IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 739 OF 2018

Commissioner of Income Tax
(IT) – 2 ….Appellant

V/s.
Iljin Electric Co. Ltd. …Respondent

Mr. Suresh Kumar for Appellant.
Mr. Madhur Agrawal i/b Mr. Atul K. Jasani for Respondent.

CORAM : K.R. SHRIRAM &
NEELA GOKHALE, JJ.
DATED : 4th OCTOBER 2023

P.C. :

1. The following four substantial questions of law are proposed in the appeal :

QUESTION OF LAW

A. "Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in holding that payment in relation to Offshore supply is not taxable in India, wrongly relying on the decision of Supreme Court in the case Ishikawajma Harima, ignoring the facts that in the case of Ishikawajma Harima the contract was divisible separately in Off-shore and On-shore component, whereas, in the fact of present case, it is a indivisible contract and decision of AAR in the MERO Asia Pacific Pte Ltd. (AAR/981/2010) will directly apply in this case?"

B. "Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in holding that Off-shore supply is not taxable in India, ignoring the role played by PE in execution of supply, procurement of goods and materials from abroad into India?"

C. "Whether on the facts and the circumstances of the case and in law, the tribunal has erred in holding that the interest u/s 234B is not leviable following the decision of the jurisdictional High Court in the case of DIT(IT) vs. NGC Network Asia LLC ignoring the fact that since the assessee had a Permanent Establishment in India and was liable to pay the advance tax, its case was distinguishable from the NGC Network Asia LLC case supra and therefore levy of interest u/s 234B of the Income Tax Act, 1961 was correctly made in assessee's case?"

D. "Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in holding that estimation of profit by the AO on presumptive basis @10% is not proper and set-aside the case to the AO to compute after verifying the account of the assessee, ignoring the facts that the assessee has not show the whole contract receipt of (on-shore supply & service and off shore supply), whereas, expenses related to off-shore supply are debited to Profit & Loss Account?"

2. Respondent/assessee is a South Korean company engaged in the business of manufacturing and installation of electric cables. It has set up project offices in India for installation of electric cables in India in connection with the Indian projects that were awarded to it.

3. During the year under consideration, i.e., Assessment Year 2012-13, assessee was executing a contract that it had entered into with Mumbai Rail Vikas Corporation Ltd. (MRVC) through its Mumbai project office, Delhi Metro Rail Corporation Ltd. (DMRC) through its Delhi project office and Transmission Corporation of Andhra Pradesh Limited (TCAPL) through its Hyderabad project office and offered the business income/loss to tax.

4. The Assessing Officer (A.O.) held that income from the Off-shore supply is also taxable in India. It is assessee's case that the contract that it had entered into with MRVC, though a composite contract, the scope of work envisaged that the price for plant and equipment to be supplied from abroad is a separate contract and the price for plant and machinery to be supplied within India quoted in the currency of India in rupee terms will

be a separate contract. In other words, though only one contract was executed between the parties, the scope of work to be undertaken were distinct and separately ear marked and provided for. Assessee submitted that the intention of the parties to the contract is to treat Off-shore supply as a distinct and separate component of the contract.

5. During the assessment, the entire amount earned by assessee was held to be taxable in India, i.e., for both components, as per the Act as well as the Double Taxation Avoidance Agreement (DTAA). The A.O. held that the income from the Off-shore supply was also taxable in India. The A.O. further went on to hold that assessee should be taxed on estimation of profit on presumptive basis at 10% because assessee had not shown the whole contract/receipt of On-shore supply and services of Off-shore supply.

6. Aggrieved by this stand taken by the A.O. following the report received from the Transfer Pricing Officer (TPO), assessee preferred an appeal before the Dispute Resolution Panel (DRP). The DRP rejected the objection filed by assessee relying upon the order of DRP in assessee's own case for Assessment Year 2012-13 and upheld the order of the A.O. holding that 10% of the receipt on account of Off-shore supply is income of assessee taxable in India. Against the order of DRP, assessee filed an appeal before the Income Tax Appellate Tribunal (ITAT) which allowed the appeal vide order dated 14th October 2016. It is this order which is impugned in this

appeal and the four substantial questions of law as quoted earlier are proposed. Question “D” is directly connected to Question “A” and “B” which are also inter linked.

7. As regards Questions “A” and “B” which relates to taxability of the amounts received by assessee on account of Off-shore supply, the ITAT has come to a factual finding that though assessee had entered into a contract with MRVC for supply of equipments and services, Off-shore as well as On-shore, the terms of the contract distinctly set out the quantum of Off-shore supplies to be made by assessee to MRVC and also the quantum of payment to be received by assessee from MRVC outside India. The ITAT after considering the contract between assessee and MRVC, came to the conclusion that the composite contract specifically records the quantum of goods to be supplied outside India, the property in the plant and machinery got transferred to MRVC once they were loaded on the mode of transport from the country of origin to India and even the payment is made outside India. We cannot find fault with these factual findings and the decision of ITAT in holding that the income arising from Off-shore supplies are not taxable in India. Therefore, question “A” and “B” raised by the Revenue cannot be entertained.

8. Consequently, Question “D” will not arise because when there is no liability to pay tax, the question of demanding 10% on presumptive basis

will not arise. Question "D" is accordingly rejected. We find support for this view of ours in ***Director of Income-tax (International Taxation) vs. Xelo Pty. Ltd.***[1].

9. As regards Question "C" proposed, in *Xelo Pty. Ltd.* (supra), the court has reproduced the second question proposed therein which is identical to the question proposed in this matter at hand. As regards the said Question, in *Xelo Pty. Ltd.* (supra), the court has recorded *"……… counsel for the parties state that the said question stands answered against the Revenue by the decision of this court in the case of DIT vs. NGC Network Asia LLC [2009] 313 ITR 187……….".*

Therefore, this question also cannot be entertained.

10. Accordingly, Appeal dismissed.

(NEELA GOKHALE, J.) **(K.R. SHRIRAM, J.)**

1 [2011] 16 taxmann.com 173 (Bombay)