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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 446/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 .....Appellant

Through: Mr. Anant Mann, JSC for Mr. Ruchir Bhatia, SSC and Mr. Prayuaksh Gupta, JSC.

versus

SOJITZ CORPORATION .....Respondent

Through: Mr. Ved Jain, Mr. Nischay Kantoor and Ms. Soniya Dodeja, Advs.

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\+ ITA 542/2023

COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 .....Appellant

Through: Mr. Anant Mann, JSC for Mr. Ruchir Bhatia, SSC and Mr. Prayuaksh Gupta, JSC.

versus

SOJITZ CORPORATION .....Respondent

Through: Mr. Ved Jain, Mr. Nischay Kantoor and Ms. Soniya Dodeja, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

O R D E R

% **17.02.2025**

1. These two appeals have been preferred by the Principal

Commissioner impugning the judgment of the Income Tax Appellate Tribunal ["**Tribunal**"] dated 26 December 2022 and 30 September 2021. While ITA 446/2023 is concerned with Assessment Year ["**AY**"] 2014-15, ITA 542/2023 pertains to AY 2012-13.

2. From the order as framed by the Tribunal, we note that it has while disposing of the appeal pertaining to AY 2014-15, essentially followed the decision of its Coordinate Bench rendered with respect to AY 2012-13. It had while disposing of that appeal, taken into consideration the view taken by the Dispute Resolution Panel ["**DRP**"] on facts that the contract stood confined to the offshore supply of equipment and chemicals on Free on Board ["**FOB**"] basis. Following the view expressed by it on the earlier appeal, the challenge taken by the Revenue pertaining to AY 2014-15 came to be dismissed.

3. ITA 542/2023, however, is concerned with AY 2012-13 and which would undisputedly be governed by the view which had been expressed by the DRP for that particular year and where it had categorically held that there was no Permanent Establishment ["**PE**"] which had come into existence.

4. However, the position takes a turn when one views the opinion formed by the DRP while examining the case of the assessee for AY 2014-15. While passing an order dated 14 June 2017 pertaining to that AY, the DRP had come to render the following findings:

> "4.4 Assessee's submissions have been considered. Contention of the assessee that the contracts were stand alone contracts is factually wrong. The contracts of TATA STEEL Jamshedpur were interdependent, execution of each contract was dependent on execution of other two contracts. There were three contracts with TATA STEEL Jamshedpur. These contracts are in nature of composite contract. The assessee has entered into three separate contracts with same party. One contract is for supply of equipments, erection and testing, second is for designs and

drawings for civil & structural work, utilities and other services, assembly, erection, start-up, commissioning and demonstration of performance tests etc and third for supervision of erection, testing and commissioning of equipments supplied by it. Perusal of terms of contract shows that obligations of the assessee do not end after supply stage, rather these continue and end only after erection, testing and commissioning of equipment supplied by it and until 'Performance Guarantee Tests' are performed successfully at the project site and project owner ' issues the 'take over certificate' to the assessee as a proof of final acceptance . It means that both parties to contract are very clear from the very beginning that the assessee shall supply equipment and shall also be responsible for erection, testing or supervision of erection, testing and commissioning of equipment supplied by it. Despite this clear understanding, three separate contracts were made, which in fact were in nature of one composite contract. This fact gets further evident in view of specific clauses in the three agreements which proves interdependence of the three agreements.

1) The agreement with TATA Steel Jamshedpur was for up gradation of exiting PL -TCM plant. This means continuous presence of the assessee at the Tata plant to study, the existing plant, to find measures required to upgrade the plant to the desired capacity and level. Detailed study of the layout machines, infrastructure available to carry out the changes etc. To carry out necessary changes presence of the assessee's employees/agents was essential from the day one of the commencement of the contract. Even if we ignore the pre bid visits by the employees of the assessee for studying requirements so as to bid for the contract.

2) Purchase agreement vide order no TS:/241932/2400000849 reproduced at page 3 of the draft order. It has Header details as under:

<u>Header Details</u>

Design, Manufacture and supply of imported plant, machinery and equipment with auxiliaries for upgradation of existing PLTCM at CRM complex, Jamshedpur as per signed Technical Specification No. 01097141-2002001-CS001 dated August 2010 and Agreement No. TSL/E&P-10-119/PL-TCM Upgrade/FOB/Sojitz (copy already available-with contractor).

It has terms of payment as under:

1.3b 2% of Contract Price for the imported Plant and Equipment as well as related designs and drawings will be payable on satisfactory completion of Integrated Cold Test for 2nd Shutdown as per the General Conditions for deisng, manufacture and supply of imported plant, machinery and equipment(Schedule 6)

This clearly means that completion of the purchase agreement is linked to installation and testing of the equipments so supplied.

3) Agreement for design, manufacture and supply of imported plant machinary and equipment with auxiliaries for upgrading of existing PL-TCM at TATA STEEL, Jamshedpur (i.e. Agreement No. TSL/E&P-10-119/) (dated 27 August 2010) has following clauses:

> "The Contract confirm that, all items of Equipment and commissioning spares, whether specifically mentioned or not in the Technical Specification, but are necessary for completeness and for safe & efficient operation, maintenance and guaranteed performance of upgrading of existing PL-TCM, shall be mutually agreed and supplied by the Contractor and are included and covered by the Contract price "**(Page 12 of the draft order)**

This means that Tata Steel was not merely purchasing plant and equipments mentioned in the contract but was also buying all those equipments and spares which though not mentioned in the agreement but were essential for successful installation, commissioning and running of the upgraded plant. Clearly the intention was not to buy equipments mentioned in the agreement but to buy a running upgraded plant.

4) Agreement of imported designs and drawings for civil & structural work, utilities and other services, assembly, erection, start-up, commissioning and demonstration of performance tests etc. for upgrading of existing PL-TCM at TATA STEEL, Jamshedpur (i.e. Agreement No. TSL/E&P-10-120 & TSL/E&P-10-121) has following clauses:

> AND WHEREAS the Purchaser has decided to obtain imported designs and drawings from the Contractor for civil and structural work, utilities and other services, assembly, erection, start-up, commissioning and demonstration of performance tests etc for upgrading of existing PL-TCM at Tata STEEL, Jamshedpur Expansion Project, situated at Jamshedpur 831 001 India. (Page 14 of the Draft order)
>
> **This means the assessee was responsible for providing layout, providing structural requirements and for providing designs and drawings so as to carry out required construction and changes in the existing plant.**
>
> 1.1.5 The Contractor shall be responsible for correctness of all

engineering work and shall vet all designs and detailed engineering drawings that will be developed by the Contractor. (page 16 of Draft order)

This means entire up gradation was the responsibility of the contractor.

TERMS OF PAYMENT

4.1.3 a) 3% of Contract Price for the Imported Designs and Drawings will be payable on satisfactory completion of Integrated Cold Test 1st Shut Down as per the General Conditions for Supply of Imported Designs and Drawings (Schedule 6), and the delivery of complete drawings and documents as per Technical Specifications and on submission

4.1.4 a) 3% of Contract Price for the Imported Designs and Drawings will be payable after the issue of Provisional Acceptance Certificate (PAC) for 1st Shutdown as per the General Conditions for Supply of Imported Designs and Drawing (Schedule 6), and on delivery of "As built drawings"

4.1.5 The last 5% of the Contract Price for the Imported Designs and Drawings will be payable after the issue of Final Acceptance Certificate as per the General Conditions for Supply of Imported Designs and Drawings (Schedule 6)

[Pages 19 & 20 of the Draft Order]

This clearly means that the execution of the contract will not be over till testing and acceptance of the installed plant and machinery supplied by the assessee as per purchase agreement and as per contract No. TSL/E&P-10-119/PL-TCM Upgrade/FOB/Sojitz

5) Agreement for foreign technicians supervision services for erection, start up, commissioning an demonstration of performance test for upgrading of existing PLTCM at TATA STEEL, Jamshedpur (Agreement No. TSL/ E&P-10-119/) has following clauses:

1.1 Scope of Workfor Supervision by Foreign Technicians

1:1.1 In consideration of the payments to be made by the Purchaser, the Contractor shall provide Supervision Services by Foreign Technicians for erection, star up, commissioning and demonstration of performance tests for upgrading of the existing PL-TCM at TATA STEEL, Jamshedpur Expansion Project, situated at Jamshedpur 831001 conforming to the Technical

Specifications ensuring timely completion of the Project and to establish to the Purchaser that the functional requirement of the Plant and Equipment are fully met. For this purpose, the Contractor shall depute qualified and experienced Foreign Technicians, to the work site and/or other places in India as maybe directed by the Purchaser after agreement with the Contractor for the scope of work as detailed hereunder.

4.5 This means the contract is for supervision of erection, star up, commissioning and demonstration of performance tests for upgrading of the existing PL-TCM. The assessee is to supply plant and equipment for upgradation as per the contract and has also provided design and drawings to civil construction for making changes in lay out for installation of the plant and equipment. This contract cannot be over till plant and equipments were supplied by the assessee and necessary structural changes were made in the existing building. Clearly this contract is dependent on other two contract and other two contracts were dependent on this contract as per their terms and conditions. They could not be completed without execution of this contract.

The facts mentioned above clearly prove that these three contracts are interwoven, linked and interdependent contracts. In short they are part of a single composite contract. The AO was therefore right in holding these contract to be part of composite contract.

Action 7, 2015 Final Report of OECD/G20 on BEPS, to which India was a participant, has also commented upon splitting -up of contracts in order to abuse the provisions of law to lower the tax liabilities and says that the Tax authorities can consider all the contracts as a Single contract.

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4.9 Submissions of the assessee have been considered. The contention of the assessee is that there existed supervisory PE in India during erection, testing stage but there was no fixed place PE through which any operation in respect of supplies has been carried out and therefore no profits in respect of supply stage are taxable in India. DRP has carefully gone through relevant clauses / terms of various contracts. It is seen that terms/clauses of various contracts are generally similar. Contention of the assessee regarding non-taxability of revenue from supplies is to be examined with reference to existence of PE in India and operations carried out through PE pertaining to such supplies. It is undisputed that the assessee has been performing its obligations under various contracts which are long term contracts in existence since many years prior to the period under consideration. This means that PE under Article 5(2)(j) of DTAA was always in existence throughout the whole of FY under consideration. The assessee has never disputed the existence of PE under Article 5(2)0) right from day one of FY under consideration. It can not therefore be said that there was no PE established in India prior to start of supply of equipment to India.

Article 7(1) of Indo-Japan DTAA is reproduced as below;

> *1. The profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in that other Contracting State but only so much of them as is directly or indirectly attributable to that permanent establishment*."

5. As is manifest from the above, while examining the case in relation to AY 2014-15, the DRP has struck a position contrary to what it had found as prevailing in AY 2012-13. This order of the DRP dated 14 June 2017 was clearly in existence by the time the Tribunal took up for consideration the appeal pertaining to AY 2014-15. However, it has chosen to rest its conclusions solely on what the DRP had held while examining the facts relating to AY 2012-13.

6. In view of the aforesaid, we are of the considered opinion that ITA 446/2023 would be liable to be allowed and the matter remitted for the consideration of the Tribunal afresh. However, and since ITA 542/2023 stands confined to AY 2012-13 and for which period the view expressed by the DRP was in favour of the assessee, the appellant submits that the same may be accorded a closure.

7. Accordingly, while we dismiss ITA 542/2023, we allow the connected appeal, namely ITA 446/2023 and set aside the order of the Tribunal dated 26 December 2022. The appeal shall consequently stand revived on the board of the Tribunal and shall be examined afresh bearing in mind the order framed by the DRP dated 14 June 2017.

8. All rights and contentions of respective parties on merits are otherwise kept open.

YASHWANT VARMA, J

HARISH VAIDYANATHAN SHANKAR, J

FEBRUARY 17, 2025/*akc*