IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "D" BENCH: NEW DELHI

(THROUGH VIDEO CONFERENCING)

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER &
DR.B.R.R.KUMAR, ACCOUNTANT MEMBER

ITA No.993/Del/2016
Assessment Year : 2012-13

DCIT(International Taxation), Circle-3(1)(2), New Delhi	vs	Sojitz Corporation, C/o-BSR & Co. (LLP), Building No.10B, 8th Floor, DLF Cyber City, Phase-II, Gurgaon PAN-AANCS6096C
APPELLANT		**RESPONDENT**
Appellant by	Sh. Ved Jain, Adv. & Sh. Ashish Goel, Adv.	
Respondent by	Sh. Sunil Kumar, CIT DR	
Date of Hearing	21.09.2021	
Date of Pronouncement	30.09.2021	

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the Revenue pertaining to assessment year 2012-13 is directed against the direction of Ld. Dispute Resolution Panel-2 ["DRP"], New Delhi dated 05.11.2015. The Revenue has raised following grounds of appeal:-

(i) "Whether on the facts and in the circumstances of the case, the DRP erred in holding that the assessee did not have a Permanent Establishment in India during the relevant period and therefore business profits from supply of equipments and chemicals are not subject to tax in India.

(ii) Whether on the facts and in the circumstances of the case, the DRP erred in not considering that in the return of income, the assessee itself has declared an income of Rs. 1,59,85,718/ chargeable to tax as Business

income arising from the Project Office thus itself admitting the existence of a PE in India in the form of Project office.

(iii) Whether on the facts and in the circumstances of the case, the DRP erred in not considering that in Form No 3CEB for the relevant period, India Project Office has been declared as constituting Permanent Establishment of assessee in India for determination of ALP of the International Transactions entered into by the assessee with its AE in India, namely, Sojit India Pvt Ltd, even in respect of transactions undertaken prior to the setting up of the Project Office and transactions undertaken after the establishment of Project Office.

(iv) Whether on the facts and in the circumstances of the case, the DRP erred in not considering that the contract entered into by the assessee with TATA Steel Ltd was for "Upgradation of existing PL - TCM at CRM complex" and was to be completed by the assessee by performing its duties from designing, supply of equipments, installation, erection, testing and commissioning. The supply of equipment and chemicals was not independent of the activities of installation, erection, testing and commissioning.

(v) Whether on the facts and in the circumstances of the case, the DRP erred in not considering that the contract entered with TATA steel was not through a bidding process and in the circumstances, the place of signing of agreement clearly becomes determinative of the place of accrual of income arising from the execution of contract.

(vi) Whether on the facts and in the circumstances of the case, the DRP erred in not considering various terms of the Purchase agreement for supply of equipment given as under;

> *(a) The Terms of Delivery, will be completed by the contractor within 31 months from contract effectiveness date.*
>
> *(b) Terms of payment : 2% of the contract price after satisfactory completion of integrated cold test for 2nd shutdown.*

(c) Arbitration – Governing Laws and jurisdiction- jurisdiction arising under the contract shall be rested only in the courts of India and parties submit to the jurisdiction of the said courts in Jamshedpur, Jharkhand.

(d) Which clearly establishes the place of accrual of income from supplies of equipments and chemicals to be India.

(vii) Whether on the facts and in the circumstances of the case, the DRP erred in not considering that when the contract was not awarded through any bidding process, a highly technical contract cannot be entered into without prolonged discussions, meetings and technical capability demonstrations thus leading to the conclusion that the activities of the assessee in India started much before the formal establishment of the Project Office and continued through the Project Office.

(viii) Whether on the facts and in the circumstances of the case, the DRP erred in not considering the fact that the substantial supply of equipments and chemicals started only after establishing the Project office and after the visit of technicians of the assessee to the Project office. Thus the contract was one and indivisible and artificial severing of the contract into several parts was simply a facade,

(ix) Whether on the facts and in the circumstances of the case, the DRP erred in not considering that the entire activities of supply of equipments and installation, erection, testing and commissioning in terms of the contract agreement with Tata Steel Ltd continued even in the years subsequent to the establishment of the Project office.

(x) The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time of or before the hearing of the appeal."

2. All the grounds raised by the Revenue are inter-connected and the only effective ground is against the finding of Ld.DRP that the assessee did not have

any fix place PE/service PE/ installation PE in India during the period under consideration.

3. Facts giving rise to the present appeal are that the assessee company filed its return of income for the Assessment Year 2012-13 declaring income of Rs.1,79,92,710/- which was thereafter, revised on 20.03.2014 declaring total income at Rs.1,59,85,720/-. The case was taken up for scrutiny assessment. The Assessing Officer issued a draft assessment order u/s 144C(1) r.w.s 143(3) of the Income Tax Act, 1961 ("the Act") on 25.03.2015. Thereby, he observed that the equipments needed for project were manufactured by assessee in Japan but were utilized for creation of projects in India. Therefore, a part of profit earned by assessee on offshore sale/supply was directly attributable to Permanent Establishment ("PE") of assessee in India. During the year, the assessee has made supply of Rs.2,16,50,35,318/-. Accordingly, the assessee's contention that supply of equipment and other items was not taxable in India, was not acceptable. Therefore, a portion of revenue from so called offshore supply to Tata Steel Ltd. was made attributable to the activities in India and chargeable to tax u/s 9(1) of the Act, read with Article 7 of DTAA. Hence, offshore supply of Rs.2,16,50,35,318/- was taxable in India and requires attribution. Further, the Assessing Officer observed that on perusal of details filed, it was seen that the assessee was recognizing offshore activities in the project office for which profit of Rs.1,59,85,718/- has been disclosed for the year besides, also disclosed supply amounting to Rs.16,87,51,062/-. Hence, the Assessing Officer was of the opinion that the assessee had fixed place PE in India. The assessee opted to file objections against the proposed adjustment in

draft assessment order before the Hon'ble DRP-2, New Delhi. Ld.DRP ruled in favour of the assessee by holding that the assessee had no PE in India. Therefore, this amount was not taxable in India.

4. Aggrieved by this direction, the Revenue has filed the present appeal.

5. Ld.CIT DR supported the grounds of appeal and submitted that Ld.DRP was not justified in holding that the assessee has no PE in India. He submitted that the Assessing Officer correctly narrated the facts and justiciable demonstrated that the assessee had PE in India during the period under consideration.

6. Per contra, Ld. Counsel for the assessee reiterated the submissions as made before Ld. DRP and also supported the orders of the Ld.DRP. He contended that Ld. DRP has rightly allowed the claim of the assessee as the prescribed threshold period is not satisfied.

7. Ld. Counsel for the assessee submitted that without prejudice to the submissions made herein above, even if it is presumed that the assessee had established a permanent project office but the threshold period for establishment of such office was not satisfied.

8. We have heard the rival contentions and perused the material available on record and gone through the orders of the authorities below. We find that Ld.DRP has given finding on facts in para 7 of the impugned direction by observing as under:-

7.0 Finding:

"DRP has duly examined the issue. It is undisputed that the assessee has opened a PO on 01.2.2011 only. Before that, the assessee did not have any branch office/ sale office/ factory site etc. in India. The assessee has offered to tax supervisory income attributable to PO in India. Various documentary evidences submitted by the assessee show that supply of equipment and chemicals was on FOB basis. Even acceptance test of equipment was to be carried out at assessee's premises outside India. Even if some employees of the assessee came to India for the purposes of contract negotiation / signing / or site visits, it can not be said that the assessee had any fixed place of business in India. In Indo-Japan DT AA, there is no service PE clause. Also, installation PE is not established as prescribed threshold period is not satisfied. Therefore, DRP is of the considered view that the assessee did not have fixed place PE /service PE'/installation PE in India during the period under consideration. Hence, objection is allowed."

9. The Revenue has not rebutted the observations made in the impugned direction and reaching to the conclusion that the assessee had no PE in India. We, therefore, do not see any reason to interfere in the finding of DRP, the same is hereby affirmed.

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

Above decision was pronounced on conclusion of Virtual Hearing in the presence of both the parties on 30th September, 2021.

Sd/- ***Sd/-***

(DR. B.R.R.KUMAR) **(KUL BHARAT)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Amit Kumar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI