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

BEFORE SHRI AMIT SHUKLA, JM, &
SHRI AMARJIT SINGH, AM

आयकरअपीलसं./ I.T.A. No. 2823/Mum/2019
(**निर्धारणवर्ष**/Assessment Year: 2016-17)

ITO(IT)-2(2)(2), R. No. 1725, 17th Floor, Air India Building, Nariman Point, Mumbai-400 021	**बनाम**/ Vs.	**M/s International Reinsurance and Insurance Consultancy & Broking Services Pvt. Ltd.** 15th floor, B-Wing, Nirmal Building, 241/242, Nariman Point, Mumbai-400 021
स्थायीलेखासं./जीआइआरसं./PAN No. AAACI2859J		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी/**Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Milind Chavan, Ld. DR
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri Atul T. Suraiya, Ld. AR
सुनवाईकीतारीख/ **Date of Hearing**	:	12.05.2022
घोषणाकीतारीख / **Date of Pronouncement**	:	13.06.2022

आदेश/O R D E R

Per Amit Shukla, Judicial Member:

The aforesaid appeal has been filed by the revenue against the impugned order dated 28.02.2019 passed by Ld. CIT (Appeals)-56,

Mumbai in relation to order u/s 201(1) and 201(1A) for the AY 2016-17-13. The revenue has taken the following grounds of appeal:-

1. "Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) was justified in holding that the remittances made by the assessee company to M/s. Aon Benfield Asia Pte. Ltd., Singapore is not liable for TDS u/s 195 of the Act."

2. "Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) was justified in holding that the assessee company is not the payer under section 195 of the Act and hence cannot be the assessee in default under section 201(1)/(1A) of the Act."

3. "Whether on the facts and in the circumstances of the case, the Id. CIT(A) was justified in not deciding the issue that the assessee company is a dependent agent of AON Benfield, acting as a Permanent Establishment of AON Benfield in India."

4. "The Appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

5. "The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

2. The facts in brief are that, the assessee is an Indian resident entity and is licensed as composite broker with Insurance Regulatory and Development Authority (IRDAI) which includes reinsurance broking and consultancy services. The main controversy involves around treating the premium paid by Agriculture Insurance Company of India **(AICI),** i.e. Indian cedant to various Non-resident reinsurers companies **(herein referred to as NRRs)** through overseas co-broker, **M/s Aon Benfield Asia Pte Ltd, Singapore (herein referred to as AB)**. As per IRDA guidelines, any Indian license broker to seek support of non-resident reinsurance company is entitled to work in conjecture with overseas co-broker which is in the present case is M/s Aon Benfield Asia Pte Ltd, Singapore (AB). The regulation also refers to overseas brokers who place reinsurance business and settle account with NRR is designated as a “co-broker”. Both assessee and AB, Singapore work as brokerage firm for NRRs only. It is also an admitted fact that, here in this case, none of the NRRs have PE in India nor any business connection and therefore, they were not liable to tax in

India; and in support, tax residency certificates, Form 10F and PE declaration have been filed.

3. In the proceedings u/s 201, the assessee stated that it is an IRDA license reinsurance broker and the remittances have been made on the premium of insurance by the insurer company, i.e., Agriculture Insurance Company of India to AB Singapore on behalf of foreign reinsurance companies (NRRs) who are not tax resident in India and they do not have any PE in India, therefore remittance is not offered to tax in India. Ld. AO noted that the entire business of the assessee is in the field of reinsurance broker /consultancy to NRRs relates to AB Singapore. He further observed that out of a total Re-insurance Brokerage received from Non-Resident entities being Rs. 11,24,98,810/-, 97.3% of which i.e. Rs. 10,94,14,818/- has been received only from AB Singapore. The assessee has also failed to file copy of its contract/agreement with (NRR) which was specifically asked vide order sheet noting dated 18/01/2018. Only the agreement copy between AB Singapore and M/s. Agriculture Insurance Company of India Ltd. has been filed.

4. Ld. AO show caused the assessee as to why M/s. International Reinsurance and Insurance Consultancy & Broking Services Pvt. Ltd. should not be held as 'assessee-in-default' u/s. 201 of the I.T. Act, 1961 for non-deduction/ withholding of tax on remittances of premium paid to M/s. Aon Bonfield Asia Pte Ltd. Singapore The assessee was also requested to show cause as to why it should not be considered as a dependent agent PE of M/s. Aon Bonfield Asia Pte Ltd. Singapore, thereby treating all the remittances paid to the said entity as taxable in India.

