IN THE INCOME TAX APPELLATE TRIBUNAL, NEW DELHI, BENCH 'E'

BEFORE SHRI G. E. VEERABHADRAPPA, HON'BLE VICE PRESIDENT AND SHRI A. D. JAIN, JUDICIAL MEMBER

ITA Nos.3399 /Del/2002, 5372/Del/2003 & 4742/Del/2004
(Assessment Year 1999-2000, 2000-01 & 2001-02 Respectively)

Rio Tinto Technical Services (A division of Technological Resources Pty. Ltd.) Project Office, 11th Floor, Gopal Das Bhawan, 28, Barakhamba Road, New Delhi.	Vs.	DCIT, Circle 2(1), New Delhi
(Appellants)		(Respondents)

PAN / GIR No.	Foreign company
Appellant by:	Shri Salil Kapoor, Sanet Kapoor, Adv. Abhishek Chawla, Nithil Jaiswal, CA
Respondent by:	Ms. Y S Kakkar, DR & Shri M k Gautam, CIT DR

ORDER

PER A. D. JAIN, JM:

1. I.T.A. No. 3399/Del/2002 is an appeal filed by the assessee against the order of Ld. CIT(A) XXIX, New Delhi in appeal No.240/2001-02 dated 14.06.2002 for the Assessment Year 1999-2000, I.T.A. No. 5372/Del/2003 is an appeal preferred by the assessee against the order of CIT(A) XXIX, New Delhi in appeal

No.20/2003-04 dated 6.10.2004 for the Assessment Year 2000-01 and I.T.A. No. 4742/Del/2004 is an appeal preferred by the assessee against the order of Ld. CIT(A) XXIX, New Delhi in appeal No.183/2003-04 dated 12.08.2004 for the Assessment Year 2001-02. As all these appeals relate to the same assessee and are in regard to only one issue, the same are being disposed of by this common order.

2. The Ld. counsel for the assessee submitted that the assessee is a division of Technical Resources Prt. Ltd. Australia, which had entered into a contract with Rio Tinto India Pvt. Ltd. (for short, 'RTIPL') on 04.03.1998 for evaluation of coal deposits in Maharashtra and corresponding feasibility studies for transporting the same to Bhadrawati Power Station; that the assessee had established a project office in India on 22.09.1998 pursuant an approval granted by RBI to render the services under the agreement; that the project with RTIPL was completed on 18.06.1999; that the assessee further entered into a contract with Resources of Orissa Mining Ltd. on 22.07.1999 for evaluation of iron ore deposits at Gadhanardhan & Malangtoly in Orissa and the corresponding feasibility studies for transportation of iron ore by rail to Paradeep Port, Orissa; for this purpose, the RBI had granted the assessee an approval

dated 02.09.1999 for the relevant Assessment Years 1999-2000, 2000-01 & 2001-02 that the assessee had field its return of income, which was processed; that the course of the assessment proceedings, the A.O. had held that the amounts received by the assessee from RTIPL and Rio Tinto Orissa Mining Limited (for short, 'RTOM') were fee for technical services and in accordance with the provisions of Section 9(1)(vii) read with Section 115A of the I. T. Act, he taxed the same @ 20%; that the gross receipt of the assessee had been treated as fee for technical services and taxed @ 20% on gross basis by invoking the provisions of Sections 115A and 44D of the Act; that the A.O. had accepted that the assessee was covered by Article 7 of the DTAA between India and Australia; that, however, the A.O. had held that the said Article 7 of the DTAA did not prescribe any rate of tax and, therefore, reference was to be made to the Act and considering that the nature of receipt of the assessee was fee for technical services and its business income, applied the provisions of Sections 115A and 44D of the Act; that the Ld. CIT(A), in the course of appellate proceedings, dismissed the assessee's appeal without appreciating the contention of the assessee; that as per the provisions of Section 90 of the Act the assessee was to be taxed as per the provisions of the Act and the relevant DTAA, which ever was beneficial to the assessee; that the assessee had opted to be taxed under the provisions of DTAA between India and Australia. It was the further admitted that the assessee had a project office in India and it constituted a permanent establishment ('PE') in India as per Article 5 of the India - Australia treaty; that as per Article 12(4) of the treaty as the assessee was deriving income from a fixed base situated in India, the provisions of Article 7 of DTAA apply; that since the assessee had PE in the form of a project office in India through which the services under the control of RTIPL & RTOM had been rendered, Article 6 of India - Australia Treaty was applicable in determining the income chargeable to tax; that as per Article 7(1), which was a charging provision for computation of business profits of the assessee, a non resident carrying on its business in India through its permanent establishment the income that would be chargeable to tax in India would be the profits that are attributable to the assessee's said permanent establishment; that the A.O. had rejected the assessee's submission and had held that since the assessee was rendering services which were in the nature of a fee for technical services, the provisions of Section 44D of the Act applicable and the assessee would be subject to tax on gross basis, as per the provisions of Sections 115A and 44D of the Act; that the payment for the services rendered was not fee for technical services, either under Article 12(3)(g) of the India-Australia Treaty, or u/s 9(1)(vii) of the Act, in so far as the assessee had not rendered any services which made available technical knowledge, experience, skill, know how or process or involve development and transfer of any technical plan or design; that the assessee was engaged in the evaluation of iron ore deposits at Gandhamardan and Malangtoli in Orissa and the corresponding feasibility study for transportation of ore by rail to Paradeep Port, Orissa; that as per the contract, the services of the assessee did not make available any technical knowledge, experience, skill or know how or process and also did not involve any development or transfer of a technical plan or design; that the provisions of Section 55A were not applicable. It was the further submission that the activities undertaken by the assessee were an integral part of a mining project and were covered by the specific exclusion provided in the definition of 'fee for technical services' u/s 9(1)(vii) of the Act; that the activities carried out by the assessee were a step in aid and an integral part of a mining project and thus fell within the definition of 'mining' for the purpose of Explanation (2) to Section 9(1)(vii) of the Act. The Ld. counsel then drew our attention to CBDT Circular No. 202 dated 5.7.1976 explaining the provisions of the Finance Act 1976 in relation to the definition of 'fee for technical services' wherein it has been specified as under:

> *"Any consideration received for any construction, assembly, mining or like project undertaken by the recipient. Such consideration has been excluded from the definition on the ground that such activities virtually amount to carrying on business in India for which considerable expenditure will have to be incurred by a non-resident and accordingly, it will not be fair to tax such consideration in the hands of a foreign company on gross basis or to restrict the expenditure incurred for earning the same to 20 per cent of the gross amount as provided in new section 44D.*
>
> *Consideration for any construction, assembly mining or like project will, therefore, be chargeable to tax on net basis, i.e. after allowing deduction in respect of costs and expenditure incurred for earning the same and charged to tax at the rates applicable to the ordinary income of non-resident as specified in the relevant Finance Act."*

2.1 The Ld counsel thus submitted that the provisions of Section 44D of the act and Section 115A did not apply to the assessee's case and the income of the assessee was entitled to be assessed as business income as per Article 7 of the DTAA and the expense were entitled to be allowed in computation of income of the assessee.

2.2 It was the alternate submission by the Ld. counsel that if Section 9(1)(vii) of the Act is deemed to be applied in the assessee's case then the assessee's case falls within the exclusion provided in Explanation (2) of the said section and a purposive interpretation of the legislation is required to be made. He stated that the rationale of introducing a gross basis of taxation was to remove the difficulty of ascertaining a non-resident's taxable income conveniently, in the absence of supporting record and data. He contended that if the provisions of section 9(1)(vii) are blindly applied, it would result in taxing a non resident, who an opens office in India and carries on business operation in India to be taxed in the same line as a non resident who is providing technical services sitting abroad. He averred that if Sections 44D and 115A of the Act are applied, payment by an Indian concern to a non-resident would be denied the benefit on a net basis whereas payment by a non-resident to a non-resident would be allowed on a net basis; that if the interpretation taken by the A.O. is applied to the treaty provisions, it would mean that a non resident rendering technical services without coming to India would get a beneficial rate of tax @ 10% to 15%, whereas a non resident coming to India and doing business in India would pay tax @ 20% to 30% on gross receipt; that the income of the assessee did arise in India and consequently, the deeming provisions of Section 9 of the Act itself did not apply; that the assessee's case was not of a non-resident who rendered services from outside India; that the assessee had taken the requisite permission to do business in India and as per the sanction granted, it had set up an office in India, which was accepted as the PE of the assessee in India as per the provisions of Article 7 of the DTAA between India and Australia; that it was the business income of the assessee which was liable to be taxed in India as per the regular provisions of the Indian Tax Laws and it was not the income of the assessee as a non resident which was liable to be taxed; that consequently, Sections 9, 44D and 115A did not apply to the assessee; that the assessee had been doing its business in India; and that it was the income of the PE of the assessee in India which was taxable in India and the complete audited accounts of the assessee were available and so, there can be no difficulty in calculating the actual profits of the assessee.

3. On the other hand, the Ld. D.R. submitted that the existence of PE of the assessee in India had not been disputed; that therefore, the taxability of the assessee in India remains undisputed; that the Explanation to

Section 9(1)(vii) of the Act, where an exclusion is provided, also does not apply to the assessee's case, as the assessee was not doing the business of mining and like activities; that the assessee, as per the contract, was providing technical services of evaluation of iron ore resources and gave the feasibility study for transportation of the ore, as also the development of iron ore handling on ship loading complex; that the contract itself talked of technical work and the payment was thus fee for technical services provided by the assessee that the provisions of Section 9(1)(vii) did apply and the income of the assessee, which was liable to be assessed only under the provisions of section 44D and 115A of the Act; that that Article 7 of the DTAA between India and Australia did not apply in so far as the services provided were fee for technical services; that even assuming that Article 7 applies, the said Article did not provide for any rate for calculating the tax and consequently, one has to rely on the domestic law for levying the tax for which purpose one would have to go to Section 115A of the Act; and that as per Section 115A, as the services rendered were fee for technical services, the gross receipts have to be taxed at the flat rate of 20%, without giving any deduction of any expenses; that Section 44D specifically provide for the taxation of fee for technical services and as per the provision of Section 44D(6), no deduction is to be allowed in respect of any expenditure or allowance under the provisions of Sections 28 to 44C of the Act; that even Article 7(3) only prevents deduction against the receipt sought to be assessed under Article 7 to the same extent as would be permissible if an assessment was made under the Act and in the case of a foreign company allowance of deduction is given by Section 44D. The Ld. D.R. vehemently supported the impugned order.

4. We have considered the rival submissions and have perused the material on record. Even though the A.O. has extracted a part of the agreement between RIPL & RITS in page 2 of the assessment order for the Assessment Year 1999-2000, it is noticed that one portion of the agreement has remained missed out. It is noticed that the A.O. has extracted Schedule 1 of the Agreement, wherein, he has extracted only para 1 of the objectives and then, has proceeded to extract the scope of the services. The portion which has remained so excluded is extracted here for better appreciation.

> *"The evaluation of the resources will begin with a geological mapping, drilling and editing programme and be followed by iron ore quality testing and resource modeling.*

Specifically, the objectives of the pre-feasibility phase 2 programme are to:

- *improve the knowledge of the orebody and ore characteristics by a bulk sampling and drilling programme;*
- *investigate preliminary metallurgical and treatment characteristics, define options and estimate costs;*
- *investigate infrastructure requirements and existing capacities, define option and estimate costs;*
- *carry out a preliminary environmental assessment;*
- *identify major issues which might prevent the project proceeding;*
- *identify major options for further study;*
- *prepare the Phase 2 Pre-feasibility study report encapsulating all of the above listed elements, including preliminary mining plan, flow sheets, and costs, and indicative financial analysis."*

4.1 A reading of portion extracted above shows that the primary objective is technical work for the evaluation of iron ore resources and the corresponding feasibility study for transportation of ore by rail and the development and handling of ship loading capacities as the specified process. The evaluation of the resources was to begin with geological mapping, drilling and editing programme, to be followed by iron ore quality testing of the resources modeling. Thus, this is not a case where a simple technical or consultancy service is provided, but it includes specific activities which are required to be done on site, i.e., by various activities such as the geological mapping, drilling, testing of quality, quantifying the possible quantity and resources, examining the environmental hazards. For the performance of the contract, it is noticed, the assessee has obtained necessary permission from the RBI, which is the sanctioning authority for opening a project office in India. It is an accepted fact that the assessee has opened its project office in India and has entered into a contract to do business in line with the permission granted by RBI. It is also an accepted fact that he assessee does have a permanent establishment (PE) in India. Thus, what we have is that the assessee is a non resident which has PE in India and is doing its business from its PE in India. In such a situation, the assessee ought to have a liberty to choose whether it wishes to be taxed under the provisions of the Act or under the DTAA as per the provisions of Section 90 of the Act. As per this provision, the assessee has chosen to be taxed under the DTAA between India and Australia, the latter being the country of registration/incorporation of the assessee company. Here, it would be worthwhile to mention that when taxing a non-resident, it would first have to be seen whether the income of the non-resident arising in India falls within the provisions of Section 9 or Section 5 of the

Income tax Act. If it does not fall within Sections 5 & Section 9 of the Act, the income itself would be specifically exempted. If it does fall within Section 5 and Section 9 of the Act, it is then that section 90 of the Act comes into operation and the liberty is given to the assessee to opt for being taxed either under the Indian tax Law or under DTAA between India and the country of incorporation.

4.2 In the present case, the assessee, as mentioned earlier, is incorporated in Australia and it has, admittedly, a PE in India. Consequently, the DTAA between India & Australia is to apply. The income of the assessee is taxable in India as per the provisions of Section 5(2) of the Act. The income of the assessee being taxable in India, the assessee has opted to be taxed under the provisions of the DTAA between India & Australia. We have not gone into the provisions of Article 5 of the DTAA, which deals with the existence of PE, in so far as it has been admitted that the assessee has a PE in India. We are concerned now with Article 7, Article 12 and Article 19 of the DTAA between India & Australia. As per Article 7, it is the business profit, which is considered therein. Article 12 deals with royalty and Article 14 with independent personal services. Article 14 of the DTAA would not apply, as it relates to an individual or a firm other than a company. Here, the assessee is a company. Article 12 relates to royalties and sub-clause 3(g) of Article 12 includes the rendering of services including those of technical and other personal nature, which makes available technical knowledge, experience, skill, know how and process and consists of development and transfer of the technical plans & designs. This is similar to the provisions of Explanation (2) to section 9(1)(vii) of the Act, which takes within its ambit fee for technical services. As per Article 12 of DTAA, the term 'royalty' includes such items as are treated as fee for technical services under the Indian tax Laws and the same the same is to be taxed in India, as the same has arisen in India. As per Article 7, the business profits of an enterprise of Australia is liable to be taxed only in Australia, unless the enterprise carries on the business in India through its PE situated in India. If the enterprise carries on its business through a PE situated in India, the profits of the enterprise can be taxed in India only to the extent as is attributable to the PE. As per Article 7(2), if an enterprise carries on its business through a PE situated in India, then the profits attributable to that PE shall be taxed as if the PE is a wholly independent enterprise. As per Article 7(3), in determining the profits of the PE that shall be allowed as deduction and in accordance with and subject to the law of limitation relating to tax in India, India being the contracting state in which the PE is situated. As per Article 7(7), where the profits include items of income, which are dealt with separately in other Articles of the DTAA then the provisions of those Articles shall not be affected by the provisions of Article 7 of the DTAA.

4.3 Thus, applying these provisions to the facts to the present case, it is noticed that the assessee having admitted that it has PE in India and the income of the assessee is taxable in India and the assessee having opted to be taxed as per the provisions of the DTAA it is Article 7 of the DTAA which applies to the assessee's case in so far as the assessee has a PE in India. Thus, as per Article 7(2) of the DTAA, the PE of the assessee would have to be treated as a wholly independent enterprise, which is liable to be taxed in India. Once it is held that the assessee is liable to be taxed as per Article 7 of the DTAA, sub-clause (3) of Article 7 of the DTAA would come into play and deduction in accordance with the subject to the law relating to the tax in India would apply. Since it is held that Article 7 of the DTAA comes into play, Section 9(1)(vii) of the Act would no more be applicable as Article 7(2) of the DTAA specifies that the PE of the assessee is to be treated as a wholly independent enterprise and it is the profits of such PE in India which are to be taxed. Since Article 7 of the DTAA is applied, Section 44D and Section 115A of the Act also will not apply in so far as they relate to foreign companies, whereas clause (2) of Article 7 of the DTAA specifies that the PE in India is to be treated as a wholly independent enterprise in India. In such a situation, sub-clause (3) of Article 7 of DTAA would come into play and the income of the assessee would have to be assessed by applying the regular provisions of the Indian tax Laws. In short, the assessee herein would be liable to be assessed as an entity separately assessable in its own independent capacity in India and the provisions of Sections 28 to 43C of the Act would be available to the assessee. What is to be understood here is that it is the business profits which are chargeable under Article 7 of the DTAA. So as to what the business of the assessee is, is also to be considered. The business of the assessee is as per the contracts entered into by the assessee with the various persons. The contracts are inclusive contracts of technical nature, as also drilling, etc., as extracted earlier. Thus, it cannot be said that he activities of the assessee is purely technical service. The drilling and excavation and testing cannot be de-linked from the evaluation and the feasibility studies. It is a consolidated activity. Thus, the activities of the assessee cannot be held to fall within Article 12 of the DTAA also. In these circumstances, the assessee having opted to be taxed under the DTAA, this option cannot be denied to the assessee and as per sub-clauses (2) and (3) of Article 7. The assessee is to be taxed as an independent enterprise in India and the regular provisions of the Indian tax Laws would apply to the exclusion of Section 9(1)(vii), section 44D and 115A of the Act. In these circumstances, the orders of the lower authorities are reversed and the appeals of the assessee are allowed.

5. In the result, the appeals of the assessee are allowed.

6. This decision was pronounced in the open court on 19th Mar., 2010.

Sd./-	Sd./-
(G.E.VEERABHADRAPPA)	(A.D. JAIN)
VICE PRESIDENT	JUDICIAL MEMBER

Dated:19th Mar., 2009

Sp.

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