The Commissioner Of Income Tax - ... vs Technip France Sas on 5 February, 2024

Author: Yashwant Varma

Bench: Yashwant Varma, Purushaindra Kumar Kaurav

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ ITA 56/2023
THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appella
Through: Mr. Aseem Chawla, Sr. SC with Ms. Pratishtha Chaudha Ms. Nivedita Jha, Mr. Navee Rohila and Mr. Aditya Gupta Advs.
versus
TECHNIP FRANCE SAS
Through:

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV
ORDER

% 05.02.2024

1. Having heard Mr. Chawla, learned senior counsel appearing for the appellant and Mr. Vohra, learned senior counsel appearing on behalf of the respondent / assessee, we note that before us it has been conceded that insofar as the issues emanating from Section 9(1)(vii) read with Section 44DA of the Income Tax Act, 1961 ["Act"] are concerned, the same stands conclusively answered by the Supreme Court in its judgment rendered in Oil and Natural Gas Corporation vs. Commissioner of Income Tax & Anr. [(2015) 376 ITR 306].

2. Having gone through the detailed order which was penned by us on 22 February 2023, we note that the solitary issue which now This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/02/2024 at 20:52:36 remains pertains to Section 44BB of the Act. That provision reads as under:

"44BB. Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils.--

(1) Notwithstanding anything to the contrary contained in Sections 28 to 41 and Sections 43 and 43-A, in the case of an assessee, being a non-resident, engaged in the business of providing services, or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession:

Provided that this sub-section shall not apply in a case where the provisions of Section 42 or Section 44-D or 1295[Section 44- DA or] Section 115-A or Section 293-A apply for the purposes of computing profits or gains or any other income referred to in those sections.

(2) The amounts referred to in sub-section (1) shall be the following, namely:--

(a) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India; and

(b) the amount received or deemed to be received in India by or on behalf of the assessee on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils outside India.

[(4) Notwithstanding anything contained in sub-section (2) of Section 32 and sub-section (1) of Section 72, where an assessee declares profits and gains of business for any previous year in accordance with the provisions of sub-section (1), no set off of unabsorbed depreciation and brought forward loss shall be allowed to the assessee for such previous year.] Explanation.--For the purposes of this section,--

(i) "plant" includes ships, aircrafts, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;

(ii) "mineral oil" includes petroleum and natural gas."

3. We note that the essence of the contract was duly captured by the Income Tax Appellate Tribunal ["ITAT"] in paragraphs 19 and 20 of its order dated 26 July 2022 and it has also been noticed in paragraph 7 of the order of this Court referred to above. Paragraphs 19 and 20 are extracted below:

> "19. At this stage, we need to examine the contract entered between the assessee and RIL on 6th March, 2010, a copy of which is placed at page 132 of the paper-book. The scope of work to be undertaken by the assessee as per Exhibit-1 to the contract is as under:
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> "Company intends to carry out remedial action on well A5 due to some we related issues. The remedial works involves retrieving the installed XMT and installation of new XMT as well A5; which further entails retrieval of the jumper between the A5 XMT & PLET of A5-M3 pipeline, disconnection of the umbilical from A5 XMT and again installation of the jumper and re-stabbing of umbilical once the new XMT is installed."

20. Thus, the scope of work clearly envisages that the assessee has to render certain services in connection with the mining activity carried on in well A5 in KG Basin. Thus, once the activity carried on by the assessee falls within the expression "mining or like projects ", it goes out of the purview of FTS as defined under Explanation 2 to section 9(l)(vii) of the Act. That being the factual and legal position, the amount received by the assessee cannot be treated as FTS under section 9(l)(vii) of the Act. That being the case, the provision of the Act being more beneficial in such a scenario, as per section 90(2) of the Act, will be applicable. Therefore, there is no need for us to examine the applicability of the term 'FTS' under India -- France Tax Treaty. Thus, once the amount received by the assessee does not fall within the definition of FTS under section 9(1)(vii) of the Act, by default, section 44DD would not apply to such payment."

4. A reading thereof would clearly and in our considered opinion qualify the pith and substance test and be viewed as being inextricably linked to the primary contract as propounded by the Supreme Court in Oil and Natural Gas Corporation and the principles reiterated by the Division Bench of this Court in Director of Income Tax vs. OHM Ltd. [2012 SCC OnLine Del 6086].

