IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Income Tax Appeal No. 01 of 2012

Samsung Heavy Industries Co. Ltd. …….. Appellant

Versus

The Director of Income-tax -1
International Taxation, Delhi
and another …….. Respondents

Present: Mr. C.S. Aggarwal, Senior Advocate assisted by Mr. P.R. Mullick, Advocate for the appellant.
Mr. Hari Mohan Bhatia, Advocate for the respondents.

Date: December 27, 2013

Coram: Hon'ble Barin Ghosh, C.J.
Hon'ble U.C. Dhyani, J.

BARIN GHOSH, C.J.

For the Assessment Year 2007-08 and in relation to previous year 2006-07, appellant, a foreign Company, filed its return of income on 21st August, 2007 showing nil income and claiming to have sustained loss. It was disclosed by the appellant that it has entered into a contract between O.N.G.C. on the one hand and Larsen & Toubro Limited and the appellant on the other hand as consortium partners executed on 28th February, 2006. It was indicated that under the contract, appellant received certain amount of money. It was held out that a part thereof was received in relation to inside India activities and, in respect thereof, it has incurred certain expenses and after deducting such expenses, it has earned a loss and, accordingly, earned no income taxable in India. The Assessing Officer, by its order dated 25th October, 2010 refused to accept some of the deductions as was claimed by the appellant and found on the disclosure made by the appellant that in addition to the sum of money shown to have been received, appellant has received other sums of monies under the contract and claimed that the same were in respect of outside India activities. The Assessing Officer held that 25 per cent of the

revenues, thus received allegedly for outside India activities, should be brought within the taxing network of this country and passed an order accordingly. This order of the Assessing Officer has been confirmed by the Appellate Tribunal. Hence the present appeal.

2. Before filing the present appeal, appellant, on the garb of seeking rectification of mistake, made an attempt to have the order of the Tribunal reviewed by it, which the Tribunal has refused to do. In the present appeal, we are not concerned with the deductions as were claimed by the appellant and disallowed by the Assessing Officer. We are only concerned with bringing in of 25 per cent of the money received by the appellant under the contract, but in connection with allegedly outside India activities within the tax network of this country.

3. A short summarization of the facts, as above, would indicate two things, namely, that (i) the appellant has a tax identity in India and a tax identity outside India and, accordingly, (ii) its tax liability in India is required to be apportioned. What mechanism will be adopted to apportion the same has, however, not been provided in the Agreement for avoidance of double taxation of income and the prevention of fiscal evasion entered by the Union of India with the Republic of Korea.

4. In paragraph 1 of Article 7 of the said Agreement, it has been provided that profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. It, therefore, recognizes two tax identities of an enterprise. The said paragraph makes it clear that the profits of the enterprise may be taxed in the other State only so much of the same which is attributable to that permanent establishment.

5. Paragraph 2 of Article 7 is as follows :-

> "Subject to the provisions of paragraph (3), where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment."

6. In the event, an enterprise having a tax identity in one Contracting State for having a permanent establishment there, and dealing wholly independently with its other tax entity situate in the other Contracting State, the profit attributable to the first tax identity will be profit which might be expected to be made.

7. Therefore, the said Agreement does not give any guidance to ascertain what income is attributable to which tax entity unless profit is generated by one tax entity dealing with the other tax entity.

8. In the instant case, appellant held out that a part of the money received by it was attributable to within India activities and the remaining on account of out of India activities. Appellant was not generating any revenue by dealing with either its Indian tax identity, or its Korean tax identity. It was generating revenue by dealing with O.N.G.C. under the said contract. It confessed that a part of such revenue was earned by it for having had carried out within India activities. It asserted and continues to assert that the remaining revenue was generated by carrying out out of India activities. There is no finding anywhere that the revenue earned and said to have been on account of out of India activity was earned, in fact, on account of within India activity.

9. Being a resident of Korea, appellant is governed by the Income-tax Laws applicable to the class of assessees as that of the appellant as prevalent in Korea. Therefore, it has a tax identity

in Korea. In addition thereto, appellant has submitted to the jurisdiction of Indian Taxing Authorities by furnishing return of income and, thereby, acknowledged that it has also a tax identity in India. The question is, this identity is covered by which provision of the Agreement. In terms of paragraph 1 of Article 7, appellant will acquire its tax identity in India only when it carries on business in India through a permanent establishment situate in India. By submitting the return, appellant has held out that it is carrying on business in India through a permanent establishment situated in India. In the circumstances, the contention of the appellant, whether the Project Office of the appellant opened at Mumbai can be, or cannot be said to be a permanent establishment within the meaning of the said Agreement is of no consequence. In terms of the said Agreement, as it appears to us, if an enterprise does not have a tax identity in India in the form of a permanent establishment, it has no obligation to either submit any tax return with, or pay any tax to India. The question still remains, whether it was right on the part of the Taxing Authority to assess income-tax liability of the appellant as was assessed in the instant case. In other words, can it be said that the Agreement permitted the Indian Taxing Authority to arbitrarily fix a part of the revenue to the permanent establishment of the appellant in India? As aforesaid, appellant held out that a part of the revenue was received by it for doing certain work in India. It did not contend that even those works were done by or through its Project Office at Mumbai. On the other hand, there is not even a finding that 25 per cent of the gross revenue of the appellant was attributable to the business carried out by the Project Office of the appellant. One has to read Article 5 of the Agreement in order to understand what a permanent establishment is, in terms whereof “permanent establishment” means a fixed place of business through which business of an enterprise is wholly or partly carried on. In the instant case, according to the revenue, the Project Office of the

appellant in Mumbai is the “permanent establishment” of the appellant in India through which it carried on business during the relevant assessment year and 25 per cent of the gross receipt is attributable to the said business. Neither the Assessing Officer, nor the Tribunal has made any effort to bring on record any evidence to justify the same.

10. That being the situation, we allow the appeal, set aside the judgment and order under appeal as well as the assessment order in so far as the same relates to imposition of tax liability on the 25 per cent of the gross receipt upon the appellant in the circumstances mentioned above, and observe that the questions of law formulated by us, while admitting the appeal, have not, in fact, arisen on the facts and circumstances of the case, but the real question was, whether the tax liability could be fastened without establishing that the same is attributable to the tax identity or permanent establishment of the enterprise situate in India and the same, we think, is answered in the negative and in favour of the appellant.

(U.C. Dhyani, J.)
27.12.2013

(Barin Ghosh, C.J.)
27.12.2013

P. Singh