IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Income Tax Appeal No. 34 of 2007

The Commissioner of Income Tax Dehradun
And another … Appellants

Versus

M/s BKI/HAM v.o.f.

C/o Arthur Anderson & Co., New Delhi ... Respondent

Mr. Arvind Vashisth, Advocate for the appellants.
Mr. S.K. Post, Advocate for the respondent assessee.

Hon'ble Tarun Agarwala, A.C.J.
Hon'ble U.C. Dhyani, J.

Heard Shri Arvind Vashistha, the learned counsel for the appellants and Shri S.K. Posti, the learned counsel for the respondent-assessee.

The present appeal has been filed by the Revenue u/S 260-A of the Income Tax Act, 1961 for the assessment year 1994-95. The facts, in brief, is that the assessee is a partnership firm consisting of Boskalis International B.V. and Hollansche Aanneming Maatschappij B.V. (BKI/HAM) incorporated under the laws of Netherlands on 24th November, 1993 with a limited liability. During the assessment year 1994-95, the assessee entered into a sub-contract for dredging and back filling works with Hyundai Heavy Industries in respect of the second Basin Hazira Trunk Pipeline Project. The contract comprised of dredging a trench for laying the pipeline and back filling of the trench after the pipeline had been laid. The dredging activities commenced in India w.e.f. 27th December, 1993 and was completed on 12th June, 1994. It may be noted here that the contract was spilled over two assessment years, i.e., 1994-95 and 1995-96 and that the entire duration of the work was less than six months.

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For the assessment year 1994-95, the appellant submitted its return declaring nil income. The assessee had claimed in its return that its revenue was not taxable in India as it did not have a permanent establishment in India as defined under Article 5 of the Double Taxation Avoidance Agreement between India and Netherlands. It was claimed that in view of clause (3) of Article 5 of the treaty, a building site or construction, installation or assembly project constituted a permanent establishment only where such project continue for a period of more than six months. It was claimed that the dredging activity was covered under Article 5 (3) of the treaty and, the activity in India, under the said contract, did not exceed more than six months, as such, the appellant did not have a permanent establishment in India and, therefore, no portion of its income was chargeable in India.

Subsequently, notice u/S 148 of the Act was issued to the assessee on 25th May, 1998 and the assessment proceedings were reopened on the basis of the assessment year 1995-96, in which it was concluded that the assessee had a permanent establishment in India and hence was taxable in India. The assessment order for the assessment year 1995-96 placed reliance on Article 5 (2) of the treaty. The Assessing Officer, on the basis of the assessment order for the assessment year 1995-96, passed the assessment order for the assessment year 1994-95 holding that the assessee had a permanent establishment in India.

The assessee, being aggrieved by the assessment order under Section 148 of the Act, filed an appeal before the Commissioner of Income Tax (Appeals). The learned Commissioner by an order dated 4th February, 2002 allowed the appeal and held that no permanent establishment of the assessee existed in the year under consideration and, consequently, no part of the revenue was taxable in India. The Commissioner of Income Tax (Appeals) found that the contract was for less than 180 days

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and was spilled over two assessment years, i.e., for the assessment year 1994-95 and 1995-96. The appellate authority found that for the assessment year 1995-96, the assessee was taxed in India on the ground that it had a permanent establishment in India. The assessee preferred an appeal which was eventually allowed by the Tribunal. The Tribunal found that in terms of the provision of Article 5 (3) of the treaty, no permanent establishment of the assessee existed for the year under consideration and that the entire duration of the contract did not exceed six months period and, consequently, no permanent establishment was created.

The Commissioner of Income Tax (Appeals) not only relied upon the order the Income Tax Appellate Tribunal for the assessment year 1995-96 but also analysed the provision of the treaty and concluded that the entire duration of the contract was less than six months and, as such, no permanent establishment was constituted in India and that the provision of Article 5 (2) of the treaty, being a general provision, would not apply in view of the specific provision being provided under Article 5 (3) of the treaty which provided for the existence of a permanent establishment. The Commissioner of Income Tax (Appeals) further found that the basic requirement of a permanent establishment, as per the provision of 5 (1) of the treaty, was completely absent in the Bombay Office of the assessee and that the facts of the case for the assessment year 1994-95 was the same as that of assessment year 1995-96 and since the contract spilled over two assessment years, the finding of the Tribunal for the assessment year 1995-96 was equally applicable for the assessment year 1994-95.

The revenue, being aggrieved by the aforesaid order, filed an appeal before the Tribunal which was dismissed by an order dated 23rd June, 2006. The revenue, being aggrieved by the said order, filed the present appeal u/S 260 A of the Act which was admitted on the following substantial question of law:-

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> "1. Whether the Hon'ble I.T.A.T. was legally correct in upholding the decision of CIT (A) on facts in his finding that the assessee did not have permanent establishment in India within the meaning of Article 5 of the DTAA between India and the Netherlands?
>
> 2. Whether the Hon'ble ITAT was legally correct in upholding the decision of CIT (A)-1, Dehradun on facts in his decision that no part of the revenue earned by the assessee is taxable in India."

The learned counsel for the appellant stressed that the Commissioner of Income Tax (Appeals) as well as the Tribunal committed an error in holding that no permanent establishment is existed in India in view of the provision of Article 5 (2) of the treaty and that the Tribunal committed an error in not considering this provision and relying upon the provision of Article 5 (3) of the treaty. On the other hand, the learned counsel for the assessee submitted that the findings of the Commissioner of Income Tax (Appeals) as well as of the Tribunal are based on the findings of fact which cannot be interfered in the present appeal and that no substantial question of law arises for consideration.

In order to appreciate the submission of the learned counsel for the parties, it would be appropriate to extract sub-clause 1, 2 and 3 of Article 5 of the treaty entered between India and Netherlands which are applicable.

> "PERMANENT ESTABLISHMENT
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> 1. For the purpose of this Convention, the terms "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

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2. The term "permanent establishment" includes especially :

(a) a place of management;

(b) a branch ;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(g) a warehouse in relation to a persons providing storage facilities for others:

(h) a premises used as a sales outlet;

(i) an installation or structure used for exploration of natural resources provided that the activities continue for more than 183 days.

(3) A building site or construction, installation or assembly project constitutes a permanent establishment only where such site or project continues for a period of more than six months."

A perusal of Article 5 (1) of the treaty indicates that a "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on. Article 5 (2) of the treaty includes a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources, a warehouse in relation to a persons providing storage facilities for others, a premises used as a sales outlet, an installation or structure used for exploration of natural resources provided that the activities continue for more than 183 days. Article 5 (3) provides that a building site or construction, installation or assembly project constitutes a permanent

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establishment only where such site or project continues for a period of more than six months.

In the light of the aforesaid provisions, the learned counsel for the assessee submitted that the assessee had a permanent establishment under the provision of Article 5 (2) and had an office at Bombay and, consequently, had a permanent establishment which has not been considered by the appellate authority as well as by the Tribunal. The learned counsel for the appellant submitted that in view of the fact that the assessee had an office at Bombay, the provision of Article 5 (3) was immaterial.

The submission of the learned counsel for the appellant is patently erroneous and mis-conceived. The Tribunal in the assessment order 1995-96 as well as the appellate authority in the assessment order 1994-95 have categorically given a finding of fact that the entire duration of the contract was from 27th December, 1993 till 26th June, 1994, i.e., less than six months. Article 5 (3) of the treaty provided that in order to constitute a permanent establishment such site or project should continue for a period of more than six months. Such site or project, in our opinion, is provided under Article 5 (2) of the treaty and, therefore, the site or project provided under Article 5 (2) should continue for a period of more than six months in order to constitute a permanent establishment. Since a categorical finding of fact has been given by the appellate authority that the contract was for less than six months, it becomes absolutely clear that the assessee did not have a permanent establishment in India as per Article 5 (3) of the treaty. The court is of the opinion that Article 5 (3) provides a specific provision which covers the provision of Article 5 (2) of the treaty. The Court is of the opinion that the specific provision would prevail over the general provision. Consequently, the court is of the opinion that no permanent

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establishment was constituted by the assessee in India during the assessment year in question.

Further, the Court finds from a reading of the order of the Tribunal that the counsel for the revenue also agreed that the controversy involved was squarely covered by the decision of the Tribunal in the assessee's own case for the assessment year 1995-96. Once this fact has been admitted and agreed by the learned counsel for the Revenue, it was no longer open to the revenue to file the appeal before this Court.

In the light of the aforesaid, we are of the opinion that the assessee did not have any permanent establishment in India within the meaning of Article 5 of the Double Taxation Avoidance Agreement entered between India and Netherlands and no part of the revenue earned by the assessee was taxable in India. The questions of law are answered accordingly.

For the reasons stated aforesaid, we do not find any merit in the appeal and is dismissed. In the circumstances, there shall be no order as to cost.

(U.C. Dhyani, J.) **(Tarun Agarwala, A.C.J.)**

Date: 14/10/2011
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