5. However, as per the AO, no proper compliance was made by the assessee and assessee has failed to approach the revenue by making an application u/s 195(2) for determination of taxability of the said transaction and withholding the tax thereon before making the remittance under consideration and no such certificate has been produced. He further held that activities of the assessee makes it as a Dependent agent PE within the provision of Article 5 of the India Singapore DTAA and consequently the profits of M/s. Aon Bonfield Asia Pte Ltd. Singapore shall be taxable in India as under Article 7 of India Singapore DTAA. He further observed that

assessee's business is to provide brokering /consultancy services and remittances have been made to M/s. Aon Bonfield Asia Pte Ltd. Singapore, therefore it was assessee's responsibility to deduct applicable tax before making payments to the non residents. Accordingly, he worked out the total tax as under:-

4. Thus in view of above, M/s. International Reinsurance and Insurance Consultancy & Broking Services Pvt. Ltd. has failed to deduct tax on the income of non-resident entity M/s. Aon Bonfield Asia Pte Ltd which was chargeable to tax as per Section 5 r.w.s 9 of the I.T. Act and is therefore treated as assessee in default as per provisions of Section 201(1) and 201(1A) r.w.s. 195 of the I.T. Act for non-deduction of tax before making payment to M/s. Aon Bonfield Asia Pte Ltd.

5. Hence the tax liability in the hands of M/s. International Reinsurance and Insurance Consultancy & Broking Services Pvt. Ltd. is worked out as under:

Amount of remittance made without deduction of TDS u/s. 195 (considered as Business Income of recipient)	*Rs. 97,01,31,697*
Applicable Tax Rate (@40%)	*Rs. 38,80,52,679*
Surcharge (@5%)	*Rs. 1,94,02,634*
Education Cess (@3%	*Rs. 1,22,23,659*
Total Tax	*Rs. 41,96,78,972*

6. Since the assessee has failed to deduct tax as referred to above, it is liable to pay simple interest u/s. 201(1A) of the Act at the rate of one percent for every month or part of month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted, and such simple interest up to the date of order works out as under:

Date on which tax was deductible	*10/11/2015*
Date of order	*20/02/2018*
No. of months in default	*28*
Interest u/s. 201(1A)	*11,75,10,112*

6. Before the Ld. CIT (A), certain additional evidences have been filed alongwith detail submission on which remand report was called for by the Ld. CIT (A). Ld. CIT (A) held that assessee is mainly a broker and the sum transferred is a premium by the insurer in India to NRRs. The assessee has no ownership and is directly paid to the insurer by the NRR companies. Finally, the Ld. CIT (A) concluded as under:-

21. The preceding discussion clearly reveals that the appellant is not the payer and they are broker. The sum transferred is premium on which they have no ownership. The premium is paid by AFCI, the insured. If tax was to be deducted, it is by the insured after examining relevant provisions of Double Taxation Avoidance

Agreement and other statutory provisions. The allegation that they are dependant agent is not substantiated. In para 3.1 of assessment order, assessment order, the Assessing Officer stated that "assessee has not demonstrated as to how it is be treated as dependant agent PE.....". It is not the case of assessee to prove they are a dependant agent Permanent Establishment. It is for Assessing Officer to establish based on factual analysis the case is to be established by examining terms of contract, if any, invoices etc. The argument in para 3.3 is also same any justification. In any case the matter is not relevant since I had held that the payer is indeed the insurer arid the role of appellant is mere broker in India.

22. The additional evidence admitted merely supports the finding made independently that the appellant is not the payer. Even without admitting the same, the result would remain same. This is recorded.

23. In view of discussion above, I hold that appellant is not liable for deduction of tax under section 195 on payment since it is not the appellant who made the payment. Ground l (ii) is allowed. Being so I direct Assessing Officer not to raise any liability under section 201 on the same.

7. We have heard both the parties and also perused the relevant findings as well as material placed before us. The fact of the issue is that the assessee company is an Indian broker for placement of

reinsurances placed with insurers domicile in India to work in conjunction with overseas brokers. The reinsurance contract is between Indian insurers and the non-resident insurance companies. The details of payment made by the assessee on which non deduction of tax at source is alleged are as under:-

Sr. No.	NRRs	*Tax Residence*	*Reinsurance Premium Amount(INR)*	*Claim amount (1NR)*	*Net Amount Paid (INR)*
1	Axis *Reinsurance Company*	*USA*	*32,37,22,438*	*17,34,43,503*	*15,02,78,935*
2	*SA Caisse Centrale de Reassurance (CCR)*	*France*	*1,11,61,650,*	*-*	*1,11,61,650*
3	*Endurance Worldwide*	*UK*	*5,89,37,276*	*-*	*5,89,37,276*
4	*IRB Brasik Resseguros S.A*	*Brazil*	*26,74,84,559*	*42,82,692*	*26,32,01,867*
5	*Korean Reinsurance Company*	*Korea*	*7,68,05,884*	*3,312,01,351*	*4,56,04,533*
6	*Lanforsakringar Sak Forsakringsakliebolag*	*Sweden*	*7,82,698*	*-*	*7,82,698*
7	*Muchener Ruckoersicher ungs Gesellscliaft Actiongelsehaft*	*Germany*	*19,94,80,010*	*1,68,84,348*	*18,25,95,662*
8	*Swis Re-insurance Company Limited*	*Switzerla nd*	*1,98,49,981*	*-*	*1,98,49,981*
9.	*Tokio Marine Underwriting Limited on behalf of Lloyd's Syndicate 1880*	*UK*	*1,19,07,200*	*-*	*1,19,07,200*

8. The aforesaid amounts of premium are collected by the assessee from the insurers and instruct them to remit the premium to the 'co-broker' who on receipt of the same passes it to the NRR companies as per the share of the risk insurers. The assessee is not the payer, albeit is merely facilitating remittance of premium on behalf of Agriculture Insurance Company of India. Ld. CIT (A) has summarized the chain of the transaction in the following manner:-

9. In the instant case there are 4 players. They are:-

A. Agricultural Insurance Company of India, the insured.

B. International Reinsurance and Consultancy and Brokerage Pvt. Ltd., the appellant

C. Aon Benfield Asia Pte Ltd., foreign broker

D. Non-Resident Reinsurance companies, entities to whom insurer had spread its risk

10. On the above actual payer of premium is A and actual receiver is D. But A (the policy holder) does not pay D directly. A pays B. B is turn, pays C and C passes to D. D gives commission to C and C shares the commission with B. This is the scheme under which the businesses operate.

9. Thus, the assessee as well as AB Singapore (co-broker) are mere facilitator for transferring the premium from the Indian Cedant companies to the NRRs and is entitled to its commission as per the broker regulations of IRDAI. The assessee has remitted AB Singapore, Rs. 74,43,19,802/- as premium received from AICI, net of recovery of claims of the gross premium of Rs. 97,01,31,696/- less claims of Rs. 22,58,11,894/- (as per details enumerated above). The premium so remitted cannot be held to be income of AB Singapore, because AB Singapore in turn, is required to remit the same, further to NRRs. The said premium are in fact receipts of NRRs which would be subjected to tax in the country of domicile and not in India as admittedly they do not have PE in India. The assessee has already filed copy of TRC, Form 10F of these NRR entities alongwith no PE declaration which fact has not been controverted by the AO. In absence of PE, the premium received by NRRs cannot be held as chargeable to tax in India. As borne from the record, only in the case of one such NRR Swiss Re, AO has treated that it had a service PE and accordingly certificate u/s 197

was obtained which was filed as additional evidence before Ld. CIT (A).

10. From the perusal of the profit and loss account of the assessee, it is seen that it reflects only brokerage as its income. All the monies received by the Assessee from the Indian Insurance companies, i.e., Indian Cedents is held in a bank account which is classified as the "Client Money Account" and this is required to be maintained in accordance with *Clause 27 of the Insurance Regulatory and Development Authority (Insurance Brokers) Regulations, 2013 read with Schedule V thereto*. The monies lying in this account are not assessee's money and the assessee is only the trustee of the monies as per IRDAI Regulations and hence the monies are not available to it. Monies in this account are to be paid to the NRRs either directly or through co-brokers not later than 2 weeks from receipt thereof. This account is reflected in the balance sheet of the Assessee with a corresponding liability ***"Reinsurance Premium payable to Reinsurers"*** and hence to assume that said premium is Assessee's income is fallacious. The regulatory authority on reinsurance in India is IRDAI, who has issued a

clarification upon the Assessee's request wherein they have stated as under:

> "... ***We are also of the view that the amount transferred by the domestic broker as reinsurance premium to the correspondent overseas broker is not the income of the overseas broker. It is the premium income of the foreign reinsurer who provide reinsurance cover for the risk undertaken by the direct reinsurer. Therefore, no tax is required to be deducted at source for such remittances"***

11. Thus, Ld. CIT(A) has rightly held that, when assessee is merely a broker and does not have any ownership on the premium amount transferred to NRR, then there was no liability to deduct TDS for remitting the said amount to the co-broker in Singapore.

12. In so far as AO's contention that assessee is DAPE of AB Singapore, it has been pointed out before us by the Ld. Counsel of the assessee that assessee is an independent broker and works on 'principal to principal' basis with its co-broker and also works with other several persons/ entities. The assessee has earned brokerage during FY 2015-16 (AY 2016-17) from 275 transactions for doing brokerage business with various NRRs without any involvement of

AB Singapore and hence, assessee cannot be recoked as DAPE of AB Singapore. In any case, the conditions provided in Article 5(8) and 5(9), which 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.

9. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State

merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise itself or on behalf of that enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.

13. In so far as applicability of para 8 of Article 5 is concerned, here it is not the case where assessee has any authority to conclude contracts on behalf of AB Singapore and conditions with respect to stock of goods are also not applicable. It is also not a case here that assessee secures order only on behalf of AB Singapore. Thus, Article 5 (8) is not applicable in the present case.

13.1 In so far Article 5(9) is concerned, the transaction between assessee and AB Singapore, who both are independent broker work on principal to principal basis and the assessee carried out a transaction of remittance of premium in ordinary course of business. In any case, assessee is an independent broker under

IRDAI and has earned majority of brokerage (73%) from NRRs without having any transaction with AB Singapore or involvement of AB Singapore. Its activities are not wholly or exclusively devoted to AB. In support of this, financial statements of the assessee for the relevant financial year i.e. FY 2015-16 have been filed. This break up of its revenue was filed before the Ld. CIT (A) as additional evidence which has been accepted by Ld. CIT (A). From the perusal of the same, it is seen that assessee received brokerage from more than 76 NRRs and majority of them without involvement of AB Singapore. Thus, the condition of Article 5(9) is also not satisfied.

14. Thus we hold that:-

Firstly, the assessee and AB Singapore are independent brokers facilitating payments between Cedants and NRRs.

Secondly, the premium paid by the assessee to NRRs through AB Singapore is not the income of AB Singapore, but a remittance of funds received by the assessee from insurer AICI for onward transfer to NRRs.

Thirdly, neither NRR nor co-broker AB Singapore have PE in India and thus, premium is not chargeable to tax in India.

Lastly, the assessee received its brokerage income from more than 76 NRRs and not done work wholly and exclusively for AB Singapore and hence, assessee is not a DAPE of AB Singapore.

15. Before us, Ld. DR had relied on 2 decisions of ITAT Chennai Bench in the case of **United India Insurance Co. Ltd. vs. JCIT (2018) 97 taxmann.com 466 (Chn-Trib) and DCIT vs. Cholamandalam Ms General Insurance Co. Ltd. (2018) 99 taxmann.com 302 (Chn-Trib)**. On perusal of above, both these judgments are not applicable on the facts of the present case because in those cases, the assessee were themselves insurance companies and have paid reinsurance premium to non-resident reinsurance company and claim the same as deduction while computing taxable income. The disallowance was made by the AO u/s 40(a)(i) on the ground that TDS was not deducted by making the said payment. But here in this case, there is no deduction claimed in the profit & loss account by the assessee on the

reinsurance premium paid. Accordingly, the grounds of appeal raised by revenue are dismissed.

16. In the result, the appeal filed by the revenue stands **dismissed**.

Orders pronounced in the open court on 13th June, 2022.

Sd/-	*Sd/-*
(Amarjit Singh)	(Amit Shukla)
Accountant Member	Judicial Member

मुंबई Mumbai;दिनांक Dated : 13.06.2022

Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई**/ ITAT, Mumbai**