

IN THE INCOME TAX APPELLATE TRIBUNAL “L” BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

I.T.A. No. 6399/Mum/2017
(Assessment Year: 2014-15)

Dominos Pizza International Franchising Inc. SRBC & Associates 14 th Floor, The Ruby, 29 Senapati Bapat Marg, Dadar (West), Mumbai-400 028	Vs.	Dy. CIT (International Taxation) Circle-2(1)(2) 17 th Floor, Room No. 1713, Air India Building, Nariman Point, Mumbai-400 0028
PAN/GIR No. AABCH 8691 J		
(Appellant)	:	(Respondent)

Appellant by	:	Shri M. P. Lohia/ Shri Heman Chandaniya
Respondent by	:	Shri Samuel Darse

Date of Hearing	:	29.05.2018
Date of Pronouncement	:	13.08.2018

ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order of the Assessing Officer passed u/s.143(3) r.w.s. 144C(1) of the Income Tax Act, 1961 pursuant to the direction of the Dispute Resolution Panel - I, Mumbai dated 28.06.2017 u/s.144C(5) and pertains to the assessment year 2014-15.

2. The grounds of appeal read as under:

Based on the facts and circumstances available of the case and in law, Dominos Pizza International Franchising Inc. (hereinafter referred to as 'Appellant') craves leave to prefer an appeal against the final assessment order dated 31 August 2017 passed by the Deputy Commissioner of Income-tax (International Taxation) - Circle 2(1)(2) (hereinafter referred to as 'Learned Assessing Officer') under

section 143(3) read with section 144C(13) of the Income-tax Act, 1961 ('Act') on the following grounds.

On the facts and in the circumstances of the case and in law, the Learned Assessing Officer/ Dispute Resolution Panel ('DRP') has erred in:

1. Holding that DPIFI has a Dependent Agent Permanent Establishment in India (Jubilant Foodworks Limited) under Article 5 of the India-USA Double Tax Avoidance Agreement ('DTAA'). Accordingly, the Learned Assessing Officer levied tax on the total income of DPIFI (after allowing a deduction of 5% of income for expenses) at the rate of 40% {plus applicable surcharge and cess) vis-a-vis a rate of 15% on gross basis as per Article 12 of the India-USA DTAA pertaining to Royalty and Fees for Included Services.

2. Without prejudice to the first objection, the Learned Assessing Officer erred in

determining that five percent of the total income should be allowed as deduction for the purpose of computing the income from the business of DPIFI.

3. Initiating levy of penalty under Section 271(1)(c) of the Act.

4. The Learned DRP has erred in violating the principles of judicial discipline in not following its own directions of earlier year ie AY 2012-13, where under the same agreement and same facts and circumstances, the Learned DRP has decided the issue in favour of the Appellant.

3. Brief facts of the case are as under:

Dominos Pizza International Franchising Inc. ('DPIFI' for short) is a company incorporated in United States of America. It had entered into a franchising arrangement with Jubilant Foodworks Limited ('Jubilant') for the franchise of Domino's Pizza stores. Jubilant pays franchise fees to DPIFI for the same. Further, DPIFI had provided certain services to Jubilant for store opening. Jubilant pays store opening fees to DPIFI for these services. These services, inter-alia, include completing necessary paperwork, providing advice on store designs, layout, providing marketing and training assistance. DPIFI does not have any other income chargeable to tax in India for AY 2014-15. DPIFI had filed its return of income for AY 2014-15 on 27 September 2014 declaring a total income of Rs.55,43,11,705 (Franchise fee amounting to Rs.50,86,06,761 and store opening fee

amounting to Rs.4,57,04,944) earned from Jubilant. Such income was offered to tax at the rate of 15 percent on gross basis as per Article 12 of the India-USA Double Tax Avoidance Agreement ('DTAA'). The Assessing Officer, however, held that the assessee has a Dependent Agent Permanent Establishment in India (Jubilant Food works Limited) under Article 5 of the India-USA Double Tax Avoidance Agreement ('DTAA') and he proceeded to determine the business income of assessee from such DAPE in India.

4. Upon the assessee's objection, the Dispute Resolution Panel noted that the same issue was decided in favour of the assessee by the Dispute Resolution Panel for the assessment year 2012-13 by observing as under:

"We have considered the facts of the case and the submission made by the assessee. Examination of Master Franchise Agreement ('MFA') entered into by DPIFI with Jubilant shows that Jubilant does not act as an agent/agency of the assessee. It is running its business independently and profit or loss from the business belongs to it. The assessee is only entitled to 3% of sale proceeds as royalty and store opening fees from it as well as sub-franchisees. Though there are certain clauses in the agreement allowing the assessee to examine the accounts, approve suppliers etc and allowing some control over advertisements to be placed by the Jubilant, these are simply to safeguard the interest of the assessee in respect of the revenue and also to safeguard the brand image of the assessee. Jubilant is neither selling nor storing any goods for or on behalf of the assessee. The master franchisee (Jubilant) has power to appoint its sub-franchisees but the assessee is entitled to only royalty and store opening fees from sub-franchisees also. Approval of the sub-franchisee agreement is only for the limited purpose of protecting assessee's brand image and business interests. Considering the fact that the master franchisee is an independent business enterprise and restrictions placed on it by the assessee are only to safeguard its brand value and ensure proper receipt of royalty income, we are of the opinion that Jubilant does not constitute a permanent establishment or agency PE of the assessee. Consequently, action of the AO in treating royalty income as profit and gains of business under section 44 DA of the IT Act is set aside"

5. However, the Dispute Resolution Panel noted that since the department had not accepted the decision and filed an appeal before the ITAT, to keep the issue alive and protect the interest of the department, it upheld the Assessing Officer's action.

6. Against this order, the assessee is in appeal before us.

7. We have heard both the counsel and perused the records. It transpires that for assessment year 2012-13 in ITA No. 1447/Mum/2016, this ITAT in assessee's own case has decided the issue in favour of the assessee. We may gainfully refer to the decision of the ITAT in this regard as under:

5. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have also gone through the copy of MFA dated 23.09.2009 (PB 16 to 108), copy of sub-franchise agreement between the Jubilant Food Works Pvt. Ltd. with Travel Food Services Pvt. Ltd. dated 23.02.2010 for Mumbai location (PB 109 to 142) and Jubilant Food Works Pvt. Ltd. and Travel Food Services Pvt. Ltd. for Delhi Location effective from 01.05.2010 (PB 143 to 172). We have also perused the various provisions of India-US DTAA. We have noted that the Assessing Officer while passing assessment order held that assessee constitute a dependent agency permanent establishment in India as per Article 5 of India-USA DTAA. The Assessing Officer took the view that Jubilant is totally dependent upon the assessee. Assessee has exclusive franchise right in India. Jubilant is not allowed any other activities other than activities prescribed in the agreement. Further, the quality of material and equipment used has to be approved by the assessee. The expenses on advertisement and marketing are also carried out in accordance with the provision of agreement. For expansion of the market or penetration has to be followed with the condition of MFA. Princes are also decided by assessee and not by Jubilant or sub-franchise. On the basis of above observation, the Assessing Officer concluded that Jubilant does not have ITA No.1447/M/16- M/s Dominos Pizza International Franchising Inc economic independence and its modus-operandi is not on principal to principal basis. Therefore, Jubilant is dependent agent for the purpose of determining a PE. The Assessing Officer treated the receipt from operations in India as a business receipt taxable @ 40% along with statutory cess.

6. Before DRP, the assessee urged the similar contention as urged before us. In addition to the submission, the assessee contended that during the proceeding

before DRP, there was mistake in submission of fact that assessee has sole right to lay down the term and condition with some franchise and that all contract and sub-franchise are concluded and signed only by assessee. The correct fact that the sub-franchise agreement is executed between Jubilant and sub-franchise and not between the assessee and sub-franchise. We have verified these facts from the copy of MFA and sub-franchise agreement (SFA) (Page No. 16 to 108 and 109 to 142 and 143 to 172 of PB) and find that the assertion of assessee is correct. The SFA is signed on behalf of Jubilant and Travel Food Services Pvt. Ltd. for Mumbai and Delhi Location. As per the clause of MFA, the assessee is entitled to 3% of sale proceed and further entitled for store opening fees as well as sub-franchise fees. We have also noted that the profit and loss from the business belongs to Jubilant or sub-franchise. We have noted that certain clauses and the agreement entitles the assessee to examine the accounts, approve suppliers and allowing control over advertisement, ITA No.1447/M/16- M/s Dominos Pizza International Franchising Inc however, the Jubilant or sub-franchise are not storing any goods on behalf of assessee. From the sub-franchise, the assessee is entitled only royalty and store opening fees. We have also perused Article-5 of India-USA DTAA and found that none of the condition prescribed under clause-(a) to clause-(l) of Article-5.2 are attracted. The Assessing Officer has relied upon Article-5.4 of India-USA DTAA. However, we have noted that the assessee has no authority to maintain in the first mentioned state its stock or goods or merchandise from which he regularly deliver goods or merchandise on behalf of the assessee. No activities are carried out by the by Jubilant on behalf of the assessee. In our view, none of the clause either (a), (b) or (c) of Article-5.4 are applicable on the assessee. Therefore, considering the contents of the MFA and SFA, the Master franchise are independent business entity, the restriction provided in MFA and SFA are only to safeguard the brand value and to ensure the correct receipt of royalty income as concluded by Id. DRP. Hence, we do not find any infirmity or illegality in the assessment order passed in pursuance of direction of DRP. The case law relied by Id. DR in Formula One World Championship Ltd. is not helpful to the Revenue. As the fact of the said case are at variance. In the said case physical control of the circuit was with Formula One World Championship Ltd. (FOWC) and its affiliates from the inception. However, in the present case, there is no physical control on the business of franchise and sub-franchise by the assessee. In ITA No.1447/M/16- M/s Dominos Pizza International Franchising Inc the result, we do not find any merit in the Ground No.1 of the appeal of the Revenue.

7. As we have confirmed the finding of Id. DRP on Ground No.1 of the appeal, therefore, discussion on other Grounds of appeal raised by Revenue has become academic.

8. In the result, appeal filed by Revenue is dismissed.

8. Since the identical issue has been decided in favour of the assessee by the tribunal in assessee's own case, respectfully following the same, we set aside the orders of the authorities below and decide the issue in favour of the assessee.

9. Since ground no. 1 has already been decided in favour of the assessee, the adjudication on other issue raised by the assessee is only of academic interest and, hence, we are not engaging into the same.

10. In the result, this appeal filed by the assessee stands allowed.

Order pronounced in the open court on 13.08.2018

Sd/-
(Ravish Sood)
Judicial Member

Mumbai; Dated :13.08.2018
Roshani, Sr. PS

Sd/-
(Shamim Yahya)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai