IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Justice P.P. Bhatt (President)
And Pramod Kumar (Vice President)

ITA No.6717/Mum/2019
Assessment year: 2015-16

The Lubrizol Corporation, USA **…… Appellant**
C/o. Lubrizol Advanced Material India P Ltd.
6th & 7th Floor, Jaswanit Landmark,
Mehra Industrial Estate, LBS Marg,
Vikhroli (W) 400079
[PAN:AAACT2758F]

Vs

Assistant Commissioner of Income Tax (IT)- 3(1)(2) **……Respondent**
Mumbai

Appearances by
Dhanesh Bafna alongwith **Arpit Aggarwal** *for the appellant*
Sanjay Singh *for the respondent*

Date of concluding the hearing : February 19th , 2020
Date of pronouncement : February 24th ,2020

ORDER

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has called into question correction of the order dated 17th September 2019, passed by the Assessing Officer in the matter of assessment under section 143(3) r.w.s. 144C(13) of the Income Tax Act 1961, for the assessment year 2015-16.

2. In ground nos. 1 to 9, which we shall take up together, the assessee has raised the following grievances:-

1. On the facts and in the circumstances of the case and in law, the Learned Assessing Officer (Ld. AO) and Hon'ble Dispute Resolution Panel (DRP) erred in not following earlier years orders of the Hon'ble Income Tax Appellate Tribunal, Mumbai, in Appellant's own case [facts of current year are similar to these Assessment Years (AYs)], wherein it has been held that the Appellant does not have any Permanent Establishment (PE) in India and therefore its income from Indian sales are not taxable in India. **Tax dispute amount (in Rs.) 4,17,07,311**

2. On the facts and in circumstances of the case and in law, the Ld. AO and Hon'ble DRP have failed to consider the fact that sales made by the Appellant to Lubrizol India Private Limited (LIPL) and other customers are not taxable in India, as:
a. the income from sales is not received, deemed to be received, accrues or arises or deemed to accrue or arise in India under Section 5(2) of the Income-tax Act, 1961 (IT Act)
b. the Appellant does not have a business connection in India under Section 9(i)(i) of the IT Act.

3. On the facts and in the circumstances of the case and in law, the Ld. AO and Hon'ble DRP have erred in concluding that the Appellant has a PE in India under Article 5 of the Double Taxation Avoidance Agreement between India and USA (Tax Treaty) and have thereby erred in charging to tax, the Business Profits of the Appellant in India under Article 7 of the Tax Treaty.

4. On the facts and in the circumstances of the case and in law, the Ld. AO and Hon'ble DRP have erred in concluding that LIPL is a virtual projection of the Appellant in India.

5. On the facts and in the circumstances of the case and in law, the Ld. AO and Hon'ble DRP have erred in concluding that the Appellant has a fixed place PE under Article 5(1) and 5(2) of the Tax Treaty in India even when the Appellant does not have any place in India under its control or disposal from which business is carried on.

6. On the facts and in the circumstances of the case and in law, the Ld. AO and Hon'ble DRP have erred in concluding that the Appellant has an Agency PE under Article 5(4) of the Tax Treaty in India in the form of LIPL even when LIPL has no authority to conclude contracts on behalf of the Appellant in India.

7. On the facts and in the circumstances of the case and in law, the Ld. AO and Hon'ble DRP have erred in taxing the profits earned from sales to LIPL by applying force of attraction rule under Article 7(1) of the India-USA Tax Treaty without appreciating the fact that such sales have been concluded outside India, the title to the goods have passed outside India, profits from such sales have accrued/arisen outside India and therefore the profit from such sales are not taxable in India under Section 5 of the IT Act.

8. On the facts and in the circumstances of the case and in law, the Ld. AO and Hon'ble DRP have erred in bringing to tax the profits of the Appellant, despite the fact that:
a. international transactions entered into by the Appellant had been found to be at arm's length by the Transfer Pricing Officer under Section 92CA of the IT Act and hence, there arose no occasion to attribute any further income to India and
b. LIPL is liable to tax on the commission income received from the Appellant, which extinguishes the tax liability of the Appellant (Principal).

9. On the facts and circumstances of the case and in law, the Ld. AO and Hon'ble DRP has erred in arbitrarily computing the taxable income by applying an adhoc profit rate of 5%, without considering the profit attribution principles under the IT Act and the Tax Treaty.

3. Learned representatives fairly agree that the issue is covered by a series of orders of the co-ordinate benches of this Tribunal, in assessee's own cases for the assessment years 2004-05 to 2014-15. Copies of these orders were placed before us in the paper book computation as well.

4. Having heard the rival submissions and having perused the material on record, we see no reasons to deviate from the stand consistently taken by the co-ordinate benches for all these years. We may also refer to the following analyses, in the order of the assessment year 2006-07, in the coordinate bench:-

22. The learned counsel took us through various Articles of India-US Treaty, which are mentioned above in the arguments of learned AR to establish that the assessee does not have PE in India. After considering the relevant material and the relevant aspects, it is noted that the LIPL has carried out an independent business of manufacture of various products under technology transfer agreement with the assessee in India. It is having its own marketing network for sale of various products manufactured by it in India. The total sales of LIPL are Rs. 408.84 crores and commission received from the assessee is 0.756 crores which constitutes only 0.18% of the sales. The assessee also sold products to Indian customers for which LIPL rendered certain services. The assessee sold the products directly to the Indian customers. Contract of sale is concluded once the purchase order is accepted by the assessee in USA. On confirmation of the order and receipt of direct payment from Indian customer, the assessee sends the products in the name of Indian customer with the invoices raised by the assessee directly on Indian customers. The LIPL assists the assessee in the direct sale of products to Indian customers and communicates information in relation to tenders and competitive bids from the

customers. The LIPL does not have authority to negotiate the terms of the sale or conclude the contract on behalf of the assessee. The final decision regarding price, terms and conditions is taken by the assessee. The assessee has no operation in respect of or sale of product carried out in India. Sales are made by the assessee to LIPL on principal to principal basis. The assessee also does not have a right to use LIPL premises. Having regard to all) of the case, we are of the view that the learned counsel has demonstrated by the assessee does not have a PE in India. For this conclusion, we derive support from the decision of ITAT, Mumbai in the case of DDIT Vs. Daimler Chrysler AG, Germany, 39 SOT 418 wherein it was held that "there should be some definite activity of the PE to which profits can be attributed and merely acting for a non-resident principal would not by itself render an agent to be considered as PE for the purpose of allocating profits taxable in the hands of the principal. It is further held that merely calling a person as agent acting on behalf of foreign non-resident would not by itself render him to be considered as an agency PB and pro tanto part of the profits of the non-resident is liable to be taxed in India.

23. In view of the above discussion and following the-ratio laid down by the ITAT, Mumbai in the case of Daimler Chrysler (supra), we hold that the assessee did not have PE in India in the year under consideration in terms of Article 5(1), 512), 5(4) & 5(5) of the Indo-US Treaty and the addition of Rs. 2,29,26,152/- made by the AO being a profit margin of 5% on the sales made by the assessee, is not sustainable. The said is therefore deleted and Ground Nos. 1 to 7 are allowed.

5. Nothing has been brought on record to show any distinction of facts or other factors warranting a different view to be taken. Respectfully following the above views, therefore, we uphold the plea of the assessee. We accordingly, hold that the assessee did not have a permanent establishment in India. The assessee succeeds in this point.

6. Ground nos. 1 to 9 are allowed in the terms indicate above.

7. Learned counsel for the assessee did not press ground nos. 10 and 11 on account of smallness of amount. He, however, hastens to add that this concession should not be put against the assessee, in principle.

8. Ground nos. 10 and 11 are dismissed as not pressed.

9. Ground nos. 12, 13 and 14 seek consequential relief and credit of TDS by the Assessing Officer. Learned DR does not oppose. The same and submits that AO can look into the matter which is exactly what assessee has prayed for. These issues are thus restored to the file of the Assessing Officer.

10. Ground nos. 12, 13, and 14 are thus allowed for statistical purposes.

11. On the result, the appeal is partly allowed in the terms indicated above. Pronounced in the open court today on the 24th day of February, 2020

Sd/- Sd/-

Justice P.P Bhatt **Pramod Kumar**
(President) (Vice President)

Mumbai, dated the 24th day of February, 2020

Nishant Verma Sr.PS

Copies to: *(1)* *The appellant* *(2)* *The respondent*
(3) *CIT* *(4)* *CIT(A)*
(5) *DR* *(6)* *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai