IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)

BEFORE HON'BLE VICE PRESIDENT, SHRI G.D. AGRAWAL
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.4659/Del./2011
(ASSESSMENT YEAR : 2005-06)

ITA No.5769/Del./2010
(ASSESSMENT YEAR : 2006-07)

ITA No.152/Del./2012
(ASSESSMENT YEAR : 2007-08)

ITA No.193/Del./2013
(ASSESSMENT YEAR : 2008-09)

M/s. Mitsubishi Corporation, Birla Towers, 3rd Floor, Rear Side 25, Barakhamba Road, New Delhi – 110 001.	vs.	DDIT, Circle 3 (1), International Taxation New Delhi.

(PAN : AACCM7020P)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri M.S. Syali, Senior Advocate
Shri Tarandeep Singh, Advocate
Shri Tarun Singh, Advocate
Shri Aditya Raj Singh, Advocate
REVENUE BY : Shri G.K. Dhall, CIT DR (International Taxation)

Date of Hearing : 15.05.2019
Date of Order : 30.05.2019

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common questions of facts and law have been raised in the aforesaid appeals, the same are being disposed off by way of composite order to avoid repetition of discussion.

2. Since identical issues are involved in all the appeals and for the sake of convenience and to avoid repetition of facts, we are taking up the facts of ITA No.4659/Del/2011 for AY 2005-06 to adjudicate the issue in controversy.

3. Appellant, M/s. Mitsubishi Corporation (hereinafter referred to as the 'assessee') by filing the present appeal sought to set aside the impugned order dated 02.08.2011 passed by the Commissioner of Income-tax (Appeals)-VII, New Delhi qua the assessment year 2005-06 on the grounds inter alia that :-

> ***"1. That on the facts and in law, the Learned CIT(A) has erred in not adjudicating the additional grounds of appeal on its respective merits and in dismissing summarily on the principle of consistency.***
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> ***2. Without prejudice to the above, principle of consistency cannot be discretionally applied only on one streak of income ignoring others.***
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> ***3. That on the facts and in law, the Learned CIT(A) has erred in upholding the order of the learned AO to include purchase from India in the turnover while computing the total income attributable to the activities of the Liaison Office ('LO') in complete disregard of the provisions of Income tax Act, 1961 ("Act') which clearly states that income shall not be deemed to accrue or arise in India on account of purchase operations for the purpose of export from India.***
>
> ***4. That on the facts and in law, the Learned CIT(A) has erred in upholding the order of the learned AO to include***

purchase from India in the turnover while computing the total income attributable to the activities of the Liaison Office ('LO') in complete disregard of the provisions of tax treaty between India and Japan which clearly states that no profits can be attributed to the purchase function.

5. That on the facts and in law, the Learned CIT(A) has erred in not appreciating that the La of the appellant handled only the Machinery Division and New Business Initiative Division and since La was held to be a Permanent Establishment (PE), the sales made by other divisions of MC Japan (without any involvement of La) should not be included in the turnover for the purpose of computing the total income.

6. That on the facts and circumstances of the case and in law, the Learned CIT(A) has erred in not considering the actual gross profit rate of 1.98% from the non-consolidated financial statements of the appellant for the subject year for the purpose of computation of income attributable to the activities of the LO in India and has wrongly applied the adhoc gross profit rate of 2.75% as was used in the earlier years.

7. That on the facts of the case and in law, the Learned CIT(A) has erred in allowing the deduction for the expenses incurred in relation to the operations of the LO only to the extent of 50% inspite of the fact that as per the provisions of the law such expenses should be allowed to the extent of 100%.

8. That on the facts on the case and in law, the Learned AO/Hon'ble DRP erred in applying the rate of 50% for the purpose of attributing income to the operations of LO without considering the fact that the major revenue generating activities were performed outside India and not by the LO.

9. That on the facts of the case and in law, the Learned CIT(A) has erred in not appreciating that the Indian subsidiary is not a PE of the appellant.

