

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI****BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR U.S., JUDICIAL MEMBER****I.T.A. No. 2734 /Del/2017 (A.Y 2011-12)**

DCIT (International Taxation) Circle-Gurgaon, Room No. 709, 7 th Floor, HSIIDC Building, Udyog Vihar, Phase-V, Gurgaon (APPELLANT)	Vs	Aecom Asia Company Ltd. 9 th Floor, Infinity Tower-C DLF Cyber City, DLF Phase-II, Gurgaon PAN No. AAFCM9853P (RESPONDENT)
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Appellant by	Sh. Vishal Kalra & Sh. S. S. Tomar, Advs
Respondent by	Sh. Sanjay Kumar, Sr. DR

Date of Hearing	21.12.2022
Date of Pronouncement	03.01.2023

ORDER**PER YOGESH KUMAR U.S., JM**

This appeal is filed by the Revenue against the order of the Id. Commissioner of Income Tax (Appeals) -43, Minto Road, New Delhi [hereinafter referred to CIT (Appeals) dated 06/02/2017 for assessment year 2011-12.

2. The grounds of appeal are as under:-

"1. Whether, on the facts and in the circumstances of the case, the Id.CIT(A) erred in deleting the addition of Rs.3,38,96,437/- (50% of Rs.6,77,92,874/-) made under section-44DA of the Income Tax Act, 1961, thereby dismissing the AO's stand that the income of Rs.6,77,92,874/- disclosed by the assessee as "Oversea Consultancy Income" and offered on

gross basis as FTS Income, is normal business and professional income u/s 44DA being effectively connected to the PE/Business Connection of the assessee.”

3. Brief facts of the case are that, the Aecom Asia Company Ltd. is a tax resident of Hongkong having its registered office at Hongkong. The Company is a provider of technical and Management Services for Engineering Solutions throughout the world. It provides fully integrated engineering, design and programme management service for a broad range of markets including infrastructure building etc. During the year under consideration, the assessee had a Project Office ('PO') in India for performing certain services in connection with two projects namely Chennai Metro Rail Project Ltd. and Kolkata East West Rail Project. The assessee rendered certain services from India and remaining service were rendered by overseas staff from Hongkong earned from such services rendered from Hongkong has been treated as overseas consultancy income ('OCI') by the assessee chargeable to tax at 10% as Fees for Technical Services ('FTS') in terms of Section 115A of the Act. The assessee filed its return of income for the year under consideration declaring total taxable income (including income taxable at special rate as per Section 115A of the Act) of Rs. 286,745,096/- and claim refund of Rs. 9,533,840/-. As per the tax computation for the year under consideration, the assessee earned the following income:-

Particulars	Income earned (Rs.)	Tax payable (including applicable surcharge and education cess) (Rs)
<i>Business Income-taxed at normal rates</i>	72,251,764/-	30,511,919/-
<i>Fee for technical services referred to as Overseas Consultancy Income-taxed at special rates as per Section 115A of the Act.</i>	45,573,567	4,811,430/-
TOTAL	286,745,096/-	35,323,349/-

4. The assessment order came to be passed u/s 143(3) read with Section 144C (3) of the Act on 25/05/2015 making an addition of Rs. 33,896,437/- to the return of income treating 50% of the income earned as OCI the chargeable to tax at 40% on net income basis in following manners:-

“ In the case of the assessee, since the entire contracts are effectively connected to the PE/Business Connection, any services rendered under these contracts even though rendered from outside India are effectively connected to such PE/Business Connection. In the present case, since AECOM Asia Company Limited is receiving FTS from India for carrying out services in relation to agreements for which PO has been established, it can be said that such FTS are effectively connected to PE/business connection in India and therefore, should be taxed as per section 44DA of the Act.

It is also important to note that in the present case, such PE/business connection (i.e. P.O.) was already in existence prior to current assessment year and therefore, it has an active role in earning such FTS.

8. The income of Rs. 67792874/- (disclosed as FTS in the return from Chennai Metro Rail Project and Kolkata Metro Rail Project) is now assessed as income from business and profession. This is the income that has been offered to tax as FS @10% u/s 115A in the return of income. Since the assessee has itself disclosed the amount of Rs. 67792874 /- as FTS from India, the whole of this amount is found attributable to the operations carried out in India for the purposes of assessing income. The assessee has not provided the details of the expenditure incurred in connection with FTS and in view of the same this income cannot be definitely ascertained. Hence, Rule 10 of the Income Tax Rule is invoked to estimate this income of the assessee. This income of the assessee is assessed after an allowance of 50% as expenditure to the assessee. The

income of the assessee shall be enhanced by an amount of Rs. 88896487 (50% of 677928741-) to be taxed @ 40%. Penalty proceeding u/s 271(l)(c) for furnishing inaccurate particulars of this income is initiated.

9. *A draft assessment order on the above lines was passed on 11-03-2015 and forwarded to the assessee on 16.03.2015. The assessee has not submitted any reply regarding filing of objection before Hon'ble DRP. Therefore, the assessment is completed in this case on the basis of the draft order itself."*

5. Aggrieved by the assessment order dated 25/05/2015, the assessee has preferred an appeal before the Ld.CIT(A) and the Ld.CIT(A) vide order dated 06/02/2017 allowed the appeal filed by the assessee by deleting the addition of Rs. 3,38,96,437/- (50% of Rs. 6,77,92,874/-) made u/s 44DA of the Act whereby negated the stand of the A.O that income of Rs. 6,77,92,874/- disclosed by the assessee as "Overseas Consultancy Income" and offered on gross basis of FTS income is normal business and profession income u/s 44DA being effectively connect to the PE/ business collection of the assessee.

6. Aggrieved by the order of the Ld.CIT(A) dated 06/02/2017 the Revenue has preferred the present appeal.

7. The Ld. Counsel for the assessee at the outset submitted that the similar additions have been made for the Assessment Year 2010-11 which have been deleted by the Ld.CIT(A) and the said order of the CIT(A) has been affirmed by the Co-ordinate Bench of the Tribunal in ITA No. 952/Del/2017 c/w C.O No. 46/Del/2020 (Assessment Year 2010-11) vide order dated 20/10/2022 and submitted that the Department has raised the similar grounds in the present

appeal, therefore submitted that, the present appeal of the Revenue is also deserves to be dismissed by following the principles of consistency.

8. The Ld. DR has not disputed the above facts and not produced any contrary judicial pronouncements.

9. We have heard the parties perused the material available on record and gave our thoughtful consideration. The Coordinate Bench of the Tribunal while dealing with the similar issues for the Assessment Year 2010-11 in Assessee's own case held as under:-

“15. Heard rival submissions perused orders of the authorities below. The issue in appeal has been dealt with by the ld. CIT (Appeals) considering the evidences and submissions of the assessee and following the judgements of the Tribunal of the coordinate bench it has been held that the services rendered by the overseas employees of home office of the assessee from Hong Kong for the activities performed for the project CMRL/KMRL are not effectively connected to PO/PE in India and, therefore, addition made under section 44DA of the Act is liable to be deleted observing as under:-

“6.1 I have carefully considered the facts of the case in the light of submissions filed by the appellant. The assessing officer observed that there is a little reference to the offshore services in the contract with CMRL and KMRL and therefore, questioned the delivery of services remotely from overseas. The Appellant submitted that reference of a little or elaborate reference in the contract with the customers cannot be any basis for holding that the OCI (Overseas Consultancy Income) is effectively connected with the PE. The appellant contended that the contract actually enables rendering of certain services from overseas Home Offices.

6.2 Further, assessing officer held that there is no evidence that a specific or a particular work has been done from outside India. The assessee contended that certain invoices along with the time sheets corroborating the fact of delivery of services from overseas were produced before the

assessing officer during assessment proceedings. The assessee also stated that the employees of the Appellant worked from their home country office and never visited India and the evidence was submitted to the AO that no employee of the Appellant visited India in connection with the OCI (Overseas Consultancy Income). The invoices raised further corroborate the fact that such services were performed offshore for which the Indian customer paid the Appellant. A perusal of the agreement shows that it nowhere restricts the rendering of services from outside India.

6.3 Assessing officer also made observation in the assessment order that even if the Appellant has received some inputs or services from outside India, these are also related to the project office in India as the same are performed in terms of the contract agreements. This particular observation highlights that the assessing officer has put aside doubt regarding actual performance of services from overseas and held that the receipts against the offshore services are chargeable to tax under section 44DA since the offshore services are related to the project office in India.

6.4 Appellant submitted that offshore services rendered from the Hong Kong do not have any link with the services which are rendered by the PE/PO in India. Further, neither the services rendered from overseas required any inputs from the PE in India nor does it provide any inputs to the Indian PE. The deliverables from the activities performed by the overseas employees from outside India are transferred to CMRL / KMRL on an as-is basis and is not reviewed, edited or amended.

6.5 With the above background of facts in mind, it may be relevant to examine the application of the provisions of section 44DA in this context.' As per section 44DA, where a foreign company carries on business in India through a PE in India; and the right, property or contract in respect of which the royalties or FTS are paid, is effectively connected, with such PE or fixed place of profession, then the income will be computed as income from business or profession as per the Act. The assessing officer has justified the addition based on "relation" of services to the project office whereas the provisions require the contract/right/property to be "effectively connected" as against mere "related".

6.6 The words "effectively connected" is not defined under the Act. The assessee has relied on the ITAT judgement in the case of JC- Bamford Excavators Ltd. (supra) to clarify the meaning of "effectively connected". Relevant extracts are as under:

"The phrase 'effectively connected with' has neither been defined under the Act nor the DTAA. In such a situation, it becomes crucial to understand the import of such an expression. In our considered opinion, the words 'effectively connected' are akin to 'really connected'. In the context of royalties, it is in the nature of something more than the mere possession by the PE of property or right but equal to or -a little less than the legal ownership of such property or right. But in no case the remote connection between the PE and property or right can be categorized as effectively connected.

6.7 Further, ITAT Delhi in the case of Hon'ble jurisdictional ITAT in the case of Sumitomo Corporation vs Deputy Commissioner of income-tax(114 ITD 61) wherein it has been held that merely because an entity has a PE in India, all the income accruing or arising to the non-resident shall not be taxable in India and only such income which is attributable to the PE shall be chargeable to tax in India. Further, the income producing activity should be closely connected to the PE. It may be noted that effective connection is required to tax the income as business income whereas the services are chargeable to tax on gross basis in the absence of effective connection. So, with relation to project office, the tax authority of source country is entitled to tax on gross basis. However, once the effective connection is established, it entitles the tax authority to tax on net basis in accordance with the provisions of section 44DA.

6.8 The "effective connection" comes into play if activities in order to deliver contractual obligations stand performed through project office. Since in this Case, situs of performance of the activities is outside India, the effective connection is not there with the project office. In this case, the assessee has offered the fee for technical services on gross basis and the activities conducted outside India are not effectively connected with PE in India, therefore, the addition made under Section 44DA of the I.T. Act is liable to

be deleted. In view of the discussion made above. Hence, ground of appeal is allowed.”

14. On careful examination and consideration of the findings of the ld. CIT (Appeals), the evidences placed on record by the assessee, we do not see any infirmity in the order passed by the ld. CIT (Appeal) in holding that the assessee has rightly offered the OCI as fees for technical services under the provisions of section 115A of the Act and the addition made under section 44DA of the Act is liable to be deleted. Ground raised by the Revenue is rejected.”

10. By respectfully following the order of the Coordinate Bench in Assessee's own case (supra) we do not find any merit in the grounds of appeal of the Revenue, accordingly the grounds of appeal filed by the Revenue are dismissed.

11. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the Open Court on this 03rd Day of January, 2023

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-

(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Dated: 03/01/2023
R. Naheed *

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

