IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES " I ", MUMBAI

BEFORE SHRI G.S. PANNU, VICE PRESIDENT
AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No. 7433/Mum/2018
Assessment Year : 2015-16

General Reinsurance AG, General Reinsurance AG India Branch, Units 107, 108, 109, Meadows, Sahar Plaza Complex, Mathuradas Vasanji Road, J.B. Nagar, Andheri East, Maharashtra [PAN : AAECG5195K]	Vs.	Deputy Commissioner of Income Tax (International Taxation)-Range-2(3)(2), Mumbai
(Appellant)		(Respondent)

Appellant by : Shri P.J. Pardiwala &
Madhur Agarwal, ARs

Respondent by : Shri Nishant Samaiya, DR

Date of Hearing : 18-03-2019
Date of Pronouncement : 14-06-2019

O R D E R

PER G.S. PANNU, VICE PRESIDENT:

This appeal is directed against the order passed by the Assessing Officer under Section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short 'the Act') giving effect to the directions of Dispute Resolution Panel–1(WZ), Mumbai (in short 'the DRP') dated 04.09.2018.

2. In this appeal, assessee has raised the following Grounds of appeal:-

"1. The learned AO has, on the facts and circumstances of the case in law, and based on the directions of the Hon'ble DRP, erred in concluding that the Appellant has a business connection in India as per the provisions of section 9(1)(i) of the Act.

2. The learned AO has, on the facts and circumstances of the case in law, and based on the directions of the Hon'ble DRP, erred in concluding that the Appellant's wholly owned subsidiary in India i.e. Gen Re Support Services Mumbai Private Limited (GSSMPL) or General Reinsurance AG Mumbai Liaison Office (GRAG LO) constitute a permanent establishment (PE) in India as per the provisions of Article 5(1) of the India-Germany Double Taxation Avoidance Agreement (India-Germany tax treaty).

3. The learned AO has, on the facts and circumstances of the case in law, and based on the directions of the Hon'ble DRP, erred in concluding that GSSMPL/ GRAG LO is a Dependent Agent PE of the Appellant in India as per Article 5(6) of the India-Germany tax treaty.

4. The learned AO has, on the facts and circumstances of the case in law, and based on the directions of the Hon'ble DRP, erred in concluding that the support services performed by GSSMPL/ GRAG LO are not in the nature of preparatory or auxiliary services.

5. The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in not considering the Appellant's claim that no further income can be attributed to the Appellant's alleged PE, since the remuneration paid to GSSMPL is at arm's length price.

6. The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in estimating 10% of the gross receipts as taxable profits by applying Rule 10 of the Income-tax Rules, 1962 while attributing profits to the alleged PE of the Appellant in India.

7. The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, not used any scientific

method in determining 50 percent of taxable profits (as arrived by applying Rule 10) to be attributable to the Indian operations.

8. The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in applying a tax rate of 40 per cent instead of 12.5 per cent (plus applicable surcharge and education cess) in case of life reinsurance business as per section 115B of the Act.

9. The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in levying consequential interest under section 234B of the Act.

10. The learned AO has, on the facts and circumstances of the case and in law, erred in initiating penalty proceedings under section 271(1)(c) of the Act."

3. The appellant before us is a foreign company, which is a tax resident of Germany, and is engaged in providing reinsurance globally to various life and non-life insurance companies. It has branches worldwide, and as per the discussion in the orders of lower authorities, it emerges that the assessee has entered into reinsurance arrangements with various Indian insurance companies also, which are stated to be negotiated, finalised and executed outside India. Assessee earns reinsurance premium in terms of the aforestated arrangements entered into with various Indian insurance companies; and, such receipts during the year amounted to Rs.103,82,31,281/-. The Indian insurance companies pay a re-insurance premium to the assessee company to reinsure their part of the risk, which is accepted by the assessee from outside India. Further, if an insurance claim devolves, assessee settles the claim with the Indian insurance company with respect to the portion of the risk re-insured by it. In the return of income, assessee claimed that such receipts were in the nature of business receipts and, therefore, in the absence of any

Permanent Establishment (PE) in India, the income therefrom is not liable to be taxed in India.

4. The orders of the authorities below reveal that the aforesaid stand of the assessee has not been accepted. As per the income-tax authorities, the aforesaid receipts are liable to be taxed in India primarily on three counts. Firstly, according to the Revenue, said receipts are liable to be taxed in India because they are earned as a result of a 'business connection' in India as understood in terms of Section 9(1)(i) of the Act. Secondly, as per the Revenue, assessee has a PE in India in terms of Article 5(1) of the India-Germany Tax Treaty; and, thirdly, assessee can be said to have a dependent agent PE in India in terms of Article 5(5) of the India-Germany Tax Treaty. After having held such receipts to be taxable in India, the Assessing Officer proceeded to estimate the income attributable to such receipts, which could be brought to tax in India. For this purpose, the Assessing Officer observed that the assessee did not furnish any India specific Profit & Loss Account; and, therefore, he resorted to estimation of taxable profits in terms of Rule 10(i) of the Income Tax Rules, 1962. The Assessing Officer apportioned the receipts between the country of recipient and the source country, i.e. India on a 50:50 basis by considering the level of operations which could be attributable to the activities in India thereby estimating that 50% of the income is attributable to India. In this manner, 50% of the gross receipts, i.e. ₹51,91,15,641/- was held attributable to operations in India and by applying a profit rate of 10%, the income from re-insurance business liable to be taxed in India was determined at ₹5,19,11,564/-. The said

decision of the Assessing Officer has been arrived at after taking into account the directions of the DRP dated 04.09.2018, which was as a consequence of the objections raised by the assessee against the draft assessment order passed by the Assessing Officer dated 30.12.2017. In this background, the assessee-company is in appeal before us on the aforestated Grounds of appeal.

5. As a perusal of the Grounds of appeal reveal, the assessee-company has not only challenged the decision of the income-tax authorities in treating the impugned re-insurance premiums as taxable in India, but it has also challenged the estimation of income attributable to the operations in India as well as the rate of tax applied to compute the final tax liability.

6. Before us, the learned representative for the assessee has taken us through the respective orders of the authorities below in order to appreciate the stand of the Revenue and he has also explained with reference to the material on record the manner in which the impugned premium on reinsurance has been earned by the assessee from various Indian insurance companies. Pertinently, the assessee-company has a 100% owned subsidiary in India, i.e. Gen Re Support Services Mumbai Pvt. Ltd. (hereinafter referred to as 'Indian subsidiary'). It has been explained that the activities carried out by the Indian subsidiary are limited to rendering of support functions, i.e. obtaining market intelligence as well as administrative support services to the assessee with respect to the re-insurance business with the Indian insurance companies. It has been

explained that initially assessee had a Liaison Office (LO) in India in terms of permission granted by the Insurance Regulatory and Development Authority (IRDA) dated 23.11.2007, a copy of which has been placed at pages 1 to 2 of the Paper Book. Hitherto, the LO was acting as a communication channel between assessee's Head Office in Germany and the insurance companies in India, and during the year under consideration, the said LO was shut down in November, 2014, when the Indian subsidiary started functioning. The Indian subsidiary has rendered administrative and business marketing support services to the assessee. At this stage, it would also be pertinent to observe that the Indian subsidiary has rendered such services in terms of a Master Service Agreement dated 01.08.2014, which is placed in the Paper Book at pages 3 to 25. This agreement has been entered amongst the assessee and group's other affiliated corporations and entities globally. The recital of the agreement states that it is designed to reduce to a single instrument all the service agreements amongst the companies of the group worldwide. This agreement is primarily between the group entities worldwide – on one hand are the entities engaged in re-insurance business and on the other hand are the entities who are providing support services, like the Indian subsidiary from India.

7. The income-tax authorities have set-up a case that the premiums earned by the assessee from various re-insurance contracts with Indian insurance companies is taxable in India because assessee has (i) a 'business connection' in India within the meaning of Sec. 9(1)(i) of the Act; (ii) a PE in India in terms of Article 5(1) of the India-Germany Tax Treaty;

and, (iii) a Dependent Agent PE in terms of Article 5(6) of the India-Germany Tax Treaty on account of the activities of the Indian subsidiary in India.