9.1 That on the facts of the case and in law, the Learned CIT(A) ought to have appreciated that the Indian subsidiary does not constitute a PE for the appellant in India and the observation / passing reference made by the AO in earlier years order was without examining any facts in relation to the Indian Subsidiary.

9.2 Without prejudice to above, the sales made to Indian subsidiary on principal to principal basis should be excluded from the total turnover for the purpose of computing the total

income as the Indian subsidiary was selling goods on its own account and not on behalf of the appellant.

9.3 Without prejudice to Additional Ground Nos.9, 9.1 and 9.2, the Learned CIT(A) ought to have appreciated that since the Indian subsidiary is remunerated on arm's length, any PE which is constituted of the appellant on account of the activities of the Indian subsidiary, gets extinguished.

9.4 Without prejudice to above, if an Indian subsidiary is held to be a PE in relation to support services provided to the appellant, the commission paid to subsidiary should-be allowed as deduction.

10. That the learned CIT(A) erred in law and in facts in upholding learned AO's order and in not appreciating the cost plus methodology adopted by the appellant for offering DMRC revenue to tax (to the extent attributable to the activities performed by appellant's Project office, MC PO) in India. In doing so:

- ***The Learned AO/CIT(A) failed to appreciate that appellant's income pertaining to activities of its project office in India has been offered to tax at cost-plus arm's length mark up basis i.e., 9 percent; and***
- ***The Learned AO/CIT(A) has erred in law in not appreciating that once an arm's length mark up has been attributed to the Permanent Establishment (PE) in India, no additional income can be brought to tax in India.***

11. Without prejudice to Ground 10, the Learned AO / CIT(A) has erred on facts of the case in not appreciating that "DMRC Sales" were attributed to appellant's LO by his office in earlier assessment years and appellant to buy peace has not objected to same, and followed the same basis (as applied by the then learned AO) in future years. Thus, with no change in facts, the same cannot be attributed to appellant's PO by the Learned AO in subsequent years.

12. Without prejudice to above, the Learned CIT(A) has erred in upholding that "DMRC Sales" are effected through appellant's PO. Further, the CIT(A) has grossly erred in law in upholding that principle of restricted force of attraction is applicable to "DMRC sales" and even "direct sales made by HO will be attributed to the PO".

12.1 The Learned AO erred on facts and in law in holding that all the activities required to achieve various milestones under different cost centres covered under the 'interim payment invoices' were carried out in India.

13. Without prejudice, the Learned CIT(A) erred in following directions issued by Hon'ble Dispute Resolution panel for Assessment Year 2002-03 & 2006-07 in appellant's case and directing the learned AO to apply a deemed profit rate of 10% on the total sales made to DMRC and attributing 50% of such profits to the appellant.

14. Without prejudice to above, the Learned CIT(A) has erred in upholding Learned AO's order and has failed to appreciate that "DMRC sales" offered to tax by appellant as part of LO revenue ought to exclude the share of revenue of other consortium member i.e., Hyundai Rotem Company, Korea ("Rotem"). In doing so, Learned CIT(A) failed to appreciate:

- ***The fact that appellant merely collected the share of Rotem under RS1 contract from DMRC and passed on the same to Rotem; and***
- ***That the share of Rotem is being brought to tax separately and independently in hands of the said consortium member, thus, violating the basic principle of taxation by bringing the same income to tax twice.***

15. Double taxation of income

15.1 That on the facts and in law, the learned CIT(A) has failed in not appreciating that DMRC sales of Rs.2, 348, 868, 060 includes receipts amounting to Rs.7,458,204 in respect of CC 'J' which was suo-mote offered to tax as Fees for Technical services on gross basis by the appellant in view of the AAR ruling in Appellant's case and has thus been subjected to tax twice.

15.2 Without prejudice to Ground No.1 0, on the facts and in law, the Learned CIT(A) has failed in not appreciating that the DMRC sales of Rs.2,348, 868, 060 also includes the portion of receipts on the basis of which income of Rs.41, 636, 466 has already been offered to tax by the Appellant as income from PO and has been subjected to tax twice.

16. The Learned CIT(A) has erred in law and on the facts of the case in upholding that the contract in question, i.e., RS1 contract is a 'Works' contract and not a 'Sales' contract."

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : assessee filed revised return at taxable

income on turnover of Rs.61,05,41,430/- voluntarily offering income to tax from activities in India to the tune of Rs.56,89,04,966/- (Rs.53.82 crores attributed to the activities of its Liaison Office (LO) + Rs.3.06 crores attributed to actual sale made to Delhi Metro Rail Corporation (DMRC). Assessee, after assuming GP rate of 2.75% and a profit attribution rate of 50%, estimated it income from activities in India at Rs.56.89 crores. Assessee also offered to tax income from Project Office (PO) in India to the tune of Rs.4.16 crores which includes Rs.74.58 lakhs as income from fee for technical services.

4. However, AO ignoring the settlement arrived at between the assessee and the Revenue Department in AYs 1998-99 to 2004-05 proceeded to compute the income from activities of LO in India @ a GP rate of 5% as against 2.75% agreed upon; and income from total turnover qua LO was held attributable to India in respect of attribution rate of 50%; and taking turnover from DMRC sales of Rs.234.88 crores pertaining to activities carried out in PO in India and charged the same separately to tax by applying GP rate of 10% and profit attribution rate of 100% and thereby assessed the total income of Rs.1,31,44,92,200/- and taxed the same @ 20% as per Article 12 of the Double Taxation Avoidance Agreement (DTAA).

5. Assessee carried the matter by way of appeals before the ld. CIT (A) who has partly allowed the appeals. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeals.

6. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

7. Undisputedly, initially assessee has sought relief from ld. CIT (A) by applying the agreed formula for AYs 1998-99 to 2004-05 by following the rule of consistency. It is also not in dispute that during the appellate proceedings, assessee raised additional grounds which were admitted. For ready perusal, additional grounds are extracted as under :-

> ***"1. That on the facts of the case and in law, the Assessing Officer has erred in taxing purchases while taxing sales and not excluding the turnover from export of goods from India while computing the total income attributable to the activities of the Liaison Office ('LO') in complete disregard of the provisions of Income tax Act, 1961 ("Act") which clearly states that income shall not be deemed to accrue or arise in India on account of purchase operations for the purpose of export from India.***
>
> ***2. That on the facts of the case and in law, the Assessing Officer has erred in taxing purchases while taxing sales and not excluding the turnover from export of goods from India while computing the total income attributable to the activities of the LO in complete disregard of the provisions of tax treaty between India and Japan which clearly states that no profits can be attributable to the purchase function.***

3. Without prejudice to the appellant's mere intention to buy peace and avoid litigation in not challenging the assessment order, the Assessing Officer erred in not appreciating that the LO of the appellant handled only the Machinery Division and since LO was held to be a PE, the sales made by other divisions of Me Japan (without any involvement of LO) should not be included in the turnover for the purpose of computing the total income.

4. That on the facts of the case and in law, the Assessing Officer erred in not appreciating that the Indian Subsidiary is not a Permanent Establishment (,PE,) of the appellant.

4.1 In any case the sales made to Indian subsidiary on principal to principal basis should be excluded from the total turnover for the purpose of computing the total income as the Indian subsidiary was selling goods on its own account and not on behalf of the appellant.

4.2 That on the facts of the case and in law, the Assessing Officer ought to have appreciated that the Indian subsidiary does not constitute a PE for the assessee in India and the observation / passing reference made by the AO in earlier years order was without examining any facts in relating to the Indian Subsidiary.

4.3 Without prejudice to the Ground Nos.4, 4.1 and 4.2 above, the Assessing Officer ought to have appreciated that since the Indian subsidiary is remunerated on arm's length, any PE which is constituted of the appellant on account of the activities of the Indian subsidiary, gets extinguished.

5. That on the facts of the case and in law, the Assessing Officer erred in allowing the deduction for the expenses incurred in relation to the operations of the La only to the extent of 50% inspite of the facts that as per the provisions of the law such expenses should be allowed to the extent of 100%.

6. That on the facts of the case and in law, the Assessing Officer erred in applying the rate of 50% for the purpose of attributing income to the operations of La without considering the fact that the major revenue generating activities were performed outside India and not by the LO."

8. Assessee by raising additional grounds sought not to decide the issue on the basis of settlement between the assessee and the Revenue for AYs 1998-99 to 2004-05.

9. By way of raising additional grounds, the assessee has challenged the taxability whereas ld. CIT (A) has only decided GP rate, so the issue as to challenging the taxability was in fact not before the AO earlier.

9. Now, the grievance of the assessee is that ld. CIT (A) after admitting the additional grounds raised by the assessee has summarily rejected the claims merely by applying the principle of consistency without going into the merits of the issue raised vide additional grounds. For ready perusal, operative part of the order passed by the ld. CIT (A) is extracted as under :-

> ***"3.4 I have carefully considered the submissions made on behalf of the appellant & findings of the Assessing Officer and facts on record. In the instant case the Assessing Officer made original assessment orders for seven assessment years from assessment year 1998-99 to assessment year 2004-05 by taking Liaison Office (LO) to be a Permanent Establishment (PE) and bringing the entire sales of the appellant to India and also the purchases made from India (for all divisions including Machinery Division) to tax. The Gross Profit of 2.75% of total sales and purchase was taken by the Assessing Officer in all the seven assessment years which was not challenged by the appellant. From the Gross profit (2.75% of total sales and purchase), certain India related expenses were deducted i.e., expense of***

LO and expatriate salaries and 50% of the resultant profits were attributed to India and deduction u/s 44C was allowed. The appellant did not challenge the above action of the AO before the appellant authorities and also filed return of its income for the subsequent years including the assessment year 2005-06 on the basis of formula determined by the department in the said seven years. At no point of time in the original round of assessment proceedings the assessee raised any objection to the action taken by the Assessing Officer and submitted himself to the jurisdiction of the Assessing Officer without demur. Similarly during the course of proceedings under section 143(3) read with section 144C for assessment year 2006-07 no objections to this regard were raised by the assessee before the Assessing Officer as well as before the Dispute Resolution Panel (DRP). The assessee's objection as made out in the additional grounds of appeal at this belated stage defies the principles of consistency. It is settled law that in the absence of any change either in facts or in law, principles of consistency itself can be made a basis to uphold or reject the claim of the appellant company. The Hon'ble Supreme Court in the case of Radhasoami Satsang vs. CIT (1992) 1931TR 321 (SC) has held as under:

…….

3.8 Applying the above rule to the facts of the instant case, it is evident that once the Gross profit rate declared by the assessee has been allowed and accepted by the Department in the proceeding and succeeding year(s) then there is no jurisdiction either to increase or decrease the Gross profit rate declared by the assessee in the year under consideration that such Gross profit rate was not justified. In view of the discussion made above, Additional Ground of appeal No.1 to 6 are dismissed."

…….

> ***6.1 As the facts and circumstances of the case under consideration are pari materia in the case of the appellant for the assessment year 2002-03 & 2006-07, for the reasons as discussed in the aforementioned order of the Hon'ble Dispute Resolution Panel-II, New Delhi, the Assessing Office is directed to apply profit rate of 10% on the total sales made to DMRC and attribute 50% of such profit to the appellant, As a result, Grounds of appeal Nos 3 to 6 are partly allowed."***

10. Ld. AR for the assessee challenging the aforesaid findings contended inter alia that the ld. CIT (A) has not decided the additional grounds of appeal on merits; that the ld. CIT (A) by ignoring the new grounds and change in the factual position proceeded to decide the appeal on the basis of principle of consistency and relied upon the decision cited as ***Bharat Sanchar Nigam Ltd. 282 ITR 273 (SC), M/s. N.R. Paper & Board Ltd. 234 ITR 733 (Guj.), M/s. Onward Technologies Ltd. 147 ITD 534 (Mum.) and M/s. Krishak Bharati Cooperative – 350 ITR 24 (Delhi)*** and contended to decide the controversy as per law applicable and not on the basis of principle of equity adopted in the past.

11. To repel the arguments addressed by the ld. AR for the assessee, the ld. DR for Revenue supported the order passed by the

ld. CIT (A) decided on the basis of claim and arguments raised by the assessee.

12. We are of the considered view that when the ld. CIT (A) has admitted the additional grounds raised by the assessee to decide the issue on merit, the issue was not to be decided by the ld. CIT (A) on the basis of agreed settlement formula by applying the rule of consistency. The ld. CIT (A) has merely decided the issue pertaining to applicability of correct gross profit rate by applying the rule of consistency. The ld. CIT (A) has also decided the applicability of gross profit rate of 10% pertaining to DMRC project but has not decided the issue of exclusion from turnover. Ld. CIT (A) in order to test the applicability of gross profit rate of 10% has merely relied upon the order of AY 2006-07. All other grounds remained unadjudicated.

13. In view of what has been discussed above, we are of the considered view that since the assessee has set up a new case by raising additional grounds by departing from the rule of consistency, all the grounds were required to be decided by the ld. CIT (A) on merits. However, at the same time, we are of the considered view that since the assessee has raised many of the new grounds first time before the ld. CIT (A) qua which no material

was there before the AO at the time of framing assessment, it would be in the interest of justice to remand the case back to AO to decide afresh after giving an opportunity of being heard to the assessee. Consequently, the appeal being ITA No.4659/Del/2011 for AY 2005-06 is allowed for statistical purposes.

14. In the light of the findings returned in the preceding paras, we are of the considered view that since issue pertaining to AYs 2006-07, 2007-08 and 2008-09 are also identical to AY 2005-06 except the difference that for these years, the assessee has filed appeal before the Tribunal challenging the assessment order passed by the AO pursuant to the direction of ld. DRP but issues raised in the grounds are identical in AYs 2006-07, 2007-08 & 2008-09 to AY 2005-06.

15. In AY 2006-07, grounds as have been raised by the assessee before the ld. CIT (A) by way of additional grounds in AY 2005-06 have been raised before the Tribunal. Likewise, in AY 2007-08 and 2008-09, similar claim as has been raised by way of additional grounds in AY 2005-06 was made before the AO as well as ld. DRP which has been rejected by following the decision rendered by the ***Hon'ble Apex Court in Goetze India Ltd. 284 ITR 323 (SC)*** which is not applicable on the power of appellate authority to

consider the revised claim as has been held in ***Rites Ltd. vs. CIT (2017) 83 taxmann.com 267 (Del.) and CIT vs. Jai Parabolic Springs Ltd. – 306 ITR 42 (Del.)***.

16. Issue as to admissibility of India Project office in AYs 2006-07, 2007-08 & 2008-09 is also identical to AY 2005-06, so we are of the considered view that in view of the findings returned in the preceding paras pertaining to appeal for AY 2005-06, appeals pertaining to AYs 2006-07, 2007-08 & 2008-09 are also remanded back to the AO to decide afresh after providing an opportunity of being heard to the assessee.

16. Resultantly, all the appeals filed by the assessee are allowed for statistical purposes.

Order pronounced in open court on this 30th day of May, 2019.

Sd/-	**sd/-**
(G.D. AGRAWAL)	**(KULDIP SINGH)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated the 30th day of May, 2019
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Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A)-VII, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
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