IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L": MUMBAI

BEFORE SHRI J. SUDHAKAR REDDY (AM) AND
SHRI R.S. PADVEKAR (JM)

ITA No. 4496/Mum/2005
(Asstt. Year : 2001-02)

ADIT (IT)-2(2), Mumbai, … Appellant
R.No. 116,
1st Floor, Scindia House,
Ballard Estate,
Mumbai – 400 038

V/s.

M/s. Krupp Uhde GmbH … Respondent
C/o. Uhde India Ltd., Uhde House,
LBS Marg, Vikhroli (W),
Mumbai - 400083
PAN : AAACU0565H

ITA No. 4652/Mum/2005
(Asstt. Year : 2001-02)

M/s. Krupp Uhde GmbH … Appellant
C/o. Uhde India Ltd., Uhde House,
LBS Marg, Vikhroli (W),
Mumbai - 400083
PAN : AAACU0565H

V/s.

Asstt. Director of Income Tax … Respondent
International Taxation -3(1),
Mumbai

Appellant by :S/Shri S.S. Rana/ Aarsi Prasad (DR)
Respondent by :Shri Firoze B. Andhyarujina

: O R D E R :

PER R.S. PADVEKAR, J.M

These Cross Appeals, one by the Revenue and another by the assessee are directed against the order of the Ld CIT(A), Mumbai dt. 21.3.2005 for the A.Y. 2001-02.

2. We first take up the Revenue's appeal for disposal in which the Revenue has taken the following Ground :

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the amount of Rs.71,11,594/- received for supervision during start up and commissioning is not chargeable to tax as there is no PE of the assessee in India during the year under consideration."*

3. The facts which reveal from the record are as under :

The assessee is a foreign company, who filed the return of income declaring the total income at Rs. 67,52,000/-. The return filed by the assessee company was selected for scrutiny and the assessment was made u/s. 143(3) of the Act. The assessee company provides plant and equipment, technical know-how, engineering services as well as renders services for erection and commissioning of plants. The assessee has rendered following services :

i) Supply of Technical Know-how
ii) Supply of Engineering and documentation and
iii) Supervision during Start-up and Commissioning

The A.O. has noted that the assessee company undertakes a contract and then it is broken into three separate sub-contracts. The A.O has also given the example in respect of the *modus operandi* of the assessee company as to how the contract is broken into three different sub-contracts. As noted by the A.O, two services namely (i) technical know-how and (ii) engineering are mostly provided by the assessee from abroad and service in respect of supervision during start up and commissioning is provided in India by deputing it's personnel in India. In the preceding years, the assessee has been offering the entire income as a royalty/fees for technical services and paying the tax at the rate of 10% as per Article 12 & 13 of DTAA between India and

Germany. The assessee has declared the sum of Rs. 71,11,594/- as a receipts towards supervision during start up and commissioning. The A.O has also accepted the factual position that stay of assessee's personal in India is only for 75 days or less in all the five projects going on during the previous year and thus, there is no PE in terms of Article 5(2)(i) of the DTAA between India and Germany. The A.O brought to tax the sum of Rs. 71,11,594/-. The assessee carried the issue before the Ld CIT(A), who deleted the addition accepting the contention of the assessee that as per the new treaty between India and Germany, the assessee's income from supervisory activity in connection with any construction, installation or assembly of project is to be treated as income of the Permanent Establishment (P.E), if such supervisory activity continue for a period exceeding six months. The operative part of the findings are as under :

> *"4.2 As regards the taxability of supervision charges amounting to Rs.71,11,594/-, I agree with the contention of the appellant that under the new treaty which was brought into force on 26/10/1996, which is applicable from the F.Y. 1997-98 (A.Y. 1998-99), the appellant's income from supervisory activity in connection with any construction, installation, assembly projects are to be treated as income of the 'Permanent Establishment (PE), if such supervisory activity continues for a period of exceeding 6 months (Article 5(2)(i) of the treaty). Since, the period of stay of the assessee's personnel is less than 6 months in all the five projects going on during the year, no income attributable to PE would be taxable in India inspite of the fact that in the immediate preceeding year, it was held as taxable under Article 12 of the DTAA because it was offered for taxation under the said Article by the appellant itself. Accordingly, I hold that the consideration received for supply of engineering and documentation and for supply of technical know how are chargeable to tax @ 19% under Article 12(2) of the DTAA and the amount received for supervision during start up and commissioning is not chargeable to tax as there is no PE of the assessee in India during the year under consideration. In the result, the appeal is partly allowed."*

4. We have heard the parties. The A.O himself admitted that the stay of the personnel of the assessee company in India was less than 75 days and hence, it cannot be said that there was a P.E. in India. As per the new treaty, the income from supervisory activity like construction and installation of the project is to be treated as income of the P.E. provided that the said activity continue for a period exceeding six months as per article 5(2)(i) of the DTAA as it is the admitted factual position that, the supervisory activity of each project was for less than 75 days and hence, the income from the supervision and installation of the plant cannot be treated as income of the P.E. . As the income as admitted by the A.O. that there is no P.E. of the assessee, there is no question for treating the income towards supervision, erection and commissioning of the plant as an income of the assessee taxable in India. The view taken by the Ld CIT(A) is correct. We, therefore, confirm the same and accordingly, dismiss the Ground taken by the Revenue.

5. Now we take up the assessee's appeal being ITA No. 4652/Mum/2005 in which there are following two effective Grounds :

> *"2. That the learned CIT(A) has erred in confirming that amount received by the assessee for the "supply of engineering and documentation", "technical know-how", was liable to tax as fee for technical services under Article 12 of the AADT between India and Germany.*
>
> *3. That the learned CIT(A) has erred in not accepting the contention of the assessee that amounts received for "supply of engineering and documentation", "technical know-how" represents Business Profits and in the absence of Permanent Establishment, the said amounts are not liable to income tax in India."*

In respect of the income from supply of the technical know-how, engineering and documentation, the assessee was consistently offering the entire income treating the same as royalty/fees for technical services and also paying the tax at the rate of 10% as per the Article 12 & 13 of the DTAA between India and Germany. In the A.Y. 2001-02, the assessee took the contention that the income received from supply of engineering and documentation and supply of technical know are incidental to supply of plant and equipment which fall within the ambit of Article 7 of the DTAA between India and Germany and the

same is to be treated as 'business profit' and as the assessee has no P.E. in India, the said amounts are not liable to income-tax. The A.O did not accept the stand of the assessee and brought to tax the income on account of the above services/supply. The assessee challenged the impugned assessment order before the Ld CIT(A) without success. The Ld Counsel for the assessee vehemently argued that it is one composite contract and supply of technical know-how & supply of engineering documentation are incidental to supply of plant and equipment and has to be treated as business income within the meaning of Articles 7 of DTAA between India and Germany.

6. The Ld D.R. supported the order of the authority below.

7. On the rival submission, we find that in respect of the supply of technical know and supply of engineering and documentation, the assessee was consistently offering the said income for taxation treating the same as royalty/fees for technical services. Though the Ld Counsel argued that both the services are part of the composite contract and incidental to the supply of the plant and equipment but nothing has been placed before us to support the said contention like agreement between the parties. In the preceding years, the assessee himself was showing that these are the distinct services and claiming the benefit of the DTAA by paying the tax at a low rate of 10%. Only in this assessment year, the assessee has changed his stand and now claiming that it should be treated as 'business profit' and as there is no P.E., within the meaning of Article 5 (2)(i) of the DTAA between India and Germany, the income from the said activities also should be exempted. We are unable to accept the plea of the assessee in view of the fact that no supporting evidence is placed before us to the said contentions when different stand is taken in this year. In our opinion, no interference is called for in the order of the CIT(A). We, therefore, confirm the same and dismiss the Grounds taken by the assessee.

8. In the result, the Revenue's appeal as well as the assessee's appeal both are dismissed.

Order pronounced in the open court on 28th day of January , 2010.

Sd/-	Sd/-
(J. SUDHAKAR REDDY)	(R.S. PADVEKAR)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, on this 28th day of January , 2010.

:US

Copy to:

1. Appellant
2. Respondent,
3.The CIT(A)- XXXIII, Mumbai
4.The CIT -concerned, Mumbai
5.The DR, "L" bench, Mumbai
6.Guard File

BY ORDER

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Asstt..Registrar, ITAT, Mumbai.

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		Date	Initials
1.	Draft dictated on	27/1/10	---------- Sr.P.S.
2.	Draft Placed before authority	28/1/10	---------- Sr.P.S.
3.	Draft proposed & placed Before the Second Member	----------	---------- JM
4.	Draft discussed/approved By Second Member	----------	---------- JM/AM
5.	Approved Draft comes to Sr.P.S. the Sr. P.S./P.S	----------	----------
6.	Kept for pronouncement on Sr.P.S.	---------	----------
7.	File sent to the Bench Clerk Sr.P.S.	---------	----------
8.	Date on which file goes to the	-------	----------
9.	Date of dispatch of Order	---------	----------