

**IN THE INCOME TAX APPELLATE TRIBUNAL
DEHRADUN BENCH, NEW DELHI**

Before Sh. Amit Shukla, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 5137/Del/2011 : Asstt. Year : 2008-09

ITA No. 6405/Del/2012 : Asstt. Year : 2009-10

Petronash FZE, C/o Hemant Arora & Co., CA, 1, Tyagi Road, Dehradun-248001	Vs	ADIT, International Taxation, Dehradun
(APPELLANT)		(RESPONDENT)
PAN No. AAFCP1784Q		

Assessee by : Sh. S. D. Kapila, Adv.

Revenue by : Sh. T. S. Mapwal, Sr. DR

Date of Hearing: 16.09.2021	Date of Pronouncement: 07.12.2021
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

These appeals have been filed by the assessee against the orders dated 20.09.2011 and 25.02.2012 passed by the AO u/s 143(3)/144C(13) of the Income Tax Act, 1961.

2. In ITA No. 5137/Del/2011, following grounds have been raised by the assessee:

"1. That on the facts and circumstances of the case and in law, the assessment order dated 20.9.11 passed u/s 143(3) read with section 144C(13) of the Income-tax Act, 1961 ('the Act') in the case of M/S Petronash FZE ('the Assessee') is based upon conjectures, surmises, assuming incorrect facts and incorrect application of law.

2. That on the facts and circumstances of the case and in law, the Assistant Director of Income Tax, International Taxation, Dehradun ("Ld. AO") erred in compute the total income of the assessee at Rs.

42,23,465/- as against the returned income of Rs. Nil in respect of contract for Replacement of well fire shutdown panels at offshore platform of MH and NH assets awarded to it by the Oil and Natural Gas Corporation Limited ('ONGC').

3. That on facts and circumstances of the case and in law the Ld. AO erred in not correctly applying provisions of Agreement for Avoidance of Double Taxation between India and UAE. (Notification no. GSR 710E dated 18.11.1993). ('Treaty' or 'the DTAA') which were more beneficial to the assessee.

3.1. That under the facts and circumstances of the case the Ld. AO/DRP having themselves acknowledged the fact that the assessee is a tax resident of UAE and the income of the assessee is taxable under the head business profits erred in not applying provisions of Article 7 r.w. Article 5 of the Treaty in bringing to tax the income of the assessee.

4. That on the facts and circumstances of the case and in law, the Ld. AO/DRP erred in giving a finding that the assessee had an installation permanent establishment ('PE') in India through which the business of the enterprise is wholly or partly carried out.

4.1. That the Ld. AO/DRP failed to appreciate the fact that during the financial year 2007-08 relevant to assessment year 2008-09 the assessee had no presence in India whatsoever and had no fixed place of business in India.

4.2. That the Ld. AO failed to appreciate the fact that under Article 5(2)(h) of the Treaty the term permanent establishment includes a building site, construction or assembly project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than nine months. The fact of the present case is that the Notice of Award is dated 22.08.2007 and the Contract has been signed on 10.09.2007, conclusively proves that during the assessment year 2008-09 the threshold of nine months stipulated in Article 5(2)(h) could not possibly have been met in order to constitute an installation PE.

5. That on the facts and circumstances of the case and in law, the Ld. AO/DRP have erred in treating the revenue of Rs. 4,22,34,655/- pertaining to outside India operations as taxable revenue of the assessee in India without correctly appreciating the facts as brought out before him and by grossly misinterpreting the clauses of the contract.

6. That on the facts and circumstances of the case and in law, the Ld. A.O/DRP have erred in applying a deemed profit rate of 10% to the gross revenues of the assessee by taking guidance from section 44BB without appreciating the fact that the said section 44BB is a machinery provision and does not override the charging provisions of section 4 read with section 5 of the Act.

7. That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in charging interest u/s 234-D.

8. That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings u/s 271B and 271(1)(c) of the Act."

3. In ITA No. 6405/Del/2012, following grounds have been raised by the assessee:

"1. That on the facts and circumstances of the case and in law, the assessment order dated 25.10.2012 passed u/s 143(3) read with section 144C(13) of the Income-tax Act, 1961 ('the Act') in the case of M/S Petronash FZE ('the Assessee') is based upon conjectures, surmises, assuming incorrect facts and incorrect application of law.

2. That on the facts and circumstances of the case and in law, the Assistant Director of Income Tax, International Taxation, Dehradun ('Ld. AO') erred in computing the total income of the assessee at Rs. 3,25,12,540/- as against the returned income of Rs. Nil in respect of contract for Replacement of well fire shutdown panels at offshore platform of MH and NH assets awarded to it by the ONGC.

3. That on facts and circumstances of the case and in law the Ld. AO erred in not correctly applying provisions of Agreement for Avoidance of Double Taxation between India and UAE. (Notification no. GSR 710E dated 18.11.1993). ('Treaty' or 'the DTAA') which were more beneficial to the assessee.

3.1. That on the facts and circumstances of the case the Ld. AO/Dispute Resolution Panel ('DRP') having themselves acknowledged the fact that the assessee is a tax resident of UAE and the income of the assessee is taxable under the head business profits erred in not applying provisions of Article 7 r.w. Article 5 of the Treaty in bringing to tax the income of the assessee.

4. That on the facts and circumstances of the case and in law, the Ld. AO/DRP erred in giving a finding that the assessee had an installation permanent establishment ('PE') in India through which the business of the enterprise is wholly or partly carried out.

4.1. That the Ld. AO/DRP, after having rightly given the findings that (i) the assessee's PE, if any, would arise under clause (h), Article 5(2) of the Indo UAE Tax Treaty, and (ii) that the first shipment of material arrived in India in May, 2008 erred in holding that the income from supplies of material from outside India were attributable to the assessee's permanent establishment in India which according to them came into existence in preceding year.

4.2. That the Ld. AO/DRP have erred in not appreciating the fact that the installation PE comes into existence only when the installation activity commences which is an activity subsequent to the materials being brought on site.

4.3. That the Ld. AO/DRP have erred in holding that in the case of turnkey contract supply of material outside India is "nothing but essential material required for the execution of the project" and therefore the same is taxable in India, by completely disregarding the fact that the offshore supplies were made by the assessee to ONGC at Arm's Length price and the said activity of supply had been concluded in

foreign country much before the installation activity commenced in India.

5. That on the facts and circumstances of the case and in law, the Ld. AO/DRP have erred in treating the revenue of Rs. 32,51,25,441/- pertaining to outside India operations as taxable revenue of the assessee in India without correctly appreciating the facts as brought out before him and by grossly misinterpreting the clauses of the contract.

6. That on the facts and circumstances of the case and in law, the Ld. AO/DRP have erred in bringing to tax revenue of Rs. 32,51,25,441 by placing reliance on the provisions of section 9(1)(i) and not appreciating the fact that Explanation 1(a) thereto provides that what can be brought to tax under the deeming provision is only such part of income as is reasonably attributable to the operations carried out in India.

7. That on the facts and circumstances of the case and in law, the Ld. A.O/DRP have erred in applying a deemed profit rate of 10% to the gross revenues of the assessee by taking guidance from section 44BB without appreciating the fact that the said section 44BB is a machinery provision and does not override the charging provisions of section 4 read with section 5 of the Act.

8. Without prejudice, on the facts and circumstances of the case the direction of the DRP are cryptic, laconic, suffers from lack of reasoning and the order of the DRP containing such directions is not a speaking order, and therefore deserves to be set aside.

8.1. That the Hon'ble DRP has failed to analyze the nature of activity of the assessee as enshrined in the relevant contract with Oil and Natural Gas Corporation Limited ('ONGC') nor has examined the objection of the assessee in the light of the relevant contract.

9. That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in charging interest u/s 234-D.

10. That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating

penalty proceedings u/s 271B and 271(1)(c) of the Act."

4. The issues involved are common for the A.Y. 2008-09 and A.Y. 2009-10.

5. The assessee is a foreign company incorporated under the laws of UAE. During the year under consideration, it was engaged in a contract with ONGC for replacement of Well fire shut down Panels at offshore platform MH and NH on a turnkey basis. For the Assessment Year under consideration, the assessee filed a return of income on 06.11.2009 declaring Nil income. The AO passed a draft Assessment Order u/s 144C proposing to tax the income of the assessee at Rs.3,25,12,540/- as against the Nil income declared by the assessee. The addition has been made pertaining to activities of supply of material carried outside India which was alleged by the assessee as not taxable in India as there was no nexus to the PE in India. The assessee was awarded contract by ONGC for replacement of well-fire shut down panels of offshore wells MH for consideration of USD 11.443 million. During the assessment year 2008-09, the assessee raised four invoices in the months of October, November 2007 aggregating to Rs.422,34,600/- and offered 10% of the receipt u/s 44BB of the Income Tax Act, 1961.

6. However, the AO held that the scope of the work includes design, engineering and manufacturing of well-fire shutdown panels. As per the findings given by the AO during the year under consideration, the assessee has carried out activities related to design and detailed engineering which according to the AO are highly technical in nature and covered under the head "fees for technical services" under the I.T. Act. The AO

has further held that the income of the assessee is also taxable under the head profits of business due to the following reasons:

- i. The contract was negotiated and signed in India.
- ii. The pre bid and post bid surreys of the site were conducted in India.
- iii. The duration o the contract is more than three years.
- iv. The entire project is executed in India.
- v. The contract is for execution of entire project and not for isolated activities.
- vi. The activities of design engineering are based on the site survey and local conditions.
- vii. The day to day monitoring of the project is undertaken in India.
- viii. As per clause 6.1 of the contract, the contractor has inspected and examined the site.
- ix. Weekly and monthly reports and customization of the design and detailed engineering is done in India.
- x. The project is complete when ONGC issues the certificate of completion and acceptance of work.

7. In view of the above facts, the AO has concluded that the entire project is a turnkey project, hence no bifurcation can be made in income accruing inside and outside India, all of which is income accruing and arising in India u/s 5 of the I.T. Act. The AO has also held that the income from detailed engineering and design is also covered under the head fees for technical services but considering that the assessee has a Permanent Establishment in India the income is chargeable to tax u/s 44DA of the I.T. Act. However, as the assessee has not maintained any books of accounts, the AO has estimated the income at 25% of the gross receipts of Rs.4,22,34,655/-

amounting to Rs.1,05,58,664/- as against Nil income declared by the assessee for the A.Y. 2008-09. The assessee has filed objections before the Id. DRP against the addition of Rs.xxxx in its income proposed by the AO.

8. The main objection pertains to failure of the revenue to appreciate the provisions of DTAA between India and UAE. The assessee argued before the Id. DRP that:

- i. During the year under consideration, the assessee carried out activities related to design and engineering only and received revenue relating to this activity. Further, all these activities were carried out in Dubai. As none of these activities had been carried out in India the related revenues were not taxable in India u/s 5 r.w.s. 9 of the I.T. Act and under Article 5 r.w. Article 7 of the DTAA between India and UAE. In view of these facts return declaring Nil income was filed.
- ii. In view of the facts that the assessee is non-resident, hence as per Section 90(2), the provisions of DTAA have to be applied.
- iii. The AO erred in invoking the provisions of Section 44DA without examining Article 5, 7 and Article 22 of India-UAE DTAA.

9. After considering the arguments of the assessee, the Id. DRP held that the PE of the assessee came into existence during the assessment year as the assessee received amounts during the year. The contract was granted on 22.08.2007 and signed on 10.09.2007. The employees of the assessee conducted post bid survey for 5 days in November and 14 days in December. This sums up that the activities are carried by the assessee in India. The arguments that since the first shipment

arrived in May 2008 and so the PE was not existing in the A.Y. 2008-09 was not accepted by the Id. DRP which held that which in turn held that the assessee was to undertake a turnkey project which involves onsite surveys, designing & planning prior to procurement of material and installation and the first visit of the employees of the assessee should be considered for determination of the PE and if this is taken into consideration, it can be said that the PE has commenced in the A.Y. 2008-09.

10. Extensive arguments have been taken place by both the parties.

Culling the relevant facts:

11. During the hearing before us, the Id. AR argued that all the engineering designs were prepared entirely at assessee's specialties outside India and send directly to ONGC from UAE and also the amounts were remitted directly to UAE by ONGC. The same have been mentioned at Volume-III page nos. 230 to 251. We have gone through the same and find that the correspondence between ONGC and Sulaiman Petrotech, UAE. Similarly, paper book Volume-III page no. 180 to 182 reveal release of payment to UAE. Keeping in view, the supply of materials, the designs conducted, the date of invoices, list of material, the presence of employees, we come to a conclusion that the Id. DRP erred in apportioning 10% to gross receipts as taxable income as provisions of 44BB do not override the provisions of Section 4 and Section 5.

12. The appeal of the assessee for A.Y. 2008-09 is allowed.

13. With regard to the A.Y. 2009-10, we hold that the same principles/ratio would be applied. As per the record and

discussion above, there is no PE before 10.09.2007. The AO is hereby directed to apportion the profits, if any, attributable to the PE pertaining to the supply of well-fire shutdown panels undertaken in India.

14. In the result, both the appeals of the assessee are allowed for statistical purpose.

Order Pronounced in the Open Court on 07/12/2021.

Sd/-

(Amit Shukla)
Judicial Member

Dated: 07/12/2021

Subodh Kumar, Sr. PS

Copy forwarded to:

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

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR