

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

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 6641/Del/2017
(for Assessment Year : 2013-14)

ACIT (International Taxation) Circle – 1(2)(2) New Delhi PAN No. AADFD 9348 K (APPELLANT)	Vs.	DHV BV Indian Branch Office B-1/1-1, 1 st Floor, Mohan Cooperative Industrial Area, Mathura Road New Delhi- 110 044 (RESPONDENT)
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Assessee by	Shri Satya Jeet Goyal, Advocate
Revenue by	Shri Sanjay Kumar, Sr. D.R.

Date of hearing:	13.04.2022
Date of Pronouncement:	27.04.2022

ORDER

PER ANIL CHATURVEDI, AM :

This appeal filed by the Revenue is directed against the order dated 23.08.2017 of the Commissioner of Income Tax (Appeals)-42, New Delhi for Assessment Year 2013-14.

2. Brief facts of the case as culled out from the material on record are as under:-

3. Assessee is stated to be a non-resident company incorporated under the laws of Netherlands and engaged in the business of providing consulting services for transportation, water supply, sewerage, solid waste management etc. The assessee-company had opened a branch office in India. Assessee filed its return of income for A.Y. 2013-14 on 30.11.2013 declaring total income of Rs.39,15,950/-. The case was selected for scrutiny and notices u/s 143(2) & 142(1) of the Act were issued to the assessee. During the course of assessment proceedings, AO noticed that assessee had offered income from National Highway Authority of India on gross basis @ 20% u/s 44D r.w.s 115A of the Act and had also offered income from Indian Branch Office, income from Jammu Kashmir Project and income from Kolkata (KEIP) Project on the net basis. He noted that the facts of the case in the year under consideration were identical to that of A.Ys. 2009-10 to 2012-13. He further noted that in earlier years, in the assessment framed, all the receipts of the assessee were taxed on gross basis. He therefore relying upon the order for A.Y. 2012-13 and the order of earlier years, taxed the receipts of the assessee on gross basis. The submissions of the assessee that CIT(A) while deciding the appeal for A.Ys. 2008-09 to 2011-12 had given the direction to tax income on net basis was not found acceptable to AO for the reason that the CIT(A)'s order was not accepted by the Department and Revenue had preferred appeal before the ITAT. He thus taxed the income at gross basis and determined the total taxable income at Rs.6,68,38,552/-.

4. Aggrieved by the order of AO, assessee carried the matter before CIT(A). CIT(A) by following the order of his predecessor in assessee's own case for A.Y. 2011-12 directed the AO to tax the income from contracts on net basis under the provision of Section 44DA of the Act.

5. Aggrieved by the order of CIT(A), Revenue is now before us and has raised the following grounds:

- “1. Whether on facts and in law, the Ld. CIT(A) has erred in holding that receipts in nature of ‘fee for technical services’ are to be taxed on net basis under section 44DA without appreciating the fact that the receipts were not ‘effectively connected’ with the PE of assessee in Indian and thus were liable to be taxed on gross basis @ 10% u/s 115A of the IT Act, 1961.*
- 2. The appellant craves to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal”*

6. Before us, at the outset, Learned AR submitted that identical issue arose before the Co-ordinate Bench of Tribunal in Revenue's appeal for A.Y 2012-13 (ITA No.2834/Del/2017). He further submitted that the Tribunal vide order dated 08.02.2022 has dismissed the appeal of the assessee. He pointed to the relevant order placed in the paper book. He therefore submitted that since the facts are identical in the year under consideration to that of A.Y. 2012-13, the appeal of Revenue be dismissed.

7. Learned DR on the other hand did not controvert the submissions made before us but however supported the order of AO.

8. We have heard the rival submissions and perused the material available on record. The issue in the present ground is about the taxability of the receipts i.e. whether it is to be taxed on gross basis or on net basis. We find identical issue arose before the Co-ordinate Bench of Tribunal in assessee's own case for A.Y. 2012-13 dated 08.02.2022 in ITA No.2834/Del/2017 has decided the issue in favour of the assessee by dismissing the ground of Revenue by observing as under :

“6. We have considered rival submissions and perused the materials on record. It is a common point between the assessee and the Revenue that the issue is squarely covered in favour of the assessee by the decision of Tribunal in assessee's own case in assessment years 2008-09, 2009-10 and 2010-11. As we find, identical issue arising in assessee's own case came up for consideration before the Tribunal in ITA No.5532/Del/2012, ITA No. 5372 & 5373/Del/2014 in assessment years 2008-09, 2009-10 and 2010-11. While deciding the issue in order dated 29.05.2018, the Tribunal has held as under:

“13. We have heard both the parties and perused all the relevant records available before us. As regard to Ground Nos. 1 and 2 for A.Y. 2008-09 appeal and Ground No. 1 for A.Y. 2009-10 & 2010-11, the CIT(A) in A.Y. 2008-09's order held as under:

“5. I have carefully considered the submissions made by the assessee and other material placed on record. The assessee has executed various projects in India either directly from head office or through a branch office in India which has been opened with permission

from RBI. The assessee has returned income from these contracts as FTS which are taxable either on gross basis u/s 44D or on net basis u/s 44DA depending upon date of entering into contract. Both these sections viz. 44D and 44DA applies only if FTS is effectively connected with PE in India. The AO has not disputed the existence of PE in India. The AO has accepted that FTS from those contracts which are signed before 01-04- 2003 are effectively connected with PE in India and hence taxable u/s 44D but he has held that FTS from contracts which are signed after 01-04-2003 are not effectively connected with PE in India and hence not taxable u/s 44DA. The AO has reasoned that project wise detail of employees for contracts executed by branch office was not furnished.

The action of the AO does not appear to be based on proper appreciation of facts. The AO has selectively chosen to hold that contracts executed by branch office in India and entered into after 01-04-2003 are not effectively connected with PE while other contracts executed by branch office in India and entered into before 01-04-2003 are effectively connected with PE. All the contracts which are subject matter of dispute in present appeal have been negotiated and signed in India by branch head. The branch office has outsourced consultancy service from subsidiary namely DHV BV India Pvt. Ltd. Various invoices have been raised by branch office and bank account has been maintained and operated by branch office. The AO has not pointed out which of the relevant operations have been carried out by the head office. A project/contract has to be effectively connected either with head office or with branch office. There is no whisper by the AO of any activity from head office which can lead to conclusion that contract is effectively connected with head office. In present case, overall supervision and management has been done by the branch office and actual operational part of rendering consultancy services has been done by Indian subsidiary DHV BV India Pvt. Ltd. In view of these facts, there cannot be any other conclusion that the

contract is effectively connected with branch office in India.

In view of discussion supra, I hold that contracts under dispute in present appeal are effectively connected with PE in India. The AO is directed to tax income these contracts on net basis as per provisions of section 44DA. The ground of appeal is accordingly allowed.”

It is pertinent to note that all the documents especially contract agreements of the relevant period were produced before the Assessing Officer by the assessee. Despite that the Assessing Officer has overlooked the said documents and has given an incorrect finding that the assessee has not submitted the documents. The activities under each of the contract were rendered in India for more than 6 months which was not disputed by the Revenue. The details of the personnel and their duration activity shows that the contracts are required to be rendered for substantially long period of time which supports the case of the assessee that the scope of work was required to be rendered in India and the time spent in India by the assessee/subcontractor proves that a Permanent Establishment (PE) was constituted in India. Therefore, the CIT(A) rightly held that income earned by the assessee under such contracts is effectively connected to a PE in India and is liable to tax at 40% on net income basis as per the RBI guidelines. Thus, there is no need to interfere with the findings of the order of the CIT(A). Therefore, Ground No. 1 and 2 for A.Y. 2008-09 and Ground No. 1 for A.Ys. 2009-10 & 2010- 11 of the Revenue’s appeals are dismissed as all the appeals are having identical facts.”

7. Facts being identical, respectfully following the aforesaid decision of the Coordinate Bench, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground raised.

9. Before us, no distinguishing feature in the facts of the present case and that of earlier year has been pointed out by the Revenue nor has Revenue placed any material on record to demonstrate that the order of Tribunal in assessee’s own case for

A.Y. 2012-13 has been set aside/overruled or stayed by higher judicial forum. We therefore following the decision of the Coordinate Bench for A.Y. 2012-13 and for similar reasons uphold the order of CIT(A) on account of taxability of the receipts and find no reason to interfere with the order of CIT(A). **Thus the grounds of the Revenue are dismissed.**

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

Order pronounced in the open court on 27.04.2022

**Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER**

**Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

Date:- 27.04.2022

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Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI