IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "D" BENCH: NEW DELHI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER &
SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No.1958/Del/2022
[Assessment Year : 2018-19]

TGE Gas Engineering GmbH, Mildred-Scheel-Str., 1 D-53175 Bonn, Germany, Germany. ***PAN-AADCT7387B***	vs	DCIT, Circle-International Taxation 3(1)(1), Delhi.
APPELLANT		**RESPONDENT**

Appellant by	Shri S.K.Aggarwal, CA
Respondent by	Shri Gangadhar Panda, CIT DR
Date of Hearing	14.12.2022
Date of Pronouncement	09.03.2023

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the assessee for the assessment year 2018-19 is directed against the order of Ld. CIT(A), International taxation 3(1)(1), Delhi passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 ("the Act") dated 28.07.2022. The assessee has raised following grounds of appeal:-

"Ground No.1: Addition to the total income of Rs. 16,13,20,000 in respect of amount received for Arbitration settlement from Indian Oil Infrastructure & Energy Services Ltd ('IOT').

1.1. On the facts and in the circumstances of the case and in law, the Ld. AO has erred in making an addition in respect of amount received for Arbitration settlement amounting to Rs.16,13,20,000 from Indian Oil Infrastructure & Energy Services Ltd ('IOT') for AY 2018-19 as income from other sources under Article 21(2) of the India-Germany DTAA.

1.2. On the facts and in the circumstances of the case and in law, the Hon'ble DRP and the Ld. AO have erred in alleging that the

settlement amount received by the appellant as income effectively connected with its fixed base in India. They have failed to appreciate that the said income is not effectively connected with its fixed base or fixed place PE (in form of its Project Office in India) because the arbitration! settlement discussion was carried out directly by TGE with no involvement of PO.

Ground No.2: Disallowance of claim of brought forward business loss of Rs. 9,80,71,711

2.1. *Without prejudice, On the facts and in the circumstances of the case and in law, the Ld. AO has erred in making a disallowance of brought forward business losses of Rs. 9,80,71,711 from earlier assessment years, stating that appellant has failed to mention the same in its income tax return form, despite satisfactorily substantiating the losses with documentary evidence by the applicant.*

2.2. *On the facts and in the circumstances of the case and in law, the Hon'ble DRP principally allowed the claim and directed the Ld. AO to verify the details of expenses claimed as brought forward losses. Ld. AO in spite of being satisfied on verification, failed to allow the set off on the ground that the Appellant has not mentioned the amount in the income tax return form. The Ld. AO grossly erred in not following the above directions in spirit and rather disallowing the brought forward loss only on technical grounds, disregarding the legal substance.*

General

3. *On facts and in law, the Ld. AO erred in initiating penalty proceedings u/s 270A of the Act for under-reported income due to misreporting thereof."*

The appellant prays for leave to add, alter, rescind from or withdraw any of the above grounds of appeal at or before the time of hearing of the appeal."

2. Facts giving rise to the present appeal are that the assessee company filed its return of income, declaring NIL income for AY 2018-19. The case was taken up for scrutiny assessment. The assessee was incorporated in Germany and is a tax resident therein. The assessee had a Project office in India during the year under consideration. The office was set up in 2012 when the assessee had entered into an EPC contract with Petronet LNG. The losses have been carried forward year after year. During the year under consideration, the assessee had received an arbitration settlement payment of Euro 2.0 Million from Indian Oil Tanking Pvt.Ltd. on account of breach of contract by its client. The assessee has not offered such amount to tax in India. Further, the assessee has claimed carry forward of losses amounting to Rs.9,80,71,711/-. The Assessing Officer ("AO") therefore, treating the settlement amount of Rs.16,13,20,000/- as taxable income in India. Further, the AO made disallowance of Rs.9,80,71,711/- and proposed to assess total income at Rs.16,13,20,000/- after disallowing the expenses. The assessee filed objection against such addition. Ld. Dispute Resolution Panel ("DRP") however, held that settlement amount would be subjected to tax in India and regarding carry forward all the losses, the AO was directed to verify the claim of the additional evidence in terms of section 144C (13) of the Act and accordingly, as per DTAA and Income Tax Act. However, the AO in respect of this, recorded that upon verification, it was found that the assessee had not claimed the brought forward losses in the Income tax return for the year under consideration. As the assessee did not claim the same in its return of income, the same was not being given set off from the assessed income in the year under consideration. Thus, the AO assessed the income at Rs.16,09,42,890/-.

