IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE MS. KAVITHA RAJAGOPAL, JM AND SMT. RENU JAUHRI, AM

ITA No.4662/Mum/2023
(Assessment Year:2021-22)

Atomstroyexport C/o. Nuclear Power Corporation of India Ltd. 16, Centre 1, World Trade Centre, Cuffee Parade, Mumbai-400 005	Vs.	Dy. CIT(IT) Circle-1(1)(2), Room No. 517, 5th Floor, Air India Building, Nariman Point, Mumbai-400 021
PAN/GIR No. AAFCA 3658 N		
(**Assessee**)	:	(**Respondent**)

Assesseeby	:	Shri Nitesh Joshi
Respondent by	:	Smt. Shailja Rai

Date of Hearing	:	11.06.2024
Date of Pronouncement	:	06.09.2024

O R D E R

Per Kavitha Rajagopal, J M:

This is an appeal has been filed by the assessee against the final assessment order dated 26.10.2023 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 ('the Act'), pursuant to the direction of the Hon'ble Dispute Resolution Panel ('ld. DRP' for short), pertaining to the Assessment Year ('A.Y.' for short) 2021-22.

2. The assessee had challenged the addition of income from Offshore Supply Contracts while calculating the total income u/s.44BBB of the Act, along with the other grounds of appeal. Ground no.1 being the legal ground on limitation has not been pressed by the learned Authorised Representative (ld. AR for short) for the assessee.

3. The brief facts are that the assessee is a Joint Stock Company incorporated under the laws of Russian Federation coming under the Ministry of Russian Federation for

Atomic Energy, Moscow and is engaged in the business of setting up of power projects across the world including construction, erection of plant and machinery, testing and commissioning of power projects. The assessee had filed its return of income dated 11.03.2022, declaring total income at Rs.171,50,98,094/-. The assessee's case was selected for scrutiny and notices u/s. 143(2) and 142(1) of the Act were duly issued and served upon the assessee.

4. During the assessment proceeding, the ld. learned Assessing Officer ('ld. A.O.' for short) observed that six 1000 MW of Nuclear Power Plant units were set up at Kundankulam, Tamil Nadu by Nuclear Power Corporation of India Ltd. (NPCIL for short) as per the Agreement for Co-operation for Construction of a Nuclear Power Station entered into between Republic of India and Russian Federation, through authorized governmental bodies namely "Atomsstroyexport" (ASE), i.e., the assessee in this case and NPCIL which is a Government of India Company, who act as agencies responsible for the implementation of the nuclear power plant. The ld. A.O. further observed that the assessee company has received income from various service contracts and has been supplying equipments and materials to NPCIL for setting up of the nuclear power project as per the agreement. The assessee is said to be in receipt for the offshore supply contracts, which the assessee claims to be not liable to be taxed as per the provision of section 44BBB of the Act. The assessee has offered 10% of the income as foreign company received from NPCIL in respect of the service contract and had claimed that the offshore supply contract receipts are not taxable in India, while it had offered the income received as 'fees for technical services', royalty income @ 10% of tax prescribed in the tax treaty between India and Russia. The ld. A.O. passed the draft assessment order dated

29.12.2022 u/s. 144C(1) of the Act, proposing an addition on deemed income u/s. 44BBB of the Act and business income attributed to PE @ 30% of the profit calculated at 15% of the total offshore supply receipt along with the other additions and determined the total income at Rs.328,14,60,573/-.

5. Aggrieved the assessee filed its objection before the Hon'ble DRP who vide direction dated 25.09.2023 disposed off the objections raised by the assessee and proposed the variance. The ld. A.O. then passed the impugned assessment order dated 26.10.2023, determining the total income at Rs.515,59,03,600/-.

6. Aggrieved the assessee is in appeal before us, challenging the impugned order.

7. We have heard the rival submissions and perused the materials available on record. It is observed that the assessee has received an amount of Rs.3480,80,55,095/- on offshore supply contracts which the assessee alleges to be not taxable in India by relying on the decision of the Hon'ble Apex Court in the case of *Ishikawajima Harima Heavy Industries Co. Ltd. v. DIT* [2007] 288 ITR 408/158 Taxman 259 (SC), wherein it was held that as the offshore service contract was carried out and concluded outside India, there is no income which is deemed to accrue or arise in India as per section 9(1) of the Act and the DTAA provisions. The assessee further stated that the said receipt does not form part of income for the purpose of section 44BBB of the Act. The co-ordinate bench has also taken a consistent view in A.Ys. 2006-07 to 2015-16, in favour of the assessee.

8. Per contra, the Revenue is in appeal before the Hon'ble High Court, challenging the order of the Tribunal in assessee's case for earlier years. The ld. A.O. had distinguished the decision of the Hon'ble Apex Court in the case of *Ishikawajima Harima*

Heavy Industries Co. Ltd.(supra) and had contended that the provisions of section 44BBB of the Act is a special provision for computing profit and gains of foreign companies engaged in the business of civil construction, etc. in certain turnkey power projects, which provision came into effect from 01.04.1990 along with Circular No. 550 dated 01.01.1990 enumerating that even if some of the operations relating to supplies has taken place in India or the permanent establishment of the assessee was involved in the offshore supply, all receipts pertaining to the said project would come under the purview of section 44BBB of the Act whether the activities are carried offshore or onshore.

9. The learned Authorised Representative (ld. AR for short) for the assessee contended that the issue has been squarely covered by the decision of the Tribunal which had relied on the Hon'ble Apex Court decision in the case of *Ishikawajima Harima Heavy Industries Co. Ltd.*(supra) and stated that there are no change in facts for this assessment year and prayed that the impugned addition be deleted.

10. The learned Departmental Representative (ld. DR for short) on the other hand, raised an objection for following the earlier year's decision on the ground that the Revenue has already preferred an appeal before the Hon'ble Jurisdictional High Court and had also filed a copy of the order of the Hon'ble High Court in admitting the said appeal. The ld. DR relied on the order of the lower authorities.

11. On the above factual matrix on the case, it is evident that this issue has been consistently arising in the previous years since A.Y. 2007-08 and has been decided by the co-ordinate bench in favour of the assessee for this year and for the subsequent years. It is

also observed that there has been no change neither in the terms of the agreements nor in the nature of work carried out as per the said contract. It is trite to extract the relevant para of the decision of the Tribunal for A.Y. 2007-08, 2008-09 and 2010-11 for ease of reference:

> *"15 Therefore after analyzing the various case laws, statutory provisfonc, DTA/ provisions and contractual terms and respectfully following judgment of Hon'ble Supreme Court in Ishikawajima- Harirna Heavy Industries Limited V/s DICT (288 ITR 408),we are inclined to hold that Offshore Supply contracts were 'carried and concluded-"outside India and hence no income therefrom deemed to accrue or arise in India as per section 9(1) and DTAA provisions and accordingly, not chargeable to tax. The receipts thereof do not form part of receipts for the purpose of computational provisions of section 44BBB. Explanation-4 could not overcome the limitation imposed by Explanation-l(a) to section 9(i)(i) and hence,the impugned income do not form part of business receipts for computation of income u/s 448A8 of the Act. We held so."*

12. Thus, from the above it could be concluded that the issue in hand is squarely covered by the decision of the tribunal for earlier years and, therefore, we are of the view that the finding in the earlier years will hold good for the impugned year where there is no change in the circumstances in whatsoever manner may be. Therefore, ground nos. 2 to 4 raised by the assessee is hereby allowed.

13. As we have already held the receipt from Offshore Supply Contracts are not liable to be taxed in India, the other grounds of appeal raised by the assessee requires no further adjudication.

14. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 06.09.2024.

Sd/-	Sd/-
(Renu Jauhri) Accountant Member	(Kavitha Rajagopal) Judicial Member

Mumbai; Dated :06.09.2024
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT- concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai