

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 13th May 2016

Decision on : 2nd June 2016

+

W.P (C) No. 7416/2012

TECHNIP SINGAPORE PTE LTD.

..... Petitioner

Through: Mr. Percy Pardiwala, Senior Advocate

With Mr. Sanat Kapoor and Ms. Ananya Kapoor

versus

DIRECTOR OF INCOME TAX & ANR.

..... Respondent

Through: Mr. Rahul Chaudhary, Senior Standing

Counsel with Mr. Raghvendra Singh, Junior

Standing counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

J U D G M E N T

% 02.06.2016

Dr. S. Muralidhar, J.:

1. An order dated 15th February 2012 passed by the Authority for Advance Rulings ('AAR') (Income Tax) in AA No. 936 of 2010 has been challenged in this writ petition filed by Technip Singapore Pte Ltd. (formerly known as Global Industries Asia Pacific Pte. Ltd.), a company incorporated in Singapore. The Petitioner, a resident of Singapore, is admittedly entitled to the benefit of India-Singapore Double Tax Avoidance Agreement (hereinafter 'DTAA').

Background facts

2. The Petitioner states that it is a leading solutions provider of offshore construction, engineering, project management and support services to the oil and gas industry worldwide. The Income Tax Officer (International Taxation) Dehradun is stated to be the Assessing Officer ('AO') as far as the Petitioner is concerned.

3. By a letter dated 12th June 2008 Indian Oil Corporation Ltd ('IOCL') invited tenders for the "Residual Offshore Construction work" at Paradip. The letter explained that IOCL was "setting up offshore crude oil receiving facility having Single Point Mooring (SPM) terminal about 20 Kms. off the coast of Paradip port in the east coast of India." The said facility would enable unloading the crude oil from the Very Large Crude Carriers (VLCCs) "to meet the crude oil requirement of its Refineries located in the eastern part of India." The work involved installation of IOCL supplied SPM including anchor chains, floating and subsea hoses.

Relevant clauses of the contract

4. By a letter dated 17th July 2008, IOCL gave the Petitioner the details of the work of "Residual Offshore construction' at Paradip. It mentioned that the work was divided into three groups as under:

Group-1: Installation of Single Point Mooring (SPM) including anchor chains, floating & subsea hoses.

Group-2: Work of Post Trenching of 48" & 14" pipeline.

Group-3: All balance works required to complete the 14" effluent pipeline.

5. The clarifications in relation to the work were enclosed as Annexure I and II to the said letter. The expression 'Contractor' connoted the Petitioner and the expression 'Owner' means IOCL. Clause 19 of Annexure II to the letter dated 17th July 2008 of IOCL provided for the various indemnities to be provided by the Contractor to the Owner in the execution of the work. Clauses 19.4.0, 19.5.0 and 19.6.0 read thus:

"19.4.0 Owner shall defend, indemnify, and hold harmless Contractor Group for all loss or damage to Owner's property, equipment, and vessels, either owned or rented and operated by Owner arising out of or relating to the performance of the Work and regardless of whether caused or brought about by any member of Contractor Group's negligence (including active, passive, sole, joint, and concurrent negligence) or any other theory of legal liability, including strict liability or the non-seaworthiness of any vessel or the non-airworthiness of any aircraft, and Owner shall release, defend, protect, indemnify and hold harmless all members of Contractor Group from and against any loss, cost, claim, obligation to indemnify another, suit, judgment, award or damage (including reasonable attorney's fees) on account of such loss or damage.

19.5.0 Contractor Group has to indemnify and hold harmless Owner from and against any liability or damage which arises from or is related to loss or damage to the 'Property which is the subject of the Work' including costs associated with repair or replacement of such loss or damage regardless of whether such loss or damage is due or claimed to be due to the negligence or breach of duty, Contractor or any other party or his equipment.

19.6.0 For the purposes of this Article, "Property which is the subject of the Work" shall include any materials, equipment, structures or components whether temporary or permanent, and specifically

includes any existing pipeline and risers and shall also include any items lifted or transported from one location to another."

6. On 5th September 2008, the Petitioner signed a contract with IOCL for the above offshore construction work involving installation of IOCL supplied SPM including anchor chains, floating and subsea hoses. The general description of the SPM as give in the contract is that it is

a floating equipment/device that serves as a loading/offloading station and a mooring point for oil tankers for loading/offloading crude and other petroleum products to/from the onshore refinery/process platform. SPMs are connected to an onshore refinery/process platform through a submarine pipeline. SPM systems are also called as CALM systems i.e. "Catenary Anchor Leg Mooring system". The SPM system is stated to consist of floating buoy anchored to the seabed by catenary chain legs, which are secured to anchors. One twin mooring hawser arrangement holds the tanker captive to a rotating part. The rotating part freely weathervanes so that the tanker can take up the position of least resistance to the prevailing weather at all times. Fluid product is transferred via the CALM from or to the tanker by floating and subsea hose systems. When the tanker moves off station, due to the effects of wind, wave and current, anchor chain legs are lifted which generate a restoring force tending to return the system to the equilibrium position, thus limiting the tanker's excursion."

7. The definition of 'work' in the above contract is contained in its preamble which reads as under:

“Whereas

The owner desires to have executed the work of Residual Offshore Construction Work At Paradip. Group-1-Installation Of Spm Including Anchor Chains, Floating & Subsea Hoses (Tender No. PLCC/PHCPL/SPM/0825) more specifically mentioned and described in the contract documents (hereinafter called the ‘work’ which expression shall include all amendments therein and/or modifications

hereof) and has accepted the tender of the Contractor for the said work."

8. Clause 3.1.1 of the Contract defined the scope of the work to include the following:

"3.1.1 Bidder's scope of work shall include pre-installation survey, review of owner supplied documents, handling of owner supplied project materials, installation engineering, installation and erection, testing, pre-commissioning and assistance during commissioning for the complete system necessary for safe handling of crude oil tankers at CALM Type Single Point Mooring (SPM) system. The system should be capable of satisfactorily functioning as a complete terminal for discharge of crude oil from vessels to the onshore tankfarm."

9. Under Clause 3.1.2, the Contractor was to provide "all marine spread, specialized manpower and equipments, installation tools and tackles, consumables, labour, logistic supplies, planning, engineering, documentation, etc. to fulfil the project specifications upto the commissioning stage." Under Clause 3.1.3, the Contractor shall be responsible for taking over all the Owner supplied project materials from the place designated by the Owner required for installation of complete CALM SPM system including their sub systems." Under Clause 3.1.4, the SBM Inc. is required to depute an installation engineer during the entire installation period of SPM system for assisting and advising the Installation Contractor in the installation of the SPM system."

10. The Annexures forming part of the contract documents gave the description and specifications of the equipments. Clause 14.0 thereunder describes 'Spread equipment' as under:

“The complete information regarding the Marine spread, the bidder intends to mobilize shall be included along with the bid. This shall essentially consist of but not limited to installation spread including, pipelines lay spread, trenching spread, diving spread etc.

Contractor shall deploy all the marine spread of the requisite specifications as approved at the time of the award of work.

The Contractor shall obtain prior approval from Owner for any replacement of any spread/equipment proposed and accepted. The owner shall evaluate such proposal and acceptance for the same shall be granted only if the contractor proves to the satisfaction of the Owner that the proposed spread/equipment is equivalent/superior to the one proposed in the bid. The decision of the Owner in this regard shall be final and binding on the Contractor."

11. Clause 19 thereunder talked of 'Mobilization of marine spread' and Clause 20 of 'De-Mobilization of marine spread.' Clauses 19.1 and 19.2 read as under:

“19.1 The marine spread shall comprise of barge/vessel equipped with suitable equipments, diving spread, anchor handling, tug support vessel, survey spread, operating and construction crew, specialized expertise equipped with all required vessel certificates and statutory clearances including Customs & Port permissions as applicable in India.

19.2. The marine spread equipped with above (22.1) shall be considered mobilized after reaching at site and its readiness to commence the work.”

12. IOCL sent to the Petitioner a 'Letter of Acceptance' dated 4th September 2008 in which it *inter alia* set out the 'contract value and price schedule'. It was stated therein that the contract value would be US\$ 18,598,140. The letter also indicated the amount in US dollar agreed to be paid for each item of work. Broadly the break up was as under (in US Dollars):

(i) Mobilization and demobilization of Marine Spread	12,980.959
(ii) Pre and post erection work	877,288
(iii) Actual installation work	4,652,381
(iv) Documentation, Misc	87,512

13. The Petitioner states that it does not have any project office or any other premises in India for executing of the work under the above contract. The Petitioner's obligations under the contract were fulfilled by deputing men and materials at the offshore site where the activity was performed.

Application before the AAR

14. On 25th May 2010, the Petitioner filed an application in the AAR under Chapter XIX B of the Income Tax Act, 1961 ('Act') for determination of certain questions regarding its tax liability in respect of the services rendered by it under the above contract. The ITO (International Taxation) (Respondent No. 2) in response to the above application filed a report dated 6th September 2011 before the AAR. According to Respondent No.2, the income of the Petitioner under the contract was taxable in India as fees for technical services ('FTS') both under the Act and the DTAA.

15. According to the Petitioner, Respondent No.2 did not dispute the Petitioner's stand that the income earned could not be regarded royalty either under Section 9 (1) (vi) of the Act or Article 12 (3) (b) of the DTAA. The Petitioner contended that the mere fact that the equipments were used for rendering services to IOCL cannot alter the nature of the contract with IOCL from a contract for services to a contract for hiring of vessel and equipment. It is pointed out that the IOCL did not use any commercial or

scientific equipment of the Petitioner.

Decision of the AAR

16. By the impugned order dated 15th February 2012, the AAR held as follows:

(i) The contract could not be said to be for installation alone. If during the activity of installation, the income in the nature of royalty or fees or FTS or interest or of any other nature arises then such income has to be assessed under that head.

(ii) IOCL paid for each of the items of work separately although the work was a composite one. In the present contract, the payment made for use of equipment, i.e., the barges, and stated as mobilization and demobilization expenses comprised a substantial part of the payment and therefore fell within the definition of royalty under Article 12.3(b) of the DTAA.

(iii) The Supreme Court in *Ishikawajima-Harima Heavy Industries Ltd. v. DIT (2007) 288 ITR 408* held that the consideration for each portion of the contract, if separately specified, can be separated from the whole. In the present case, the contract was divisible one. The expenses were loaded in favour of mobilization. As observed in *State of Madras v. Richardson (1968) 21 STC 245*, even in the works contract, a contract of sale of material utilized in the works can be inferred.

(iv) Installation was to be carried out by locating the ends of anchor chains,

cross tensioning of the anchor chains, adding to the length of the anchor chain where it is falling short of the desired length, towing and setting up the Buoy from the port to the location and fixing the chain to the SPM Buoy, testing the leakages of the floating hose strings, affixing the umbilical to the valves outlets and installing all end connection, installing navigational aids, pressure gauge.

(v) As installation was ancillary and subsidiary to the use of equipment or enjoyment of the right for such use, the payment for the installation would fall under the definition of FTS in terms of Article 12.4(a) of the DTAA.

17. It may be noted here that the impugned order of the AAR was common to two contracts entered into by the Petitioner, one with IOCL and the other with M/s Larsen & Toubro ('L&T'). That portion of the impugned order concerning the contract with L&T is outside the ambit of the present petition. Pursuant to the notice issued in the present petition, a counter affidavit has been filed by the Respondent reiterating the stand taken by it before the AAR. A rejoinder thereto has been filed by the Petitioner.

Submissions of counsel

18. This Court has heard the submissions of Mr. Percy Pardiwala, learned Senior counsel for the Petitioner and Mr. Rahul Chaudhary, learned Senior Standing counsel for the Revenue.

19. The submissions of Mr. Pardiwala were as under:

(i) Under the contract, IOCL had no right to use or control over the movement or operation of any equipment, vessels etc. belonging to the Petitioner. The equipment was being used only by the Petitioner for rendering services for the offshore construction work. The work involved installation of IOCL supplied SPM including anchor chains, floating and subsea hoses. Thus IOCL had no control or dominion over the movement of the vessel or the equipment brought to the site and used by the Petitioner for the purposes of rendering services under the contract.

(ii) The contract made it clear that in case of any damage or loss to the property, equipment etc., supplied to IOCL while being installed or during the movement, the responsibility will be of the Petitioner alone.

(iii) The very purpose of the mobilisation of the equipment was to install the IOCL supplied SPM. The primary purpose was the offshore construction work which was the work of installation of the IOCL supplied SPM which included anchor chains, floating and subsea hoses. Therefore, the AAR erred in concluding that the installation activity was ancillary and subsidiary to the use of the equipment. The Respondent has never disputed that the income earned by the Petitioner could not be regarded as royalty either under Section 9(1) (vi) or Article 12 of the DTAA. The conclusion arrived at by the AAR was without giving the Petitioner any opportunity of addressing the issue. The AAR proceeded to decide against the Petitioner on a point on which there was no dispute between the parties. Reliance was placed on the decision in *Asia Satellite Telecommunications Co. Ltd. v. Director of Income Tax (2011) 332 ITR 340 (Del)*.

(iv) The income earned by the Petitioner from the contract in question did not fall within the definition of the 'royalty' under Article 12.3 (b) of the DTAA.

20. In reply to the above submissions, Mr. Rahul Chaudhary pointed out that as regards the contract to the L&T, the AAR has held that the Petitioner has a PE in India and that the consideration received under that contract by the Petitioner, including for mobilisation and demobilisation, was liable to tax in India in terms of Section 44BB of the Act. According to him, although the AAR may not have given a finding as regards the Petitioner having PE in respect of the contract with IOCL, the Petitioner could not take advantage of that fact and claim that the AAR did not hold that the Petitioner has a PE in India in relation to the contract with IOCL.

21. Referring to the certificates dated 30th January 2009 and 13th July 2009, issued by the Revenue under Section 197 of the Act in respect of the consideration received or receivable, it had been mentioned thereunder that the consideration was in the nature of royalty. He pointed out that the Petitioner did not accept the tax withholding certificates and raised a specific question whether the consideration received by the Petitioner for services provided by it could be 'Royalty' under Section 9(1) (vi) of the Act or under Article 12 of the DTAA?

22. According to Mr. Chaudhary, the Revenue had not accepted the contention of the Petitioner that the payments are not in the nature of royalty

or that FTS and royalty were not mutually exclusive. According to the Revenue, there is no single lump sum price for the whole contract. The consideration for mobilisation and demobilisation constituted 68% of the total consideration and the actual installation constituted 25%. Therefore a large percentage of the consideration related to supply/use of the equipment. It was not necessary that the equipment should be in the direct dominion and control of the IOCL for the payment to constitute royalty. As long as the equipment can be exploited by or by the order of IOCL, the requirement of dominion/control would stand satisfied and the payment for the same qualify as royalty.

23. Mr. Chaudhary has contended that it was an undisputed fact that during the period in question, the equipment could not be used by any other entity or person other than IOCL and that IOCL was, in fact, in control of the equipment. He placed reliance on the decision in *Ishikawajima-Harima (supra)* and supported the decision of the AAR that the payment of mobilisation and de-mobilisation fell under the definition of royalty under Article 12.3(b) of the Act and the payment for installation was FTS under Article 12.4(a) of the DTAA.

Contract cannot be re-characterised

24. The Revenue's attempt at re-characterising the contract as one for hire of equipment must fail. From the various clauses of the contract, as noted hereinbefore, it is evident that IOCL did not have dominion or control over the equipment. The clauses of the contract make it clear that at all times during the execution of the contract the control over the equipment brought

by the Petitioner was to remain with the Petitioner. While the SPM system was supplied by IOCL, the task of installation, testing and pre-commissioning was the work of Petitioner. The system was to be capable of satisfactorily functioning as a complete terminal for discharge of crude oil from vessels to the onshore tankfarm. Clause 3.1.2 made it clear that it was the Petitioner which had to supply “all marine spread specialized manpower and equipments, installation tools and tackles, consumables, labour, logistic supplies, planning, engineering, documentation etc”. Further under Clause 3.1.3 the Petitioner was made responsible for taking over all the IOCL supplied project materials from the place designated by the IOCL which was required for installation of complete CALM SPM system including their sub systems. In the circumstances, the Court is unable to appreciate how the AAR could conclude that the *de facto* control of the equipment was with IOCL.

