IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.7809/Del/2018
Assessment Year: 2010-11.

DCIT (International Taxation), Circle-1(3)(1), New Delhi	**Vs.**	M/s. Foundation Co. of Canada Ltd. (Now merged with Aecon Construction Group Inc.), 28, Continental House, Nehru Place, New Delhi
		PAN :AAACF1541L
(Appellant)		**(Respondent)**

And
ITA No.5131/Del/2019
Assessment Year: 2010-11

M/s. Foundation Co. of Canada Ltd. (Now merged with Aecon Construction Group Inc.), 12, Ground Floor, Central Lane, Bengali Market, Mandi House, New Delhi	**Vs.**	DCIT (International Taxation), Circle-1(3)(1), New Delhi
PAN :AAACF1541L		
(Appellant)		**(Respondent)**

Assessee by	Ms. Ananya Kapoor, Advocate Sh. Vibhu Jain, Advocate
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	03.10.2023
Date of pronouncement	10.10.2023

ORDER

Captioned cross appeals arise out of order dated 25.09.2018 of learned Commissioner of Income Tax (Appeals)-42, New Delhi, for the assessment year 2010-11.

ITA No. 7809/Del/2018
Revenue's appeal

2. Effective grounds raised by the Revenue are as under:

1. *On the facts and circumstances of the case, the CIT(A) erred in deleting the order of the Assessing Officer that charged the income of the assessee to tax at normal rates applicable to non-residents.*

2. *On the facts and circumstances of the case, the CIT(A) erred in relying solely on the order passed by TDS officer u/s 195(2) in the case of Continental Foundation Joint Venture. Issue in the order u/s 195(2) was limited to TDS liability of the deductor. It cannot be the sole basis for determining the tax rate applicable to the assessee*

3. *On the facts and circumstances of the case, the CIT(A) erred and in holding that Technical know-how fee was taxable @10% and financial commitment fee @ 15%.*

4. *Onthe facts and circumstances of the case, the CIT(A) erred in holding the income of theassessee as taxable at reduced rates without sufficient material on record to establish the nature of receipts and residence status of the assessee.*

5. *On the facts and circumstances of the case, the CIT(A) erredin admitting additional evidence in violation of Rule 46A, without giving A.O. any opportunity to examine them*

3. As could be seen from the grounds raised, the issue relates to deletion of addition of Rs.69,93,54,377/-.

4. Briefly the facts are, the assessee is a non-resident corporate entity incorporated under the laws of Canada. As stated, the assessee is engaged in the business of construction and infrastructure development. The assessee had entered into a joint venture ("JV") with Continental Construction Limited, an Indian entity for execution of Nathpajhakri Hydroelectric Project in 1993. The JV is assessed to tax in India in the status of Association of Persons ("AOP"). The profit sharing ratio between the JV partners is at 45:55. In the assessment year under dispute, the JV paid an amount of Rs.37,78,54,377/- as fee for technical know-how and another amount of Rs.32,78,54,377/- as a financial commitment fee.

5. Apparently, for the assessment year under dispute, the assessee did not file any return of income. Subsequently, the Assessing Officer received information that the assessee had received the aforesaid two amounts aggregating to Rs. 69,93,54,377/- during the year under consideration. Whereas, it has not offered them to tax in India. Since, the assessee had not filed any return of income, the Assessing Officer reopened assessment under section 147 of the Income-tax Act, 1961 (in short 'the Act'). As observed by the Assessing Officer, in spite of

notices being issued to the assessee to participate in the assessment proceeding and to furnish necessary information, the assessee remained non-compliant. As a result, the Assessing Officer proceeded to complete the assessment under section 144 of the Act to the best of his judgment. While doing so, the Assessing Officer added back the receipts of Rs.69,93,54,377/- to the assessee. Against the assessment order so passed, the assessee preferred an appeal before learned first appellate authority. In course of proceeding before the first appellate authority, the assessee furnished detailed submissions along with supporting evidences. It was submitted by the assessee that since, the JV has withheld tax on the payments made towards technical know-how fee and financial commitment fee at the rate of 10% and 15% respectively in accordance with an order passed by TDS Officer under section 195 of the Act, to settle the matter at rest, the assessee is willing to offer the income subject to settlement of tax liability at the rate at which TDS has been deducted. After perusing the submissions of the assessee and other materials on record, learned first appellate authority allowed assessee's claim to be taxed as per the rate provided under India – Canada Double Taxation Avoidance Agreement

(DTAA). Being aggrieved with the aforesaid decision of learned first appellate authority, the Revenue is in appeal before us.

6. We have considered rival submissions and perused the materials on record. Undisputedly, the assessee has received an amount of Rs. 37,15,00,000/- as technical know-how fee and Rs.32,78,54,377/- towards financial commitment fee from the JV. It is apparent, the JV had approached the TDS Officer under section 195 of the Act seeking a direction regarding the rate of TDS on the aforesaid payments. In response to the application filed by the JV, the TDS officer has issued an order under section 195 of the Act, wherein he has directed the JV to deduct tax at the rate of 10% on technical know-how fee and at the rate of 15% on financial commitment fee. The aforesaid rates were applied by the TDS Officer treating the technical know-how fee as FTS and the financial commitment fee as interest income. The rate of TDS was determined in terms with the rate of tax for FTS and interest income as per the treaty provisions. Whereas, the Assessing Officer has taxed the entire receipts by applying the normal rate of tax as per the provisions of domestic law.

7. There is no dispute that the assessee has willingly offered the entire receipts to tax in India. The dispute is only with regard

to applicable rate of tax on such receipts. Since, the assessee is resident of Canada and is entitled to get benefit under India – Canada DTAA, in our view, the assessee must get benefit of the tax rate provided under the DTAA. In fact, being conscious of this factual position, the TDS Officer has issued an order under section 195 of the Act directing the payer to deduct tax at 10% and 15% respectively. Thus, on overall consideration of facts and circumstances of the case, we do not find any infirmity in the decision of learned first appellate authority on the issue. Accordingly, we dismiss the grounds.

8. In the result, the appeal is dismissed.

ITA No. 5131/Del/2019
Assessee's Appeal

9. The grounds raised by the assessee in this appeal are on the validity of reopening of assessment under section 147 of the Act.

10. Since, while deciding Revenue's appeal in the earlier part of the order, we have confirmed the order of learned Commissioner (Appeals), the issues raised in the present appeal have become purely academic and, as a corollary, the appeal has become infructuous. Accordingly, the appeal is dismissed.

11. To sum up, both the appeals are dismissed.

Order pronounced in the open court on 10th October, 2023

Sd/-	***Sd/-***
(DR. B.R.R. KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 10th October, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi