IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER &
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

I.T.A. Nos.680&681/Ahd/2019
(Assessment Years: 2013-14 & 2014-15)

M/s Skaps Industries India Pvt. Ltd., (Mundra SEZ Unit-II), Plot No. 10 Road, 12F, Sector Mundra Integrated Textile, Nr. Shantipath, Mundra SEZ, Mundra Gujarat-370421	Vs.	Income Tax Officer (International Taxation), Ahmedabad-2
[PAN No.AADCP2779D]		
(Appellant)	..	**(Respondent)**

Appellant by :	Shri S. N. Soparkar, Sr. Adv. & Shri Parin Shah, A.R.
Respondent by:	Shri Vipul Chavda, Sr. D.R.

Date of Hearing	27.09.2024
Date of Pronouncement	18.12.2024

O R D E R

PER SIDDHARTHA NAUTIYAL - JUDICIAL MEMBER:

Both appeals have been filed by the Assessee against the order passed by the Ld. Commissioner of Income Tax (Appeals)-13, (in short "Ld. CIT(A)"), Ahmedabad vide orders dated 28.02.2019 passed for A.Ys. 2013-14 & 2014-15. Since common facts and issues for consideration are involved in both the years under consideration before us, both the appeals filed by the assessee for the aforesaid Assessment Years are being taken up together.

2. The assessee raised the following grounds of appeal:

ITA No. 680/Ahd/2019 (A.Y. 2013-14)

"1. Both the lower authorities erred in law and on facts in holding that payment to "TEEMS ELECTRIC CO., USA" is taxable in India ignoring submission and documentary evidence.

2. Both the lower authorities ought to have considered fact that as payee is not liable for taxation in India under domestic law and accordingly there shall be no obligation for deduction of TDS on appellant (Payer).

3. Alternatively, both lower authorities ought to have considered fact that payment is not taxable as per DTAA and accordingly there is no default on the part of the Appellant in not deducting tax.

4. In any case both the lower authorities erred in not restricting the alleged amount of default only to the payment for services received by the Appellant."

ITA No. 681/Ahd/2019 (A.Y. 2014-15)

"1. Both the lower authorities erred in law and on facts in holding that payment to "TEEMS ELECTRIC CO., USA" is taxable in India ignoring submission and documentary evidence.

2. Both the lower authorities ought to have considered fact that as payee is not liable for taxation in India under domestic law and accordingly there shall be no obligation for deduction of TDS on appellant (Payer).

3. Alternatively, both lower authorities ought to have considered fact that payment is not taxable as per DTAA and accordingly there is no default on the part of the Appellant in not deducting tax.

4. In any case both the lower authorities erred in not restricting the alleged amount of default only to the payment for services received by the Appellant."

3. The brief facts of the case are that certain payments were made by the assessee company, SKAPS, to Teems Electric Co. Inc. USA during the financial years 2012-13 and 2013-14. The total remittance to Teems Electric Co. Inc. USA amounted to USD 730,478, with all payments occurring between January 2013 to July 2013. These payments were linked to three purchase orders (PO Nos. 155/1213, 156/1213, and 157/1213) issued by the assessee for services and equipment related to the installation services availed

by the assessee at Mundra plant. PO No. 155/1213 covered electrical labor services, PO No. 156/1213 covered mechanical labor, and PO No. 157/1213 was for equipment and services for the Heat Set Cabinet and Exit Section drives and controls. The issue for consideration before the TDS officer was the assessee's failure to withhold taxes on payments made to Teems Electric Co. Inc. under Section 195 of the Income-Tax Act, which requires withholding tax on payments to foreign entities if those payments are for services which are taxable in India. The TDS officer also held that the assessee was liable for withholding tax under Section 195 of the Income-tax Act and could be treated as an assessee in default for failing to deduct tax at source. Furthermore, the TDS officer levied interest under Section 201(1A) for the failure to withhold tax on the payments.

4. The assessee filed appeal against the aforesaid order before Ld. CIT(A). Ld. CIT(A) held that the payments received by Teems Electric (TEC) were business receipts and that, since TEC had a permanent establishment (PE) in India, the income from those receipts was taxable as business income in India and therefore, the taxability and consequent tax withholding requirement on such payments on the part of the assessee, would have to be determined in light of the fact whether TEC had a PE in India. Ld. CIT(A) noted that whether TEC had a PE in India would have to be considered in light of the evidence concerning the presence of TEC employees or representatives in India. During the course of appellate proceedings, the assessee submitted evidences, including submissions dated 27th August 2018, 17th May 2018, and 13th November 2018 and submitted that the determination of the taxability of the payments should be made in

TEC's assessment and not in the assessee's assessment. The assessee further submitted an AMC (Annual Maintenance Contract) with a third party, DILO Machines, to suggest that maintenance was handled by external parties. Moreover, the assessee invoked Article 16 of the India-USA DTAA, which deals with the taxation of employees' income and submitted that since the TEC employees stayed in India for **lesser than 183 days**, no tax should be levied on them. During the course of appellate proceedings, the assessee also submitted records to show that the number of man-days spent in India, which amounted to 52 days in FY 2012-13 and 109 days in FY 2013-14, and submitted that TEC did not have a PE in India. However, these submissions were not accepted by Ld. CIT(A), for several reasons. First, Ld. CIT(A) noted that the assessee had not filed an application under Section 195(2) of the Income Tax Act to determine the taxability of the payee, as mandated by the Supreme Court in *GE India Technology Centre (P.) Ltd. v. CIT*. In this case, the assessee had failed to file requisite application u/s 195 of the Act to the concerned tax officer to determine whether TEC had a PE in India, which weakened the argument of the assessee. Secondly, Ld. CIT(A) observed that the assessee's submission of Form 15CA, which includes an undertaking to pay any outstanding taxes and penalties, indicated that the assessee had a responsibility to ensure the taxability of the payments made to TEC. The argument of the assessee that the tax liability should be determined in TEC's assessment was thus rejected, as the assessee had an obligation to maintain proper documentation and to determine the withholding tax liability of TEC. Thirdly, Ld. CIT(A) noted that the AMC agreement submitted by the assessee, which was signed years after the installation of the machinery, was irrelevant, as it did not provide conclusive evidence regarding the role of third

parties in the maintenance of the non-woven lines. Fourthly, the assessee's reliance on Article 16 of the India-USA DTAA was also dismissed by Ld. CIT(A), as this Article pertains to the taxation of employees' income, not to determining whether TEC had a PE in India. Ld. CIT(A) noted that the critical issue in this case was whether TEC had a PE in India under the relevant provisions of the DTAA. Ld. CIT(A) observed that the assessee's own submissions demonstrated that TEC's employees had spent more than 120 days in India within a twelve-month period, which triggered the creation of a PE in India. According to the appellant's records, the number of man-days in India amounted to 161 days over the relevant periods. These 161 days included the time spent by TEC's personnel for installation and commissioning activities. Specifically, for Job Orders 155 and 156, which dealt with electrical and mechanical labour, TEC's employees were expected to be in India for 16 weeks (112 days), while Job Order 157 involved an additional 30 days for system start-up and commissioning activities. Payments for these activities were made starting in January 2013, with the first payment occurring shortly after the arrival of TEC's personnel in India. Ld. CIT(A) was of the view that the assessee had failed to provide evidence to contradict these facts or to demonstrate that TEC did not have a PE in India. Despite multiple opportunities provided by the CIT(A) for the assessee to submit further documentation, such as the passport copies of TEC's engineers, to prove that their stay in India was less than 120 days, the appellant did not produce any credible evidence to support their claims. Therefore, Ld. CIT(A) held that TEC had a permanent establishment in India due to the prolonged stay of its employees and the nature of the activities conducted in India. Ld. CIT(A) analyzed the taxability of the payments made

to TEC under Article 5(2)(k) of the India-USA DTAA, which applies to situations involving construction, installation, or assembly projects that last more than 120 days within any twelve-month period. Since the project undertaken by TEC in India lasted for more than 120 days, the provisions of Article 5(2)(k) established that TEC had a permanent establishment in India. Consequently, the payments made to TEC were subject to Indian tax laws. Ld. CIT(A) noted that the OECD commentary specifically states that the duration of a project plays a critical role in determining the existence of a PE. According to the OECD Commentary, a construction or installation project constitutes a PE if it lasts more than 12 months. The project's existence starts from the date the contractor begins work, including preparatory activities, and continues until the work is completed or permanently abandoned. Temporary interruptions, such as weather conditions or material shortages, do not affect the determination of the project's duration. Even if the project extends over more than one calendar year, the PE is considered to have existed from the outset, provided the 120 days duration is exceeded. This principle applies to TEC's project in India, where employees of TEC were present in India for more than the stipulated period of 120 days, even though their stay extended over two assessment years. Based on this, Ld. CIT(A) held that TEC had a PE in India under Article 5(2)(k) of the India-USA DTAA, as the project duration exceeded the 120-day threshold. The Protocol to the India-USA DTAA further clarifies that the 12-month period can extend over two taxable years, the only exception being that if the site or project continues for less than 30 days in any given year, then it would not constitute a PE in that year. Since TEC's presence in India exceeded 120 days, the PE was clearly established. As a result, the appeals for both assessment years (2013-14 and

2014-15) were dismissed, holding that TEC's income from the project was taxable in India, and Ld. CIT(A) held that the assessee was liable to withhold taxes under Section 195 of the Income Tax Act.

5. The assessee is in appeal before us against the aforesaid order passed by Ld. CIT(A) holding that the assessee has a PE in India.

6. Before us, the Counsel for the assessee submitted that the issue primarily involves the period of stay of the employees of TEEMS Electric Co., USA in India. The Counsel for the assessee submitted that TEC had given a certificate, giving specific details of employees visit in India and the number of days they had stayed India. As per the certificate issued by TEC, for A.Y. 2013-14, their period of stay was 52 days during A.Y. 2014-15, their period of stay was for 109 days. The only reason why a PE was held to exist in India was on account of double counting of period of employees, in relation to work done by these employees related to the contracts entered into between the assessee and TEC. The Counsel for the assessee submitted that a perusal of various contracts would demonstrate that these contracts were carried out at the same site and therefore, there is no question of multiple counting of period of stay of employees in India.

7. In response, the Ld. D.R. placed reliance on the observations made by Ld. CIT(A) in the appellate order.

8. We have heard the rival contentions and perused the material on record.

9. The issue for consideration before us is whether in the present facts of construction / installation permanent establishment can be said to exist looking into the facts of the instant case. In terms of Article 5(2)(k) of the India-USA Treaty construction / installation permanent establishment would come into existence in case installation / assembly or supervisory activities in connection therewith would continue in India for a period of more than 120 days in any 12 month period. The issue for consideration is whether the period of stay of the employees exceeded this threshold provided under Article 5(2)(k) of the India-USA Tax Treaty.

10. We observe that the assessee entered into three job work orders with TEC viz. Order No. 155/1213, Order No. 156/1213 and Order No. 157/1213, all orders having been signed on 20.11.2012. Order No. 155/1213 required services of Electricians for New Non-Woven Line 8 at the SKAPS Plant in Mundra, Gujarat, Order No. 156/1213 required provision of services of Mechanic for installation of New Non-Woven Line 8 at SKAPS Plant in Mundra, Gujarat and Order No. 157/1213 required carrying on job work for installation of New Non-Woven Line 8 at SKAPS Plant, Mundra, Gujarat. On going through the contents of the three job works / orders, it is observed that all three job works were entered for period of 16 weeks and all work was to be carried out at the same premises i.e. at SKAPS Plant in Mundra, Gujarat. Therefore, the commencement as well as completion of the three job work orders was at the same premises i.e. SKAPS Plant in Mundra, Gujarat. What we observe from the order passed by Ld. CIT(A) is that the appellate order was passed on the presumption that the work of installation began immediately on receipt of equipment in the month of November / December

2012 (refer Page 33 of the order). However, from the submissions furnished by assessee before Ld. CIT(A), it has been submitted that the employees of TEC visited India for a period of 26 days from 05.03.2013 to 31.03.2013. The employees from TEC were on a visit to India during the period from March 5, 2013 to March 31, 2013 for A.Y. 2013-14. Before going further into facts, it would be useful to reproduce a judicial precedent which has an important bearing on the particular set of facts and issue for consideration before us. In the case of **Linklaters vs. DDIT (IT), Circle-3(2), Mumbai 106 taxmann.com 195 (Mumbai – Trib.)**, the ITAT has clarified that for the purposes of Article 5(2)(k), for the purpose of computing the period of rendering of service, the stay of employees in India on a particular day has to be taken cumulatively and not independently. That being the case, multiple counting of employees in a single day is not permissible under Article 5(2)(k). Therefore, in the instant case, we observe that from the table of chart submitted by assessee regarding period of stay in India, it is observed that the employees stayed in India during the period from March 5, 2013 to March 31, 2013 (relevant to A.Y. 2013-14) and during the period April 1, 2013 to June 7, 2013 (relevant to A.Y. 2014-15). Accordingly, keeping in view the decision of the Mumbai Tribunal referred to above, which has clarified that for the purpose of determining an Installation PE under Article 5(2)(k), the stay of employees in India on a particular date has to be taken cumulatively and not independently, and also taking into consideration the fact that Ld. CIT(A) has not disputed the dates of employee visits of TEC in India, in our view, the employees had visited India during the period 5th March, 2013, relevant to A.Y. 2013-14. We also note that it is not the case where the assessee was carrying out multiple projects at various locations in India for

which separate employees had visited India, in which case we would have to analyse how the period of commencement and completion of various projects would have to be aggregated so as to ascertain whether the employees of TEC had visited India for a period existing 120 days in a calendar year. This, however, is a case where all three job works in relation to installation of New Non-Woven Line 8 were to be carried by the employees of TEC at the same premises i.e. SKAPS Plant in Mundra, SEZ, Gujarat. Even on perusal of the details of employees visits furnished during the period for A.Y. 2013-14, relevant to A.Y. 2014-15, we observe that employees of TEC had visited India during the period 01.04.2013 to 07.06.2013 i.e. for a total period of approximately 65 days for F.Y. 2013-14, relevant to A.Y. 2014-15. Further, in the order passed by Ld. CIT(A), Ld. CIT(A) referred to letter filed by the assessee dated 17.09.2018, in which the Ld. CIT(A) took note of a certificate issued by TEC regarding visit of staff at the premises of the assessee during F.Y. 2013-14 and concluded that TEC employees had visited the premises of the assessee for a total number of days 109 man days. However, as it evident from the details of employee who had visited as per the aforesaid certificate, which was referred to by Ld. CIT(A), it is seen that these employees had visited the premises of the assessee simultaneously, and in terms of the decision of Linklaters supra there cannot be any cumulative / multiple counting of employees visiting India during the same period for the purpose of determining existence of an Installation / Construction PE of the overseas company in terms of Article 5(2)(k) of the India-USA Tax Treaty. We note that as per submission dated 17.09.2018, reproduced at Page 109 of the Paper Book submitted before us, and another submission dated 21.03.2014 reproduced at Page 21-22 of the Paper Book the period of employee visit

extends from 01.04.2013 to 07.06.2013 and therefore, even in light of these submissions, which evidently have not been disputed by the Tax Authorities, the period of stay does not exceed more than 65 man days for F.Y. 2013-14, relevant to A.Y. 2014-15. Accordingly, looking into the instant facts and in light of the ITAT ruling in Linklaters *supra*, in our considered view, TEC does not have a permanent establishment in India in terms of Article 5(2)(k) of the India-USA Tax Treaty. Further, in our considered view, the details of payment by the assessee to TEC would not have any bearing on the presumed date of commencement and conclusion of the installation activities, since the payment dates may have no relevance or bearing on the date of commencement and completion of the project. Accordingly, in light of the above facts, since we have held that TEC does not have an installation PE in India in terms of Article 5(2)(k) of the India-USA Tax Treaty, the assessee did not have an obligation to withhold taxes at source of payments made to TEC. Accordingly, we hold that the assessee was not under an obligation deducted taxes at source with respect of contractual payments made to TEC, USA.

11. In the result, the appeal of the assesee is allowed for both the assessment years.

This Order is pronounced in the Open Court on	**18/12/2024**

Sd/-	**Sd/-**
(ANNAPURNA GUPTA)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 18/12/2024
TANMAY, Sr. PS ***TRUE COPY***

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad