

OD-3

ITA/121/2019

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX (IT
& TP), KOLKATA

-Versus-

M/S. VAN OORD ATLANTA B.V.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 14th March, 2023

Appearance :
Mr. Smarajit Roychowdhury, Adv.
...for the appellant

Mr. J. P. Khaitan, Sr. Adv.
Ms. Swapna Das, Adv.
Ms. Sanjukta Gupta, Adv.
...for the respondent.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order dated 20th November, 2018 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (the Tribunal) in ITA No.1063/Kol/2009 for the assessment year 2003-04.

The appeal was admitted on 2nd September, 2019 on the following substantial question of law:

The above referred substantial question of law was considered by this Court in ITA/254/2008 and by judgment dated 7th February, 2023 the appeal filed by the revenue was dismissed. The operative portion of the judgement reads as follows:

The only question which arises for consideration in this appeal is whether the project office of the respondent/assessee which functioned for a period of about 153 days could be construed as a 'permanent establishment' and whether the respondent/assessee could be subjected to proceedings under the Income Tax Act, 1961. The Assessing Officer was of the view that the selling of the dredger which was brought from Netherlands to the waterways outside West Bengal did not necessarily mean the closure of the project office in India.

Further, the approval of the Reserve Bank of India is mandatory for closure of the project office and the bank accounts reveal that the project office was operating till 31st March, 2000. The said order was affirmed by the Commissioner of Income Tax (Appeals). Challenging the same the assessee filed appeal before the Tribunal.

The nature of transaction which was the subject matter of appeal would be covered by the agreement for avoidance for double taxation and prevention of physical evasion with Netherlands. Article 5 of the said agreement deals with 'permanent establishment'. Paragraph 2 of Article 5 defines the term 'permanent establishment. Paragraph 3 of Article 5 states that a complete site or construction, installation or assembly project constitutes a permanent establishment only where such site or project continues for a period of more than six months. Paragraph 4 of Article 5 commences with a non obstante clause stating that notwithstanding the preceding provisions of Article 5 the term 'permanent establishment' shall be deemed not to include and there are six clauses in paragraph 4 of which clause (e) would be relevant for case on hand, which states that maintenance of fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for other activities which had preparatory or auxiliary character for the enterprise would not fall within the definition of a permanent establishment. Taking note of Article 5 of the agreement with Netherlands, the learned Tribunal examined the facts of the case

and found that the activities of the project office of the respondent/assessee in West Bengal was auxiliary in character. The project office was in operation from 26th February, 1999 to 29th July, 1999, that is, for a period of 153 days only, which the Tribunal found, was much less than the period of six months, as stipulated in Article 5(3).

Therefore, the learned Tribunal held that there was no valid reason for treating the project office of the assessee as a permanent establishment. The view taken by the learned Tribunal cannot be faulted, more so, because of the recent decision of the Hon'ble Supreme Court in the case of Director of Income Tax-II (International Taxation) New Delhi & Anr. vs. Samsung Heavy Industries Company Limited, (2020) 7 SCC 347 = (2020) 426 ITR 1. In the said case, the question which arose for consideration before the Hon'ble Supreme Court as to the taxability of the income attributable to a permanent establishment set u p in a fixed place in India arising from the agreement for avoidance for double taxation of income and prevention of physical evasion with the republic of Korea. The language in the said agreement is in pari meteria with the agreement with Netherlands.

The Hon'ble Supreme Court after referring to various decisions in paragraph 26 held as follows :-

"26. A reading of the aforesaid judgments makes it clear that when it comes to "fixed place" permanent establishments under double taxation avoidance treaties, the condition precedent for applicability of Article 5(1) of the double taxation

treaty and the ascertainment of a "permanent establishment" is that it should be an establishment "through which the business of an enterprise" is wholly or partly carried on. Further, the profits of the foreign enterprise are taxable only where the said enterprise carries on its core business through a permanent establishment. What is equally clear is that the maintenance of a fixed place of business which is of a preparatory or auxiliary character in the trade or business of the enterprise would not be considered to be a permanent establishment under Article 5. Also, it is only so much of the profits of the enterprise that may be taxed in the other State as is attributable to that permanent establishment."

As held by the Hon'ble Supreme Court in the above quoted paragraph, the condition precedent for applicability of Article 5 of the double taxation treaty and ascertainment of permanent establishment is that it should be an establishment through which business of an enterprise is wholly or party carried on. Further, the profits of the foreign enterprise are taxable only where the said enterprise carries on its core business through a permanent establishment. Further, it was held that maintenance of a fixed place of business which is of a preparatory or auxiliary character in the trade or business of the enterprise would not be considered to be a permanent establishment under Article 5 of the said treaty. The facts of the said case were also more or less identical to the case on hand and ultimately the Hon'ble Supreme Court held that the Mumbai office of the said assessee had only two employees and neither

of whom was qualified to perform in core activity of the assessee and on facts, the Hon'ble Supreme Court found that the project office of the said assessee would fall within Article 5(4)(e) of the agreement inasmuch as the office is solely and auxiliary office, meant to act as a liaison office between the assessee and ONGC. In the case on hand, the factual position has been analyzed by the learned Tribunal and has recorded a finding that the office in West Bengal was only auxiliary in character. In other words, the activities carried out from the said office in West Bengal was auxiliary in character. Thus, the view taken by the learned Tribunal finds support from the decision of the Hon'ble Supreme Court in Samsung Heavy Industries Limited (supra).

For the above reasons, the appeal filed by the revenue is dismissed and the substantial question of law is answered against the revenue."

In the light of the above decision, the substantial question of law framed for consideration is answered against the revenue and the appeal (ITA/121/2019) stands dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)