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

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND SH. KUL BHARAT, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCING)

ITA Nos. 5106 & 5108/Del/2015
Assessment Years : 2009-10 & 2011-12

DCIT (International Taxation) Circle-2(2)(1), New Delhi PAN : AAACM 5469 Q	Vs.	M/s. Mitsui & Co. Plot No.D1, 4th Floor, Salcon Ras Vilas District Centre, Saket, New Delhi
(APPELLANT)		**(RESPONDENT)**

CO Nos. 296 & 297/Del/2016
Assessment Years : 2009-10 & 2011-12

M/s. Mitsui & Co. Plot No.D1, 4th Floor, Salcon Ras Vilas District Centre, Saket, New Delhi PAN : AAACM 5469 Q	Vs.	DCIT (International Taxation) Circle-2(2)(1), New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Ved Jain, Adv. Ashish Goel, Adv.
Revenue by	Shri Lakshminarayan, Sr. D.R.

Date of hearing:	25.10.2021
Date of Pronouncement:	04.01.2022

ORDER

PER ANIL CHATURVEDI, AM :

These appeals by the Revenue and cross objection (CO) by the assessee are preferred against the very same order of the Commissioner of Income Tax (Appeals)-43, New Delhi dated 29.05.2015 pertaining to Assessment Years 2009-10 & 2011-12.

2. Before us, at the outset, both the parties submitted that the issues raised in both the appeals of Revenue and CO of the assessee are identical. In view of the aforesaid submissions, we for the sake of convenience proceed to dispose of both the appeals and CO by a consolidated order but however refer to the facts for A.Y. 2009-10.

3. The relevant facts as culled from the material on records are as under:

4. Assessee is a company stated to be incorporated in Japan and is involved in trading of various items and also undertakes several projects in connection with big industrial installations power projects. Assessee filed its return of income for A.Y. 2009-10 on 30.09.2009 declaring income of Rs.7,87,67,803/-. The case was selected for scrutiny and thereafter assessment was framed u/s 144C(3) r.w.s 143(3) of the Act vide order dated 22.02.2012 and the total income was determined at Rs.9,07,91,624/-. Aggrieved by the order of AO, assessee carried the matter before

the CIT(A), who vide order dated 29.05.2015 (in Appeal No.318/2014-15) granted partial relief to the assessee. Aggrieved by the order of CIT(A), Revenue is now in appeal before us and assessee has also filed Cross Objection. The grounds raised by the Revenue reads as under:-

> *"1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the Offshore supplies in respect of 'Teesta' and 'Purulia' projects cannot be taxed @ 10% u/s 44BB of the IT Act.*
>
> *2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the profits that can be attributed to the PE of the assessee should be 20% and not 50% as determined by the AO.*
>
> *3. On the facts and in the circumstances of the case, Ld CIT(A) has erred in holding that the assessee's income from 'Teesta' and 'Purulia' projects should be taxed on cash basis instead of Mercantile basis.*
>
> *4. The appellant craves to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal."*

5. The assessee in its CO has raised the following grounds:

> *1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad, both in the eyes of law as well as on facts.*
>
> *2. On the facts and circumstances of the case, the Learned CIT(A) has erred both on facts in law, in upholding the view of the AO that Mitsui India Pvt. Ltd. has been constituted as a Dependent Agency Permanent Establishment of the assessee company in India.*
>
> *3. Without prejudice to the above and in the alternative, the learned CIT(A) has erred in not accepting the fact that the transaction between the assessee and Mitsui India Pvt. Ltd.*

being at arm's length only, no further profit could be attributable to the assessee.

4. *On the facts and circumstances of the case, the learned CIT(A) has erred in holding 20% of the gross trading profits to be attributable to be operations of assessee in India without there being any basis for the same.*
5. *That the respondent craves leave to add, amend or alter any of the grounds of appeal."*

We first proceed with Revenue's appeal:

Ground No: 1:

6. It was noticed by the AO that during the year under consideration assessee had received consideration for executing two projects, namely Teesta & Purulia projects. He noted that assessee had entered into contracts with National Hydroelectric Power Corporation Ltd. (NHPC) for carrying out Electrical and mechanical works of Teesta Housing projects and also West Bengal State Electricity Board, Calcutta (WBSEB) in respect of Purulia Pumped Storage Project. Assessee was asked to show-cause as to why the Project Office be not taxed under section 44BBB of the Act and the assessment not be completed by following the assessment orders for earlier assessments years as the facts of the case were identical to that of earlier years. Assessee made the detailed submissions which are not found acceptable to AO. AO was of the view that as per provisions of Section 44BBB of the Act the deemed income u/s 44BBB has to be computed @10% on the amounts received on account of such business whether in or outside India. He was of the view that assessee was required to include all the amounts received/

receivable by it whether in India or outside India which are on account of business carried on by the assessee. He was further of the view that under the Provision of Section 44BBB of the Act which is the scheme of presumptive taxation, the taxable income has to be computed at the percentage of the turnover of the assessee. He therefore held that 10% of the payments that was received from offshore supplies in respect to Teesta & Purulia projects should be considered as taxable income u/s 44BBB of the Act. He thereafter computed the total income from Teesta projects at Rs.15,570,661/- and for Purulia Project Rs.3,724,685/-. He also computed income from offshore Purulia Project at Rs.58,711,918/-.

7. Aggrieved by the order of AO, assessee carried the matter before the CIT(A). CIT(A) following the order of his predecessor for A.Y. 2006-07 & 2007-08, deleted the addition. Aggrieved by the order of CIT(A), Revenue is now in appeal before us.

8. Before us, Learned DR supported the order of AO.

9. Learned AR on the other hand submitted that issue in the present ground is squarely covered in favour of the assessee by the order of Hon'ble Delhi ITAT in assessee's own case for A.Y. 2006-07 to 2008-09 vide order dated 07.01.2020. He pointed to the relevant order placed in the paper book. He therefore submitted that since the facts in the year under consideration are

identical to that of A.Y. 2006-07 & 2008-09, no interference to the order of CIT(A) is called for.

10. We have heard the rival submissions and perused the material on record. We find that identical issue arose in Revenue's appeal in A.Y. 2006-07 in ITA No. 2801/Del/2011. The Co-ordinate Bench for the detailed reasons stated in the order in para 46 of the order concluded that CIT(A) was correct in holding that income from offshore supplies was not liable to tax in India both u/s 44BBB as well as under the provisions of Article – 7 r.w. para 6 of DTAA between India & Japan. The aforesaid order was followed by the Co-ordinate Bench of Tribunal while deciding the appeal for A.Y. 2007-08 & 2008-09. Before us, Revenue has not placed any material to demonstrate that the order of Tribunal in assessee's own case for earlier years have been set aside/stayed/overruled by higher judicial forum. Since the facts in the year under consideration are identical to that of earlier years, we for similar reasons hold no reason to interfere with the order of CIT(A) and **thus dismiss the ground of Revenue.**

11. **Ground No. 2** : AO on perusing the Profit and Loss Account noticed that assessee had received amounts for supply to Teesta & Purulia Project but the entire receipts were not offered to tax. The assessee was asked to explain the reasons for non inclusion of the amounts to tax to which it made the submissions. Assessee was also asked to explain as to why Mitsui India Pvt. Ltd. (MIPL) not be treated as its Dependent Agent Permanent Establishment

(DAPE) in India and also why the assessment not be completed as per last year as the facts remained same. The submissions of the assessee were not found acceptable to AO. AO noted that the total supplies made by Mitsui Japan to Indian customers amounted to Rs.37,339,380,834/-. He noted that as per the non consolidated Balance Sheet of Mitsui & Co. Japan, the gross profit worked out to 1.530%. He thereafter worked out the profits attributable to the PE at Rs.285,646,263/- as per the following table:

Total trading T.O. in India (INR)	37,339,380,834
Gross Profit @ 1.530%	571,292,527
Gross Profits attributable to Indian operation @ 50%	**285,646,263**

12. Aggrieved by the order of AO, assessee carried the matter before the CIT(A). CIT(A) noted that facts in the year under consideration were identical to A.Y. 2008-09. He thereafter upheld the action of AO to the extent of holding Mitusi India Pvt. Ltd. as DAPE but restricted the profit attributable to Indian operation at 20% as held by his predecessor. The relevant observation of CIT(A) are as under:

> *"The facts of the present case are identical to the facts of the preceding years. In the assessment year under consideration the AO has considered Mitsui India Pvt. Ltd. as a DAPE and 50% of the gross profit has been attributed to this DAPE. Respectfully following the order of my predecessor CIT(A) for immediate preceding, year 2008-09, I hold that the action of the AO to the extent of holding Mitsui India Pvt. Ltd. as a DAPE is upheld. Further the profit attributable to Indian operations is restricted to 20% as held by my predecessor. This way the profit attributable to Indian operation shall be Rs.11,42,58,505/- as against Rs.28,56,46,263 determined by the AO by applying 50% of global profit. I further note that Mitsui India Pvt. Ltd. has been paid a commission of Rs.50,60,72,924 which is 1.35% of the total sale.*

The AO has restricted this commission to Rs. 33,25,27,947/- by restricting the commission to 0.8905556%. The issue of payment of commission to Mitusi India Pvt. Ltd. was left open by my predecessor in the assessment year 2008-09 on the ground that matter regarding determination of the arm's length commission paid by the appellant to Mitsui India Pvt. Ltd. has been referred to the TPO in the case of MIPL and has not yet been finalized. He has further directed the AO to follow the decision of the TPO in the case of MIPL in this regard and take consequential action. In the year under consideration the report of the TPO has been received and TPO has in fact held that the commission received by MIPL at Rs.50,60,72,924 is less than the arm's length price. Accordingly the commission to the extent of Rs.50,60,72,924 has to be allowed, as claimed by the assessee in view of TPO's report also. Accordingly, I hold that the AO was not justified in restricting the commission allowable to Rs.33.25,27,947/- as against Rs.50,60,72,924 paid by the assessee.

Now as per above facts the income accruing to India stands consumed by the payment made to agent in India and there is no income left to be taxed in India. It is a matter of record that the DAPE was paid commission of Rs.50,60,72,924 which has also been taxed in India as against gross profit at the rate of 20% i.e. Rs.11,42,58,505 attributable to Indian operations as calculated hereinabove. Thus the income attributable to PE in India is negative income of Rs.39,18,14,419. Therefore no income from PE can be charged in the hands of the appellant company. The AO, however, has computed loss of Rs.4,68,81,684. This action of the AO, in allowing this, loss to the assessee as income of the DAPE is against the provisions of the Act. No loss from PE can be attributed to Indian operations and accordingly the AO was not correct in taking into consideration this loss of Rs.4,68,81,684/- while computing income of the appellant. This ground of appeal is disposed of accordingly.

The assessee succeeds in part."

13. Aggrieved by the order of CIT(A), Revenue is now before us.

14. Before us, Learned DR supported the order of AO.

15. Learned AR on the other hand reiterated the submissions made before the lower authorities and further submitted that issue in the present ground is squarely covered by the decision of Tribunal in assessee's own case for A.Y. 2006-07 to 2008-09, 2010-11, 2012-13 & 2013-14. He pointed to the relevant portion of the order placed in the paper book. He therefore submitted that in view of these facts the ground of the Revenue be dismissed.

16. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the computation of profits attributable to PE. AO attributed the profit to PE @ 50% whereas CIT(A) attributed it to 20%. We find that identical issue arose in assessee's own case in A.Y. 2006-07 to 2008-09, 2010-11, 2012-13 & 2013-14. The relevant findings of the Co-ordinate Bench of Tribunal in assessee's own case for A.Y. 2013-14 in ITA No.5901/Del/2016 in CO No.28/Del/2017 dated 27.11.2020 reads as under:

> *"4. After hearing both the parties and on perusal of the impugned order and the issues involved, we find that grounds no.1 and 2 in Revenue's appeal and grounds no.3 to 5 in assessee's cross objection are common which has been pointed out by the ld. counsel before us that, the same is covered by the order of the ITAT in assessee's own case right from the Assessment Years 2005-06 to 2008-09 and 2010-11, wherein ITAT has consistently held that MIPL is not a DAPE of assessee company. The Assessing Officer has followed the earlier year order wherein Mitsui India Pvt. Ltd. has been held to DAPE of the assessee-company and has attributed 50% of the gross trading profits of MIPL as income of the assessee-company and the commission paid by the assessee to MIPL was registered @ 0.8905556% of the total sale. The Ld. CIT (A) has though uphold the action of the Assessing Officer that the MIPL is a DAPE but has attributed only 20% of the gross trading profit of MIPL. Ld. CIT(A) further held that commission paid by the*

assessee-company to MIPL have been accepted at Arm's Length Price to the TPO that no discount of commission has to be made that since the commission paid was more than 20% attributed to DAPE, the entire addition made by the Assessing Officer was deleted. The Revenue is in appeal against the order of Ld. CIT (A) questioning the order of gross profit of sales and deleting the disallowance of commission.

5. Now that the issues are covered in favour of the assessee by the order of the ITAT for the Assessment Year 2005-06 in ITA No.2335/Del/2011 order dated 14.09.2017, wherein it has been held that MIPL is not DAPE of the assessee- company. The said order has been followed from Assessment Years 2006-07 to 2008-09 and 2010-11. Once MIPL is not held to be DAPE of assessee-company, then ostensibly no income can be attributed to the assessee company under Article 7 of DTAA, and therefore, there cannot be any question of computing income of PE or any disallowance of commission which is otherwise at Arms' Length Price as accepted by the TPO. Similar grounds raised by the Revenue has been dismissed by the Tribunal vide its latest order dated 09.09.2020 for the Assessment Year 2010-11. Thus, the grounds raised by the Revenue are dismissed and the grounds no.3 to 5 as raised by the assessee in Cross Objection is allowed. The other grounds are treated as academic in nature and tax neutral; therefore, same are dismissed as infructuous."

17. Before us, no distinguishing feature in the facts of the case under consideration and that of earlier years has been pointed by Revenue. Further, Revenue has also not placed any material to demonstrate that the order of the Co-ordinate Bench of Tribunal in assessee's own case for earlier years has been set aside/stayed/overruled by higher judicial forum. In such circumstances, we following the order of the Co-ordinate Bench for earlier years and for similar reasons, find no reason to interfere with the order of CIT(A) and **thus the grounds of Revenue is dismissed.**

18. **Ground No.3**: During the course of assessment proceedings, AO noticed that assessee has paid commission of Rs.506,072,924/- to MIPL. The commission on the total sales of Rs.37,339,380,834/- worked out to 1.35% of the total sales. It was submitted by the assessee that commission was paid to MIPL for support services rendered by it to the assessee and that the same was as per the agreement entered by it with the assessee. The submissions of the assessee were not found acceptable to AO. AO noted in A.Y. 2008-09, the commission payment was allowed at 0.8905556%. He also noted that the commission paid during the year had increased despite decrease in sales as compared to earlier year. He noted that the facts of the case in the year under consideration were similar to that of A.Y. 2008-09. He accordingly, by applying the rate of commission of 0.8905556% on the total sales of Rs.37,339,380,834/- worked out the commission at Rs.33,25,27,947/- and thus the excess commission of Rs.17,35,44,977/- (Rs.506,072,924 - Rs.33,25,27,947) was disallowed. He thereafter computed the total income from PE as under:

Gross Profits attributable to Indian operation @ 50%	*285,646,263*
Less :- Commission allowable to MIPL as discussed above	*33,25,27,947*
Total Income From P.E. (INR)	*(4,68,81,684)*

19. He further noticed that the income from Teesta & Purulia Project was worked out by the assessee on receipt basis though the assessee was following mercantile system of accounting. He noted that while finalizing the assessment for A.Y. 2007-08, the

income was worked out by the AO on accrual basis. He accordingly to protect the interest of Revenue, added the difference of income (worked between accrued method & receipt basis) amounting to Rs.42,27,642/- as income on protective basis.

20. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who while deciding the issue in favour of the assessee noted that identical issue arose in assessee's own case in A.Y. 2007-08 & 2008-09 and his predecessor had decided the issue in assessee's favour. He therefore following the order of his predecessor decided the issue in assessee's favour.

21. Aggrieved by the order of CIT(A), Revenue is now before us.

22. Before us, Learned DR supported the order of AO.

23. Learned AR on the other hand submitted that the issue is squarely covered in assessee's favour by the decision of Tribunal in assessee's own case for A.Y. 2007-08 (ITA No.4329/Del/2011) and the order for A.Y. 2007-08 was followed by Tribunal while deciding the appeal for A.Y. 2008-09. He pointed to the relevant order placed in the paper book. He therefore submitted that since there is no change in facts as compared to earlier years, the ground of Revenue needs to be dismissed.

24. We have heard the rival submissions and perused the material on record. In the present ground Revenue is aggrieved by the order of CIT(A) wherein he has held that the assessee's income from Teesta & Purulia Projects be taxed on cash basis instead of mercantile basis. We find that identical issue arose before the Co-ordinate Bench of Tribunal in assessee's own case in A.Y. 2007-08. The Co-ordinate Bench, in ITA No.4329/Del/2011 order dated 07.01.2020, decided the issue in assessee's favour, by dismissing the ground of Revenue by observing as under:

> *"60. So far as ground of appeal No.3 by the Revenue is concerned, the same relates to determination of income from Teesta and Purulia projects on cash basis instead of mercantile basis.*
>
> *61. After hearing both the sides, we find the AO applied section 44BBB in respect of onshore supplies and onshore services in computing the income on the basis of amount accrued. We find the Ld.CIT(A) at para 5.3 of the order has discussed the issue and held that as per the provisions of section 44BBB, it is a presumptive module. The relevant observation of the CIT(A) is at para 5.3 of his order. The Id. DR could not controvert the findings given by the Ld.CIT(A). In our opinion, the ld.CIT(A) was fully justified in holding that while computing the presumptive income books of account are not required to be maintained. Therefore, what is received by the assessee during the year a fixed percentage of such receipt is deemed to be the income. In absence of any distinguishable features brought before us by the ld. DR in the findings given by the Ld.CIT(A), we do not find any infirmity in the same. Accordingly, the same is upheld and the ground raised by the Revenue is dismissed."*

25. The above order was followed while deciding the appeal for A.Y. 2008-09 in ITA No.794/Del/2011 order dated 07.01.2020.

26. Before us, Revenue has not pointed to any fallacy in the findings of CIT(A). Further, it has also not placed any material on record to demonstrate, that the order of Tribunal for A.Y. 2007-08 & 2008-09 has been set aside/ stayed/ overruled by higher judicial forum. In such a situation, we find no reason to interfere with the order of CIT(A) and **thus the ground of Revenue is dismissed.**

27. **In the result, appeal of the Revenue for A.Y. 2009-10 is dismissed.**

28. As far as the appeal of Revenue for A.Y. 2011-12 (ITA No.5108/Del/2015) is concerned, in view of the submission of both the parties that the issues raised in A.Y. 2011-12 are identical to that of A.Y. 2009-10, we for the reasons stated therein above while deciding the appeal for A.Y. 2009-10 and for similar reasons dismiss the appeal of Revenue.

29. **In the result, appeal of Revenue for A.Y. 2011-12 is dismissed.**

We now proceed with deciding the CO of assessee for A.Y. 2009-10 and AY 2011-12:

30. Before us, at the outset, Learned AR submitted that the issues raised in CO for A.Y.s 2009-10 & 2011-12 are identical. In

view of the aforesaid submission of Ld AR we proceed to dispose of both the COs but proceed with AY 2009-10.

31. **Ground No.2** is with respect to the action of CIT(A) in upholding Mitsui India Pvt. Ltd. (MIPL) to be Dependent Agency Permanent Establishment of the assessee company in India.

32. Before us, Learned AR submitted that AO had held Mitsui India Pvt. Ltd. (MIPL) to be Dependent Agency Permanent Establishment (DAPE) of assessee company in India. He submitted that identical issue arose before the Co-ordinate Bench of ITAT in A.Y. 2006-07 wherein it was held that MIPL to be not dependent agent of the assessee. He further submitted that the order for A.Y. 2006-07 was followed by ITAT while deciding the appeal for A.Y. 2007-08 (ITA No.4329/Del/2011) and 2008-09 (ITA No.794/Del/2011). He pointed to the relevant observations in the order. He therefore submitted that since the facts of the case in the year under consideration are identical to that of earlier year, the ground be allowed.

33. Learned DR did not controvert the submissions made by Learned AR but however supported the order of lower authorities.

34. We have heard the rival submissions and perused the materials on record. The issue in the present ground is with respect to the treatment of MIPL as Dependent Agency Permanent Establishment (DAPE) of assessee company. We find that

identical issue arose in assessee's own case in A.Y. 2006-07. The Co-ordinate Bench for the detailed reasons stated in the order (which for the sake of brevity are not reproduced) concluded MIPL to be not a dependent agent PE of the AE. The aforesaid decision was followed by the co-ordinate Bench of Tribunal while deciding the appeal for A.Y. 2007-08 & 2008-09. In the absence of change in facts between the year under consideration and that of earlier years, we following the order of the Co-ordinate Bench for earlier years and for similar reasons hold that MIPL to be not a Dependent Agent PE of assessee. **Thus the ground of assessee is allowed.**

35. **Ground No.3 & 4** are w.r.t attribution of 20% profits to the assessee.

36. Before us, Learned AR submitted that AO while treated MIPL to be Dependent Agent PE of assessee attributed gross profits attributable to Indian operations at 50%. When the matter was carried before CIT(A), he attributed the gross profits at 20% as against 50% held by AO. Aggrieved by the order of CIT(A), assessee is now before us.

37. Before us, at the outset, the Learned AR submitted that the issue is covered in assessee's favour by the decision of ITAT in assessee's own case for A.Y. 2006-07, 2007-08 & 2008-09. He pointed to the relevant observations in the order placed in paper book. He therefore submitted that in the absence of any change in

facts as compared to earlier years, following the ITAT order for earlier years, the issue be decided in assessee's favour.

38. Learned DR did not controvert the submissions made by Learned AR but however supported the order of lower authorities.

39. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to attribution of profits to the assessee. AO had attributed 50% of gross profits to assessee which was reduced to 20% by CIT(A). We find identical issue arose in assessee's own case in A.Y. 2006-07. The Co-ordinate Bench for the detailed reasons stated in the order upheld the order of CIT(A) in holding that no income was liable to be attributable in India even if Mitsui & Co. Ltd. constituted DAPE of the assessee in India. The aforesaid order was followed by ITAT while deciding the appeal for A.Y. 2007-08 & 2008-09.

40. Before us, no distinguishing feature in the facts for the year under consideration and that of earlier years has been pointed out by Revenue. We therefore following the reasoning of the Co-ordinate Bench on the issue for earlier years and for similar reasons hold that no income is liable to be attributed to the operations of assessee in India. **Thus the ground of assessee is allowed.**

41. **In the result, CO of assessee for A.Y. 2009-10 is allowed**

42. As far as CO for A.Y. 2011-12 is concerned, before us, it has been stated that the facts, in A.Y. 2011-12 being identical to that of A.Y. 2009-10, we for the reasons given herein above while deciding the CO for A.Y. 2009-10 and for similar reasons **allow the CO.**

43. In the result, the CO of assessee is allowed.

44. **In the combined result, the appeals of Revenue are dismissed and Cross Objections of assessee are allowed.**

Order pronounced in the open court on 04.01.2022

Sd/-	**Sd/-**
(KUL BHARAT)	**(ANIL CHATURVEDI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 04.01.2022
PY*
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI