

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH : 'C', NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA.No.5341/Del/2011  
Assessment Year 2008-2009

Global Construction Mauritius Services Limited. PAN AACCG5102E C/o. S.R. Batliboi & Co. 6 <sup>th</sup> Floor, HT House, 18-20, Kasturba Gandhi Marg, New Delhi – 110 001.	vs.	The Asst. Director of Income Tax (International Taxation) Dehradun.
Appellant		Respondent

Assessee by :	Ms. Ananya Kapoor for Shri Salil Kapoor, Advocate
Revenue by :	Shri A.K. Yadav, Sr. D.R.

Date of Hearing :	14.08.2018
Date of Pronouncement :	04.09.2018

**ORDER**

**PER BHAVNESH SAINI, JM**

This appeal by Assessee has been directed against  
the Order of the Assistant Director of Income Tax

(International Taxation), Dehradun, Dated 12.10.2011 under section 143(3)/144C(13) of the Income Tax Act, 1961, for the A.Y. 2008-2009 passed in pursuance of directions issued by Disputes Resolution Panel-II (in short “DRP”), New Delhi, Dated 29.09.2011, on the following grounds :

*“On the facts and the circumstances of the case and in law, the learned Assessing Officer, based on the directions of DRP;*

- 1. Erred in assessing total income at Rs.10,823,460/- as against NIL returned income;*
- 2. Erred in holding that the Appellant has a fixed place of business in India and hence, constitutes a Permanent Establishment (‘PE’) in India, without appreciating that appellant does not have a PE in India in accordance with Article 5(2)(i) of the India - Mauritius Double Taxation Avoidance Agreement and therefore the income from these contracts will not be liable to tax in India;*

3. Erred in calculating the total tax payable at Rs.6,326,825 after including an amount of Rs.1,151,470 towards refund already paid disregarding the fact that no refund was actually received by the Appellant;
4. Erred in levying interest under section 234D of the Act disregarding the fact that no refund was actually received by the Appellant;
5. Erred in levying interest under section 234B of the Act disregarding the fact that the Appellant is a non-resident and its entire revenues/receipts are subject to tax withholding at source in India under section 195 of the Act and the Appellant is not liable to pay advance tax in respect of such revenues.

*On the facts and the circumstances of the case and in law, the learned Assessing Officer*

6. Erred in initiating penalty proceedings under section 271B of the Act disregarding the fact that in the

*absence of taxable income in India under the provisions of the India Mauritius Tax Treaty, GCMSL was under a bonafide belief that books of accounts are not required to be maintain in India and consequently, GCMSL is not required to get audit of accounts undertaken as prescribed under section 44AB of the Act.”*

2. Briefly the facts of the case are that assessee filed e-return of income declaring NIL income. The case was selected for scrutiny. The A.O. passed the draft assessment order dated 31.12.2010 on total income of Rs.10,82,34,592/- to be taxed @ 15% as per Article 12 of Indo-Mauritius DTAA plus chargeable interest as per Law. The assessee filed objections before DRP against the draft order raising the objections for assessment of the income at Rs.10.82 crores, holding P.E. in India and for direction to apply Section 44BB of the I.T. Act, taxability of assessee's income as "Royalty" and treating the assessee's income as 'fees for technical services'. The DRP vide

order dated 29.12.2011 directed that there exists P.E. in India and assessee's income is taxable in India. This objection was rejected. The A.O. was directed to tax the income of the assessee at the rates prescribed under section 44BB of the I.T. Act. The A.O. as per the directions of the DRP computed the profit of the assessee @ 10% and assessed the income at Rs.1,08,23,460/-. The A.O. also directed to charge interest under section 234B and 234D of the I.T. Act. The penalty proceedings were also initiated under sections 271(1)(c) and 271B of the I.T. Act, 1961, separately.

3. We have heard the Learned Representatives of both the parties.

4. Learned Counsel for the Assessee filed letter dated 14.08.2018 submitting therein that assessee did not press Ground Nos.1, 2 and 5 of the appeal noted above. It is also stated that assessee has a strong case on merits but even if assessee succeeds before the Tribunal, the Department may file an appeal before the Hon'ble High Court and assessee has

to face protected litigation. It is also stated that since assessee does not have any operations in India since the year 2008, therefore, there is an undue hardship to the assessee both financially and administratively on account of ongoing cost of litigation. Learned Counsel for the Assessee, therefore, submitted that assessee in order to buy peace of mind would not like to press Ground Nos. 1, 2 and 5 of the appeal. In view of the above submissions of the Learned Counsel for the Assessee, ground Nos. 1, 2, 5 of the appeal of assessee are dismissed as not pressed. Letter of Assessee's Counsel dated 14.08.2018 is placed on record.

5. On ground Nos.3 and 4 with regard to calculation of the tax payable by the assessee, Learned Counsel for the Assessee prayed that the same may be restored to the file of A.O. for verification. The demand notice under section 156 attached with the assessment order shows net tax payable by the assessee at Rs.63,26,825/-. The A.O. in the computation has added refund already paid of Rs.11,51,470/-. Learned

Counsel for the Assessee submitted that the amount of refund have been wrongly added as no refund was actually received by the assessee and it would require verification at the end of the A.O. It is also submitted that it would have impact on calculation of interest under section 234D of the I.T. Act. Ld. D.R. did not have objection for verification of the same at the level of the A.O. In view of the above, we set aside the Order of the A.O. and restore the matter in issue on Ground Nos. 3 and 4 above to the file of A.O. with a direction to verify the claim of assessee from the record and pass consequential order by giving reasonable, sufficient opportunity of being heard to the assessee. Ground Nos. 3 and 4 of the appeal of Assessee are allowed for statistical purposes.

6. On ground No.6, assessee challenged initiation of penalty proceedings under section 271B of the I.T. Act which is separate and independent proceedings and as such, no interference is called for. Ground No.6 is dismissed.

7. In the result, appeal of assessee is allowed partly for statistical purposes as noted above.

Order pronounced in the open court.

Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Sd/-  
(BHAVNESH SAINI)  
JUDICIAL MEMBER

Delhi, Dated 04<sup>th</sup> September, 2018

VBP/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT C-Bench, Delhi
6. Guard File

//By Order//

Asst. Registrar : ITAT : Delhi Benches :  
Delhi.