5. In OHM Ltd., after noticing the relevant provisions of the Act, the Court had held thus:

> "11. We do not think that there is any error in the view taken by Authority for Advance Rulings. Basically the rule that the specific provision excludes the general provision has been applied. Section 44BB is a special provision for computing the profits and gains of a non-resident in connection with the business of providing services or facilities in connection with, or supplying plant and machinery on hire, used or to be used, in the prospecting for, or extraction or production of mineral oils

including petroleum and natural gas. Section 44DA is also a provision which applies to non- residents only. It is, however, broader and more general in nature and provides for assessment of the income of the non-resident by way of royalty or fees for technical services, where such non- resident carries on business in India through a permanent establishment situated therein or performs services from a fixed place of profession situated in India and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with the permanent establishment or fixed place of profession. Such income would be computed and assessed under the head "Business" in accordance with the provisions of the Act, subject to the condition that no deduction would be allowed in respect of any expenditure or allowance which is not wholly or exclusively incurred for the business of such permanent establishment or fixed place of profession or in respect of amounts, if any, paid by the permanent establishment to its head office or to any of its other offices. Under section 44BB, one does not find any reference to a permanent establishment in India. The type of services contemplated by the provision is more specific than what is contemplated by section 44DA. Section 44BB refers specifically to "services or facilities in connection with, or supplying plant and machinery on hire, used or to be used in the prospecting for, or extraction or production of mineral oils". Revenues earned by the non-resident from rendering such specific services are covered by section 44BB. It is a well settled rule of interpretation that if a special provision is made respecting a certain matter, that matter is excluded from the general provision under the rule which is expressed by the maxim "generalia specialibus non derogant". It is again a well-settled rule of construction that when, in an enactment two provisions exist, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This was stated to be the "rule of harmonious construction" by the Supreme Court in Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255. If as contended by the Revenue, section 44DA covers all types of services rendered by the non-resident, that would reduce section 44BB to a useless lumber or dead letter and such a result would be opposed to the very essence of the rule of harmonious construction. In South India Corporation (P) Ltd. v. Secretary, Board of Revenue, Trivandrum, AIR 1964 SC 207, it was held that a familiar approach in such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific.

12. The second proviso to sub-section (1) of section 44DA inserted by the Finance Act, 2010, with effect from April 1, 2011, makes the position clear. Simultaneously, a reference to section 44DA was inserted in the proviso to sub-section (1) of section 44BB. It should be remembered that section 44DA also requires that the non-resident or the foreign company should carry on business in India through a

permanent establishment situated therein and the right, property or contract in respect of which the royalty or fees for technical services is paid should be effectively connected with the permanent establishment. Such a requirement has not been spelt out in section 44BB ; moreover, a flat rate of 10 per cent. of the revenues received by the non-resident for the specific services rendered by it are deemed to be profits from the business chargeable to tax in India under section 44BB, whereas under section 44DA, deduction of expenditure or allowance wholly and exclusively incurred by the non-resident for the business of the permanent establishment in India and for expenditure towards reimbursement of actual expenses by the permanent establishment to its head office or to any of its other offices is allowed from the revenues received by the non-resident. Because of the different modes or methods prescribed in the two sections for computing the profits, it apparently became necessary to clarify the position by making necessary amendments. That perhaps is the reason for inserting the second proviso to sub-section (1) of section 44DA and a reference to section 44DA in the proviso below sub-section (1) of section 44BB. A careful perusal of both the provisos shows that they refer only to computation of the profits under the sections. If both the sections have to be read harmoniously and in such a manner that neither of them becomes a useless lumber then the only way in which the provisos can be given effect to is to understand them as referring only to the computation of profits, and to understand the amendments as having been inserted only to clarify the position. So understood, the proviso to sub-section (1) of section 44BB can only mean that the flat rate of 10 per cent. of the revenues cannot be deemed to be the profits of the non-resident where the services are of the type which do not fall under that section, but are more general in nature so as to fall under section 44DA. Similarly, the second proviso to sub-section (1) of section 44DA can only be interpreted to mean that where the services are general in nature and fall under the sub-section read with Explanation 2 to section 9(1)(vii) of the Act, then an assessee rendering such services as provided in section 44BB cannot claim This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/02/2024 at 20:52:37 the benefit of being assessed on the basis that 10 per cent. of the revenues will be deemed to be the profits as provided in section 44BB. In other words, the amendment made by the Finance Act, 2010, with effect from April 1, 2011, in both the sections, cannot have the effect of altering or effacing the fundamental nature of both the provisions or their respective spheres of operation or to take away the separate identity of section 44BB. We do not, therefore, see how these amendments can assist the Revenues contention in the present case, put forward by the learned senior standing counsel. We, therefore, agree with the Authority for Advance Rulings that in the present case the profits shall be computed in accordance with the provisions of section 44BB of the Act and not section 44DA.

13. In the result the writ petition fails and is dismissed with no order as to costs."

6. We thus find that since the terms of the contract are not questioned or assailed before us they would clearly fall within the scope of the expression "in connection with" as appearing in Section 44BB of the Act. We, consequently find no ground to interfere with the view as expressed by the ITAT.

7. We, additionally note that the ITAT while holding in favour of the assessee before this Court had also relied upon on its own order dated 17 December 2018 passed in ITA 1116/Del/2014. We are informed by Mr. Chawla that the same has attained finality since no appeal was preferred by the Department.

8. The appeal is thus additionally liable to be dismissed following the principles of consistency.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

FEBRUARY 5, 2024/p This is a digitally signed order.