8. As per the Assessing Officer the existence of 'business connection' in India is established because the technical and key functions of re-insurance business relatable to actuarial and underwriting support and risk assessment services are enabled by the Indian subsidiary. Secondly, it is sought to be pointed out that the Indian subsidiary has used the Electronic Underwriting Software, which is globally used by entities of the assessee group. As per the Assessing Officer, after uploading the data in the software, the Indian subsidiary also makes baseline recommendations in relation to underwriting proposals. It is also pointed out that the reinsurance proposals are procured from the insurance companies or the brokers in India, which is a regular and continuous activity, therefore, there is a 'business connection' in India and the income so earned is taxable in India under Section 9(1)(i) of the Act. At the time of hearing, the ld. DR had also pointed out that all such data and analysis thereof is carried out in India, and by referring to the discussion in the assessment order, he has sought to point out that, a re-insurance proposal, duly processed, goes to the Head Office in Germany only for final approval. The conclusion by the DRP in para 4.3 of its order has also been sought to be pointed out. The DRP in para 4.3, *inter-alia*, notes that the reinsurance income is earned by the assessee in terms of a Master Service Agreement signed with the Indian subsidiary "*in India*", in terms of which the Indian subsidiary provides marketing intelligence and administrative support

services to the assessee. It is also the say of the Revenue that the Indian subsidiary is being compensated at cost plus specified mark-up, which also goes to show that the Indian subsidiary is a captive service provider, and thus assessee has a PE in India. As per the Revenue, the manner in which the business is carried out between the Indian subsidiary and the assessee-company, the relationship is that of a Principal and Agent, rather than that of Principal to Principal and, therefore, a portion of the impugned receipts by way of re-insurance premium are attributable to the activities of Indian PE i.e. the Indian subsidiary. Apart therefrom, it has also been pointed out that the Indian subsidiary is using the brand name of the assessee while representing the assessee in India to third parties, which shows a Principal and Agent relationship. All these points have been emphasised to submit that the impugned receipts are liable to be taxed in India either on the basis that there is a 'business connection' under Section 9(1)(i) of the Act or because of existence of a PE or a Dependent Agent PE as per Article 5(1) and 5(6) of the India-Germany Tax Treaty respectively in India on account of the existence of the functions performed by the Indian subsidiary.

9. On the other hand, the learned Representative for the assessee pointed out that the activities of the Indian subsidiary do not involve any actuarial or underwriting services, but it is providing only administrative support services in relation to the actuarial and underwriting functions carried out by the assessee. It is contended that the Assessing Officer has grossly misunderstood the use of Electronic Underwriting Software by the Indian subsidiary. According to the appellant, the Indian subsidiary had

access to a common software platform, which is owned by the assessee-company and which is also used by other group companies worldwide. It is explained that the Indian subsidiary merely feeds the data and information received from third parties with regard to the re-insurance proposal in the software; thus, this activity of the Indian subsidiary is merely a support service and does not reflect the carrying out of core re-insurance functions of actuarial or underwriting or risk assessment, which falls in the exclusive domain of the assessee based in Germany. It has been emphasised that once the data is uploaded by the Indian subsidiary in the software, no further recommendation is uploaded by the Indian subsidiary, an aspect which has been wrongly noted by the lower authorities. It was contended that the finding of the Assessing Officer that the baseline recommendation in relation to a underwriting proposal is also made by the Indian subsidiary is factually untenable, and incorrect. According to the Ld. Representative, assessee had asserted this aspect on more than one occasion before the lower authorities, but it has been completely ignored. It was pointed out that it is a common software, which is being used by other group entities worldwide and even the server is located outside India and, therefore, it cannot be said that the core activities of actuarial and underwriting and risk assessment of reinsurance business are being undertaken by the Indian subsidiary.

10. It has also been explained that the assessee has its own infrastructure, personnel and approvals to carry out reinsurance activities from outside India, and the Indian subsidiary does not serve as a base in India even for the employees of the assessee who carry out such activities

from outside India. The learned representative submitted that merely because assessee has a subsidiary in India, that by itself cannot be a ground to say that there exists a 'business connection' or that the subsidiary constitutes a PE in India. At this stage, reference was also made to the observation made by the DRP in para 4.3 of its order whereby the expression "*in India*" has been used with reference to the Master Service Agreement signed by the assessee with the Indian subsidiary. It has been pointed out that the agreement was not executed in India and, for that matter, reference was made to page 23 of the Paper Book. It has also been explained that the Indian subsidiary does not have any obligation or authority to execute or finalise terms of re-insurance on behalf of the assessee and, therefore, it is not a case of a Principal and Agent relationship. As per the appellant, the Indian subsidiary is engaged in an independent business of providing support services in the field of reinsurance business for which it has its own independent infrastructure and employees, and it does not even have the requisite statutory approvals to carry out re-insurance business.

11. We have carefully considered the rival submissions and perused the relevant material and record. As our discussion in the earlier paras show, the substantive dispute in this appeal relates to the taxability or otherwise in India of the reinsurance premium earned by the non-resident foreign assessee by underwriting the risks of various Indian insurance companies. It is not in dispute that the appellant before us is an entity incorporated in Germany and is a tax resident of Germany. The manner in which the reinsurance premium is earned by the assessee is

also not in dispute. But to recapitulate, we may note that the appellant is a global re-insurance company which has entered into re-insurance contracts with various Indian insurance companies. For underwriting the risks of the Indian insurance companies, assessee earns reinsurance premiums, which is the subject-matter of dispute before us. So far as the nature of receipts in question is concerned, there is a convergence between the assessee and the Revenue that the same are in the nature of business receipts. It is quite well understood that in such like cases where the foreign company earns business income, the same can be taxed in India only if it has a PE in India or 'business connection' so as to fall within the scope of Indian tax laws. At the outset, it has been asserted by the appellant before us that in such situations, the onus is on the Revenue to establish that the foreign company has a 'business connection' or a PE in India so as to invite any tax liability under the Indian tax laws. Ostensibly, the aforesaid is supported by the judgment of the Hon'ble Supreme Court in the case of *E funds IT Solution Inc vs ADIT, (2017) 86 taxmann.com 240.* Therefore, in this background, we may now examine the facts of the instant case as to whether such an onus has been discharged by the Revenue or not.

12. Before proceeding further, we may briefly examine and consider the services obtained by the assessee from the Indian subsidiary because this aspect is crucial to decide the controversy. Assessee has obtained services from the Indian subsidiary in terms of a Master Service agreement, a copy of which is placed in the Paper Book. As per this agreement, assessee compensates the Indian subsidiary on a cost plus

mutually agreed mark up. The Master Service agreement is entered between various concerns of the assessee group located worldwide, and is very comprehensive, dealing with intra-group dealings, i.e. within the group entities. Out of the activities enumerated in the Master Service agreement, only marketing support and administrative or business support services are being rendered by the Indian subsidiary to the assessee. In order to appreciate the nature of services, it would be appropriate to refer to the Addendum to the Master Service agreement between assessee and the Indian subsidiary which is placed at pages 26-27 of the Paper Book. The significant activities being performed by the Indian subsidiary have been broadly put in four categories, namely, (i) Actuarial support, (ii) Medical/Financial Underwriting support, (iii) Representation and Development, and, (iv) Training & Presentations, and the same are reproduced hereinafter :-

"Actuarial Support

- *Collect and verify data for pricing.*
- *Input data into pro-approved pricing models.*
- *Support GRAG in carrying out experience investigations of its business and its clients' business.*
- *Update GRAG on actuarial developments in India and other designated markets.*
- *Support GRAG in its audits of clients.*

Medical/Financial Underwriting Support

- *Collect and verify data for individual and group underwriting.*
- *Input data into pre-approved underwriting models.*
- *Support GRAG in investigating claims and provide information for assessing claims.*

- *Support GRAG in its conduct of underwriting and claims audits of clients*

Representation & Development

- *Promote GRAG in India and other designated markets.*
- *Act as a communication channel between GRAG and GRAG's clients in India and other designated markets.*
- *Represent Gen Re at market and industry functions in India and other designated markets.*
- *Identify business development opportunities for GRAG in India and other designated markets and pursue them under the instructions and guidance of GRAG.*
- *Analyse and assess new products launched in the Indian and other designated markets.*
- *Support GRAG in developing products that could be reinsured by GRAG's clients with GRAG.*

Training & Presentations

- *Provide training to staff and clients of GRAG. This training can take place in India and other designated markets.*
- *Provide presentations on business-related topics on which the SC has expertise. This can be to GRAG clients in India or other designated markets."*

13. A perusal of the aforesaid reveals that the scope of the services by the Indian subsidiary is limited to activities such as collecting, entering and presenting data to the assessee regarding the reinsurance functions of actuarial, underwriting and risk assessments. In fact, if one is to read the clause in the agreement relating to 'Prohibited Activities', the nature and scope of services being provided by the Indian subsidiary become amply clear. The clause of 'Prohibited Activities' reads as under :-

*"**Prohibited Activities***

The following activities shall not be carried out by the SC for either India or any other designated markets :

- *Concluding binding reinsurance agreements with clients on behalf of GRAG.*
- *Negotiating on behalf of GRAG on any insurance/reinsurance related issue.*
- *Preparing final treaty documents for reinsurance business concluded.*
- *Passing on quotations or decisions to clients on reinsurance matters which have not been correctly authorized by GRAG staff.*
- *Providing recommendations to GRAG regarding underwriting matters."*

14. The aforesaid agreements were very much before the lower authorities and there is no allegation, much less a finding by the income-tax authorities that the Indian subsidiary has rendered any services outside the terms of the Service agreements. It is quite clear that the Indian subsidiary is only providing support services, and it does not execute contracts on behalf of the assessee and nor does it have the authority to do so. In the course of hearing, the Ld. Representative for the assessee had referred to a reinsurance Contract between assessee and SBI Life Insurance Company Limited, a copy of which is placed in the Paper Book at pages 28 to 102. It has been referred as an illustration to show that the reinsurance contracts are agreed and concluded between the assessee and the Indian insurance companies directly, and such contracts are executed outside India. Thus, factually speaking, the Indian subsidiary is only providing support services, which cannot be equated to the carrying on of a reinsurance business. Notably, assessee had asserted before the lower authorities that the Indian subsidiary does not have the

requisite regulatory approvals from IRDA to carry out reinsurance functions, an aspect which has not been negated at any stage.

15. Before proceeding further, it would also be appropriate to refer to another aspect of the matter which has been dealt with by the Hon'ble Supreme Court in the case of *E funds IT Solution Inc (supra)* in the context of existence of a subsidiary in India of a foreign company. As per the Hon'ble Supreme Court, the presence or otherwise of subsidiary of a foreign company in India would not be conclusive to say that there exists a PE in India. Thus, the existence of the Indian subsidiary cannot ipso-facto be understood as a PE of the assessee in India.

16. At this stage, we may briefly refer to the existence of the LO of the assessee in India. The LO stopped functioning in November, 2014, near about when the Indian subsidiary started functioning. In the course of hearing, it has been explained that the LO, as approved by IRDA, has been functioning in India since 2007, a copy of the approval dated 23.11.2007 has been placed at pages 1 & 2 of the Paper Book. A perusal of the terms of approval by the IRDA clearly brings out that the LO was permitted for the purpose of acting as a communication channel between the assessee's Head Office and parties in India. The LO was specifically prohibited from engaging in carrying out insurance, reinsurance, cession or retrocession business operations either directly or indirectly under any circumstances. One of the conditions also lays down that the entire expenses of the LO in India will be met exclusively out of funds received from abroad through normal banking channels. Other notable condition

was that the LO shall not carry out any activity other than activity for which the approval has been granted. The LO has been prohibited from carrying out by itself or in partnership or by otherwise any activity of a trading, commercial or industrial nature. The LO was prohibited from charging any commission or fee or any other remuneration for liaising activities or any such other activities rendered by it in India other than those approved by the IRDA. We are only emphasising the aforesaid features of the working of LO to bring out that the existence of the LO cannot be construed to be the existence of any 'business connection' in India within the meaning of Sec. 9(1)(i) of the Act or even PE under the India-Germany Tax Treaty since the carrying out of any activity of trading, commercial or industrial is specifically prohibited by IRDA. Pertinently, the LO has also been mandated to furnish to the IRDA, an annualised certificate from the Auditor that it has complied with all the terms and conditions stipulated in the letter of approval issued by IRDA and that all the expenses are met by way of approved means. It has been brought out by the learned representative at the time of hearing, without controversion from the other side, that the LO has been adhering to the conditions imposed by the IRDA. It has been pointed out that the activities of the LO cannot be construed as giving rise to a 'business connection' or PE of the assessee in India *qua* the income by way of reinsurance premiums earned by the assessee. It is pointed out that the activities of the LO, as permissible under the relevant statute, only are in the nature of preparatory or auxiliary in character, which satisfies the requirement of Article 5(4)(e) of the India-Germany Tax Treaty and, therefore, the same could not be taken as a PE of the assessee in India.

Apart therefrom, reliance was placed on the judgment of the Hon'ble Delhi High Court in the case of *DIT vs Mitsui & Co. Ltd.*, *[2017] 84 taxmann.com 3 (Delhi),* wherein the Hon'ble Court noted its earlier decision in the case of *National Petroleum Construction Co. vs DIT (IT), 383 ITR 648 (Del)* in the context of the nature of activities of the LO being preparatory or auxiliary in character. The Hon'ble High Court therein noted that the LO of the assessee was found adhering to the conditions imposed by the RBI for running a LO and, therefore, it would increase the burden of Revenue to show that notwithstanding the RBI permission continuing over the years, the LO can still be considered as a PE of the foreign company in India.

17. It has been asserted before us that the instant year is the first year when the assessee has filed a return of income as it had some taxable income, while in the past years there was no taxable income. In the past, there was no income other than premium on reinsurance business, yet the existence of LO since 2007 is in the knowledge of the assessing authority and no steps have been taken in any of the earlier years to construe the activities of the LO as constituting a 'business connection' or a PE of assessee in India. The learned representative asserted that it is only in this year that the function of the LO (for part of the year) has been understood by the Assessing Officer to be giving rise to a 'business connection' or existence of PE in India so as to hold that the income from the premium on reinsurance earned by the assessee is taxable in India. In our considered opinion, factually as well as on point of law, we do not find any merit in the stand of the Revenue that the activities of the LO of

assessee generate any scope for treating it as a PE of assessee in India or a 'business connection' in India. We say so for the reason that the conditions under which the LO has been allowed to operate clearly bring out that the activities were preparatory or auxiliary in nature and the same cannot lead to determination of a PE in India, considering the provisions of Article 5(4)(e) of the India-Germany Tax Treaty. As per the statement made by the learned representative at the Bar, the LO has complied with the conditions imposed by IRDA and there is no adverse view determined by IRDA. Thus, on facts we do not find any force in the plea of the Revenue; and, even on the point of law, as has been brought out by the Hon'ble Delhi High Court in the case of *National Petroleum Construction Co. (supra)*, the LO merely acts as a channel of communication between the Head office and the parties in India and cannot undertake any commercial, trading or industrial activity, and thus, the activities of the LO cannot give rise to a 'business connection' within the meaning of Sec. 9(1)(i) of the Act or a PE of the assessee in India, considering that the activities are compliant with the approval granted by IRDA.

18. We may now address the point as to whether the operations of the Indian subsidiary, which have indeed been carried out from India, can be construed as enabling invoking of 'business connection' of the assessee as envisaged under Section 9(1)(i) of the Act or whether the Indian subsidiary constitutes a PE of assessee in India. Article 5(1) of the India-Germany Tax Treaty provides that PE means a fixed place of business through which the business or enterprise is wholly or partially carried on.

On this aspect, the case set-up by the Revenue is that the key functions of reinsurance business, namely, actuarial services and underwriting services are provided by the Indian subsidiary. Such discussion is contained in paras 9.7.2 to 9.8 of the final order of the Assessing Officer. On this aspect, we have carefully examined the contentions put forth by the Revenue as well as the material on record, namely, the Master Service Agreement and the Addendum to the Master Service agreement between assessee and the Indian subsidiary and find that the approach of the Assessing Officer is quite misdirected. In fact, the services that have been provided by the Indian subsidiary are support services in the field of actuarial and underwriting functions undertaken by the assessee and not services of actuarial or underwriting of insurance risks *per se*. We have already quite succinctly noted the nature and scope of the services rendered by the Indian subsidiary in the earlier paras 12 and 13 above. In fact, the Assessing Officer is grossly wrong in holding in para 9.7.8 of his order that all the functions with respect to the claim settlement are carried out by the Indian subsidiary itself; rather, it is a case where the Indian subsidiary provides support functions and assists the assessee in such matters. The privity of contract is between the assessee and the Indian insurance companies and, it is abundantly clear from the terms of engagement between the assessee and the Indian subsidiary that the Indian subsidiary is not authorised to execute any contract or settle claims on its own or on behalf of the assessee. In fact, there is no factual support for the stand of the Assessing Officer, as there is nothing either as per the Service agreement or any material to say that the Indian subsidiary has provided actuarial and risk underwriting services, which are

core and crucial activities of the reinsurance business. Even the use of 'Electronic Underwriting Software' by the Indian subsidiary is a misnomer. The software is a standard tool which is used by global entities of the group for entering the data in respect of the reinsurance transactions of the assessee. The software is owned by the assessee and not the Indian subsidiary, and the software is used by the Indian subsidiary to enter the data of the Indian insurance companies, but no further recommendations are made by the Indian subsidiary. It is only the assessee through its own personnel who examines the proposal and negotiates the terms and conditions of the reinsurance contracts. There is nothing to dispute the assertions of the assessee that the infrastructure, personnel and approvals to carry out reinsurance activities are from outside India. Thus, there is nothing to suggest that the core activities of the reinsurance business of the assessee are carried out in or from India by the Indian subsidiary.

19. Moreover, in the context of Article 5(1) of the India-Germany Tax Treaty, what is essential is to examine whether there exists an assessee's fixed place of business in India or not. Factually or legally speaking, the place of business of Indian subsidiary per-se can in no way be equated to mean the fixed place of business of the assessee in India. In fact, in this connection, the observations of the Hon'ble Supreme Court in the case of *E funds IT Solution Inc (supra)* are very apt. In para 12 of its order, the Hon'ble Supreme Court has dealt with in detail, by making reference to the findings of the Hon'ble High Court, and concluded that there was no fixed place PE of the assessee before it on the facts of the case before it.

One of the points noted by the Hon'ble High Court was that the foreign company was dependent on the Indian subsidiary for earning its income. This aspect was specifically negated and held not to be a relevant criteria to determine whether there existed a fixed place PE or not. Similarly, the manner and mode of carrying on of transaction was also not found to be a proper test to determine as to whether there existed a fixed place of business or not. Taking a cue from the reasoning approved by the Hon'ble'ble Supreme Court, in the present case too, the mere rendering of support services in connection with actuarial or underwriting services cannot be a ground to say that there exists a fixed place or a PE of the assessee in India. Therefore, on parity of reasoning which prevailed with the Hon'ble Supreme Court in the case of *E funds IT Solution Inc (supra)*, in the present case too, the arguments of the Revenue do not deserve any indulgence. Accordingly, the same are rejected.

20. So far as the case of the Revenue that there is a dependent PE in India is concerned, herein also, the Revenue has merely brushed aside the claim of the assessee that the Indian subsidiary does not have any authority to secure contracts or solicit business on its behalf in India independent of the assessee. According to the Revenue, the Indian subsidiary uses brand name of the assessee while carrying out its activities in India. In our view, the same cannot be a ground to say that there existed a dependent PE in India. In fact, a point which has been emphasised before us is that the assertions of the Revenue that the Indian subsidiary has a decision making authority is a mere bald assertion and is devoid of any factual support. We have perused the order of the

Assessing Officer as well as of the DRP and find that the assertions of the assessee in this regard have been completely brushed aside. The income-tax authorities have not referred to any particular arrangement or agreement or any other piece of evidence to show that the Indian subsidiary could enter into contracts or was authorised to enter into any business in India on behalf of the assessee. Considering that it was imperative for the Revenue to bring out instances where the Indian subsidiary had concluded contract or secured orders on behalf of the assessee, we find that such burden has not been discharged by the Revenue. In fact, at the time of hearing, the learned representative for the assessee referred to an illustrative agreement placed at pages 28 to 102 of the Paper Book, which is a reinsurance arrangement with SBI Group Life, which has been entered into by assessee and the Indian insurance company, i.e. SBI Group Life directly. Therefore, factually also, we find no support for the case of the Revenue that the Indian subsidiary constitutes a dependent PE of assessee in India.

21. Before we conclude, we may also refer to some of the precedents which have been cited before us in order to establish that in somewhat similar situations, foreign companies engaged in reinsurance business have not been found to be having a fixed PE or an agency PE in India in the form of an Indian subsidiary. In this context, reference has been invited to the decision of the Mumbai Bench of the Tribunal in the case of *Swiss re-Insurance Co. Ltd. vs DDIT(IT), [2015] 55 taxmann.com 520 (Mumbai – Trib.)*, which according to the learned representative, is directly on the point. We have perused the said decision and find that the

factual matrix which prevails in the instant case before us is similar to what has been considered in the case of *Swiss re-Insurance Co. Ltd. (supra)*. In para 2.1 of the order, the relevant facts have been noted and the discussion reveals that the facts before us are quite similar to the case before our co-ordinate Bench. It was the case of a reinsurance company based in Switzerland which was receiving income for providing reinsurance to various insurance companies in India. Swiss re-Insurance company had a wholly owned subsidiary in India which was rendering administrative, market intelligence and other risk assessment services, which is quite similar to the services being rendered to assessee before us by its Indian subsidiary. Therein also, the appellant was remunerating its Indian subsidiary on the basis of cost plus mark-up. Therein also, the Assessing Officer had sought to tax the income by invoking 'business connection' in terms of Sec. 9(1)(i) of the Act as well as treating the Indian subsidiary as a PE in India. In nutshell, the facts as well as the dispute before our co-ordinate Bench in the case of *Swiss re-Insurance Co. Ltd. (supra)* stood on a similar footing as is the case before us. Our co-ordinate Bench considered the provisions of Explanation-2 to Sec. 9(1) of the Act as well as the provisions of India-Switzerland DTAA, which was the subject matter before it, and concluded that the foreign company therein did not have any 'business connection' in India or a PE in India. The aforesaid precedent fully supports the inference which has been drawn by us in the earlier paras. Similarly, in the context of Sections 201/201(1A) of the Act proceedings in the *ITA Nos. 4805 to 4808/Mum/2015 dated 05.07.2017 in the case of M/s. Bharti-AXA Life Insurance Co. Ltd.*, the foreign company in India was held not to be liable

for tax in India on its reinsurance premium earned from the Indian insurance companies. In fact, our co-ordinate Bench in the case of *M/s. Bharti-AXA Life Insurance Co. Ltd. (supra)* followed the earlier decision in the case of *Swiss re-Insurance Co. Ltd. (supra).* Similar was the situation in the case of *Bajaj Allianz General Insurance Co. Ltd., ITA No. 2560/PN/2012 dated 03.02.2016* wherein also, payments by Indian concerns to the foreign reinsurance company was disallowed on the ground of failure to deduct the requisite tax at source. Our co-ordinate Bench held that the foreign reinsurance company earning reinsurance premium from the Indian concerns was not liable for tax in India and, therefore, the action of the Assessing Officer was set aside.

22. All these decisions as well as our discussion aforesaid enables us to come to a conclusion that the income-tax authorities have erred in holding that there exists a 'business connection' in India under Section 9(1)(i) of the Act and also that there exists a PE in India within the meaning of Article 5(1) and/or 5(4) of the India-Germany Tax Treaty. In view of the aforesaid discussion, we hereby set-aside the order of Assessing Officer and uphold the stand of the assessee. As a consequence, so far as Ground of appeal nos. 1 to 4 are concerned, the same are treated as allowed.

23. In Ground of appeal no. 5, it is sought to be pointed out that even if there existed a PE in India, so long as the consideration paid to the Indian PE meets with the arm's length principle, no further attribution can be made towards the income liable to be taxed in India. The said proposition

is canvassed on the basis of judgment of the Hon'ble Supreme Court in the case of *Morgan Stanley and Co. Inc., 292 ITR 416 (SC)*. Since we have already upheld the plea of the assessee that there does not exist any PE in India, the said Ground is rendered academic and is kept open and is not being adjudicated for the present.

24. Similarly, Ground of appeal nos. 6 to 8 relate to quantification of income attributable to the operations in India as well as the rate of tax which are also rendered academic in view of our decision in Ground of appeal nos. 1 to 4.

25. Ground of appeal no. 9 is in relation to levy of interest under Section 234B of the Act, which is consequential in nature.

26. In the result, appeal of the assessee is allowed, as above.

Order pronounced in the open court on 14/ 06/2019

Sd/-	Sd/-
(SANDEEP GOSAIN)	**(G.S. PANNU)**
JUDICIAL MEMBER	**VICE PRESIDENT**

Mumbai, Date : 14/ 06/2019

SSL

Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai