

IN THE ANDHRA PRADESH HIGH COURT

THE HON'BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA

AND

THE HON'BLE SRI JUSTICE SANJAY KUMAR

I.T.T.A. No.612 of 2013

DATED: 4.2.2014

Between:

The Director of Income Tax (International Taxation), ... Appellant

And

M/s Nisso Lwai Corporation, JapanRespondent

Judgment: (per the Hon'ble the Chief Justice Sri Kalyan Jyoti Sengupta)

This appeal is sought to be preferred against the judgment and order of the learned Tribunal dated 22.6.2010 and is sought to be admitted on the following substantial questions of law:

(1) In the facts and circumstances of the case, whether the finding of the Hon'ble Tribunal that the amounts received by the respondent assessee for supply of design and engineering drawings do not come within the definition of 'fee for technical services' in terms of Section 9(1)(vii) of Income Tax Act is not erroneous and contrary to law and liable to be set aside ?

(2) Whether the finding of the Hon'ble Tribunal that the fee for design and engineering drawings received by the Respondent assessee is not liable for tax in India, is not vitiated in law as the Hon'ble Tribunal failed to consider and appreciate the material facts and reasons on record?

We have heard Mr. B. Narasimha Sarma, learned counsel for the appellant and have gone through the judgment and order of the learned Tribunal.

It appears, the learned Tribunal, on fact, found that there has been no accrual of income in India and this accrual of income has taken place in Japan. As such, the Income Tax Act cannot be made applicable. We feel that the decision is legally correct and we do not find any element of law to be decided in this appeal.

The appeal is accordingly dismissed.

K.J. SENGUPTA, CJ

SANJAY KUMAR, J
4.2.2014

IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM

BEFORE: SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND
SHRI BR BASKARAN, ACCOUNTANT MEMBER

ITA No. 372/Vizag/2002

Assessment Year: 1991-92

M/s Nissho Iwai Corpn. Rep.
RINL, VSP, Visakhapatnam
(Appellant)
PAN No:

Vs.

ACIT, Special Range-1,
Visakhapatnam
(Respondent)

Appellant By: **Dr. Anitha Sumanthi, Advocate**
Respondent By: **Shri G.s.S. Gopinath, (DR)**

ORDER

Per Shri B. R. BASKARAN, Accountant Member:

The appeal of the assessee is directed against the order dated 21-02-2002 passed by the Ld CIT (A)-II Visakhapatnam and it relates to the assessment year 1991-92.

2. All the grounds raised by the assessee are directed against a single issue namely whether the fee for design and engineering documentation received by the assessee company is taxable in India.

3. The facts relating to the issue are stated in brief. The assessee is a non-resident company and it is represented by M/s Rashtriya Ispat Nigam Ltd., (RINL) Visakhapatnam. The assessee company has provided design and engineering services, manufacture, delivery, technical assistance through supervision of erection and commissioning etc., to establish compressor house-I for M/s. RINL. The payments were made by M/s RINL separately for each of the services/equipments provided/supplied by the assessee. It, inter alia, included payment made towards supply of design

and engineering drawings. The assessee company claimed the said payment is not taxable under the Indian Income Tax Act as it was a transaction of sale of goods that has taken place outside India. The said claim was rejected by the AO and his order was confirmed by CIT (A). Hence the assessee is in appeal before us.

4. We have heard the parties and carefully perused the record. During the course of hearing the Ld Counsel for the assessee carried us through the following clauses in the agreement between the Assessee Company and RINL in 1986 to support her case that even as per the original contract that the supply of design and drawing documents have to take place outside India.

a) 1.2 Supply of drawing and documentation:

The Prime Contractor shall supply the drawings and documentation as detailed in Article-11 of the Purchaser's General Conditions of Contract.

b) 2.4.1. The Prime Contractor shall transfer, deliver and impart the designs and drawing to the representative designated for that purpose by Purchaser in Japan or at the request of the Purchaser by transmitting the same either by surface mail or air mail or through a carrier in which case the post office or such carrier in Japan shall be the agent of the Purchaser.

c) 3.5.1.1 Property in the designs and drawings shall vest with the Purchaser on the same being transferred, delivered and imparted to the representative of the Purchaser in Japan or when the packet containing the design and drawings is delivered either to the post office or to a carrier designated by the Purchaser in Japan as the case may be.

Though the Ld DR contended that there is no proof to show that the supply has taken place in Japan, yet we notice from the record that there was no dispute on this point. According to the clauses cited above, the preparation and delivery of design and drawings have to take place in Japan. Since the contract was entered into between the parties prior to the commencement of construction of the "Compressor House-I", in the absence of any other

contrary evidence, it has to be accepted that the preparation and delivery of the said documents have taken place in Japan.

4.1 The Hon'ble Supreme Court, in the case of Ishikawajima Harima Heavy Industries Ltd., Vs. Dir. of IT (288 ITR 408) has held that in case of off shore supply of goods, if all parts of the transaction, i.e. the transfer of property in goods as well as the payment, were carried on outside the Indian soil, the transaction could not have been taxed in India. In the instant case also, all the parts of the transactions have taken place outside the Indian soil and hence the impugned transaction falls outside the purview of Indian taxation.

4.2 In the alternative, the Ld AR also submitted that the design and drawing constitutes a plant and hence it cannot be taken as fee for technical services. In that regard the reliance was placed on the following decision of the Hon'ble Supreme Court:

- i) Scientific Engineering House P Ltd., vs. CIT (AP) (Supreme Court 157, ITR 86
- ii) Elicon Engineering 166, ITR 66

Since the payment in the instant case has been made for outright purchase of design and engineering drawings, the same would not fall under the definition of fee for technical services provided in 9(1) (vii) of the Act.

4.3 In our view the decision of Delhi ITAT Bench in the case of Mannesman Demag Sack AG Vs.Add.CIT reported in (2008), 119 TTJ (Del) 543, on which reliance was placed by Ld DR, is not applicable to the facts of the instant case. In the case of Mannesman Demag Sack, supra, the decision was rendered on the basis of the terms of the contract which provided that technical services shall include supply of design and drawings. Hence on the facts of the case, the Tribunal held that design and drawing charges are in the nature of fee for technical services. However, it may be

pertinent to note that the Tribunal in that case, accepted the alternative contention of the assessee that the said fee cannot be assessed in India, unless it is shown that some part of work has emanated from Indian territories.

4.4 Hence on a conspectus of the matter, we are of the view that the amount received by the assessee for supply of design and engineering drawings is in the nature of plant and since the preparation and delivery has taken place outside Indian territories, the same can not be subjected to tax in India. Accordingly we set aside the order of the Ld CIT (A) and direct the AO to delete the addition on this issue.

5. In the result, the appeal of the assessee is allowed.

Pronounced in the open Court on 22nd June, 2010.

Sd/-
(Sunil Kumar Yadav)
Judicial Member

Sd/-
(B R Baskaran)
Accountant Member

PVV/SPS
Visakhapatnam,
Date: 22-06-2010.

Copy to

- 1 M/s.NISSHO IWAI Corpn. Japan, Rep. by M/s RINL, V.S.P. Visakhapatnam 530031
- 2 The ACIT, Special Range-1, Visakhapatnam
- 3 The CIT –II Visakhapatnam
4. The CIT(A)-II, Visakhapatnam.
- 5 The DR, ITAT, Visakhapatnam.
- 6 Guard file.

By Order

Senior Private Secretary
INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM