tax Act, applicable on the fact of the case in respect of contracts with M/s Sumitomo Corporation, Japan for Sardar Sarovar (Narmada) Power Project and Contract for Bhakra Beas Management Board G&K Power Project;*
11. *That the Learned ADIT has erred in taxing income received from Brakes India, Tata Motors Ltd, amounting to Rs.1,36,23,485/- and installation supervisory charges received from Sumitomo Corporation amounting to Rs.1,61,25,892/- eligible for taxation as royalty and fee for technical services @ 20% instead of 10%.*
12. *That the Learned ADIT has erred in charging interest u/s 234-B of the Income tax Act, provision of which are not attracted on the facts of the case;*
13. *That the learned ADIT has erred in initiating the penalty proceedings under Section 271(1)(c) of the Act, the provisions of which are not attracted on the facts of the case;*
14. *That the Learned ADIT has without appreciating the facts of the case erred in imposing penalty proceedings u/s 271(1)(b) of the IT Act.*
15. *That the appeal is within time as the assessee received the assessment order on 21.10.2010.*
16. *That the assessee may be allowed to add, alter, substitute, supplement, delete any of the grounds raised hereinabove.”*

4. Before us, at the outset, Learned AR submitted that **Ground No.1, 2 & 13 to 16** are being general in nature therefore requires no adjudication. In view of the aforesaid submission of Learned AR, **these grounds are dismissed.**

5. With respect to **Ground No.3 to 6**, Learned AR submitted that assessee does not want to wish to press these grounds and

in support of which he pointed to the Assessee's Email dated 14<sup>th</sup> April, 2021, addressed to the Tribunal, which is placed at Page 90 & 91 of the Paper Book. In view of the aforesaid submissions of the Learned AR, **these grounds are dismissed as not pressed.**

6. He thereafter submitted that **Ground No.7 & 10** are interconnected.

7. AO noted that assessee had received fees from Bhakra Beas Management Board (BBMB), Gangwal & Kotla, for Onshore Services for Power Projects at Gangwal & Kotla Hydro Power Houses. As per the Profit and Loss account, it was noticed that the total receipts of the assessee was Rs.27,100,200/-, the expenses towards subcontractors expenses were Rs.24,606,132/- and clearing agency fee was Rs.15,720,113/-. It was the submission of the assessee that it was not awarded any contract by BBMB for supply of offshore equipment but it was doing onshore activities. AO noted that the expenses incurred by the assessee as clearing agency fee was higher than its receipts and according to AO it cannot be accepted to be the correct position. AO was of the view that though the assessee has denied of having not supplied the equipment but according to AO it was possible that the equipments was supplied by its related person with whom the assessee has internal arrangements by which the other person will supply the equipment and the assessee will clear the customs, transport and install and commission the same. He was of the view that there was possibility of an arrangement by which the profits would be earned by the assessee due to activities in

India were already adjusted with the supplier. According to AO, the aforesaid was the reasons for assessee having incurred more expenses than the receipts of the contract. AO noted that assessee was given various opportunities to substantiate the expenses vis-à-vis receipts but the same was not done. AO accordingly considering the whole of the contractual receipts of Rs.6,81,34,733/- received by assessee from BBMB project to be as business income and held it to be taxable at 40% + surcharge @ 2.5% and education cess @ 2%. Aggrieved by the order of AO, assessee carried the matter before DRP. DRP noted that the order passed by the AO in the draft assessment order to be as per the consistent stand of the Revenue in assessee's case for AY 2004-05 to 2006-07 and the matters were under litigation. The DRP thus upheld the order of the AO. AO thereafter in the final assessment order proceeded to tax the income received from BBMB project to be business income and taxed it at 40% plus surcharge. Aggrieved by the order of AO, the Assessee is now in appeal before us.

8. Before us, Learned AR submitted that in A.Y. 2006-07 in the order passed u/s 143(3) dated 19.12.2008, AO had in similar circumstances held the receipts from BBMB Projects to be taxable @ 40% + surcharge + education cess (the copy of the assessment order is placed at Page 21 to 41 and relevant action of AO at page 41 of the paper book). He submitted that against the order of AO assessee carried the matter before the CIT(A). CIT(A) in the order dtd 15.12.2010, estimated the profit from BBMB Project at 10% of the gross receipts (He pointed to the relevant order of CIT(A)

which is placed at page 42 to 63 of the paper book). He submitted that the order of CIT(A) was not challenged by the Revenue meaning thereby that the order of the CIT(A) was accepted by the Revenue and it had attained finality. He thereafter submitted that in subsequent assessment year i.e. A.Y. 2008-09, in the order passed u/s 143(3) r.w. Section 144C order dated 22.02.2011, the Revenue has held 10% of the amount received by the assessee from BBMB project to be the profit.(he pointed to the Page 64 to 69 of the paper book). He thereafter submitted that in subsequent assessment years i.e. A.Y. 2010-11, 2012-13, 2013-14 & 2014-15, the receipts from BBMB projects have been taxed @ 10% and that only in the year under consideration, without there being any change in the facts, the receipts have been taxed @ 40%. He therefore submitted that in order to maintain the consistency, the assessee has no objection if the income from BBMB Project is deemed to be @ 10% of the total receipts as per the provisions contained u/s 44BBB of the Act.

9. Learned DR on the other hand supported the order of lower authorities and pointed to the consolidated order of CIT(A) for A.Y. 2004-05, 2005-06 & 2006-07 wherein CIT(A) has noted that Section 44BBB were not applicable in assessee's case. He further submitted that AO has noted that the assessee was asked to submit the details but the assessee failed to furnish the details and in such circumstances the AO had no other option but to tax the income at 40% plus surcharge. Learned AR in his rejoinder submitted that Learned CIT(A) has though noted that provision of

Section 44BBB were not applicable but he has taken the guidance from the provision of Section 44BBB and has estimated the profits at 10% of the total receipt. He further submitted that it is not that assessment has been framed u/s 144 of the Act but has been passed u/s 143(3) of the Act and thus it cannot be said that the details were not provided by the Assessee.

10. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the taxability of the receipt from the BBMB Project. The AO has considered the entire receipts from the BBMB Project to be taxable @ 40% + surcharge. We find that in A.Y. 2006-07, AO had taxed the receipts from BBMB Projects in similar circumstances @ 40% but when the matter was carried before the CIT(A), CIT(A) directed the AO to tax the receipts from BBMB Project @ 10%. Before us, it is the submission of the Learned AR that the aforesaid order of CIT(A) has attained finality as the order of CIT(A) has not been challenged by the Revenue. The aforesaid contention of the Learned AR has not been controverted by the Revenue by placing any material on record. We further find that in subsequent assessment years i.e. AY 2010-11, 2012-13, 2013-14 & 2014-15 the receipts from BBMB Project have been taxed by the Revenue @ 10% of the receipts. Before us, no distinguishing feature in the facts in the year under consideration and that of the earlier years and subsequent years has been pointed out by the Revenue nor has it placed any material to demonstrate the justification for taking a different view than in earlier and subsequent years. In such as situation in

order to maintain the consistency, we hold that the receipts from BBMC Project to be taxed @ 10% of the receipt. We thus direct so.

**Thus the grounds of the assessee are allowed.**

11. **Ground No.11** is with respect to the taxation as royalty and fee for technical services @ 20% instead of 10%.

12. AO noted that assessee had received Royalty for technical services from Brakes India and from TATA Motors Ltd. amounting to Rs.1,36,23,485/-. He also noted that assessee has also received Installation Supervisory charges from Sumitomo Corporation amounting to Rs.1,61,25,892/-. He held the aforesaid receipt to be taxable @ 20% as against the assessee's claim of being taxed @ 10%.

13. Before us, it is Learned AR's contention that before DRP assessee vide Ground No.13 had raised an objection about it being taxed @ 20% instead of 10%. He submitted that no directions have been issued by the DRP on this issue. On the merits, he submitted that there is amendment to DTAA between India and Japan. He submitted that as per the amendment made by Notification No. S.O. 1136(E) dated 19.7.2006 w.r.e.f 28.6.2006, as per Article 12(2) of the DTAA, royalty and technical fees are to be taxed at 10%. (He pointed to the copy of the amendment to DTAA which is placed at page 103 of paper book No 3). He therefore fairly submitted that the matter be remitted to AO to verify the contentions of the assessee and that the AO be

directed to tax the royalty and fees from technical services as per the applicable rates.

14. Learned DR did not controvert the submission made by the Learned AR but however supported the order of AO.

15. We have heard the rival submissions and perused the materials available on record. The issue in the present ground is with respect to the taxability of royalty and fees for technical services. AO has taxed the aforesaid income at 20% as against the claim of assessee that it is taxable at 10%. Before us, Learned AR has pointed to the amendment made in Article 12(2) of the DTAA between India and Japan by Notification No S.O. 1136(E) dtd 19.7.2006 w.r.e.f 28.6.2006. As per the aforesaid amendment, the tax charged shall not exceed 10% of the gross amount of royalties or fees for technical services. Considering the submission of the Learned AR, we restore the issue to the file of the AO and direct him to compute the taxes on the aforesaid income in accordance with the applicable DTAA and in accordance with law. Needless to state that AO shall grant adequate opportunity of hearing to the assessee. **Thus the ground of the assessee is allowed.**

16. **Ground No.12** is with respect to charging interest u/s 234-B of the Income tax Act.

17. Before us, Learned AR submitted that the AO has charged interest u/s 234-B of the Act. He submitted that assessee being a

non-resident company, entire tax was to be deducted at source by the payers to the assessee and therefore assessee was not liable for any interest u/s 234-B of the Act. In support of the aforesaid contention, he relied on the decision rendered by Hon'ble Delhi High Court in the case of Director of Income Tax (International Transaction) vs. GE Packaged Power Inc. reported in (2015) 373 ITR 65 (Del). Learned AR therefore submitted that interest levied u/s 234-B be directed to be deleted.

18. Learned DR on the other hand supported the order of lower authorities and further submitted that against the order of Hon'ble Delhi High Court in the case of Ge Packaged Power Inc. (supra), which has been relied upon by the Ld AR, the matter was pending before the Supreme Court.

19. We have heard the rival submissions and perused the materials available on record. The issue in the present ground is with respect to chargeability of interest u/s 234B of the Act. It is an undisputed fact that assessee is a foreign company and it is the responsibility of payer to deduct entire tax at source on payments made to the Assessee. We find that Hon'ble Delhi High Court in the case of GE Packaged Power Inc. (supra) has held that when the assessee was a non resident company, the entire tax was to be deducted at source on the payments made by payee to the assessee and therefore there was no question of payment of advance tax by the assessee and therefore it would not be permissible for the revenue to charge any interest u/s 234B from the assessee. Before us, Revenue has not pointed to any contrary

binding decision in its support nor has pointed to any distinguishing facts in the present case and the case relied upon by Ld AR but however it is the contention of the Ld DR that the aforesaid order of the Delhi High Court has been challenged by the Revenue. The contention of the Ld DR of having challenged the aforesaid order of H'ble Delhi High Court may be true but at the same time, the Revenue has not placed any material on record to demonstrate that the aforesaid order has been stayed by higher judicial forum. In such a situation, relying on the ratio of the aforesaid decision in the case of GE Packaged Power (supra) we are of the view that AO was not justified in levying the interest u/s 234B. We therefore direct the deletion of interest. **Thus ground of assessee is allowed.**

**20. In the result, appeal of the assessee is partly allowed.**

**Order pronounced in the open court on 08.06.2021**

**Sd/-**

**(SUDHANSHU SRIVASTAVA)  
JUDICIAL MEMBER**

**Sd/-**

**(ANIL CHATURVEDI)  
ACCOUNTANT MEMBER**

*Date:- 08.06.2021*

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Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI