

(1992) 10 DEL CK 0054

In the Delhi High Court

Case No : CWP No"s. 2892 of 1988, 3469 of 1989, 3081 of 1990, 1713 of 1991

N. E. I. PROJECTS (INDIA) LTD.

APPELLANT

Vs

UNION OF INDIA and Others

RESPONDENT

Date of Decision : 23-10-1992

Acts Referred:

Citation : (1993) 109 CTR 76

Hon'ble Judges : P. K. Bahri, J

Bench : Division Bench

Judgement

P. K. BAHRI, J. :

Vide this judgment we propose to dispose of the aforesaid four writ petitions which seek quashment of similar orders made by Dy. CIT (Asstt.) Special Range-16, issued under s. 195(3) of the IT Act, 1961, but making it clear that the certificates so issued shall not cover any sum in the nature of fees for technical service or on account of expatriate supervision charges under the contract/agreement dt. 10th October, 1982, entered into between petitioner and National Thermal Power Corporation-respondent No. 5 (for short NTPC). These orders pertain to financial years 1988-89, 1989-90, 1990-91 and 1991-92.

2. The petitioner admittedly is a non-Indian (foreign) company incorporated in England and has a branch functioning in Delhi since 1983 situated at A-3, Qutab Hotel New Delhi and said branch is "permanent establishment" of the petitioner company within the meaning of the expression as used in agreement for avoidance of double taxation entered into between United Kingdom and India and the said permanent establishment is admittedly regularly assessed to Income Tax in India. Assessments for earlier years have been completed.

3. M/s. Northern Engineering Industries plc., the holding company of the petitioner, entered into an agreement with respondent No. 5 NTPC, a Government of India undertaking, for setting up a super-thermal power station at Rihand, Distt. Mirzapur (Uttar Pradesh), on 15th May, 1982. The said

agreement envisaged two distinct contracts. One was supply contract in respect of which the work was to be performed in United Kingdom covering project management including project engineering, civil design, preparation of civil construction drawings and designs, manufacture of shop-testing, etc., and the second contract which was in favor of M/s. N. E. I. Projects (India) Ltd. (for short NPIL) was in respect of the work to be performed in India covering port clearance, handling, inland transportation, storage testing and putting into satisfactory operation including successful completion of performance and guarantee tests of all the equipment systems of the complete power station. The petitioner was awarded the said second contract for which the agreement was entered into in 19th Oct., 1982 which was termed as "erection contract". Art. 11 of the said contract contemplated payment by NTPC for performance of the work by the petitioner which included co-ordination charges payable @ 7.5 per cent. of the payments (as per terms and conditions) to be made to the sub-contractor and secondly, expatriate supervision charges payable to the petitioner on monthly billing calculated on the basis of actual man days spent by such personnel on supervision. The coordination charges mentioned above were in part to be paid in India to the petitioner while the balance coordination charges and the expatriate supervision charges were to be paid in United Kingdom in an exclusive bank account of the permanent establishment in India, the branch of the petitioner.

4. It is the case of the petitioner that all these payments are duly reflected in the account of the India branch of the petitioner-company and are being duly assessed to tax in India by respondent No. 4, Dy. CIT.

5. Sec. 195 of the IT Act requires a person responsible for making payment of income referred to in sub-s. (1) to a company non-resident including a foreign company to deduct tax, if such payment is taxable under the Act, before making the payment. Sub-ss. (3), (4) and (5) provide a machinery under which any non-resident may apply for and the Assessing Officer may give a certificate to the effect that any such payment to the non-resident may be made without deduction of tax at source or with deduction at a rate lesser than the prescribed rate of tax. Rule 29B of the IT Rules provides for the said exemption under s. 195(3) where the foreign company carries on business in India through a branch and amount receivable by the branch is on its own account and not on behalf of its head office or any branches situated outside India or any other person.

6. The short question which arises for decision in these petitions is whether the expatriate supervision charges payable to the petitioner-company, mentioned above, by the NTPC were being received by the petitioner for its branch in Delhi on its own account and not on behalf of its head office or not ?

7. It is a common case of the parties that if the Court comes to the conclusion that such amounts were receivable and were being received by the petitioner-company for its branch being run in Delhi and not on behalf of its head office of the petitioner or any other branch of the petitioner then the petitioner is liable to

succeed in these writ petitions and the condition imposed in the certificates issued under s. 195(1) of the Act that the said certificates would not cover the payment of expatriate supervision charges as contemplated by the contract, is liable to be quashed.

8. Article 7 of the contract lays down that NPIL will arrange for the necessary expatriate supervision required for supervising all the activities included in the scope of this contract by providing an adequate number of qualified and trained expatriate personnel in relevant areas for ensuring that the entire work under the contract shall be effectively performed as per the requirements of the contract documents and according to the contract schedules. NPIL was to furnish within a period of 90 days a detailed proposal for the deployment of such personnel and Art. 8 provided that NPIL was to prepare detailed organisation chart within a period of 120 days from the date of the contract bringing out in adequate details the proposed organisation set up to be developed in India for the purpose of performing this contract, excepting for the expatriate supervisory personnel and their proposed placement plan and finalise the same with NTPC for effective coordination of the various activities under this contract. Art. 11.3 of the contract provided that the expatriate supervision charges, not exceeding a cumulative total of 5 million pound (base price) will be payable to NPIL on monthly billing, the amounts of such billing computed on the basis of actual man days spent by such personnel on supervision, the categories of such personnel and the corresponding manday rates applicable. Art 12 made the petitioner-company responsible to comply with the provisions Indian laws and liability for payment of tax under the Indian IT Act, etc. The NPIL was also required to establish an office in India and appoint its authorised representative in India. The terms of payment and mode of payment in respect of expatriate supervisory personnel deployed as per Art. 7 and payable as per Art. 11.3 shall be submitted by the petitioner to NTPC each month setting forth therein the payments due on the basis of actual man days of service rendered in accordance with the employment chart approved by NTPC. The total base cost of expatriate supervisory personnel was not to exceed 5 million pound and was to be paid in the following manner :

(a) the initial 15 per cent. of this supervisory charges as per the deployment chart were to be paid by direct payment; and

(b) the balance 85 per cent. of such charges were to be paid by bank payment.

NTPC as per Art. 10.2 was to arrange suitable unfurnished accommodation at the site and other facilities for the expatriate supervisors who were to carry on the work in India under the said erection contract.

9. It is averred by the petitioner in the petitions that the Indian branch of the petitioner-company established in India as per the contract was having its bank account in England and 85 per cent of expatriate supervision charges were being deposited by the NTPC directly through its banker in the said bank account. This

averment of the petitioner has not been controverted in the counter-affidavits filed by the respondents.

10. The terms and conditions of the contract, enumerated above, unequivocally indicate that the payment for expatriate supervision charges was to be received by the petitioner for its Indian branch in its own legal right and not on behalf of any head office or any other person. It is also not disputed before us that the expatriate supervisors supervising the work were treated as employees of the petitioner based in India and their perquisites and salaries were subjected to tax at source by Indian branch of the petitioner-company. There was no privity of contract between the said supervisors and NTPC. It is, indeed, also not in dispute that the expatriate supervision charges received by the petitioner are being shown by the petitioner in its account books and returns have been filed in India in respect of the said income and the assessments have been made on the basis of the said returns. The petitioner had shown the said amounts in its profit and loss account. The balance sheets and the account books of the petitioner do not indicate at all that these payments have been received by the petitioner on behalf of any head office or any other person. These amounts are clearly shown to relate to the Indian operations. It is also clear from the account books, copies of which are filed with the petitions, that in the balance sheets the account of the head office is separately shown and these amounts of expatriate supervision charges are not shown in the account of the head office. It is also clear that in view of the double taxation avoidance agreement appearing in *Commissioner of Income Tax Vs. Sundaram Clayton Ltd.*, that any amounts received as income for the work being performed by the foreign company in India are to be subjected to taxation laws of India only. The petitioners office in India admittedly constituted a permanent establishment as contemplated by the said double taxation avoidance agreement.

11. The learned counsel for the petitioner has argued vehemently that in view of the clear facts that the expatriate supervision charges were being received by the petitioner from NTPC for the work being performed in India, were not on behalf of head office or any other person and those amounts were subject to taxation laws of India and have been shown in profits and loss account of the permanent establishment of the petitioner-company in India. Thus, the authorities were not right in subjecting the said payments to deduction of tax at source and not including the same in the certificates issued to the petitioner under s. 195(3) of the Act. IT is to be noted here that these amounts have been earlier taxed in petitioners hand and have been allowed to be remitted to the petitioner without deduction of tax at source on the basis of the certificates issued under s. 195(3) for the financial years 1983-84 to 1987-88. It is only in respect of the financial year 1988-89 that for the first time the respondents have raised the present issue by clarifying in the certificates that such payments would not be immune from deduction of tax at source. It is mentioned that in respect of assessment proceedings of financial year 1986-87 the stand of the Revenue had been upset by the appellate authority vide order dt. 9th November, 1989.

12. The learned counsel for the respondents, on the other hand, has contended that the contract in Art. 8 provided that NPIL shall prepare the detailed organisational chart within a period of 120 days, excepting for the expatriate supervisory personnel. So, it is contended that the said supervisory staff was not to be provided by the petitioner and thus, any payments received as expatriate supervision charges were meant to be paid not to the Indian branch of the petitioner-company but were meant to be paid to said supervisors who were to be deputed by the head office of the petitioner-company and thus, the said payments are not immune from deduction of Income Tax at source. We are afraid that the said cl. 8 is not to be read in the manner sought to be interpreted by the learned counsel for the respondents. There is fallacy in the argument. The deployment of expatriate supervisors has been already indicated in the previous clause and thus, cl. 8 provided for other organisational set up. So, it cannot be said that the supervisors were not be provided by the petitioners branch in India. Keeping in view all the terms of the contract which have been summarised by us above, it is quite evident that expatriate supervision charges were to be paid to the petitioner in respect of the work to be performed in India by the said supervisors and the work was to be looked after by the permanent establishment of the petitioner established in India. In fact also the said expatriate supervision charges have been paid in the bank account of the permanent establishment branch office of the petitioner-company in India, as it is maintaining its separate account in England. It is, hence, quite evident that the amounts being received by the branch of the petitioner-company in India as expatriate supervision charges are being received on its own account and not on behalf of its head office or any branches constituted outside India or any other person. The respondents were not justified in excluding these amounts from the certificates issued under s. 195(3) of the Act for different years. The petitioner is not excluding these amounts from taxation in Indian but only relief sought is that they should be deemed to be covered by the certificates issued to the petitioner under s. 195(3) r/w r. 29B so that such payments are not subjected to deduction of tax at source. The petitioner-company, in our view, fulfills necessary conditions specified in r. 29B and thus, the said payments termed as expatriate supervision charges made in accordance with the contract are being received by the petitioners branch in India in its own account and not on behalf of any head office or any other person, so they are not liable to be subjected to deduction of tax at source. We hold accordingly and allow the writ petitions and make the rule absolute and quash the impugned conditions of the orders which make the said payments subjected to deduction of tax at source. Parties are, however, left to bear their own costs. The bank guarantees furnished by the petitioner are discharged.