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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 2258/DEL/2022 [A.Y. 2019-20]

Smiths Detection Asia Pacific Pte Ltd Unit No. 300, 3rd Floor Vardhman Crown Mall, Sector - 19 Dwarka, New Delhi	Vs.	The Dy. C.I.T International Taxation Central Circle– 3(1)(2)
PAN: AAHCS 6642 J		
(Applicant)		(Respondent)

Assessee By	:	ShriHimanshu Sinha, Adv Shri Bhuwan Dhoopar, Adv
Department By	:	Shri Sukesh Kumar Jain – CIT-DR

Date of Hearing : 15.02.2023
Date of Pronouncement : 22.02.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 18.07.2022 framed u/s 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to Assessment Year 2019-20.

2. Though the assessee has raised as many as 7 grounds of appeal, but the sum and substance of the grievance of the assessee relates to the taxability of offshore supply of equipment under the Act and taxability of offshore supply of equipment under the India-Singapore Double Taxation Avoidance Agreement [DTAA].

3. Briefly stated, the facts of the case are that the assessee company is incorporated under the laws of Singapore and is a tax resident of Singapore, within the meaning of Article 4 of the DTAA between India and Singapore. The assessee is a part of UK based business conglomerate - Smiths Group and is engaged in the business of manufacturing and trading of security equipment manufacturing and trading of security equipment.

4. The assessee filed its return of income on 30.11.2020 declaring total income of Rs. 3,50,02,980/- at special rates and a loss of Rs. 1,11,62,442/- and claimed exempt income of Rs. 1,04,55,60,800/- on account of supply of offshore equipments.

5. During the year under consideration, the assessee declared the following receipts in its return of income:

S. No	Payer	Nature of	Amount (in INR)
1.	Cochin International Airport Ltd.	Maintenance receipts	22,01,272/- (17,83,601/- pertained to Cochin International Airport)
2.	Smiths Detection Systems Pvt Ltd (SDS)	Royalty/Fee for Technical Services	35,00,313/-
3.	Airport Authority of India (AAI)	Offshore supply of equipment	97,80,42,736/-
4.	Chandigarh International Airport Ltd. (CIAL)	Offshore supply of equipment	6,75,18,064/-
5.	Canara Bank	Interest on Fixed Deposits (FDs)	62,94,461/-

6. During the course of scrutiny assessment proceedings, the assessee itself submitted that it has a Permanent Establishment [PE] in existence in India with respect to contract with CIAL and accordingly, the Assessing Officer was of the opinion that once a PE has been established for foreign entity, there is no need to establish the PE again.

7. The Assessing Officer was further of the view that the taxation of business income of the non-resident is ascertained as per source rules under the domestic provisions r.w. relevant Article of the DTAA.

8. Referring to various financial statements furnished by the assessee for the relevant period, the Assessing Officer noticed that the assessee company also carries out similar business in other countries. Therefore, the operating margin shown by the assessee company itself from similar businesses across the world could be taken as the profit similar to the Arms length profit margin.

9. Applying the said ratio, the Assessing Officer computed the total profit to be attributed at Rs. 10,73,79,094/-.

10. Proceeding further, the Assessing Officer noticed that as per Form 26AS, the assessee has received interest income of Rs. 71,51,535/- from Canara Bank. However, interest of Rs. 62,94,461/- has been declared by the assessee. The Assessing Officer, accordingly, made addition of Rs. 8,57,074/- and concluded the assessment proceedings.

11. Objections raised before the DRP were of no avail.

12. Before us, the ld. counsel for the assessee vehemently stated that the assessee's branch office has no role to play in the execution of contracts pertaining to AAI and CIAL. It is the say of the ld. counsel that the role of branch office was limited to maintenance of CIAL.

13. The ld. counsel for the assessee further stated that the assessee does not have a PE in India in relation to off shore supply of equipment. The ld. counsel for the assessee pointed out that the transaction involved in the present case is one, akin to export of goods from outside of India where the contract for supply of goods was entered outside of India and the sale was also affected outside of India and title to the property in the equipment passed outside of India.

14. Strong reliance was placed on the decision of the Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Limited 288 ITR 408 and Hyundai Heavy Industries Co. Ltd 291 ITR 482.

15. Per contra, the ld. DR strongly supported the findings of the Assessing Officer/DRP. Referring to the remand report submitted by

the Assessing Officer, the ld. DR pointed out that via communication letter written by the assessee company to the CIAL dated 22.08.2018 and communication addressed to the AAI, the assessee on its own accord, divided the scope of work awarded to it into two components – comprising of supply of equipments and the other being installation, testing, commissioning and comprehensive annual maintenance.

16. The ld. DR vehemently stated that the assessee has assigned the aspect related to supply of equipment to itself and the other component of work i.e, installation, testing, commissioning, AMC has been assigned to the subsidiary of the assessee in India i.e. Smith Detection Systems Pvt Ltd.

17. The ld. DR further stated that suo moto bifurcation by the assessee will not change the colour of transaction and the attribution of profit by the Assessing Officer /DRP cannot be faulted with.

18. We have given thoughtful consideration to the orders of the authorities below and have duly considered the judicial decisions relied upon by the ld. counsel for the assessee and relevant

documentary evidences brought on record in light of Rule 18(6) of the ITAT Rules.

19. The core issue which needs to be addressed at the outset is to what extent the Force of Attraction Rule apply in the case of off shore supply/sales of goods/merchandise.