No PE in India

25. The AAR was not called upon to decide whether, in the context of the contract with IOCL, the Petitioner had any PE in India. That was not even the contention of the Revenue before the AAR. That question arose in the context of the Petitioner's contract with L&T and not IOCL. The finding of the AAR that the Petitioner had a PE in India was rendered in the context of contract that the Petitioner had with the L&T. Therefore, it is not open for the Revenue to now contend that the Petitioner cannot take advantage of the absence of a finding by the AAR as regards the existence of a PE qua the contract with IOCL.

26. The Revenue has been unable to counter the factual position that in terms of Article 5 (1) of the DTAA, the Petitioner has no fixed place of business in India. Under Article 5 (3) the Petitioner can be said to have a PE in India only if the installation or construction activity is carried on in India for a period exceeding 183 days in any fiscal year. The Petitioner was admittedly present in India only from 25th November 2008 till 4th January 2009. In other words it was present for 41 days during 2008-09 for rendering the contract of service to IOCL. The Petitioner also did not have a project office in India for executing the contract with IOCL.

27. In terms of Article 7 of the DTAA, the business profits earned by the Petitioner shall be liable to tax in India only if it carries on business in India through a PE in India and the profits earned by it in India are attributable to the activities carried out through such PE. Since factually the Revenue was not able to show that the Petitioner had a PE in India, the income earned by the Petitioner from the contract with IOCL cannot be brought to tax in India in terms of Article 7 of the DTAA.

28. Turning to the other main issues that arise from the impugned order of the AAR, the question is whether the mobilisation/demobilisation charges which constituted 68% of the total consideration could be treated as royalty within the meaning of Section 9 (1) (vi) of the Act read with Article 12 (3) (b) of the DTAA and whether the installation charges could be treated as FTS within the meaning of Explanation 2 below Section 9 (1) (vii) of the Act read with Article 12 (4) (a) of the DTAA?

Are mobilisation/demobilisation charges 'royalty'?

29. The Petitioner is right in its contention that the Revenue did not contend before the AAR that the income earned by the Petitioner from the contract towards mobilisation/demobilisation charges should be treated as royalty under Section 9(i) (vi) of the Act or Article 12.3(b) of the DTAA. The fact that in the certificates issued under Section 197 of the Act the Revenue may have earlier characterized the payment as royalty cannot change its stand taken subsequently before the AAR. Therefore, there was no occasion for the AAR to examine the question as to whether the payment received for mobilisation/demobilisation could be treated as royalty under Section 9(i) (vi) of the Act read with Article 12.3(b) of the DTAA.

30. The term 'royalty' is defined in Article 12.3 of the DTAA as under:

“The term ‘royalties’ as used in this Article means payments of any kind received as a consideration for the use of, or the right to use:

(a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information;

(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8.”

31. As far as the Act is concerned, Section 9(1) (vi) states that the following incomes shall be deemed to accrue or arise in India:

"(vi) income by way of royalty payable by—

(a) the Government ; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or
(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Provided that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April, 1976, and the agreement is approved by the Central Government :

Provided further that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum payment made by a person, who is a resident, for the transfer of all or any rights (including the granting of a licence) in respect of computer software supplied by a non-resident manufacturer along with a computer or computer-based equipment under any scheme approved under the Policy on Computer Software Export, Software Development and Training, 1986 of the Government of India.

32. Explanation 2 thereunder defines royalty to mean as under:

"Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—

- (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;
- (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;
- (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;
- (iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;
- (v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or
- (vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).

33. Further, Explanation 5 below Section 9(vi) reads as under:

“Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not—

- (a) the possession or control of such right, property or information is with the payer;
- (b) such right, property or information is used directly by the payer;
- (c) the location of such right, property or information is in India.”

34. As far as DTAA in the present case is concerned, the income earned by the Assessee would be treated as royalty only where it is received as

consideration for the use of the equipment, i.e., industrial, commercial or scientific. It can also be for use of or the right to use any copyright or for information concerning industrial, commercial or scientific experience. It is clear from the contract itself that the control of the equipment throughout remained with the Petitioner and did not get transferred to IOCL.

35.1 In this context, it is necessary to refer to the decision of this Court in *Asia Satellite Telecommunications Co. Ltd (supra)*. The facts were that the Assessee in that case, Asia Satellite Telecommunications Co. Ltd. (ASTC), a company incorporated in Hong Kong, was carrying on the business of private satellite communications and broadcasting facilities and was the lessee of a satellite called AsiaSat 1 which was launched in April 1990 and was the owner of a satellite called AsiaSat 2 which was launched in November 1995. ASTC entered into agreements with television channels, communication companies or other companies who desired to utilize the transponder capacity available on the assessee's satellite to relay their signals. The customers had their own relaying facilities, which were not situated in India. From these facilities, the signals were beamed in space where they were received by a transponder located in the assessee's satellite.

35.2 The process of transmission of TV programmes started with TV channels (customers of ASTC) uplinking the signals containing the television programmes ; thereafter the satellite received the signals and after amplifying and changing their frequency relayed it down in India and other countries where the cable operators caught the signals and distributed them to the public. Any person who had a dish antenna could also catch the

signals relayed from these satellites. The role of ASTC was that of receiving the signals, amplifying them and after changing the frequency relaying them on the earth. For this service, the TV channels paid ASTC.

35.3 The Court held that ASTC was the operator of the satellites and in control of the satellite. It had not leased out the equipment to the customers. ASTC had merely given access to a broadband width available in a transponder which could be utilized for the purpose of transmitting signals of the customer. It was held that the terms “lease of transponder capacity”, “lessor”, “lessee” and “rental” used in the agreement would not be the determinative factors. There was no use of “process” by the television channels. Moreover, no such purported use had taken place in India. It was held that the services provided were an "integral part of the satellite" and remained "under the control of the satellite/transponder owner (like the appellant in this case) and it does not vest with the telecast operator/television channels." The Court rejected the plea that the payment made to ASTC could be 'royalty' within the meaning of Section 9 (1) (vi) of the Act. The Court reiterated that "the fact remains that there is no use of 'process' by the television channels. Moreover, no such purported use has taken place in India."

35.4 The Court has held that the concept of dominion or control is *sine qua non* **use**. Further Explanation 5 below Section 9 (vi), to the extent it is not beneficial to the Assessee, will have to in terms of Section 90 (2) of the Act, make way for the provision of the DTAA which is more beneficial to the

Assessee. This aspect too has been clarified by the Court in *Asia Satellite Telecommunications (supra)*. It was observed:

"The effect of an agreement made pursuant to Section 90 is that if no tax liability is imposed under this Act, the question of resorting to agreement would not arise. No provision of the agreement can fasten a tax liability when the liability is not imposed by this Act. If a tax liability is imposed by this Act, the agreement may be resorted to for negating or reducing it. In case of difference between the provisions of the Act and of an agreement under section 90, the provisions of the agreement shall prevail over the provisions of the Act and can be enforced by an appellate authority or the court. However, as provided by sub-section (2), the provisions of this Act will apply to the assessee in the event they are more beneficial to him. Where there is no specific provision in the agreement, it is the basic law, i.e., the Income-tax Act which will govern the taxation of income."

36. For the payment to be characterised as one for the use of the equipment, factually, the equipment must be used by IOCL. In the present case factually, there is no finding that the equipment had actually been used by IOCL. There is a difference between the use of the equipment by the Petitioner 'for' IOCL and the use of the equipment 'by' IOCL. Since the equipment was used for rendering services to IOCL, it could not be converted to a contract of hiring of equipment by IOCL.

37. As observed in *Visual Inc. v. Asst. CCT 124 STC 426 (Karn)*:

"9. Thus if the transaction is one of leasing/hiring/letting simpliciter under which the possession of the goods, i.e., effective and general control of the goods is to be given to the customer and the customer has the freedom and choice of selecting the manner, time and nature of use and enjoyment, though within the frame work of the agreement, then it would be a transfer of the right to use the goods and fall under the extended definition of 'sale'. On the other hand, if

the customer entrusts to the assessee the work of achieving a certain desired result and that involves the use of goods belonging to the assessee and rendering of several other services and the goods used by the assessee to achieve the desired result continue to be in the effective and general control of the assessee, then, the transaction will not be a transfer of the right to use goods falling within the extended definition of 'sale'."

38. Consequently, this Court is unable to concur with the finding of the AAR that in the instant case the consideration received for mobilisation/demobilisation should be considered as royalty paid by IOCL to the Petitioner.

Are installation charges FTS?

39. Turning to the other question of the nature of the consideration received by the Petitioner for installation, the definition of FTS in Article 12(4) is relevant. It reads as under:

“The term “fees for technical services” as used in this Article means payments of any kind to any person in consideration for services or a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein; or

(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the

person acquiring the service to apply the technology contained therein.

For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person.

5. Notwithstanding paragraph 4, “fees for technical services” does not include payments:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a);

(b) for services that are ancillary and subsidiary to the rental or ships, aircraft, containers or other equipment used in connect with the operation of ships or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the personal use of the individual or individuals making the payment;

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14;

(f) for services rendered in connection with an installation or structure used for the exploration or exploitation of natural resources referred to in paragraph 2(j) of Article 5;

(g) for services referred to in paragraphs 4 and 5 of Article 5.”

40. The AAR held the installation services to be ancillary and subsidiary to the main work of the Petitioner. In that sense, the payment of FTS under Article 12.4(a) of the DTAA is linked to the payment received as royalty

under Article 12.3. In the light of the finding of this Court that payment of mobilisation/demobilisation cannot be termed as royalty, the question of treating the work of installation as ancillary to such work and the payment for installation as FTS does not arise. Further, in terms of the contract with IOCL, the Petitioner provides services of construction and installation of SPM. This does not involve any transfer of any technology, skill, experience or know-how, to enable IOCL to undertake such activities on its own.

41. The Revenue's contention that the work of mobilisation/de-mobilisation and the work of installation are separable components of the work as a whole is not borne out by the documents constituting the written contract. Consequently, the decision in *Ishikawajima-Harima Heavy Industries Ltd. v. DIT (supra)* is not of assistance to the Revenue. IOCL's letter dated 17th July 2008 to the Petitioner clarified that the work of 'Residual Offshore construction' at Paradip was a composite one comprising three groups viz., installation of the SPM; post trenching of the 48" and 14" pipeline and all balance works required to complete the 14" effluent pipeline. However, as far as the Petitioner was concerned it had to perform all the three 'groups' of work and the payment was for execution of the composite contract.

42. While the payment was a lumpsum of US\$ 18,598,140, the said sum was broken up for the individual components like mobilization and demobilization of Marine Spread; Pre and post erection work; Actual installation work and documentation and miscellaneous. This again did not mean that mobilisation and de-mobilisation of marine spread was the main work and installation was ancillary and subsidiary to the said work.

43. In the above factual background, an examination is undertaken of Section 9 (1)(viii) of the Act which deals with the income by way of FTS and reads as under:

"(vii) income by way of fees for technical services payable by-

(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non- resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

.....

Explanation 2.- For the purposes of this clause, " fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head" Salaries".

44. The Petitioner is right in contending that the services rendered by it to IOCL under the contract fell under the exclusionary portion of Explanation 2 viz., "consideration for any construction, assembly, mining or like project undertaken by the recipient" This has been unable to be denied by the Revenue.

45. Therefore, on two counts the finding of the AAR on FTS cannot be sustained. The first being that the installation services are not incidental to the mobilisation/demobilisation service. The contract was in fact for installation, erection of equipment. Mobilisation/demobilisation constituted an integral part of the contract. Secondly, the AAR has proceeded on a factual misconception that the dominion and control of the equipment was with IOCL. It was erroneously concluded that the payment for such mobilisation/demobilisation constitutes royalty. In that view of the matter, the consideration for installation cannot not be characterized as FTS and brought within the ambit of Article 12.4(a) of the DTAA. The resultant position is that no part of the income earned by the Petitioner from the contract with IOCL can be taxed in India.

Conclusion

46. For the aforementioned reasons, the impugned order dated 15th February 2012 of the AAR is hereby set aside. The petition is allowed in the above terms with no order as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

JUNE 02, 2016

mg