

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

ITA/788/2008
DIRECTOR OF INCOME TAX (INTERNATIONAL TAXATION), KOLKATA
-Versus-
HARNISCHFEGGER (U.K.) LTD.
-And-
ITA/682/2008
DIRECTOR OF INCOME TAX (INTERNATIONAL TAXATION)
-Versus-
HARNISCHFEGGER (U.K.) LTD.

BEFORE
The Hon'ble Justice I.P. MUKERJI
-And-
The Hon'ble Justice BISWAROOP CHOWDHURY
Date: 13th October, 2023

Mr. Aryak Dutt with
Ms. Riya Kundu, Advs.
...for the appellant in ITA/788/2008.

Ms. Smita Das De, Adv.
...for the appellant in ITA/682/2008.

Mr. J.P. Khaitan, Sr. Adv. with
Mr. Somak Basu, Adv.
...for respondent.

The points in each of the appeals are similar. We have taken them for hearing together and are disposing of the same by this common judgement and order.

On 12th September, 2008, these appeals under Section 260A of the Income Tax Act, 1961 were admitted by a division bench of this court on the following questions of law :

- “i) Whether in the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in holding that income from supply of spare parts by the assessee non-resident company was not liable to tax in India on the ground that the agreement for maintenance of the shovels supplied was divisible and not a composite one and that the sale took place outside India contrary to the facts to the effect that the spares were supplied in India in connection with the maintenance of

the shovels supplied and as an integral part of the composite agreement for maintenance, the spares not used remained the property of the assessee company, the spares were used according to the requirement for the maintenance and the remuneration therefor was payable hourly with reference to the maintenance ?

2. Whether, on the facts and in the circumstances of the case, the Income tax Appellate Tribunal is correct in holding that only 15% of 47% of the payment made for maintenance of the shovels supplied by the assessee company was liable to tax contrary to the facts to the effect that 53% payment to Voltas Ltd. distributor of the assessee, was on behalf of the assessee company, the grounds of appeal before the Tribunal were with reference to the individual items of the expenditure claimed and allowed for the maintenance work, the entire payment was with reference to the time consumed in the maintenance on account of labour and overhead charges and there is no basis for estimating the income at 15% instead of the actual income after allowing the expenditure incurred and allowable and the finding of the Tribunal to the effect that the appointment of the Voltas Ltd. by the assessee resulted in maintaining a permanent establishment by it ?”

Two substantial points are involved in these appeals. The first is, whether the appellant had a service permanent establishment in India so as to be eligible to income tax in this country? The second is : Whether the contract between the respondent and the Indian buyer company was composite in nature or divisible?

As far as the first point is concerned, the learned tribunal, by its impugned judgement and order dated 31st January, 2008, held that the

respondent did have a service permanent establishment in India. It had held so after a detailed analysis of facts, evidence and with compelling reasons.

The second point was : Whether the agreement of the respondent with the Indian buyer for the sale and supply of electric shovels was separable from the one for the supply of spares and maintenance of the electric shovels or was it part of a composite agreement?

The tribunal by detailed reasons came to the finding that the contract and transactions were divisible and that the responsibility for carrying out the contract with the Indian buyer was entrusted by the agreement to Voltas, which had a major and separate role to play in the performance of the contract and in maintenance of the said equipments sold.

We are of the view that there is absolutely no dispute about the law applicable. The dispute was with regard to the certain facts which were essential to be established for application of the law. The finding on facts, as held by the tribunal, are reasonable and a plausible view of the matter. Hence, we do not find any substantial question of law involved to call for our interference with the said order of the tribunal.

We dispose of each of the appeals by answering question nos. 1 and 2, stated in the first paragraph of this order in the affirmative.

(I.P. MUKERJI, J.)

(BISWAROOP CHOWDHURY, J.)