20. The Hon'ble Supreme Court in the case of Hyundai Heavy Industries Co. [supra] had the occasion to address such issue. The relevant observations of the Hon'ble Supreme Court read as under:

> ***"The attraction rule implies that when an enterprise (GE) sets up a PE in another country, it brings itself within the fiscal jurisdiction of that another country to such a degree that such another country can tax all profits that the GE derives from the sources country-whether though PE or not. It is the act of setting out a PE which triggers the taxability of transactions in the source State. Therefore, unless the PE is set up, the question of taxability does not arise-Whether the transactions are direct or they are through the PE. In the case of a Turnkey Project, the PE is set up at the installation stage while the entire Turnkey Project, including the sale of equipment, is finalized before the installation stage. The setting up of PE, in such a case, is a stage subsequent to the conclusion of the contract. It is as a result of the sale of equipment that the installation PE comes into existence. However, this is not an absolute rule. In the present case, there was no allegation made by the Department that the***

PE came into existence even before the sale took place outside India. Similarly, in the present case, there was no allegation made by the Department. that the price at which ONGC was billed/invoiced by the assessee for supply of fabricated platforms included any element for services rendered by the PE. In the present case, we are concerned with assessment years 1987-88 and 1988-89. Therefore, we are not inclined to remit the matter to the adjudicating authority. We reiterate, in the circumstances, not all the profits of the assessee company from its business connection in India (PE) would be taxable in India, but only so much of profits having economic nexus with PE in India would be taxable in India. To this extent, we find no infirmity in the impugned judgment of the Tribunal. Accordingly, we are of the view that the Tribunal was right in holding that profits attributable to the Korean Operations was not taxable in view of Article 7 of CADT."

21. In light of the aforementioned findings of the Hon'ble Supreme Court [supra], we find that the facts of the case in hand are also identical to the facts of the case considered by the Hon'ble Supreme Court.

22. Similarly, in so far as turnkey project or composite contract having different severable parts are concerned, the Hon'ble Supreme Court addressed the issue in the case of Ishikawajima Harima Heavy Industries Limited [supra]. The relevant findings of the Hon'ble Supreme Court read as under:

"68. In cases such as this, where different severable parts of the composite contract is performed in different places, the principle of apportionment can be applied, to determine which fiscal jurisdiction can tax that particular part of the transaction. This principle helps determine, where the territorial jurisdiction of a particular state lies, to determine its capacity to tax an event. Applying it to composite transactions which have some operations in one territory and some in others, is essential to determine the taxability of various operations.

XXXXX

XXXXX

79. We, therefore, hold as under :

Re : Offshore Supply :

(1) That only such part of the income, as is attributable to the operations carried out in India can be taxed in India.

(2) Since all parts of the transaction in question, i.e. the transfer of property in goods as well as the payment, were carried on outside the Indian soil, the transaction could not have been taxed in India. (3) The principle of apportionment, wherein the territorial jurisdiction of a particular state determines its capacity to tax an event, has to be followed.

(4) The fact that the contract was signed in India is of no material consequence, since all activities in connection with the offshore supply were outside India, and therefore cannot be deemed to accrue or arise in the country.

(5) There exists a distinction between a business connection and a permanent establishment. As the permanent establishment cannot be said to be involved in the transaction, the aforementioned provision will have no application. The permanent establishment cannot be equated to a business connection, since the former is for the purpose of assessment of income of a non-resident under a Double Taxation Avoidance Agreement, and the latter is for the application of Section 9 of the Income Tax Act.

(6) Clause (a) of Explanation 1 to S. 9(1)(i) states that only such part of the income as is attributable to the operations carried out in India, are taxable in India.

(7) The existence of a permanent establishment would not constitute sufficient 'business connection', and the permanent establishment would be the taxable entity. The fiscal jurisdiction of a country would not extend to the taxing entire income attributable to the permanent establishment.

(8) There exists a difference between the existence of a business connection and the income accruing or arising out of such business connection.

(9) Paragraph 6 of the Protocol to the DTAA is not applicable, because, for the profits to be 'attributable directly or indirectly', the permanent establishment must be involved in the activity giving rise to the profits."

23. Facts of the above decisions of the Hon'ble Supreme Court [supra] squarely apply to the facts of the case in hand also. Turnkey project was split into two parts – as per break-up given at pages 339, 340 and 341 of the Paper Book and payments have also been made by

AAI and CIAL separately for off shore supply and installation and commissioning. Therefore, the allegation of ht ld. DR that the assessee suo moto bifurcated the contract does not hold any water as other parties also concurred at the beginning itself and therefore, made separate payments.

24. Considering the facts of the case in totality in light of two above decisions of the Hon'ble Supreme Court [supra] discussed elsewhere, we do not find any justification in attribution of profit on off shore sale of equipment and direct the Assessing Officer to delete the impugned addition. This grievance alongwith with all its sub grounds is allowed.

25. The next grievance relates to the addition of interest on fixed deposits amounting to Rs. 8,57,074/-.

26. The ld. counsel for the assessee vehemently stated that the assessee misplaced the fixed deposits and being capital assets, have written off the same. Therefore there is no question of earning any interest income.

27. We are of the considered view that this contention of the ld. counsel for the assessee is not only illogical, but also unacceptable.

The Canara Bank in Form No. 26AS has acknowledged the Fixed Deposits with it and has credited interest by deducting tax at source. Even if the Fixed Deposits are misplaced, the assessee can approach the Canara Bank and ask for duplicate Fixed Deposits. We do not find any error or infirmity in the addition made by the Assessing Officer and the same is upheld.

28. In the result, the appeal of the assessee in ITA No. 2258/DEL/2022 is partly allowed.

The order is pronounced in the open court on 22.02.2023.

Sd/-	**Sd/-**
[ANUBHAV SHARMA]	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 22 February, 2023.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi