IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'B', BANGALORE

BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER
AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

IT (TP) A No. 1104 (Bang) 2013
(Assessment year : 2010 – 11)

M/s Electrical material Center Co. Ltd.,
C/o ABB Ltd.,
2nd Floor, East wing,
Khanija Bhawan,
No. 49, Race Course Road,
Bangalore – 560001.
PAN: AACCE6078R
Appellant

Vs

DDIT (International Taxation), Circle – 1 (1),
Bangalore.
Respondent

Assessee by : Shri S. Raghunathan Advocate
Revenue by : Ms Neera Malhotra, CIT DR

Date of hearing : 30-08-2017
Date of pronouncement : 28-09-2017

O R D E R

PER A. K. GARODIA, A. M.:

This appeal is filed by the assessee and this is directed against the assessment order dated 10.05.2013 for A. Y. 2010 – 11 passed by the A. O. u/s 143 (3) r.w.s. 144C of the I T Act, 1961.

2. The grounds raised by the assessee are as under:-

> "*The grounds stated hereunder are independent of and without prejudice to one another. The Appellant submits as under:*

*1**. Holding the payments received by the appellant as royalty under the Income-tax Act, 1961 (`Act') and under the Double Taxation Avoidance Agreement between India and Saudi Arabia (`DTAA')***

On the facts and in the circumstances of the case, the learned Assessing Officer (`AO') erred in law and facts in holding and the learned Dispute Resolution Panel (`DRP') erred in law and facts in confirming the fees received by the appellant for services rendered as royalty under the Act and the DTAA and accordingly taxing the fees under section 115A of the Act.

2. Holding that where there is no specific Article for taxability of particular payment in the DTAA, the provisions of the Act would be applicable

a) On the facts and in the circumstances of the case, the learned AO erred in law in holding and the learned DRP erred in law in confirming that where there is no specific Article for taxability of a particular payment in the DTAA, the provisions of the Act would be applicable.

b) On the facts and in the circumstances of the case, the learned AO erred in law in taxing the fees received by the appellant under section 115A of the Act irrespective of there being no Article in the DTAA for taxation of fees for technical services and the appellant not having Permanent Establishment (PE') in India.

*3**. Holding the appellant to have constituted a Service PE in India***

On the facts and in the circumstances of the case, the learned AO erred in law in:

a) Holding that the appellant has constituted a PE in India under the DTAA, due to presence of four service engineers in India for 90 days each.

b) Considering man-days of services rendered instead of the period for which activities continues in India (i.e. solar days) as per Article 5(3)(b) of the DTAA.

c) The learned DRP erred in not adjudicating on this ground in detail based on above facts and law.

4. Levy of interest under section 234B of the Act

On the facts and in the circumstances of the case, the learned AO has erred in levying interest of INR 319,893 under section 234B of the Act.

5. Penalty proceedings under section 271(1)(c)

The learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.

> ***6. Relief***
> *a) The appellant prays that directions be given to grant all such relief arising from the above grounds and also all relief consequential thereto.*
>
> *b) The appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal.*
>
> *c) Further, the appellant prays that all the above adjustments / additions / disallowances made by the learned AO and upheld by the learned DRP are bad in law and liable to be deleted.*"

3. Learned AR of the assessee submitted that the case of the revenue is this that the receipt in question is Royalty and therefore, as per DTAA between India and Saudi Arabia and u/s 115A of I T Act, it is taxable @ 10% and the case of the assessee is his that the receipt in question is not Royalty and it is FTS and therefore, it is not taxable because there is no specific provision for taxability of FTS in this treaty between India and Saudi Arabia. He further submitted that the A. O. has also stated in the assessment order that solar days (360) are to be considered and not man days (90) for the purpose of deciding the existence of PE in India and on this basis, he held that there is PE in India and therefore, the income in question is taxable @ 40%. He submitted that only solar days can be considered for this purpose and in support of this contention, he placed reliance on the tribunal order rendered in the case of Clifford Chance vs. DCIT as reported in 76 TTJ 0725/82 ITD 0106. As against this, learned DR of the revenue placed reliance on the tribunal order rendered in the case of ABB FZ – LLC vs. DCIT in IT (TP) A No. 1103/bang/2013 dated 21.06.2017. He submitted a copy of this tribunal order and drawn our attention to Para 46 of this tribunal order. In rejoinder, the learned AR of the assessee drawn our attention to Para 49 of this tribunal order and submitted that in that case, the dispute was about service PE without physical presence of the employees and it is noted by the tribunal that service, information, consultancy, management etc. can be

provided with various virtual modes like e mail, internet, video conference etc. and therefore physical presence of employee is not essential.

4. We have considered the rival submissions. We have to decide this issue first that whether there is PE or not in India because if a PE is there, income is taxable @ 40% and if no PE is there, income whether Royalty or FTS is taxable @ 10%. In our considered opinion, there is no PE because as per the tribunal order cited by the learned AR of the assessee having been rendered in the case of Clifford Chance vs. DCIT (Supra), only solar days are to be considered and not man days. The decision of tribunal is this: ***"Multiple counting of the common days is to be avoided so that the days when two or more partners were present in India, together, are to be counted only once. Multiple counting would lead to absurd results. For example, if 20 partners were present in India together for 20 days in one fiscal year, multiple counting would result in 400 days. There cannot be more than 365 days in a year."*** Regarding the tribunal order cited by the learned DR of the revenue having been rendered in the case of ABB FZ – LLC vs. DCIT (Supra), we would like to observe that in the present case, this tribunal order is not relevant because of difference in facts. In that case, the assessee had rendered managerial and consultancy services and as per the tribunal, these services can be rendered without physical presence of the employees. In the present case, as per the invoice on page 37 of the paper book, the assessee has raised a bill of USD 57,764 for 2063 man days @ USD 28 per day. This is not a case of the revenue that any other invoice is raised by the assessee. When admittedly, the only invoice raised is in respect of stay of 4 Engineers in India on the basis of man hours spent by them in India, it cannot be said that any other service was rendered in the present case without physical presence by way of virtual modes like e mail, internet, video conference etc. and therefore, physical presence of employee is not essential. Because of these differences in facts, this tribunal order cited by the learned DR of the revenue is not applicable in the present case. We, therefore, follow the tribunal order cited by the learned AR of the assessee having been rendered in the case of

Clifford Chance vs. DCIT (Supra) and hold that in the present case, the stay in India of the assessee was only 90 days and since it is less than 182 days as required under Article 5 (3) (b) of the India SA DTAA, there is no PE.

5. Now the second issue to be decided is this that whether the impugned receipt is Royalty or FTS and the third issue to be decided is this that whether the income is taxable in India if it is FTS. If it is found that the income is taxable even if it held to be FTS than the second issue will be of academic interest only because both these incomes i.e. Royalty & FTS are taxable at the same rate i.e. 10%. Hence, we first decide the 3rd issue. Regarding this issue, this is the submission of the learned AR of the assessee that in the DTAA between India and Saudi Arabia, there is no clause regarding taxation of FTS and therefore, FTS is not taxable in India. In support of this contention, he placed reliance on a judgment of Hon'ble Madras High Court rendered in the case of Bangkok Glass Industry Co. Ltd. vs. ACIT as reported in 2015 (4) TMI 503. He filed a copy of this judgment. We have gone through this judgment. We find that in Para 8 of this judgment, it is noted that as per the assessee in that case, FTS was not taxable as Royalty under Article 12 of DTAA between India & Thailand. The case of the A.O. in that case was that this receipt is not taxable as Business Profit under Article 7 of DTAA between India & Thailand. The A.O. held in that case that the impugned receipt will fall under Article 22 i.e. residual clause and could be taxed only in the contracting state where the income arose. We reproduce the said clause of DTAA between India & Thailand. This reads as under:-

"Article 22

Other Income

Items of income of a resident of a Contracting State, wherever arising, not expressly dealt with in the foregoing Articles may be taxed in that State. Such items of income may also be taxed in the Contracting State where the income arises."

6. Now we reproduce the said clause of DTAA between India & Saudi Arabia also. This reads as under:-

"Article 22

Other Income

1. ***Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this convention shall be taxable only in that contracting State."***

7. There are some exceptions provided in Article 22 (2) where Article 22 (1) is not applicable but those exceptions do not include FTS. Therefore, we are of the considered opinion that in view of Article 22 (1) of DTAA between India & Saudi Arabia, FTS is not taxable in India because it will fall in Article 22 (1) and as per this Article, income is taxable in the state of residence i.e. Saudi Arabia.

8. Now, we have to decide the second issue as to whether the impugned receipt is Royalty or FTS. In this regard, we find that the A.O. has noted in Para 5 of the assessment order that the exact details of the work done by the four service Engineers of ELEMAC in India were never furnished. In the absence of the complete details, this issue cannot be decided. We feel it proper to restore this after to the file of the A. O. for a fresh decision with the direction that the assessee should provide all details required by the A.O. The A. O. should decide this issue afresh after providing adequate opportunity of being heard to the assessee.

9. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-	**Sd/-**
(VIJAY PAL RAO)	**(A.K. GARODIA)**
JUDICAL MEMBER	**ACCOUNTANT MEMBER**

Place: Bangalore
D a t e d : 28.09.2017
*MS

Copy to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Senior Private Secretary,
Income Tax Appellate Tribunal,
Bangalore.