IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI KUL BHARAT, JUDICIAL MEMBER

Stay Appln. No.100/Del/2023
(in ITA No.521/Del./2023)
(ASSESSMENT YEAR : 2020-21)

in / and

ITA No.521/Del./2023
(ASSESSMENT YEAR : 2020-21)

Baker Hughes Energy Technologies UK Ltd., Soneywood Park North, Dyee, Aberdeen, UK. **(PAN : AAHCG6037F)**	vs.	ACIT, Circle 1(1)(2), International Taxation,
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Sachit Jolly, Advocate
Shri Soham Dua, Advocate
Ms. Disha Jham, Advocate
REVENUE BY : Shri Vijay Vasanta, CIT DR

Date of Hearing : 29.05.2023
Date of Order : 06.06.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

This appeal filed by the assessee is directed against the order of Assessing Officer passed pursuant to the directions of the Dispute Resolution Panel (DRP) for the assessment year 2020-21.

2. The grounds of appeal taken by the assessee read as under :-

"1. That the Assessing Officer ("AO") erred on facts and in law in computing the income of the Appellant for the relevant Assessment Year 'AY") at Rs 144.78.05.266/- as against income of Rs. 83,91,03,650/- returned by the Appellant.

2. That the order dated 16.12.2022 issued by Dispute Resolution Panel does not bear mandatory Document Identification Number ("DIN") in the body of the order and therefore, said order and the consequent final assessment order dated 25.01.2023 are void ab initio.

3. That on the facts and circumstances of the case, the AO erred in holding that the Appellant has a permanent establishment ("PE") in India under the India-UK Double Taxation Avoidance Treaty 'DTAA").

4. That on the facts and circumstances of the case, the AO erred in mechanically holding the Appellant has a PE without specifying the relevant provision of Article 5 under which PE is created and without specifying how conditions for existence of PE are satisfied.

5. That on the facts and circumstance of the case. after holding the issue of PE is an academic Issue. the DRP erred in not appreciating that in the absence of a PE, Section 4488 of the Act doesn't apply.

6.

7. That on the facts and circumstances of the case, the AO and the DRP erred in bringing to tax income from supply of goods and equipment to ONGC in relation to contract no. EOA/MM/SURF-SPS/K07NL 17002 dated 05.1 1.2018, without appreciating that no part of manufacture or sales function had taken place in India.

8. That on the facts and circumstances of the case, the AO erred in holding that the other consortium members responsible for rendering services/supplying material to ONGC under the contract dated 05.11.2018 are working on behalf of the Appellant without appreciating that the scope of work in case of each consortium member was distinctly defined and the scope

of work of the Appellant was restricted to supply of sub-sea production system components including subsea trees, manifolds and subsea and topside control system.

9. That on the facts and circumstances of the case, the AO and the DRP erred in not establishing how the profits from sale of goods and equipment was attributable to the alleged PE of the Appellant in India.

10. That on the facts and circumstances of the case, the AO and the DRP erred in making an addition of Rs.60,87,01,615/- under Section 44BB(1) of the Act towards profits and gains of business or profession representing 10% of total contract revenue of Rs.6,08,70,16,150/- without appreciating that the said provision does not apply to sale of goods and equipment.

11. That on the facts and circumstances of the case, the AO and the DRP erred in not appreciating that the project office of the Appellant has already been compensated on an arm's length basis and no further attribution was required to be made in the hands of the alleged PE of the Appellant in India.

12. Without prejudice to the above, on the facts and circumstances of the case, the AO and the DRP erred in facts and circumstances of the case in not allowing the deduction of arm's length remuneration which has already been offered to tax in the hands of the Appellant's project office in India while calculating the total assessed income of the Appellant during the instant year under consideration.

13. Without prejudice to the above, on the facts and circumstances of the case, the AO and the DRP erred in not applying the attribution of 1% of sales as profits attributable to the alleged PE as prescribed under Circular No.1767 dated ° 1.07.1987 issued by the CBDT.

14. That on the facts and circumstances of the case, the AO erred in the passing the Final Assessment Order based on several factually incorrect findings, despite specific directions in this regard of the DRP in para 3.2.10 of the order dated 16.12.2022 to verify the factual inaccuracies and without taking into consideration the submissions of the Appellant.

15. That on the facts and circumstances of the case, the order passed by the DRP is also perverse given the fact despite its clear directions to the AO to verify facts, the DRP has itself relied on the very same facts for upholding application of Section 44BB of the Act.

16. That on the facts and circumstances of the case, the AO has erred in adding amount of Rs.8,22,808/- to the tax payable alleging that the refund has already been granted to the Appellant. however, neither such refund has been issued to the Appellant till date nor there was any demand earlier for adjustment of refunds.

17. That on the facts and circumstances of the case, the AO erred in initiating penalty under Section 270A of the Act."

3. The assessee, Baker Hughes Energy Technology UK Limited, is a company incorporated in, and a tax resident of, United Kingdom (UK). It is a part of Baker Hughes Group of companies. In this case, the return of income for AY 2020-21 was e-filed on 31.03.2021 declaring a total income of Rs.83,91,03,650/- and later on filed revised return of income on 20.03.2022 at Rs.2,35,640/-. The assessee along with four other consortium members was awarded a contract by ONGC on 05.11.2018. It was contended before the AO that under this contract, the assessee was required to manufacture and supply subsea production system components. AO treated the same as a composite contract. It was contended by the assessee before the AO that the offshore manufacture and supply of equipment and parts to ONGC is not taxable in India since neither the assessee had a Permanent Establishment (PE) in India nor

could provisions of Section 44BB be applied to sale of equipment made from outside India. The Assessing Officer vide draft order dated 19.03.2022. held that the "consortium member is working on behalf of the Assessee Company which forms the PE of the Assessee Company". The AO further held that the assessee was also involved in survey, installation and commissioning of the equipment in India and since the payments were not bifurcable the entire receipt of the assessee was taxable in India under Section 44BB of the Act. The findings of the AO were based on information said to be provided by ONGC under Section 133(6) of the Act. Before the DRP, the assessee contended that the AO has failed to point out which consortium member and which office constituted PE of the assessee. The assessee also contended that the AO has failed to point out the nature of PE and when such PE was constituted. Without prejudice, it was also argued that Section 44BB does not apply to offshore sale of equipment. The DRP held that Section 44BB applies and the issue of PE is academic in nature. Insofar as the alternate contention of the assessee regarding non applicability of Section 44BB to offshore sales, the DRP placed reliance on the decision of the Supreme Court in ONCC vs CIT (2015) 59 Taxmann.com 1, to hold that offshore supplies are also covered within the ambit of Section 44BB.

4. Against the above order, assessee is in appeal before us. We have heard both the parties and perused the records.

5. Ld. Counsel of the assessee summarized his submissions as under:-

> "In the absence of PE, Section 44BB does not apply
>
> 7. Section 44BB is a computation provision contained in Chapter IV of the Act. It provides that notwithstanding anything contained in Sections 28 to 41 and Section 43 and 43A, 10% of the gross receipt of a non-resident engaged in the business of providing services or facilities or supplying plant and machinery on hire which is used in prospecting for or extraction of mineral oils shall be deemed to be the profits and gains of business. The section provides a presumptive taxation rate for computation of profits but does not override provision of Section 5, 9, or section 90 of the Income Tax Act. (See Sedco Forex International vs. CIT 399 ITR 1 (SC), at paras 16, 17 at pgs 15-16 of attached compilation and para 38 at pgs. 27-28 of attached compilation) [Attached]
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> 8. Reliance in this regard is also placed on the decision of the coordinate bench of the Tribunal in R&B Falcon Offshore Ltd. vs. ACIT, ITA No.389(Del)/2005, Order dated 10.09.2010, Para 11 at page 66 of attached compilation, wherein it has been held that in the absence of PE, Section 44BB has no application. Reliance in this regard is also placed on the decision DDIT vs. Mitsui & Co. 118 Taxmann.com 379 (See para 12 to 14 and 27 to 29 at pages 7-1-76 and 93-9-1 of attached compilation, respectively)
>
> 9. As a corollary, it follows that unless the Revenue is able to prove that the Appellant has a PE in India, its business profits cannot be subject to tax in India.

10. Applying the aforesaid test in the present case, there is no finding in the assessment order as to which consortium member and which office of such consortium member constitutes PE of the Appellant in India. The AO also does not point out when does the PE come into existence or how is the offshore supply of equipment attributable to the PE. Despite specific grounds being taken before the DRP, the DRP wrongly holds that the issue of the PE is academic and therefore, need not be answered. The DRP's finding are binding on the AO and therefore, in the final assessment order, the AO has held Section 44BB to be applicable dehors the existence of a PE.

11. As submitted above, the said finding of the DRP and the AO are contrary to the decision of the Hon'ble Supreme Court in Sedco Forex(supra) as well as decisions of this Tribunal in R&B Falcon Offshore Ltd. (supra) and Mitsui (supra).

12. On this ground alone the appeal of the Appellant deserves to be allowed.

13. During the course of hearing the Ld. DR pointed out that the AO had in the show cause notice extracted at page 2 of the draft order, required the assessee by a fixed place PE should not be constituted in your case since there was a project office in India.

14. In this regard, it is submitted that the finding of the AO in the draft order is not that the project office constitutes PE but some alleged consortium members who is working on behalf of the appellant which form the PE. The DRP on the other hand, holds that the question of PE is academic and on that basis the final order has been issued. Therefore, merely because the AO issued a show cause asking why fixed place PE should not be constituted does not mean that the finding is to that effect.

15. In any case, the Hon'ble Supreme Court in the case of ADIT v. E-Funds (2018) 13 SCC 294, Para 16 at pg. 125 of attached compilation, has held that burden on proving the existence of PE lies on the Revenue which has not been discharged till date. In this regard it is also submitted that the Hon'ble Supreme Court in CIT v. Samsung Heavy Industries (2020) 7 SCC 347, Para 26 and 31 at pgs. 159 & 162 of attached compilation held mere existence of a project office does not give rise to a PE in India unless it is shown that the project office was engaged in carrying out actual business activities. No such evidence has been led by the AO or the Ld. DR during the course of hearing. Accordingly, no case for PE is made out.

16. The Appellant also submits that the response provided by ONGC under Section 133(6) does not state that the Appellant was involved in survey, installation. and commissioning of the equipment in India and it also does not state that the payments are not bifurcable. This finding of the AO is, therefore, perverse and not borne out of the records.

Section 44BB is not applicable to Offshore sale of equipment

17. Section 44BB(I) of the Act reads as under:

> "44BB. (1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for. or extraction or production of mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession":"

18. A bare perusal of the aforesaid section demonstrates it does not apply to sale of equipment but only to equipment provided on hire. Reliance in this regard is placed on decision of the Delhi Bench of the Tribunal in the case of Baker Hughes Asia Pacific Ltd. & Ors. v. Addl. DIT, (2014) 34 ITR (Trib.) 192 (Delhi), at para 165 at pg. 209 of attached compilation.

19. In so far as the decision of the Supreme Court of India in ONCC (supra), relied upon by the AO and DRP is concerned, the said decision dealt with provision of services and not offshore supply of equipment. A bare perusal of the nature of activities in respect of which the decision was sought (reproduced at pages 8-9, at para 13 of the decision, pg. 224-225 of attached compilation) demonstrates that none of the taxpayers therein were involved in offshore supply of equipment. Therefore, the said decision has no relevance in the present case.

20. During the course of hearing, the submission of the Ld. DR was that since this was composite contract Section 44BB is automatic. It was also contended that the Appellant had overall responsibility towards 0 GC and therefore, Section 44BB shall apply.

21. Both the aforesaid arguments are only stated to be reject. At first it is submitted that the Appellant's scope of work was restricted to manufacture and supply of the equipment. (See page 433, and 441 of Paperbook along with page 7 of the draft assessment order) Even the consideration payable to the assessee was clearly identifiable at 31.28% of the total contract value (See page 442 of Paper book)

22. The argument that 44BB shall apply to every turnkey project has been specifically rejected by the Hon'ble Supreme Court in the cases of Ishikawajma Harima Heavy Industries Co. Ltd., (2007) 3 SCC 481, Paras 14 at pgs.

238-239, 30 at pg. 245 & 86-88 at pgs. 257-258 of attached compilation; CIT v. Hyundai Heavy Industries (2007) 7 SCC 422, Para 12, 14 & 17 at pgs. 269-271 of attached compilation, wherein the Apex Court held that in the absence of a PE, offshore supply of equipment will not be taxable in India. This view has been reiterated by the Hon'ble Delhi High Court in the case of LC Cables 2010 SCC OnLine Del 4590, Paras 19 & 35 at pgs. 288-29 and 297-298 of attached compilation, respectively.

23. It is also noteworthy to point out that clause 5 of the MOU on which both the AO and Ld. DR placed heavy reliance on clearly provides that notwithstanding joint and several liability, the parties shall each be responsible and liable inter se for the performance and completion of their respective scope of work including any obligations and liabilities thereof. This understanding between the consortium members was within the knowledge of ONGC and approved by ONGC since the MOU was specifically made part of the agreement dated 5 November 2018. It, therefore, follows that the division of work had the approval of ONGC, which acknowledged that the Appellant was only required to manufacture and supply the equipment and parts from outside India.

24. Therefore, it is submitted that the findings of the AO and submissions of the Ld. DR to the effect that the Appellant was responsible for the overall contract and hence, Section 44BB applies is incorrect in law and on the facts of the present case.

6. On the other hand, ld. DR for the Revenue strongly relied upon the orders of the authorities below.

7. We have carefully considered the submissions and perused the records. We will first address the issue whether section 44BB will apply in absence of PE. Section 44BB reads as under :-

"44BB. (1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee , being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession" :

Provided that this sub-section shall not apply in a case where the provisions of section 42 or section 44D or section 44DA or section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections.

(2) The amounts referred to in sub-section (1) shall be the following, namely :—

(*a*) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India; and

(*b*) the amount received or deemed to be received in India by or on behalf of the assessee on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils outside India.

(3) Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains than the profits and gains specified in that sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee

under sub-section (3) of section 143 and determine the sum payable by, or refundable to, the assessee.

Following sub-section (4) shall be inserted after sub-section (3) of section 44BB by the Finance Act, 2023, w.e.f. 1-4-2024:

(4) Notwithstanding anything contained in sub-section (2) of section 32 and sub-section (1) of section 72, where an assessee declares profits and gains of business for any previous year in accordance with the provisions of sub-section (1), no set off of unabsorbed depreciation and brought forward loss shall be allowed to the assessee for such previous year.

Explanation.—For the purposes of this section,—

(*i*) "plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;

(*ii*) "mineral oil" includes petroleum and natural gas."

8. Thus, a reading of the above section shows that the section provides that notwithstanding anything contained in sections 28 to 41 and section 43 & 43A, 10% of the gross receipt of a non-resident engaged in the business of providing services or facilities or supplying plant & machinery on hire which is used in prospecting for or extraction of mineral oils shall be deemed to be the profits & gains of business. Thus, this section has rightly been contended by ld. Counsel of the assessee that it is a computation provision. Thus, this section provides a presumptive taxation rate for computation of profits but does not override provision of sections 5, 9 or section 90 of the Income-tax Act, 1961. Case law referred by the ld. Counsel for the assessee in this regard i.e. Sedco Forex

International vs. CIT 399 ITR 1 (SC) fully supports this proposition. In this regard, Hon'ble Supreme Court had expounded that sections 4, 5 & 9 are to be kept in mind, where assessment is done u/s 44BB. It is settled proposition that unless Revenue is able to prove that the assessee has a PE in India, its business profits cannot be subject to tax in India. This view is supported by ITAT decision in the case of R&B Falcon Offshore Ltd. In this case, ITAT clearly held that in absence of a PE, section 44BB has no application. We may refer to this ITAT order para 11 wherein it has been held as under :-

> "11. Ground nos.3, 4, 5 7 6 are in regard to computation of income and the application of presumptive scheme of taxation/s 44BB of the Act. This section provides for computation of business income on a presumptive basis at 10% of the aggregate amount paid or payable to the assessee. This machinery provision will admittedly come into operation only when the income is liable to be computed under the Act. That can be done only if the assessee has a PE in India. We have already decided the matter of PE against the revenue and in favour of the assessee. Therefore, there is no question of computation of business income in this case."

As to when does the specific PE come into existence or how the offshore supply of equipment is attributable to the PE has not been identified by the AO. Assessee's counsel has specifically mentioned that there is no finding in the assessment order as to which consortium member and which office of such consortium member constitutes PE of the assessee in India. Assessee has challenged the aforesaid finding before the DRP.

DRP did not address the issue but held that the issue of PE is academic, therefore, need not be answered. This view is quite contradictory to the above decision. As referred in Hon'ble Supreme Court decision in the case of ADIT vs. E-Funds (2018) 13 SCC 294, burden of proving the existence of PE lies on the Revenue which has not been discharged. In this view of the matter, assessee succeeds that there is no finding of PE in this case, hence section 44BB will not apply. Since the assessee succeeds on this plank, other limb of arguments is not being adjudicated as they are now of academic interest.

9. Since we have already disposed off the appeal as above, the stay application becomes infructuous.

10. In the result, the appeal filed by the assessee is allowed and the stay application is dismissed as infructuous.

Order pronounced in the open court on this 6th day of June, 2023.

Sd/-	**sd/-**
(KUL BHARAT)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 6th day of June, 2023
TS
Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.DRP.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.