

Sec. 44BBB: ITAT remands case as assessee didn't provide agreement from which nature of contract could be determined

Summary – The Delhi ITAT in a recent case of Shanghai Electric Group Co. Ltd., (the Assessee) held that where assessee offered income from supervisory service fee under section 44BBB, but relevant agreements were not placed for consideration, matter was to be readjudicated.

Facts

- The assessee, a Chinese company, was engaged in the business of supply of Boiler, Turbine & Generator (BTG) equipments to various companies setting up power plants in India. The assessee also provided supervisory services for erection/commissioning of such equipment at project owner's sites. The assessee offered income from supervisory service fee under section 44BBB and regarding supply of BTG equipment, the assessee's contention was that these were off-shore supplies, and hence, not taxable in India.
- The Assessing Officer arrived at conclusion that the supply of the BTG equipment and supervisory services in respect of erection and commissioning of such equipment was a composite work contract and same could not be divided and held one as contract for sale of equipment and another as contract for rendering of supervisory services. He further held that the assessee was having permanent establishment in India and arrived at the conclusion that 25 per cent of the profit accruing from supply of BTG equipment was attributable to PE in India. Accordingly, the Assessing Officer determined the assessee's income.
- DRP upheld the order passed by Assessing Officer.
- On appeal:

Held

- The DRP had not considered either the assessee's contention or the provisions of DTAA and simply sustained the addition holding that the Assessing Officer had taken the stand after detailed analysis of terms and contract entered into by the assessee. That if the DRP has to simply endorsed the order of the Assessing Officer, the purpose of creating the high-powered panel *i.e.*, DRP, which is consisting of three Commissioners, would be totally frustrated. The order of the DRP needs to be set aside being cryptic and non-speaking.
- However, during the course of assessment proceedings, it was pointed out by the revenue that the assessee had taken the contradictory stand before the Assessing Officer. He stated that on one side the assessee contended that there are two separate and independent contracts, one for supply of equipment and another for rendering of supervisory services but the assessee has offered the income from supervisory services under section 44BBB which is applicable in respect of turnkey

projects. He further submitted that the assessee has entered into an agreement for supply of equipment with twelve parties but has produced only copy of three agreements. In the absence of agreement with nine parties, the Revenue is unable to determine the nature of contract between the parties. He, therefore, submitted that either the order of the Assessing Officer should be sustained or if at all the matter is being set aside, it should be set aside to the file of the Assessing Officer so that he may examine all the aspects in detail. Section 44BBB being applicable for computing the profits and gains of foreign companies engaged in the business of civil construction or in certain turnkey power projects. The assessee was taking a contradictory stand while offering income in respect of supervisory service agreement and in respect of equipment supply agreement.

- It would meet the ends of justice if the matter was set aside and restored to the file of the Assessing Officer.