3. Aggrieved against the order of Ld.CIT(A), the assessee is in appeal before this Tribunal.

4. Apropos to grounds of appeal raised by the assessee, Ld. Counsel for the assessee vehemently argued that the authorities below were not justified in disallowing the claim of carry forward vis-à-vis taxing the amount related to arbitration settlement. He further reiterated the submissions as made in the synopsis. For the sake of clarity, the relevant contents of the synopsis are reproduced as under:-

"May it please Your Honours:

1. ***Background of the appellant:*** *It is a company incorporated in Germany and is a tax resident therein. It is engaged in the business of cryogenic Liquid Gas Storages & Terminals for LNG& Petrochemicals. It secures projects from various clients, provides Engineering- procurement-construction ('EPC') assistance, or executes the same on turnkey basis as an EPC contractor. It also provides commissioning assistance and hands over the same to client for further operation. TGE has a wholly owned subsidiary in India named TGE Gas Engineering Private Limited.*

2. ***Return of income:*** *The appellant electronically filed its return of income u/s 139(1) of the Income Tax Act ('the Act') for AY 2018-19 on September 07, 2018 vide e-filing acknowledgement number 286346921070918, declaring loss of Rs. 3,77,110. Refer page no 1-68 of Paper Book.*

3. ***Draft assessment order u/s 143(3) r.w.s 144C of the Act:*** *The Deputy Commissioner of Income Tax, Circle International Tax 3(1)(1), Delhi ('Ld. AO') issued draft assessment order u/s 143(3) r.w.s 144C of the Act vide dated September 28, 2021 (refer page no. 69- 75 of*

Paper Book for copy of draft assessment order), wherein the following additions/ disallowances have been made:

Sr. No	***Particulars***	***Amount***
1	*Addition of settlement amount received from Indian Oil Infrastructure & Energy Services Ltd ('IOT') under the head 'Income from Other Sources' under Article 21 of the India-Germany tax treaty treating It as effectively connected to the PE.*	*Rs. 16,13,20,000*
2	*Disallowance of claim of brought forward loss and current year expenses*	*Rs. 9,80,71,711*

4. Proceedings before Hon'ble Dispute Resolution Panel - 1, Delhi ("DRP"): *The appellant filed application before the Hon'ble DRP against the abovementioned draft assessment order and the Hon'ble DRP issued directions vide order dated June 23, 2022 (refer page no 76 - 87 of Paper Book for Copy of directions).*

Further, regarding the objection of the appellant on the issue pertaining to 'disallowance of brought forward loss and current year expenses', the Hon'ble DRP allowed the ground as under:

"The AO has held the Project Office as constituting a PE in India in terms of the lndia- Germany DTAA and business connection in terms of the IT Act. Under Paragraph 3 of Article 7 of India-Germany DT AA, in the determination of profits of the P E, expenses which are incurred for the purposes of the business of the PE are allowable as deductions in accordance with the domestic law of the contracting state in which the PE is situated. In view of above mentioned Article 24(2) of the OTAA, the project office being the PE shall be allowed deduction of expenses and carry forward of the same. The AO shall verify the expenses claimed from the said additional evidence in terms of Section 144C(13) of the Act and allow accordingly as per DTAA and IT Act. Ground 2 is disposed of as above. "

5. Final Assessment order u/s 143(3) r.w.s 144C of the Act: *Pursuant to directions of the Hon'ble DRP, the Ld. AO passed the final assessment order dated July 28,2022 u/s 143(3) r.w.s. 144C*

of the Act. The Ld. AO has retained he disallowances and additions made in the draft assessment order and determined taxable income of the applicant for AY 2018-19 as follows (refer page no. 88 – 97 of Paper Book for copy of final assessment order):

Particulars	***Amount in Rs.***
Total income as per return of income	*(3,77,110)*
Addition: Arbitration receipt	*16,13,20,000*
Total assessed income	*16,09,42,890*

6. ***Appeal before Hon'ble ITAT:*** *Against the above order, the appellant has filed an appeal before your honors.*

Synopsis of arguments

7. ***Ground No.1:*** *Addition in respect of amount received for Arbitration settlement amounting to Rs.16,13,20,000 from Indian Oil Infrastructure & Energy Services Ltd ('IOT')*

7.1.1. Background

The Appellant submits the chain of events that took place in the below table for your Honour's ready reference:

Date	**Particulars**	**Reference**
22nd December 2010	Appellant entered into a consortium agreement with IOT to participate in the tender floated by Petronet LNG Limited ('PLL') for expansion of the LNG facility at Dahej LNG terminal (herein after referred as 'Consortium ').	*Refer pages* 98 - *117 of Paper*
11thJanuary 2011	Consortium awarded a contract by PLL for Engineering, Procurement, Construction and commissioning ('EPCC Contract') of Top Side facilities for stand by Jetty at Dahe LNG Termina	*Refer pages* 118 - 291 *of Paper*
2012	Appellant established a Project Office ('PO') in India in for execution of said Contract.	
9th July2012	EPCC Contract terminated by PLL without making any payment to the consortium.	*Refer pages 292-302 of Paper*
14th January 2013	Consortium invoked arbitration mechanism with PLL.	
2nd *Feb 2016*	During the pendency of arbitration proceedings, IOT approached TGE to settle the dispute with PLL.	*Refer pages 303 - 305 of Paper*

	Accordingly, a Memorandum of Understanding ('MOU') was signed between TGE and IOT to jointly approach PLL for settlement	
30th April 2016	Arbitration hearings concluded.	
13th July 2017	A settlement agreement signed between TGE-IOT and PLL, pursuant to which they approached the arbitral tribunal with the settlement agreement and a request to pass appropriate order.	*Refer pages 306 - 314 of Paper*
17th July 2017	The Appellant raised an independent invoice on IOT for settlement of arbitration for Euro 2 million under the settlement agreement in lieu of Liability clause (Article 12) under consortium agreement dated 22 December 2010 entered between TGE Germany and IOT.	*Refer pages 315 Paper Book.*
31st July 2017	Arbitral tribunall accepted the settlement reached between the parties and issued order terminating the arbitration proceeding	*Refer pages 316 - 330 of Paper*
January 2018	The Arbitration settlement payment of Euro 2 million received by the Appellant from IOT.	
28th September 2021	The Ld. AO vide draft assessment order proposed to make addition to the total income of the Appellant in respect of the arbitration settlement receipt	*Refer pages 69- of Paper Book.*

7.1.2. Facts in appellant's case

- *The Appellant incorporated the PO for execution of original EPCC contract which was later terminated by PLL by issuing a contract termination letter dated 9th July 2012 (refer pages 292- 302 of the Paper Book).*
- *The separate tripartite Settlement agreement entered between PLL, the Appellant and IOT on July 13, 2017 explicitly states that arbitration settlement is independent of the EPCC contract entered into by Appellant with PLL. Clause H of recitals under settlement agreement specifically mentions independence of the settlement payment. Therefore, it states that PLL has no role in the payment made by IOT and is not on behalf of PLL. Therefore, it demonstrates that PO (set-up for contract with PLL) has no role in arbitral payment made by IOT. Relevant extract is reproduced as under (refer pages 306 - 314 of the Paper Book):*

"TGE-IOT hereby represent that they have entered into a separate agreement amongst themselves for a payment to be made by IOT to TGE which is independent from this Agreement and does not have any connection to the settlement reached between TGE-IOT and PLL."

- *In light of above, a separate MOU has been entered between TGE and IOT under which the said arbitral payment has been made, to which PLL is not a party (refer pages 303 - 305 of the Paper Book).*
- *Pursuant to the above MOU, an independent invoice has been raised by the appellant on IOT having no connection with the EPCC contract (refer page 315 of the Paper Book). Thus, the arbitration settlement receipt is not connected with the PO of the Appellant, and the arbitration/ settlement discussion was carried out directly by TGE with no involvement of PO (which was responsible for only executing the EPCC contract with PLL).*
- *The payment is towards the settlement of dispute (in lieu of consortium agreement entered between the Appellant and IOT to make good all the losses incurred due to irregularities by IOT to fulfill the contract with PLL) and not towards provision of any work service by the Appellant.*
- *It has been specifically submitted before the Ld AO that no work has been undertaken/executed in the relevant year by the Appellant vide its submission for hearing dated 11th Feb 2021 in response to query no 5 of notice dated 3rd February 2021 (refer pages 331 - 499 of Paper Book).*

7.1.3. Key contentions of the appellant

As per Article 21 of India - Germany DTAA, the income of a non-resident under the head "other sources" is taxable in India only if the said income is effectively connected with the PE of the non-resident, otherwise the income would be taxable only in Germany.

The relevant extract of the Article 21 of India - Germany DTAA is reproduced for Hon'ble Panel's ready reference:

"1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from affixed base situated therein and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

At the outset, the appellant submits that the addition proposed by the Ld. AO is on the ground that the receipt for arbitration settlement is effectively connected with Appellant's fixed base and thus chargeable to tax in India. However, the appellant would like to humbly submit that the fixed base (in form of PO) of the appellant has no role to play in the receipt of arbitration settlement amount and thus the argument of Ld AO that the receipt is effectively connected with the PE is not tenable in law.

Reliance placed on the following judicial precedents for the same:

Case Law citation	***Held***	**Reference**
M/s JC Bamford Excavators Limited [ITA No. 540/Del/2011]	*"The phrase' effectively connected with' has neither been defined under the Act nor the DT AA. In such a situation, it becomes crucial to understand the import of such an expression. In our considered opinion, the words effectively connected' are akin to 'really connected'. In the context of royalties, it is in the*	*Refer pages 500-* 557 *of the Paper / Book for a copy of judgement*

	nature of something more than the mere possession by the PE of property or right but equal to or a little less than the legal ownership of such property or right. But in no case the remote connection between the PE and property or right can be categorized as effectively connected".	
EPCOS AG (2014) 43 taxman.com 65 (Pune Trib.)	*an Assessee having no PE at all, or having PE but no income attributable to PE will not be liable to tax in India*	*Refer pages* 558 - 564 *of the Paper Book for a copy of judgement*
Ishikawajma-Harima Heavy Industries Ltd. (2007) 158 Taxman 259 (SC)	*"The distinction between the existence of a business connection and the income accruing or arising out of such business connection is clear and explicit. In the instant case, the permanent establishment's non-involvement in transaction in question excludes it from being a part of the cause of the income itself, and thus there is no business connection."*	*Refer pages* 565- 594 *of the Paper Book for a copy of judgement*

Therefore, as per the factual and legal details mentioned above, it is well established that PO of the Appellant set-up for the execution of project has no role to play in the subject arbitral settlement receipt of the Appellant and hence the said receipt/ income is not effectively connected with the PE of the Appellant. Thus, the said receipt is not taxable in the hands of the Appellant as per Article 21 read with Article 7 of India - Germany DTAA.

The Appellant would like to further submit that even where the said receipt is proposed to be taxed under the provisions of Article 7 of India - Germany DTAA as a business income rather than as income from other sources (as in proposed in the draft assessment order of the Ld. AO), still the receipt would be taxable in India only if it is effectively connected with the PE of the appellant, otherwise the income would be taxable only in Germany. Drawing inference from the above details, it can be argued that irrespective of whether the receipt is sought to be taxed as business

income under Article 7 of the DTAA or as income from other sources under Article 21 of the DTAA, the settlement receipt cannot be taxed since it is not effectively connected with the PE of the Appellant in form of PO.

8. Ground No.2: Disallowance of claim of brought forward loss of Rs. 9,80,71,711

8.1. Background

The appellant has claimed total carry forward loss of Rs. 9,80,71,711 in income tax return for AY 2018-19 on account of following:

AY	***Amount of Loss (in Rs.)***
2012-l3	*2,15,58,022*
2013-14	*86,53,400*
2014-15	*1,39,53,999*
2015-16	*2,35,36,520*
2016-17	*1,59,00,335*
2017-18	*1,40,92,324*
2018-19	*3,77,111*
Total	***9,80,71,711***

The appellant had been asked by Ld AO office to explain the nature of losses carried forward along with the break-up thereof vide notice u/s 142(1) of the Act dated 26 February 2021. The appellant has duly furnished details thereof vide response filed for hearing dated 04 March 2021. Further, as called upon, income tax return and audited balance sheet of the PO was also duly filed before the Ld AO during the course of assessment proceedings.

The Hon'ble DRP remanded the matter back to the Ld AO with respect to verification of the expenses claimed from the additional evidences filed by the appellant.

Relevant extract of DRP directions are reproduced as under:

"3.2 The submissions have been explained. There is no dispute that expenses have been claimed by the project office in the returns filed for preceding assessment years based on audited financial statements and allowed as such under section 143(1) of the Act for those years. As stated earlier, the additional evidence containing details of expenses claimed in each of the financial years from 2011-12 to 2017- 18 in the form of ledgers

and sample supporting vouchers for disallowed claim of loss of INR 9,80,71,711 was forwarded to the AO for examination vide ORP letter dated 08.02.20 22. However, no report was received from the AD. Under paragraph 2 of Article 24 (Non-discrimination) of the India- Germany DTAA.

"2. The taxation of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities….."

3.4 The AO has held the Project Office as constituting a PE in India in terms of the India- Germany DTAA and business connection in terms of the IT Act. Under Paragraph 3 of Article 7 of India-Germany DTAA, in the determination of profits of the PE, expenses which are incurred for the purposes of the business of the PE are allowable as deductions in accordance with the domestic law of the contracting state in which the PE is situated. In view of above-mentioned Article 24(2) of the OTAA, the project office being the PE shall be allowed deduction of expenses and carry forward of the same. The AO shall verify the expenses claimed from the said additional evidence in terms of Section 144C(13) of the Act and allow accordingly as per DTAA and IT Act. Ground 2 is disposed of as above.

Further, the Ld. AO was duly furnished the additional evidence and pursuant to evaluating the same, the Ld. AO disallowed the brought forward loss claimed by the Applicant only basis an administrative premise, disregarding the legal substance. The Hon'ble DRP principally allowed the claim and directed the Ld. AO to verify the details of expenses claimed as brought forward losses. Ld. AO is also principally fine with the said claim, however, not allowed the claim on administrative reason i.e. Applicant has not claim the same in its income tax return.

Relevant extract of the assessment order of Ld. AO are reproduced as under:

"As per Hon'ble DRP directions, the expenses claimed by the assessee in each of the financial years i.e. FY 2011-12 to FY 2012-13 were verified from the additional evidence as submitted by the assessee during Hon'ble DRP proceedings and found to be satisfactory as per provisions of the Act. Further, from the information available on ITD database, it is noticed that the assessee has filed its return of income for the abovementioned years within stipulated time as prescribed u/s 139(1) of the Act. But upon verification, it is found that assessee has not claimed the brought forward losses in the income tax return for the year under consideration. As the assessee has not itself claimed the same in its return of income, the same is not being set off from the assessed income in the year under consideration".

8.2 Key contentions of the appellant

The appellant had submitted that the claim of expenses during each of the financial year concerned i.e. FY 2011-12 to FY 2017-18 has been made basis the financial statements of the PO of Appellant which have been duly audited. This itself establishes the authenticity of the claim of Appellant. Further, the Appellant has also submitted the detail of expenses claimed in each of the prior financial years i.e. FY 2011-12 to FY 2017-18 alongwith their ledgers and sample supporting vouchers.

Thus, it is only on administrative grounds that the claim has been disallowance which is against the legal substance.

Reliance is placed on the following case laws:

Case Law citation	***Held***	***Reference***
M/s Mistral Solutions (p.) Ltd. v. DCIT [(2021) 123 taxmann.com 125 (Bangalore - Trib.)]	***Facts:*** *Assessee company filed its return and declared ' ii' business Income - Subsequently, assessee filed rectification application before Assessing Officer seeking set-off of unabsorbed losses - Assessing Officer held that fresh claim of deduction could not be considered since assessee had omitted to file such with original return.* ***Held:****In view of provision of section 72(1)(i) whether or not assessee has set-off losses in return of income, income tax authorities are required to give effect to section 72(1)(i) and set-off such losses. Thus, Assessing Officer was directed to*	*Refer pages 595-607 of the Paper Book for a copy of judgement*

	consider assessee's claim of set-off of unabsorbed losses/depreciation against declared income. *"The A.O. is directed to consider the assessee 's claim of set off of unabsorbed losses/depreciation against the declared income for assessment year 2005-2006. The A.O. shall afford an opportunity of hearing to the assessee. The A.O. shall not reject the assessee's case solely for the reason that the assessee had not made the claim of set off of unabsorbed losses/depreciation in the original return filed. "*	
Maharashtra State Warehousing Corporation v. DCIT [TS-327-ITAT-20 19(PUNE)]	*Pune ITAT allows assessee's belated claim of set-off of brought forward business loss from earlier AY by way of a rectification petition, rejects Revenue's stand that in absence of claim of set off made in the return of income for subject AYs 2003-04 to 2006-07, the same cannot be allowed.*	*Refer pages 619-628 of the Paper Book for a copy of judgement*
ITO v. Shri Jignesh V. Sheta ***[ITA No. 1143/ Ahd/2011 (Ahmedabad Bench)]***	*ITAT observed that assessee had raised a genuine claim of business loss of Rs16.20 lakhs on account of share transactions and he had also submitted the details and evidences of the loss during assessment proceedings. ITAT observed that if any loss was actually suffered by assessee or any deduction was legally allowable for which all details were available before AO at the time of the assessment, then such loss or deduction had to be allowed by AO. ITAT held, "the Assessing Officer is duty bound to compute the total income of the assessee as per provisions of law and it cannot be appreciated that the Assessing Officer will not allow the benefit of loss or deduction to the assessee merely on the ground that the assessee has not claimed the same in the return of income."*	*Refer pages 619-628 of the Paper Book for a copy of judgement*
TRC Engineering India Pvt. Ltd v. ITO [TS-596- ITAT-2020(Bang)]	*ITAT holds when certain exemptions or deductions are not claimed in return of income, the assessee may make a claim through a letter before the authorities as ruled out by SC in NTPC Ltd.: ITAT Bang*	*Refer pages 629 - 637 of the Paper Book for a copy of judgement.*
ACIT v. Mangaiam Timber Products Ltd [2017] 82 taxmann.com 62 (Cuttack - Trib.)	*ITAT has held that where assessee in return of income mentioned appropriate amount of carry forward of losses, but amount of brought forward losses could not be mentioned in appropriate column due to technical error, application for rectification to allow such loss should be entertained.*	*Refer pages 638 - 643 of the Paper Book for a copy of judgement.*

In view of the detailed factual and legal submissions, it is most respectfully prayed before your Honors that the objection of the appellant be allowed, and relief granted accordingly.

Prayed accordingly."

5. Ld. CIT DR opposed these submissions and supported the orders of the authorities below. He contended that there is no infirmity into the order of Ld.DRP.

6. **Ground No.1** raised by the assessee is related to taxability of amount of Rs.16,13,20,000/- i.e. the amount received in the arbitration settlement received from Indian Oil Infrastructure & Energy Services Ltd. ("IOT").

7. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. We find that Ld.DRP has given a finding on fact by observing as under:-

> *2.9. "In the present case, the economic ownership of the income from the project lay with the PE and such income would have ordinarily been allocated to it, had the contract survived. The economic ownership of such income therefore was effectively connected with amounts, as the settlement amount given by IOT was in effect for replacement of the lost income of the assessee from the Project on account of breach of contract and termination of the Project by Petronet LNG, the sum is taxable as business income. Pursuant to the award of contract, the assessee setup the project office for undertaking the deliverables relating to the project. The project office was involved in actual rendering of the services until termination of contract. It is also noted that the project office has been claiming expenditure on account of consultancy fees to subcontractors as well as other project and arbitration related expenditure on account of legal fees, professional charges and rent year-on-year, all of which are undisputedly related to the contract. The entire contract was thus "effectively connected' with the permanent establishment with the PE being wholly involved in the project. The assessee carried on its business under the Project*

through the PE in India. Such settlement amount cannot be said to be independent of PE.

2.10 The assessee's reliance on the Hon'ble, Supreme Court's ruling in Ishikawajima Harima case is misplaced since the issue under consideration in that case was in relation to the rendering of offshore services rendered outside India due to which it was held that the PE did not have any role to play in the earning of the said income. In the present case, it is not in dispute that the assessee had a PE in India during the period. As discussed above, the assessee was engaged in the project only through its PE in India. In view of the complete involvement of the PE as above, the settlement amount, arising out of the MOU consequent upon project termination is also effectively connected to the PE. The said sum falls within the Scope of Article 21 (2) of the DTAA and will be taxable in India under Article 7 of the DTAA. The AO shall compute the income accordingly as provided under Article 7 of the DTAA. Ground 1 is disposed of as above."

8. We do not see any infirmity into the order of Ld.DRP as admittedly the settlement amount is related to project office of the assessee company. Therefore, the submission of the assessee is that it has no connection with the project office in India is misplaced and contrary to the records. We therefore, do not find any merit in the Ground No.1 raised by the assessee, the same is hereby dismissed.

9. Now, coming to **Ground No.2** raised by the assessee in respect of disallowance of claim of brought forward business loss of Rs.9,80,71,711/-.

10. Ld. Counsel for the assessee submitted that in pursuance to the direction of Ld.DRP, the AO did not allow set off of loss of earlier years amounting to Rs.9,80,71,711/- on the basis that assessee has not claimed

brought forward loss in the Income tax return for the year under consideration. However, before Ld.DRP, the assessee had claimed such carry forward loss. The submissions of the assessee in this regard are reproduced as under:-

2.2. "During DRP proceedings, the assessee stated as follows-

i. The company secures project from various clients, provides engineering-procurement-construction (EPC) assistance or executes the same on turnkey basis as an EPC contractor.

ii. The assessee entered into a Consortium Agreement dated 22.12.2010 with IOT Infrastructure and Energy Services Ltd to participate in the tender floated Petronet LNG Limited for expansion of the LNG facility at Dahej LNG Terminal.

iii. The Consortium was awarded a contract by Petronet LNG on 11.01.2011 for engineering, procurement, construction and commissioning (EPCC contract) of topside facilities for standby jetty at Dahej LNG terminal.

iv. The assessee established a Project Office in India in 2012 for execution of the contract.

v. The contract was terminated by Petro net LNG on 9.07.2012 without making any payment to the Consortium.

vi. On 14.01.2013, the Consortium invoked arbitration mechanism with Petronet LNG. The arbitration hearings concluded on 30.04.2016 and the parties awaited final arbitration award.

vii. In the meantime, IOT approached the assessee to settle the dispute with Petronet LNG. Accordingly, an MOU was signed between TGE and IOT on 02.02.2016 to jointly approach Petronet LNG for settlement.

viii. Subsequently a settlement agreement was signed between TGE-IOT and Petronet LNG on 13.07.2017 pursuant to which they

approached the arbitration tribunal with the settlement agreement and requested to pass appropriate orders.

ix. *On 31.07.2017, the arbitration tribunal accepted the settlement reached between the parties and issued order terminating the arbitration proceedings. Thereafter the assessee raised an independent invoice dated 17.07.2017 on IOT for settlement of arbitration for an amount of Euro 2 million under the settlement agreement in view of liability clause (Article 12) under Consortium Agreement dated 22.12.2010 entered between the assessee and IOT. The said arbitration settlement payment of Euro 2 million was received by the assessee from IOT in January 2018.*

x. *As per Article 21 of India-Germany DTAA, the income of a non-resident under the head "Other Sources" is taxable in India only if the said income is effectively connected with PE of the non-resident, otherwise income would only be taxable in Germany. The fixed base in the form of Project Office of the assessee had no role to play in the receipt of arbitration settlement amount. The Project Office was incorporated by assessee for execution of original EPCC contract which was later terminated by Petronet LNG by issuing a contract termination letter dated 09.07.2012. A separate settlement agreement was entered into between Petronet LNG, the assessee and IOT which states that arbitration settlement is independent of the EPC contract entered into by assessee with Petro net LNG. Clause 'H' of recitals under settlement agreement specifically mentions independence of the settlement payment. Petronet LNG has no role in the payment made by IOT and it is not in behalf of Petronet LNG.*

xi. *The project office set up for contract with Petro net LNG has no role in the payment made by IOT. The payment is toward settlement of disputes in lieu of Consortium Agreement entered between the assessee and IOT to make with all the losses incurred due to*

irregularities by IOT to fulfill contract with Petro net LNG and not towards provision of any work/service by the assessee.

xii. No work has been undertaken/executed in the relevant year by the assessee. Hence the receipt is not taxable in the hands of assessee as per Article 21(2) / Article 7 of India-Germany DTAA.

xiii. Without prejudice, the attributable income is to be taxed on net basis i.e. after allowing expenses incurred to earn the said income."

11. Ld. Counsel for the assessee further placed reliance in the decisions of Co-ordinate Bench of the Tribunal rendered in the following cases:-

[i] M/s. Mistral Solutions (P.) Ltd. v DCIT [2021] 123 taxmann.com 125 (Banglore-Trib.);

[ii] Maharashtra State Warehousing Corporation v DCIT [TS-327-ITAT-2019 (PUNE)];

[iii] ITO v Shri Jignesh V. Sheta [ITA no.1143/Ahd/2011 (Ahmedabad Bench)];

[iv] TRC Engineering India Pvt.Ltd. v ITO [TS-596-ITAT-2020 (Bang.)]; and

[v] ACIT v Mangalam Timber Products Ltd. [2017] 82 taxmann.com 62 (Cuttack-Trib.).

12. Ld.CIT DR opposed these submissions and supported the orders of the authorities below.

13. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. We find that the Revenue has not disputed the fact that the expenses are related to the project office and claimed on the basis of audited financial statement. Ld. Counsel for the assessee took us through the finding of Ld.DRP in this regard. Ld.DRP in its direction has directed the AO in para 3.4 as under:-

3.4. *"The AO has held the Project Office as constituting a PE in India in terms of the India-Germany DTAA and business connection in terms of the IT Act. Under Paragraph 3 of Article 7 of India-Germany DTAA, in the determination of profits of the PE, expenses which are incurred for the purposes of the business of the PE are allowable as deductions in accordance with the domestic law of the contracting state in which the PE is situated. In view of above mentioned Article 24(2) of the DTAA, the project office being the PE shall be allowed deduction of expenses and carry forward of the same. The AO shall verify the expenses claimed from the said additional evidence in terms of Section 144C(13) of the Act and allow accordingly as per DTAA and IT Act. Ground 2 is disposed of as above."*

14. In our considered view, the AO ought to have given set off of losses in pursuance of the direction of Ld.DRP. The AO failed to take note of the fact that the assessee had raised its claim before the Ld.DRP. Therefore, the AO was under legal obligation to comply with the direction of higher authority. We therefore, considering the totality of the facts, direct the Assessing Authority to allow set off of the losses as claimed by the assessee before the Ld.DRP. Thus, Ground No.2 raised by the assessee is allowed in terms indicated herein above.

15. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 09th March, 2023.

Sd/- ***Sd/-***

(NARENDRA KUMAR BILLAIYA) **(KUL BHARAT)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

** Amit Kumar **

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI