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TAX

A. **In Re Worley Parsons Services Pty. Ltd.**¹

The issue of taxability of offshore services was settled by the Supreme Court in case of *Ishikawajima-Harima Heavy Industries Ltd vs. Director of Income Tax, Mumbai*² ("**Ishika Case**") wherein it was observed that there are two conditions which are required to be met in order to bring the income from services in the tax net in India. The two conditions both of which are to be met are that services should be rendered in India and that the services should be utilized in India. Thus where services are rendered/ provided outside India, the consideration received in respect to the same will

not be taxed in India even if the services are utilized in India. The Apex Court in the context of territorial nexus further observed that where there are different severable parts of a composite contract which are performed in different places, the principle of apportionment should be applied to determine fiscal jurisdiction. However, in a recent ruling the Authority for Advance Rulings reconsidered the matter in *Re Worley Parsons Services Pty. Ltd.*

Facts-

- Worley Parsons Services Pty. Ltd (**Applicant**) is a company incorporated in Australia and provides professional services to the energy and resource industries.
- In the financial years 2001-02 to 2003-04, the Applicant entered into agreements with various Indian companies.

¹ A.A.R. NO. 748 OF 2007

² AIR2007SC929

- This application was in respect of the contract entered into by the Applicant with Sterlite Industries (I) Limited ("**Sterlite**") in connection with the setting up of an Alumina Refinery in Orissa on August 1, 2003 ("**Contract**").
- The Applicant as per the Contract was responsible for development of a set of basic engineering documents which involves preparation of various diagrams, designs, drawings and lay out plans.
- The Applicant had its design centers at Perth – Australia from where the design services were performed.
- However, for the purpose of gathering inputs for the preparation of designs and documents, the Applicant personnel came to India for collecting data and information which was done at ground level. The Applicant's staff also visited India to "explain deliverables to the officers/engineers of Sterlite" and to help Sterlite test the same.
- The collection of data and transfer of deliverables had taken place in India. However, preparation of deliverables, which is the crucial activity in the transaction, was done in Perth-Australia. While the work was carried out from Australia, several employees visited India intermittently for site visits and meetings. The number of days spent by the employees of the

Applicant in India was 24 days during the financial year 2003-04 and 70 days during 2004-05.

Issues-

Issues which came up were as follows-

- (a) Whether the receipts of the Applicant under the Contract with Sterlite are in the nature of royalties as defined in Article 12 of Double Taxation Avoidance Agreement ("**DTAA**") between India and Australia?
- (b) Whether the Applicant does not have a Permanent Establishment in India in respect of the Contract?
- (c) If answers to (a) and (b) are in affirmative; the receipts from the Contract are taxable only to the extent of services utilized as well as rendered in India and, therefore, the services outside India is not to be taxed."

Answers to (a) and (b) were given in the affirmative thus this issue at clause (c) was the only question that was debated for which the Applicant took support from the decision of the Supreme Court in Ishika Case for its arguments.

Ration Decidendi of Ishika Case-

"For a non-resident entity to be taxed in India it should carry on business through a permanent establishment in India and income taxed is on basis of extent appropriate to part played by permanent establishment in those transactions."

"Only such part of the income, as is attributable to the operations carried out in India can be taxed in India."

"Sufficient territorial nexus between the rendition of services and territorial limits of India is necessary to make the income taxable."

"Location of the source of income within India would not render sufficient nexus to tax the income from that source."

Held-

- Applicant's personnel came to India and stayed in India for collecting data and information from Sterlite which was done at 'ground level'. Further, as stated by the Applicant, transfer of deliverables took place in India and the staff of the Applicant visited India for 'transferring and testing' the basic engineering deliverables under the Contract.
- Going by the facts the Court observed that even though the core activities of preparation of designs and plans took place in Australia, the activities and services undertaken by the Applicant at various stages (both before and after the preparation of

designs and other deliverables) are by no means negligible or insufficient. In fact, they were essential to carry out the obligations under the Contract. Hence, it cannot be said that there is no sufficient territorial nexus for the levy of tax under the Income Tax Act, 1961 read with the provisions of the DTAA.

- In the *Ishika Case*, the entire offshore services, which according to the Supreme Court were inextricably linked to offshore supply of goods, were rendered from outside India, and therefore the Supreme Court held that the deeming provision in Section 9 (which deals with income deemed to accrue or arise in India) cannot reach such income.
- Further it was observed that the extent of territorial connection is not a material factor to determine the fiscal jurisdiction of the State which seeks to tax the subject. Not only the services have been utilized in India for the work done in India for the benefit of a resident of India, but even a part of the activities/services under the Agreement were actually undertaken in India. Thus sufficient territorial nexus exists to subject the royalty income to tax in India.
- In the *Ishika Case*, the Supreme Court did not allocate profits to the two countries based on the operations carried on within and outside India as regards the offshore services. In fact, no such occasion did arise because the entire offshore services were

rendered in Japan and therefore the territorial nexus to tax any part of the income in relation thereto was lacking

- Making and observation of the facts in the Ishika Case and comparing them to the facts in the present case the court observed that:

"There were offshore supplies of goods in respect of which title passed outside the territorial limits of India, and there were offshore engineering services which were rendered entirely outside India i.e. from the head-office of appellant company. Separate consideration was fixed for these supplies and services. There were also onshore services and onshore supplies which took place in India. Thus, a composite contract consisted of distinct and severable segments, some having territorial nexus with India, some not having such nexus. That is how it was viewed by the Supreme Court and the apportionment contemplated by the Supreme Court was in relation to offshore supplies/services and onshore supplies/services. Regarding the latter, there was actually no dispute. The Supreme Court was not concerned with a situation where in respect of a distinct segment of the contract, for e.g., offshore services, part of the work was done in India and part of it was done outside the territory of India. We cannot understand the

observations of the Supreme Court as extending the principle of apportionment to a situation where there is a single Agreement covering only one particular type of work/services, as in the present case. It does not follow from what has been stated by Supreme Court that the services or work covered by such agreement should be split up depending on the actual place of performing them and the profits should be apportioned accordingly. Proportionate deemed income in respect of a single agreement which does not have severable elements was not contemplated by the Supreme Court as a concomitant of the principle of apportionment. We do not think that S.9 (1) (VI) can be interpreted in that manner."

Finally the questions (a) & (b) were answered in the affirmative, agreeing with the contention of the Applicant. Question no. (c) was however answered in the negative. The entire receipts representing royalty income under the agreement in question are liable to be taxed in India at the appropriate rate, both under the provisions of IT Act, 1961 as well as DTAA between India Australia. The splitting up of such income was held not permissible and the court

observed that the Applicant cannot draw support from the decision of the Supreme Court in *Ishika Case*.

B. Anti-dumping Investigations: Domestic Industry in India turns alleged dumping exporter in Brazil

Reliance Industries Limited (“**RIL**”), acting as domestic industries, had filed a petition with the Directorate General of Anti-Dumping & Allied Duties, Ministry of Commerce & Industry in India (“**DGAD**”) for initiation of anti-dumping investigations against the imports of Polypropylene (i.e., homo polymers of propylene and copolymers of propylene and ethylene) manufactured in or exported from Oman, Saudi Arabia and Singapore.

DGAD, vide Initiation Notification No. 14/5/2009-DGAD dated February 24, 2009, stated the investigations and called the exporters in subject countries and importers and users in India to participate in the investigations.

Based on the investigations, DGAD recorded Preliminary Findings dated June 15, 2009 and proposed levy of anti-dumping duties on exports of Polypropylene from the subject countries. DGAD also invited comments on those findings from all interested parties

within forty days from the date of Preliminary Findings, which expired recently. The Preliminary Findings can also be found from the below link:

http://commerce.nic.in/writereaddata/traderemedies/adperf_Polypropylene_Oman_SaudiArabia_Singapore.htm

Surprising as it may sound, RIL, the petitioner domestic industry in the mentioned proceedings in India, has been alleged as a dumping exporter of the same product viz. Polypropylene by the domestic industry in Brazil. In pursuance to that, the Secretary of Foreign Trade, Ministry of Development, Industry, and Foreign Trade of Brazil, vide Initiation Circular No. 41 dated July 21, 2009 (published in Federal Official Gazette No 139 - Section 1 dated July 23, 2009), has initiated anti-dumping investigations against import of Polypropylene imported to Brazil from the US and India.

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