IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "B": NEW DELHI]

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA. Nos. 8154 AND 8155/Del/2019
(Assessment Years: 2014-15 & 2015-16)

Dynamic Drilling & Services Pvt. Ltd., Unit No. 631 – 634, 6th Floor, DLF Towers, Shivaji Marg, New Delhi – 110 015. **PAN: AADCD2277J**	Vs.	ACIT, Circle :7 (2), New Delhi.
(Appellant)		(Respondent)

Assessee by :	Shri Suresh K. Gupta, C. A.;
Department by:	Shri Rajesh Kumar,Sr. D.R.;
Date of Hearing :	08/03/2022
Date of pronouncement :	08/03/2022

O R D E R

PER AMIT SHUKLA, J. M.

1. The aforesaid appeals have been filed by the assessee against separate impugned order of even date 16.01.2018, passed by the ld. Commissioner of Income Tax (Appeals)–3, New Delhi [hereinafter referred to CIT (Appeals)] for the quantum of assessment under Section 143(3) of the Income Tax Act, 1961 (the Act) for assessment years 2014-15 and 2015-16.

2. Since grounds in both the years are common arising out of identical set of facts, therefore, same were heard together and are being disposed of, for the sake of convenience, by this common order.

3. In sum and substance, the assessee has challenged the disallowance of Rs.26,95,950/- in assessment year 2014-15 and Rs.28,10,930/- in assessment year 2015-16 on account of withholding tax deducted by the Singapore company on the payment of performance guarantee commission.

4. We will take up appeal of A.Y. 2014-15 as lead case and our finding given therein will apply mutatis mutandis for the AY 2015-16 also. The grounds of appeal raised by the assessee for the assessment year 2014-15, for the sake of ready reference, are as under:-

> "1. The Ld CIT (A) has erred both in law and in facts of the case in upholding disallowance of tax credit of Rs.26,95,950/- being withholding tax deducted by the Singapore company on the payment of performance guarantee commission treating such commission as business income in terms of DTAA with Singapore Government and on such business income as per as per DTAA, no withholding tax was required to be deducted by the payer in Singapore when the assessee had no PE in that country.
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> 2. The Ld C1T (A) has erred both in law and in facts of the case in upholding disallowance of tax credit of Rs.26,95,950/- ignoring the alternate contention on behalf of appellant that the said tax credit is available in terms of sec 91 of IT Act if the claim of appellant was not allowable u/s 90 of the IT Act.
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> 3. The Ld. CIT (A) has erred both in law and in facts of the case in not allowing the benefit of sec 295(2ha) read with rule 128 of IT Rules 1962 w.e.f 01.04.2017 being clarificatory in nature and therefore benefit of above rule is available to the appellant for claiming withholding tax deducted on the remittances received from abroad. This ground is without prejudice to the above Ground No. l and 2. "

5. The facts in brief are that assessee is engaged in the business of providing offshore drilling services and exploration and production of oils for companies in India. The ld. Assessing Officer noted that assessee had claimed foreign tax credit (FTC) of Rs.1,25,90,234/- under Section 90 of the Act for assessment year 2014-15. The Assessing Officer observed that the assessee has received Performance Guarantee Commission of Rs.1,79,73,000/- from its Associated Enterprises. The assessee had overseas JV partner, M/s. Dynamic Drilling Holdco PTE Ltd. [DDHPL] based in Singapore and the said company has deducted withholding tax of Rs.26,95,950/-. The joint venture partner entered into a put/call option deed to buy 12 million ordinary shares of M/s. Dynamic Offshore Drilling Ltd., Cyprus. The vendor in the above deed was, M/s. Dynamic Orion Singapore Pte Ltd. (DOSPL). The assessee company provided a performance guarantee in favour of the buyer company, i.e., DDHPL to the above vendor company DOSPL for a sum of USD 15 million through an agreement dated 25.01.2013. The Assessing Officer further observed that the Performance Guarantee Commission received by the assessee is taxable in India and same has been offered to tax by the assessee in India which is not in dispute. The said agreement was followed by addendum dated 1.04.2013 as per which the fee was increased from 1.5% and 2%. The agreement was signed and executed in Singapore

and was governed by the laws of Singapore. It is a matter of fact that both the vendor and buyer are Singapore resident companies and the above execution deed was executed and signed by Singapore based companies in Singapore. The assessee during the year under consideration had received from the buyer company, Performance Guarantee Commission amounting to Rs.1,79,73,000/- equivalent USD 3,00,000. The above company withheld tax @ 15% on the above payment under Singapore Tax Laws and deducted tax of USD 45,000 which converted into INR 26,95,950/- @ Rs.59.9 per USD.

6. AO however held that Performance Guarantee Commission received by the assessee from Singapore company was a business income of assessee and since assessee company did not had any PE in Singapore under Article 7, therefore Singapore Tax Authorities could not have withheld the tax as entire income is taxable in India. He also referred to the decision of Chennai Bench of the ITAT in the case of Vestas Wind Technology India Pvt. Ltd. Vs. ACIT in ITA. No. 177/Mds./2016 dated 22.04.2016 and Delhi Bench of the ITAT in the case of DCIT Vs. M/s. Power Machines (India) Ltd. In ITA. No. 2221/Del//2014 and in the case of M/s. Uniparts India Limited Vs. CIT in ITA. Nos.201 to 205/Del/2015, to arrive at his conclusion.

7. The ld. CIT (Appeals) has upheld the order of the Assessing Officer after observing and holding as under:-

"4.2.1 In this case, it is noted that the Performance Guarantee has

been given by the ant to DOSPL in favour of its joint venture partner DDHPL which had entered into a put/call option "deed to buy 12 million shares of M/s DODL, Cyprus from DOSPL and for this purpose, DDHPL has given commission of Rs, 1,79/73,000/- @ 2% to the appellant company for 3-4 years. It has been contended By the AR that the said income is taxable in Singapore under the Residual head of Income and is covered by Article 23 of the DTAA between India and Singapore. It is also contended that the said income is not in the nature of business profit in view of the decision of **ITAT Delhi in the case of Johnson Matthey Public Ltd. CO. vs. DCIT.** However, the **AR** has failed to place on record any document to counter the view of the AO that the appellant had provided the Performance Guarantee for its joint venture partner in order to further its business interest. The appellant is engaged in the business of providing offshore drilling services to exploration and production companies. Its joint venture partner DDH.FL is also engaged in the similar business activities as observed by the AO and the company DODL, whose shares were being

purchased is also in similar line of business. In view of these facts, it is obvious that the Performance Guarantee has been provided by the appellant for strategic purposes in the course of its business activities. Even if the main business activity does not include providing Performance Guarantee, yet the very nature of Transaction / activity of providing Performance Guarantee is directly linked to the business interest of the appellant. It is not uncommon for the professional multinational companies to provide Performance Guarantees in order to improve or safeguard their business interests. The appellant has not explained its nature of relations with the joint venture partner DDHPL for whom it had provided Performance Guarantee over a period of 3-4 years and in each year, it has earned commission @2%. In my view, the AO has rightly relied upon the decision of **Hon'ble ITAT Chennai in the case of Vestas Wind Technology India Pvt. Ltd. vs. ACIT,** in which the Performance Guarantee Commission for providing guarantee has been held as business incomc. Reference is also made to the decision of **Hon'ble ITAT Delhi in the case of DCIT vs. M/S POWER MACHINES (INDIA) LTD. in ITA No. 2221/Del/2014,** in which it has been held that –

> *8.5 Now, the next question arises for determination is, 'as to whether assesses company was liable to deduct the tax at source on the bank guarantee commission paid to VTB bank u/s 195 of the Act'.*
>
> *8.6 In order to find out the answer to the aforesaid question, first of all, it is required to be decided 'as to whether sum payable on account of bank guarantee commission by the assessee company to*

VTB bank is chargeable to tax under the Act?' When the Revenue authorities have failed to lay hands on any cogent material that the bank guarantee commission paid by the assessee company paid on account of business transaction between assessee company and VTB hank particularly in the face of the fact that VTB bank has no PE in India, the question of attracting provision contained u/s 195 of the Act does not arise. In other words, when the assessee company has directly made the payments to VTB bank, Russia through ids banker in India, no income can be said, to have accrued or arisen, in India to the VTB bank u/s 4, 5 and 9 of the Act, So, in the given circumstances, assessee Company was not liable to deduct the tax at source on the bank guarantee commission paid to a foreign bank. "

4.2.2 In this case also, the appellant does not have a PE in Singapore and the commission received by it from its joint venture partner based in Singapore on account of business transaction of providing Performs Guarantee is not subject to tax in Singapore and constitutes business profit of the appellant company. In view of these facts, I am of the opinion that the tax was wrongly withheld in Singapore on the payment made to the appellant and, therefore, the appellant is not entitled for its credit in India. Accordingly, the decision of the AO is not granting credit to the foreign tax is upheld and the grounds of appeal are dismissed. "

8 Exact similar finding has been given in assessment year 2015-16 also.

9. Before us the ld. Counsel submitted that the Ld CIT (A) in para 4.2.2 at page 8 therein gave a finding that appellant does not have permanent establishment in Singapore and therefore the above commission received by the appellant from its joint venture partner is on account of business transaction of providing performance guarantee fee, is not subject to tax in Singapore and constitutes business profit of appellant company taxable only in India. The tax was wrongly withheld in Singapore on payment made to appellant and therefore appellant is not entitled to tax credit in India. AO has treated the income as taxable as business profit under Article 7 with DTAA

with Singapore and reliance has been placed on the judgment of ITAT Chennai Bench decision in the case of ***Vestas Wind Technology India Pvt Ltd vs ACIT*** ITA No.177/Mds/2016 dt: 22.04.2016 and Delhi ITAT decision in case of ***DCIT vs Power Machines India*** ITA No.2221/Del/2014 and ***Uniparts India Ltd vs CIT*** ITA No.201 to 205/Del/2015 to support the above view.

10. Ld. Counsel made his submissions on various contentions on the issues separately which are summarised as under:

a) Taxability of Performance Guarantee Fee as business profits:

The AO/CIT (A) has misapplied the facts of the case and a finding is given that the provision of performance guarantee to the joint venture partner is for the strategic purpose in the course of business activity and it is therefore attributable to the business activity. The AO therefore in para 6 at internal pages 4-9 concludes that the performance guarantee given by the appellant should be attributable to business activity and income earned in respect of performance guarantee should be treated as business profit. The above finding of fact is not based on the facts of the case. The appellant is not in the business of providing bank guarantee or performance guarantee and the business of the appellant is providing offshore drilling services to Exploration and production companies in India. The P&L of the appellant on page 47 will show that the revenue of Rs.739.69 Crore out of total revenue of Rs.752.13 Crore is from the core activity of Service to oil sector which can be verified from the audited balance sheet at page 39-72 of the paper book. The income from performance guarantee commission forms part of other income in Schedule 18

of the audited balance sheet at page 59 of the paper book. The AO does not give any material to support the above finding. The AO simply says that the provision of performance guarantee fee is for strategic purpose. Simply because the obligation is taken to support acquisition of shares by the joint venture partner is not sufficient for the AO to hold that it was action taken for strategic purpose. No strategic investment is made by the appellant for furtherance of its core business of offshore drilling. In the absence of any material to suggest that the investment is for the furtherance of the business of the appellant, the AO is not entitled to assume the above fact and on that basis the characterization of this income as business profit for the application of Article 7 of DTAA with Singapore is not tenable.

b) The performance guarantee commission as FTS/Interest Income is not covered by relevant Article of DTAA:

i) The income is also not FTS as had been held in Johnson Matthey case (supra) as there is no rendering of technical or consultancy service and further there is no concept of making any knowledge, experience, skill, know-how or process or development for transfer of any technical plant or technical design as per provision of sec 9(1)(vii) of the Act and therefore such commission does not fall in Article 12 of the treaty.

ii. The income in question also does not fall in Article 11 of the treaty in absence of any money borrowed or debt incurred which is evident from the facts of the case.

iii. There remains residual head of income covered by Article 23 of DTAA as per which item of income which is not expressively mentioned in other Articles of DTAA may be taxed in accordance

with taxation laws of contracting states. If the income in question falls in Article 23 of DTAA then this income needs be dealt in terms of provisions of Indian Income Tax Act and Singapore Taxation Laws.

11. Coming to the decisions in support of the contention raised by the revenue, Ld. Counsel invited our attention to the judgment of the Delhi Bench of Hon'ble ITAT in the case of Johnson Matthey Public Ltd Co vs DCIT in ITA No.1143/Del/2016 dt: 06.12.2017 wherein it was held that where bank guarantee is given to subsidiary company for availing loan facility and commission received in consideration of such guarantee will be covered by Article 7 of UK Treaty only if the recipient is in the business of providing corporate/bank guarantee on regular basis and as a continuous activity. He referred to para 18 of the order of ITAT. The Hon'ble ITAT took note of the fact that the said company was engaged in the business of manufacturing of technology of advance chemicals known as catalyst for the automobiles and other industries and there was no material that the assessee was also in the business of corporate/bank guarantee on regular basis.The Global guarantee by the assessee is only for limited purpose of securing loans to its subsidiary and therefore recharge income is only incidental income. The Hon'ble ITAT on above facts that the Article 7 of UK Treaty has no application. Incidentally, the Article 7 of UK Treaty and Singapore Treaty are similarly worded.

12. Similarly, the reliance placed by the Assessing Officer on Vestas Wind Technology India Pvt Ltd (supra) to support his above finding that the bank guarantees commission is business income. From the copy of the judgment, he submitted that it can be seen that the bank

guarantee has been provided by a parent company to the assessee customers to facilitate the purpose of windmill so that image of the assessee company in market increases and therefore the assessee able to sell its product in the Indian Market. The judgment of the ITAT Chennai in the above case is based on above peculiar facts which proves that the provision of bank guarantee for in furtherance of the business of the assessee company and therefore such profits is considered as business profits for DTAA. But AO failed to appreciate the above distinguishing feature of the Chennai ITAT Decision to support the finding that the performance guarantee commission is business profits. The decision in the case of Johnson Matthey (supra) which deals with the guarantee given to a subsidiary where no business exigency or normal business activity established, such income cannot be categorized as business profit as Article 7 of DTAA with Singapore.

13. In so far as the other decisions relied by the Ld CIT(A) is DCIT vs Power Machines India Ltd ITA No.2221/Del/2014. In that case, relying of the provisions of sec 40(a)(ia) r.w.s 2(28A) of the IT Act, it was decided by Hon'ble Bench that foreign guarantee commission paid to a foreign bank is taxable in India in absence of any PE of the foreign bank in India. The Ld CIT(A) ignored the very important feature of the judgment which is the absence of any discussion of DTAA with the residence country. Since, in the present case, the taxability of Income is required to be decided with reference to DTAA with Singapore, the decision of the bench in the said case does not help the cause of the revenue.

14 The next judgment relied by Ld CIT (A) is Uniparts India Ltd vs CIT ITA No.201 to 2015/Del/2015 (authored by Hon'ble JM). This

judgment also does not help the stand of revenue as in the said case in para 9, the para relied by Ld CIT(A), the proposition laid down is that there should be clarity under provision the amount of income remitted to India is liable to tax under USA law. If there is evidence to show that withholding of tax by USA Company is accordance with law of USA state, the credit of said tax need to be allowed to assessee in India. In the present case, the certificate of deduction of tax under sec 45 of Singapore Income Tax Law is placed in paper book at pages 83-84 and this being the case, the appellant need be allowed credit when the withholding certificate is produced. Besides this the appellant has proved that the amount of income accruing in or derived from Singapore is taxable either under sec 10(1) or 12(6) of Singapore Act which is reproduced at page 6 of the Ld CIT (A) order.

15. On the other hand, the ld. DR referred to the various observations of the Assessing Officer and the ld. CIT (Appeals) and strongly relied upon the said finding as incorporated above. His case was that when the entire income is taxable in India, then there is no occasion that same income is taxable in Singapore and therefore, tax deducted in Singapore cannot be given credit to.

DECISION

15. We have heard the rival submissions and also perused the relevant finding given in the impugned order as well as the material referred to before us. The only issue before us is, whether tax credit can be allowed to the assessee company on the income offered to tax in India on the tax deducted by the Singapore Company from the Performance Guarantee Commission during the year under assessment. The main reason for denial of the credit by the Assessing

Officer and the ld. CIT (Appeals) is that, Performance Guarantee Commission received by the assessee is a business profit in India and directly linked to the business of the appellant. Since assessee does not have a PE in Singapore, therefore, entire commission received from DDHPL in Singapore on account of business transaction cannot be subject to tax in Singapore. Therefore, entire business profit is taxable in India. The Assessing Officer and the CIT (Appeals) were of the opinion that tax was withheld in Singapore and payment made to the assessee; it is not entitled for credit on taxes paid in India. First of all, assessee's main business was providing offshore drilling services and exploration and production of oil for companies in India. The AO and Ld. CIT (A) have misconstrued the facts and have given a finding that the provision of performance guarantee to the joint venture partner is for the strategic purpose in the course of business activity and it is therefore attributable to the business activity. They have concluded that the performance guarantee given by the appellant should be attributable to business activity and income earned in respect of performance guarantee should be treated as business profit. The appellant is not in the business of providing bank guarantee or performance guarantee as the business of the appellant is providing offshore drilling services to Exploration and production companies in India. The P&L reflects that the revenue of Rs.739.69 Crore out of total revenue of Rs.752.13 Crore is from the core activity of Service in oil sector. The Assessing Officer on these facts cannot change the characteristic of one time income by way of performance guarantee commission as business profit to bring it under Article 7 of the DTAA, and hold that in order to avail tax benefit the assessee must have a PE under Article 7.

16. We have to examine first, what is the nature of income falling within the clauses of India Singapore DTAA. Looking to the facts as narrated above, the performance guarantee cannot be reckoned as FTS (fee for technical services) as there is no rendering of technical service because there is no make available of knowledge, experience, skills, knowhow or process and development of any technical plant, technical design as per FTS clause of Article 12 of the Singapore India DTAA. In fact this does not even fall under the provisions of Section 9(1)(vii) of the Income Tax Act. It can neither be reckoned as interest falling under Article 11 of the Treaty in absence of any money borrowed or debt incurred on any money borrowed or debt incurred. Neither, does it falls under any other source of income elaborated in other Articles or any business income carried out from fixed place or under any of the clauses of Article 5. It then falls under residual head of income, which is covered under **Article 23 of DTAA** as per which **item of income not mentioned in other Articles of DTAA may be taxed in accordance with the taxation laws of the contracting State.**

17. Here, in this case, Singapore based company, DDHPL had entered into a put/call option deed to buy 12 million shares of another entity M/s. DODL. The seller/vendor is also a Singapore based company M/s. DOSPL. The assessee company provided a performance guarantee in favour of the buyer company i.e. DDHPL to the above vendor company M/s. DOSPL. A sum of USD 15 million was the consideration for which the assessee was to get fee @ 2%. Now this payment of commission of performance guarantee has been treated as business activity of the assessee by the Revenue authorities and then a view has been taken that it is a business profit of the assessee earned from Singapore and received in Singapore and since assessee

does not have a PE under Article 7 of Singapore India DTAA, therefore, the entire profit is to be taxed in India. It is neither the case of the Assessing Officer or the assessee that the amount received by the assessee is otherwise not taxable in India. Assessee has offered it for tax under the head 'other income' and not offered as 'income from business operations'. The entire character of the transaction has been changed by the Revenue authorities to treat it as business income, without even examining the terms of the Agreement by which assessee received the fee or the nature of business activity carried out by the assessee. As stated above, it is neither in the nature of FTS or interest income or any other income falling under any other Article. Once the payment has been received from a foreign entity for providing performance guarantee for another foreign entity, then it cannot be reckoned as business income of the assessee carried out in Singapore as assessee is not carrying out any business of doing providing performance guarantee in Singapore, albeit all its operations are in India. The Article 23 of Singapore DTAA clearly provides that the items of income which are not expressly mentioned in the foregoing Articles of this Agreement, same may be taxed by the respective contracting States, i.e., both under the taxation laws of Singapore as well as India. Nowhere the Assessing Officer and CIT (Appeals) have tried to find out whether this payment or the income of the assessee is not subjected to withholding tax under the laws of Singapore. They have presumed on the hypothesis that Guarantee performance fees is the business income of the assessee carrying out business activity in Singapore without having any PE and, therefore, as an Indian resident company the entire business is taxable in India. This hypothesis is divorced from the facts and material on record. If the source country which here in this case is Singapore, has held that amount is taxable under the

Singapore Income Tax Laws and tax has been withheld, then tax credit has to be given on the same income shown by the assessee in India which has been offered for tax. On the contrary, Section 12(6) of the Singapore Income Tax Act provides that, *any interest, commission, PE or any other payment in connection with any loan or indebtedness or with any arrangement, management, guarantee or of service relating to any loan or indebtedness is deemed to be source in Singapore or if it is borne directly or indirectly by a person residing in Singapore or any shipment in Singapore or payment is expenses to the payer*. Thus, in view of Singapore Taxation Laws the income in question is taxable in Singapore even if the assessee has no PE in Singapore, on account of the fact that commission of Performance Guarantee fees is deductible expenses to the entity paying in Singapore. Thus, we are unable to subscribe to the view taken by the Assessing Officer and the CIT (Appeals) and the same is rejected.

18. Since income is also taxable in India, the assessee is eligible for payment of such tax much less income has suffered tax in Singapore by virtue of provisions of Section 90(1) of the Act. Thus, we direct the Assessing Officer to allow tax credit in both the assessment years 2014-15 and 2015-16.

19. While arriving to our aforesaid conclusion we also draw our guidance in support from the decision of Hon'ble Mumbai ITAT in the case of ***Amarchand Mangaldas and Suresh K Shroff & Co vs ACIT*** ITA No.2613/Mum/2019 dt: 18.12.2020 where in **para 10 at page 8 therein**, the Hon'ble Bench held that DTAA provisions don't require that state of residence eliminate the double taxation in all cases where state of source has imposed its tax by applying to an item of income, a

provision of convention that is different from state of residence considers to be applicable. **Therefore, in all cases in which interpretation of residence country about applicability of a treaty provision is not the same as that of source jurisdiction about the provision and yet the source country levied taxes whether directly or by way of tax withholding, tax credit cannot be declined.**

20. Further, Rule 128 read with Section 295(2)(ha) of the Act read as under:-

> *"128. Foreign Tax Credit.- (1) An assessee, being a resident shall be allowed a credit for the amount of any foreign tax paid by him in a country or specified territory outside India, by way of deduction or otherwise, in the year in which the income corresponding to such tax has been offered to tax or assessed to tax in India, in the manner and to the extent as specified in this rule:*
>
> *(2) The foreign tax referred to in sub-rule (1) shall mean,*
> *(a) in respect of a country or specified territory outside India with which India has entered into an agreement for the relief or avoidance of double taxation of income in terms of section 90 or section 90A, the tax covered under the said agreement;*
>
> *(b)----------"*

21. Though this Rule no longer, still Assessing Officer was obliged to allow withheld tax deductible in Singapore which is offered to tax in the impugned assessment years subject to the compliance under the Rules which shall be made to claim above benefit of tax. Though this Rule has been 1.04.2017, but the foreign tax credit is available to the assessee showing foreign income. Thus, we direct the Assessing Officer to allow tax credit.

22. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the open court on: **08/03/2022.**

Sd/-	**Sd/-**
(DR. B.R.R. KUMAR)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 08/03/2022.

MEHTA

Copy forwarded to

1. Appellant;
2. Respondent;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	8.03.2022
Date on which the typed draft is placed before the dictating member	8.03.2022
Date on which the typed draft is placed before the other member	8.03.2022
Date on which the approved draft comes to the Sr. PS/ PS	8.03.2022
Date on which the fair order is placed before the dictating member for pronouncement	8.03.2022
Date on which the fair order comes back to the Sr. PS/ PS	8.03.2022
Date on which the final order is uploaded on the website of ITAT	8.03.2022
date on which the file goes to the Bench Clerk	8.03.2022
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant	

Registrar for signature on the order	
Date of dispatch of the order	