आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ "डी", नई दिल्ली में

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

सुश्री सुषमा चावला, उपाध्यक्ष एवं श्री प्रशांत महर्षि, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, VP & SHRI PRASHANT MAHARISHI, AM

आयकर अपील सं. / ITA No.6018/Del/2012
निर्धारण वर्ष / Assessment Year 2008-09

The DDIT,
Circle-2(2), New Delhi. .....**अपीलार्थी**/Appellant

vs

M/s. Yum! Restaurants (Asia) Pte. Ltd.,
C/o-M.K.Mandal & Associate,
258, Satyam Tower, Jwalaheri Market,
Paschim Vihar, New Delhi-110063.
PAN-AAACY2204M ..... **प्रत्यर्थी** / Respondent

अपीलार्थी की ओर से / Appellant by : Sh. Satpal Gulati, CIT DR
प्रत्यर्थी की ओर से / Respondent by : Ms. Ananya Kapoor, Adv.
Ms. Sakshi Jain, Adv. &
Sh. Sidharth Kanwar, Adv.

सुनवाई की तारीख / **Date of Hearing : 16.03.2020**		**घोषणा की तारीख /** **Date of Pronouncement: 06.07.2020**

आदेश / ORDER

PER SUSHMA CHOWLA,VP

The present appeal filed by Revenue is against order of CIT(A)-XXIX, New Delhi dated 18.09.2012 relating to assessment year 2008-09 against the order

passed under section 143(3) r.w.s 144C of the Income-tax Act, 1961 (in short 'the Act').

2. The Revenue has raised following grounds of appeal:-

1. Whether on the facts and circumstances of the case the Ld. CIT(A) has erred in ignoring the dictum that existence of a PE is a finding of fact and allowed relief relying upon case laws distinguishable from the case on hand on facts, thus ignoring the whelming facts in support of existence of PE.

2. Whether on the facts and circumstances of the case the Ld. CIT(A) has erred in ignoring the facts that seconded employee Mr. Mehboobani retained lien over his employment with YRAPL, that his deputation agreement did not spell out his terms of work and that YRAPL continued to disburse his salary , all pointing to existence of PE.

3. Whether on the facts and circumstances of the case the Ld. CIT(A) has erred in concluding that there is no link between the royalty income earned by YRAPL and the functions performed by Mr Mehboobani, when the stewardship activities of the employee of furthering the business of YRIPL through new equity stores, franchisees and business development contribute to increased royalty received by YRAPL and require no further evidence supporting the AO's finding of PE.

4. Whether on the facts and circumstances of the case the Ld. CIT(A) has erred in ignoring the detailed finding given by AO in the assessment order regarding the fact that the assessee has a place of management constituting a PE in India and reimbursement of salary and other expenses made by YRIPL to the assessee YRAPL is to be characterized as FTS.

5. Whether on the facts and circumstances of the case the CIT(A) has erred in holding that Indian affiliates namely YRIPL and YRMPL do not constitute DAPE or PE of the assessee in India despite facts marshalled by AO to show the assignment of rights and obligations by YRIPL to YRAPL and that Indian AE's were working without compensation

6. Whether on the facts and circumstances of the case the Ld. CIT(A) has erred in not adjudicating the attribution of AMP receipts of YRMPL to asses sees PE, holding this ground to be infructuous and incorrectly concluding that AMP expenditure of independent franchisees cannot be held attributable to asessees PE.

7. Whether on the facts and circumstances of the case, the CIT(A) has erred in law in holding that interest u/s234B was not chargeable in the assessee's case, by relying upon the decision of Hon'ble Delhi High Court dt.30.08.201 0 in the case of DIT Vs Jacobs Civil Incorporated, without appreciating that the levy of interest u/s 234B is mandatory as held in the case of CIT Vs Anjum M. H. Ghaswala &others 252 ITR1 (SC)."

3. The issue in the present appeal is against the addition on account of salary reimbursement cost treated as fee for technical services (in short "FTS") taxable @ 10% amounting to Rs.1,47,35,151/- and income from business and profession taxable @ 40% amounting to Rs.11,82,90,721/-.

4. Briefly in the facts of the case the assessee is a company incorporated in Singapore, which is engaged in the business of franchising KFC, Pizza Hut and Taco Bell brands for a number of territories in the Asia Pacific region (including India). For the operation of restaurant outlets, the assessee entered into Technology License Agreement (in short "TLA") for license of "Technology" and "System" with Yum! Restaurants (India) Private Limited (in short "YRIPL"). YRIPL in turn had appointed various franchisees for operating restaurants in India under the brand name KFC and Pizza Hut. YRIPL also operated the company owned KFC restaurants in India. As per the terms of the Technology License Agreement, the assessee was to receive royalty as under:-

- *2.079% (i.e. 33% of 6.3%) of sales of equity stores.*
- *33% of royalty, initial fees and renewal fees collected from franchisee stores.*

5. The royalty income was offered to tax in India on the basis of tax rates prescribed in DTAA between India and Singapore i.e. @ 10%. There is no dispute with the regard to the same. The Assessing Officer was of the view that the person employed by the assessee, working under the Indian entity, were seconded to India; the salary of the said person was reimbursed by the Indian entity and hence taxable in the hands of the assessee. The case of the assessee was that the said person had shifted to India and was working solely for the Indian concern whose salary was reimbursed. The Assessing Officer however, treated the salary reimbursement cost as FTS. The Assessing Officer was of the view that the furnishing of services by the seconded employee were technical in nature and taxable as FTS under Article 12 of DTAA between India and Singapore. The Assessing Officer came to a finding that Mr. Vinod Mahboobani was the employee of the assessee company and services were being provided to YRIPL by Mr. Vinod Mahboobani on behalf of the assessee company.

6. The CIT(A) after going through the clauses of Deputation Agreement concluded that Mr. Vinod Mahboobani was under the control of YRIPL and was working for it. The CIT(A) also held that he was not the employee of the assessee and hence there was no right/lien over his employment and hence, there was no service PE. He referred to the various evidences filed by the assessee in this regard and also referred to the clauses of Deputation Agreement. The Revenue is in appeal against the findings of the CIT(A) on this issue.

7. The Ld.DR for the Revenue pointed out that there is Technical License Agreement between the assessee and the YRIPL and also there is deputation of employee of the assessee company. He further stated that the person was in India, was seconded to India and the question was whether there was a PE or not. He referred to the findings of the Assessing Officer at pages 4 & 5 in this regard. He further stressed that the royalty which is offered to tax by the assessee, was on account of sales in India; its employee and functions performed in India, benefits both the concerns. He also pointed out that the royalty was proportionate to sales in India. Referring to page 7 of the assessment order, the Ld. DR for the Revenue pointed out that the case put up by the Revenue was of service PE. He was of the view that since it was case of ancillary PE, "make available" clause was not relevant; hence it was case of FTS. He reiterated that the employee was in India to promote the business of the assessee company. He stressed that it was a fact that there was no separate agreement and it was also a fact that person had been seconded. Referring to the order of the Assessing Officer at page 8, Ld.DR for the Revenue referred to the second issue in the present appeal and pointed out that as per the OECD guidelines, extraordinary expenses result in brand building. Again referring to the assessment order page 9, he stressed that it was a case of dependent agent PE and the AO considered 2% as reasonable and applied 3% as income.

8. The Ld.AR for the assessee on the other hand pointed out that the first issue raised in the present appeal was whether there was seconded employee

of assessee company working for it resulting in service PE. She took us through various parts of the appellate order to establish case of no right or lien. Our attention was drawn to clauses 2.1 & 2.2 of the Deputation Agreement under which deputation of employee was given, but the lien on employment was with Indian concern, which paid his salary. It was pointed out that in the absence of any separate Service Agreement between the Indian entity and non-resident assessee company, there was no question of any service PE. Coming to the ancillary clause of the Deputation Agreement, it was pointed out that the same was not the case of AO; first thing to determine was, whose employee is seconded. Referring to the DTAA between India and Singapore, our attention was drawn to Article 5(8) & Article 7, it was stressed that the provisions of Article 7 of DTAA would be invoked since there was no income, as salary paid is expense. This argument was on, without prejudice basis and it was stressed that even if there was PE, no income would be attributable to it as the expenses/salary would be deducted and hence there will be NIL business income. It was further stressed that as per the DTAA, income attributable to the PE only is taxable in India. Reliance was placed on the decision of Ahmadabad Bench of Tribunal in Burt Hill Design (P.) Ltd. vs DDIT (International taxation) (Ahmedabad ITAT-164 ITD 697).

9. Now, coming to the next aspect of the issue, it was pointed out that as per Article 12 of DTAA, FTS is taxable i.e. if 'make available clause' is fulfilled, which is not the case of the assessee. It was also pointed out that in the absence of any element of income, it is a case of cost to cost reimbursement

and the same cannot be treated as FTS. The Ld.AR for the assessee prays that it was a case of pure reimbursement being received by the assessee company and in the absence of any element of income, reimbursement per se was not taxable in the hands of the assessee company. Further, the employee Mr. Vinod Mahboobani had already paid taxes on the said income in India and taxing the said amount as FTS would amount to double taxation.

10. Coming to the second issue raised in the present appeal i.e. attribution of business income to the PE on account of marketing activities undertaken by Indian affiliates on behalf of YRAPL taxable @ 40%, reference was made to paras 5.2.1 to 5.2.4 and para 6.2 of the CIT(A) order) and no Dependent Agent PE (in short "DAPE"). The case of the assessee is that there is no Dependent Agency PE (in short "DAPE"). The Ld.AR for the assessee referred to the condition prescribed in Article 5(8) of DTAA and none of the said conditions were satisfied by the assessee company. Referring to the order of the CIT para 5.2.2 onwards, the same was vehemently relied on for the proposition of non-applicability of Article 5(8) to the facts of the case. The Ld.AR for the assessee further pointed out that the contention of the AO were factually incorrect. As the marketing activities were undertaken for the benefit of YRIPL and its franchisee; the assessee was not party to any Agreement between YRIPL and its franchisee and also the Indian franchisee was not the AE of the assessee company. It is also stressed by the Ld.AR for the assessee that in the absence of any permanent place of business in India wherein YRIPL was independent entity having own business and no business undertaken by YRIPL

on behalf of the assessee company, there was no fixed PE also. Reliance was also placed on the decision of Hon'ble Supreme Court in the case of Morgan Stanley 292 ITR 416 (SC).

11. It was also pointed out that the decision of Hon'ble Delhi High Court in Centrica India Offshore Pvt.ltd. [2014] 364 ITR 336 is not applicable to the facts of the present case and is distinguishable. Referring to para 34 of the judgement, the Ld.AR for the assessee stated that in the facts of the said case, salary was the responsibility of foreign company which was reimbursed by the Indian concern, including direct costs; and the personnel also returned back. However, in the facts of the present case, salary was paid by the Indian concern, including direct costs. Further, Mr. Vinod Mahboobani acted as Director and signed all the financial statements. Further, the said person was not deputed for short period. Reference was made to the letter of deputation placed at pages 429 and other documents at pages 430 to 433 of the Paperbook.

12. The Ld.DR for the Revenue referred to clause 2.2 of the Seconded Agreement. He further pointed out that additions on account of FTS was under Article 12 of the DTAA between India and Singapore. He also placed reliance on the decision of Delhi High Court in Centrica India Offshore Pvt.Ltd. (supra).

13. We have heard the rival contentions and perused the record. The year under appeal is Assessment Year 2008-09. The assessee is a non-resident company incorporated in Singapore. It is engaged in the business of franchising KFC, Pizza Hut and Taco Bell brands for a number of territories in

the Asia Pacific region (including India). It entered into TLA with YRIPL under which it licensed 'Technology' and 'System', for the operation of the restaurant outlets in India. The royalty received by the assessee company under TLA is offered to tax and is not in dispute. As per the Agreement between two parties, Mr. Vinod Mahboobani was deputed to India. The relevant clauses of the Deputation Agreement are reproduced under para 4.1.9 of the appellate order. The question which arises for adjudication is whether Mr. Vinod Mahboobani was working for the assessee company or YRIPL, who had the right or lien over his employment. The case of the assessee is that it had no right or lien over the employment of Mr. Vinod Mahboobani and consequently, that he was not the employee of the assessee company. The relevant clauses of the Deputation agreement read as under:-

> *"2.1. "Home Country Yum! entity shall not be responsible for the work of the International Assignees or assume any risk for the results produced from the work performed by the International Assignees while under deputation to YRIPL. The International Assignees while under deputation to YRIPL shall not in any way be subject to any kind of instructions or control of Home Country Yum! entity. The International Assignees shall function solely under the control, direction and supervision of YRIPL and in accordance with the policies, rules and guidelines generally applicable to the employees of YRIPL during the period of deputation. Home Country Yum! entity will not have continuing obligation towards YRIPL with regard to the performance of the International Assignees.*
>
> *2.2 Home Country Yum! entity hereby agrees to release and discharge the International Assignees from all obligation and rights whatsoever, including any lien on employment, if any, and from all actions, claims and demands towards Home Country Yum! entity, while they were working as employees of Home Country Yum! entity. Home Country Yum! entity hereby also agrees that while the International Assignees are in India on deputation, it shall not enforce any kind of contractual obligations that the International Assignees have/had as employees of Home Country Yum! entity.*

2.3 During the period of deputation, for administrative convenience, Home Country Yum! entity shall make payment towards salary, bonus and all other eligible benefits to the International Assignees as per terms agreed with the International Assignees (on behalf of YRIPL) at the time of the deputation and intimate YRIPL of the same.

2.4. YRIPL shall reimburse Home Country Yum! entity for payments made towards salary, bonus and all other eligible benefits of the International Assignees in relation to the period of deputation. For this purpose, Home Country Yum! entity would produce the necessary documentary evidence supporting the payment towards salary, bonus and all other eligible benefits to the International Assignees, to YRIPL, to enable the latter to make the payment.

2.5 All other costs and expenses in India relating to the International Assignees, including without limitation, reasonable expenses relating to boarding and lodging, food and beverage, travel and other miscellaneous expenses associated with the performance of work by the International Assignees shall be borne by YRIPL.

2.6 YRIPL shall be responsible for complying with the requirements of withholding tax under the Indian tax laws, on salary and other related entitlements paid to the International Assignees.

2.7 Once the International Assignees are deputed to YRIPL, the Home Country Yum! entity shall not have the right to recall any of such deputed personnel. Home Country Yum! entity will also not be under any obligation to replace any of the deputed personnel in the event where any of such personnel terminate their employment while under deputation at YRIPL for any reason."

14. The assessee has further filed the letter of Deputation which is available at page 429 of the Paper Book and other evidences certifying the role of Mr. Vinod Mahboobani in the day-to-day functioning of YRIPL. He not only attended the Board's meetings of the said concern, but he also singed the financial statements of YRIPL in his capacity as Director. The said statement is available at page 87 of the Paper Book. The evidences need to be seen in their entirety as the burden of proving that the foreign assessee has a PE in India and consequently it has to be taxed on the business generated by such PE is

initially on the Revenue. Such is the proposition laid down by Hon'ble Supreme Court in ADIT vs E-funds IT Solutions Inc. 399 ITR 34 (SC). In such a scenario, the question of taxability of service PE in India of the assessee company is answered in the negative. The evidences have also been gone into by the CIT(A), who has given detailed finding in para 4.2.3, which reads as under:-

> *4.2.3. "Now, it is to be seen what kind of services have been provided and who is service provider. Mr. Vinod Mahboobani, a highly qualified and experienced professional, was employed with YRAPL as Vice President - Legal and worked in the capacity of a senior legal counsel for the operations of YRAPL in Asian and Middle East countries. He was sent on deputation by YRAPL to YRIPL vide deputation agreement between two entities. Clauses 2.1 to 2.7 of deputation agreement have been reproduced above. Perusal of these clauses show that Sh. Mahboobani was under direct control and superintendence of YRIPL and the appellant discharged the employee from all obligations and rights whatsoever, including lien on employment. The functioning of the development team of YRIPL was supervised by Mr. Ajay Bansal (Director in YRIPL) who resigned in January 2007. In order to appoint a suitable professional with requisite qualifications and experience in this specialized field, Mr. Vinod Mahboobani was deputed to YRIPL to perform such functions in India. Therefore, essentially he was deputed to India as a replacement for Mr. Ajay Bansal. Once his deputation period expired, Mr. Vinod Mahboobani was permanently moved to the payroll of YRIPL to continue his employment with YRIPL w.e.f August, 2008. During period under consideration, salary was paid by the appellant to Sh. Mahboobani in Singapore and it was reimbursed by YRIPL on cost to cost basis. Thus, salary of deputed person is born by YRIPL who is also responsible for tax obligations on salary payment. YRIPL has deducted tax on source on salary paid and has also paid fringe benefit taxes as applicable. Therefore, it is clear that salary paid to Sh. Mahboobani has been brought to tax in India and YRIPL has claimed it as its business expenditure. The AO has again taxed the same amount as FTS which amounts to double taxation. All the facts and circumstance of the case and clauses of deputation agreement indicate that Sh. Mahboobani was employee of YRIPL and YRAPL had simply acted as conduit to pay salary to him in Singapore as his family was there in Singapore."*

15. The Ld. DR for the Revenue has failed to controvert the said finding of the CIT(A). In the absence of the same, it cannot be said that the assessee had service PE in India.

16. Another aspect which is to be kept in mind for the taxability of service PE is that the expenses of salary cost needs to be deducted from the business income generated by the PE in India, which in the present case would be NIL. In other words, there will be no income attributable to the PE. We find no merit in the stand of the Revenue in this regard.

17. Before parting, we may also refer to another aspect of taxability in the hands of the assessee company i.e. income arising on account of deputation of Mr. Vinod Mahboobani and whether the same constitute service PE. The issue is whether there is rendering of services of technical nature, taxable as FTS under Article 5(6) r.w. Article 12 of the DTAA. We find no merit in the stand of the Assessing Officer in this regard, i.e. existence of service PE and provision of technical services; the same cannot co-exist. In any case under Article 12 of DTAA, the clause of "make available" needs to be fulfilled to hold existence of PE for technical services. In the absence of fulfillment of "make available" clause, it is not possible to hold that there is taxability of FTS under Article 12 of the DTAA. Further, we find no merit in the stand of the Assessing Officer in treating the reimbursement received by the assessee company from YRIPL on account of salary payment as FTS. We have already held in the paras above that Mr. Vinod Mahboobani was working as an employee of YRIPL and not as an employee of the assessee company. The reimbursement of salary had no

element of income and was not taxable. In any case since Mr. Vinod Mahboobani had already paid taxes in India on the aforesaid salary, the same amount being taxed as FTS in the hands of the assessee company, would amount to double taxation. Upholding the order of the CIT(A), we dismiss the ground of appeal raised by the Revenue in this regard.

18. Now, coming to the next aspect i.e. the attribution of business income to the alleged PE of the assessee company in India.

19. The issue which is arising in the present appeal is whether there is DAPE. The Assessing Officer has alleged the existence of DAPE on account of alleged marketing activities undertaken by Indian entity on behalf of the assessee company. The case of the assessee before us is that it is an entity in Singapore and has entered into TLA with only YRIPL, which was in charge of operations of Pizza Hut & KFC restaurants in India. In order to run its business, YRIPL had franchised different outlets and was also running own stores. Yum! Restaurants Marketing Pvt.Ltd. (in short "YRMPL") was set up for undertaking AMP activities on behalf of YRIPL and its franchisees. The assessee company was not a party to this Agreement which was exclusively between the Indian concern and its marketing company. The Assessing Officer was of the view that the marketing activities also benefit the assessee company and hence DAPE.

20. The condition which needs to be fulfilled in Article 5(8) of the DTAA between India and Singapore for holding of DAPE and the same reads as under:-

8. "Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 9 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if-

(a) he has and habitually exercises in that State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise;

(b) he has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise," or

(c) he habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise."

21. The aforesaid conditions need to be satisfied for establishing DAPE in India and in the absence of the same, it cannot be said that the assessee company had DAPE. The Assessing Officer has failed to establish his case and where none of the conditions specified in Article 5(8) of the DTAA have been satisfied, then it cannot be said that the assessee had any DAPE in India. In any case, the marketing activities undertaken by the YRMPL were on behalf of the YRIPL and its franchisees and in the absence of any link whatsoever with the business of the assessee company, there is no merit in attribution of contribution made by the Independent third-party franchisees, to constitute PE of the assessee company in India.

22. Further, the assessee has no PE in India and no business undertaken in India, hence no fixed place PE also.

23. Before parting, we may also refer to the decision of Hon'ble Delhi High Court in Centrica India Offshore Pvt. Ltd. (supra). The facts of the said case are at variance where Centrica UK was providing services to Indian company through seconded employees to ensure quality control and management of their vendors of outsourced activities, with the intention to provide staff with appropriate expertise and knowledge about process and practices implemented. The facts of the present case are at variance and hence, the said decision is not applicable to the present facts. We find no merit in the issues raised by Revenue. The grounds of appeal raised by the Revenue are thus dismissed.

24. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 06th July, 2020.

Sd/-	**Sd/-**
(PRASHANT MAHARISHI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**उपाध्यक्ष / VICE PRESIDENT**

दिल्ली / दिनांक Dated : 06th July, 2020

** Amit Kumar **

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. **अपीलार्थी** / The Appellant
2. **प्रत्यर्थी** / The Respondent
3. **आयकर आयुक्त (अपील)**/ The CIT(A)
4. **मुख्य आयकर आयुक्त** / The Pr. CIT
5. **विभागीय प्रतिनिधि,आयकर अपीलीय अधिकरण , दिल्ली** / DR, ITAT, Delhi
6. **गार्ड फाईल /**Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक रजिस्ट्रार, आयकर अपीलीय अधिकरण ,दिल्ली
Assistant Registrar, ITAT, Delhi