$~34

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 17.07.2018

\+ **W.P.(C) 7216/2018**

THE COMMISSIONER OF INCOME TAX ..... Petitioner
Through: Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Deepak Anand, Jr. Standing Counsel for Revenue.

versus

STEAG ENERGY SERVICES GMBH ..... Respondent
Through: Mr. Deepak Chopra, Mr. Harpreet Singh Ajmani and Mr. Rohan Khare, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)
%

The Revenue's writ petition – challenges the order of the Settlement Commission dated 26.10.2017 made for the Assessment Year (A.Y.) 2009-10 to 2014-15.

2. The respondent is headquartered in Essen in Germany – it is the Engineering and Nuclear Technology Division of STEAG GmbH, which provides professional and specialised energy services in Germany and elsewhere. It has a wholly owned subsidiary in India i.e. M/s STEAG Energy Services (India) Pvt. Ltd. (hereinafter

"SESI") set up in 2001 to provide cost-effective consultancy services by integrating resources of its parent company and those of SESI units in India. It entered into an operation and maintenance (O&M) contract with HPL Cogeneration Limited (HPLCL) on 30.06.2006 for operation and maintenance in Engineering support for the 116 MW Combined Cycle Cogeneration Power Plant at Haldia, West Bengal. As per the contract, the SESI had to operate and maintain the plant on behalf of HPLCL. For that activity, SESI sub-contracted a part of the contract to the respondent on 01.09.2006; the latter deputed the three personnel to work at the plant site for the period of 3½ years i.e. from September, 2006 to April, 2010. In relation to this arrangement the engineering and technical services were rendered by the respondent to SESI. A survey was conducted on 04.01.2016 under Section 133A of the Income Tax Act of the respondent in its office at NOIDA, U.P. As a consequence of the survey, the respondent applied under Section 245C(1) of the Act for the period in question (A.Y. 2009-10 to 2014-15).

3. An order was made under Section 245D(2C) of the Act and the Commissioner of Income Tax furnished a report under Rule 9 of the Income Tax Settlement Commission Rules. After considering the materials on record, the Settlement Commission rendered its findings. The issues which it dealt with concerned (i) the existence of a permanent establishment; (ii) the TDS on payment of salary, wages etc.; (iii) royalty for supply of software and (iv) Transfer Pricing issues (reference to Transfer Pricing Officer, Adjustments made in

respect of reimbursements, delay in receivables from Associated Enterprises and fee for technical services (FTS) that was offered by the assessee.

4. The final order – which is impugned in this case held the assessee/petitioner liable to pay for a total income of ₹53,75,27,974/-. The Commission had made an addition of ₹59,38,707/- upon an additional income of ₹53,15,89,267/- offered by the assessee/ petitioner.

5. The Revenue urges that the Settlement Commission's order impugned in the present petition was unsustainable on two grounds; firstly, as the respondent had violated the provisions of Section 40a(iii) of the Act since it was not paid within the time the additions needed to be made; secondly, the question of royalty, which according to the Revenue was erroneously held against the Revenue and in favour of the assessee given the true meaning of the term under Explanation 2 to Section 9(1)(vi) of the Act. It was lastly contended that the Settlement Commission also fell into error in permitting the assessee to exclude adjustments in respect of Jharsuguda project, Orissa (for A.Y. 2010-11 to 2013-14).

6. So far as the first two issues i.e. the question with respect to TDS and the payment of royalty (on software) goes, this Court notices at the outset that the findings of the Settlement Commission fully accord with the law declared by this Court in *ANZ Grindlays Bank vs. DCIT*; 382 ITR 156 (Del) and with DIT vs. Infrasoft Ltd., 220

Taxman 273 as far as the second issue urged with respect to royalty on software is concerned.

7. On the third issue i.e. exclusion of the outstanding receivable of the Jharsuguda project, this is what the Settlement Commission had to say:-

> *"We have considered the submissions made by the A.R and find considerable force in the argument that at least on account of outstanding receivables of Jharusugoda project there is absolutely no case for an adjustment as the applicant has already shown super-normal profits of 500%. We are therefore of the view that no adjustment is warranted on account of outstanding receivables in the case of Jharsugoda project for A.Y. 2010-11 to 2013-14……"*

8. The Revenue's complaint is that even whilst the assessee conceded that without prejudice to its contentions it was open to adjustments in respect of the receivables the exclusion of Jharsugoda project only on the ground that in that unit it had reflected "super-normal profits of 500%" is entirely without logic or rationale. It is submitted that the question of accepting such reasoning is contrary to the spirit of the provisions of the Income Tax Act. Having agreed to the adjustments, the mere fact that in the Jharsugoda project the assessee had reflected substantive profits which were offered by it to tax did not mean that the adjustments in that regard ought not to have been gone into.

9. This Court notices, at the outset, that out of the three errors sought to be highlighted two issues are covered by the previous decisions of the Court - against the Revenue. As far as the third issue i.e. the exclusion of adjustments in respect of Jharsugoda project goes, the matter is factored. The case law as to the scope of the Court's remit under Article 226 of the Constitution of India while dealing with the orders of the Settlement Commission are categorical, it is only in the case where there is manifest and egregious findings of law that are erroneous; which call for interference. The other grounds on which the Court is permitted to interfere with the Settlement Commission's findings are non-application of mind or lack of *bona fides*, or as emphasised in *'CIT, Mumbai vs. Anjum M.H. Ghaswala,* (2001) 252 ITR 1 (SC) and *'Brij Lal & Others vs. Commissioner of Income Tax,* (2011) 1 SCC 1 where no true and full disclosure was made by the assessee.

10. In the opinion of this Court none of these vitiating factors have been disclosed by the Revenue calling for interference with the Settlement Commission's order impugned in the present case. Consequently, the petition has to fail and is accordingly dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JULY 17, 2018
nn