THE INCOME TAX APPELLATE TRIBUNAL
DELHIBENCH 'D', NEW DELHI

Before Dr. B. R. R. Kumar, Accountant Member
Sh. Yogesh Kumar US, Judicial Member

SA No. 89 to 93/Del/2023
(In ITA Nos. 406 to 410/Del/2023)
Asstt. Years: 2013-14 to 2016-17, 2020-21

AB Sciex Pte Ltd, Block 334, 46, Marsiling Industries Estate 30406, Singapore	Vs.	ACIT, Central Circle-International Taxation-1(1)(1), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AANCA1192P		

ITA Nos. 406 to 410/Del/2023
Asstt. Years: 2013-14 to 2016-17, 2020-21

AB Sciex Pte Ltd, Block 334, 46, Marsiling Industries Estate 30406, Singapore	Vs.	ACIT, Central Circle-International Taxation-1(1)(1), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AANCA1192P		

Assessee by : Sh. Ajay Vohra, Sr. Adv
Revenue by : Sh. Anshuman Pattnaik, CIT(DR)

Date of Hearing: 16.03.2023		**Date of Pronouncement: 17.03.2023**

ORDER

Per Bench

The present appeals have been filed by the assessee against the order ld AO dated 27.01.2023 for Assessment Years 2013-14 to 2016-17 and 2020-21 respectively.

2. The assessee has raised the following grounds of appeal in ITA No. 406/Del/2023 for AY 2013-14:-

"General Grounds

Ground 1*: On the facts and circumstances of the case and in law, the Ld. AO has erred in reopening the assessment under section 147 of the Act. The action of the Ld. AO is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the reassessment proceedings being illegal and without any basis.*

Ground 2*: On the facts and circumstances of the case and in law, the Ld. AO has erred in passing the final assessment order dated 27 January 2023 without considering the directions of the Hon'ble DRP dated 2 December 2022 as mandated by Section 144C(13) of the Act. Consequently, the final assessment order dated 27 January 2023 deserves to be quashed.*

Grounds with respect to allegation of constitution of Permanent Establishment ('PE') in India

Ground 3*: On the facts and circumstances of the case and in law, the Ld. AO as well as Hon'ble DRP have erred in assessing the total income of the Appellant under section 147 read with section 144C of the Act, for the AY 2013-14 at INR 2,09,26,235 as against the NIL returned income.*

Ground 4*: On the facts and circumstances of the case and in law, the Ld. AO has erred in completely ignoring the orders passed in favour of the Appellant by the Hon'ble Income Tax Appellate Tribunal (ITAT) in the Appellant's own case for AY 2017-18, AY 2018-19 and AY 2019-20, wherein the ITAT after careful examination of the facts of the case (which are identical to the facts of the year under consideration) held that" no fixed place PE and Agency PE of the Appellant is constituted in India - Violating the essential principles of judicial discipline.*

Ground 5*: In doing so the Ld. AO/ Hon'ble DRP has erred in passing the order solely based on surmises and conjectures by completely disregarding all submissions, agreements and documentary evidence(s) submitted by the Appellant in this regard, which are crucial for establishing the non-existence of PE in India and clearly show (amongst various other things) that:*

5.1 No fixed place PE is constituted in India as neither of employees have visited India during the relevant year nor is any inventory, warehouse or sales outlet maintained by DHR Holding India Private Limited (DHR India') on behalf of the Appellant in India and;

5.2 No agency PE is constituted in India as DHR India does not have any authority to conclude contracts on behalf of the Appellant and works on principal-to-principal relationship

Ground 6*: On the facts and in the circumstances of the case and in law, the Ld. AO as well as Hon'ble DRP have erred in holding that the Appellant has a fixed place PE and dependent agency PE in India*

Grounds with respect to attribution of profits to the alleged PE

***Ground 7**: The Ld. AO and the Hon'ble DRP grossly erred in law, in attributing profits to the alleged PE on an unrealistic and ad-hoc basis which are in complete violation of the various legal principles, applicable provisions of DTAA (Double Tax Avoidance Agreement) and international guidance set out in this regard.*

***Ground 8**: On the facts and circumstances of the case and in law, the Ld. AO erred in applying an ad-hoc approach and rejecting the arm's length principal even though the Rule 10 of the Act is not applicable.*

***Ground 9**: The Ld. AO and the Hon'ble DRP grossly erred in law in ignoring the jurisprudence of the Hon'ble Supreme Court in the case of DIT vs. Morgan Stanley [2007] 7 SCC / holding that once the AE is remunerated on arm's length basis, there should be no further attribution.*

***Ground 10**: On the facts and circumstances of the case, the Ld. AO/ Hon'ble DRP erred in attributing excessive profits to the alleged PE on an ad-hoc and arbitrary basis, by not considering commercial and economic factors governing the business of the Appellant and completely ignoring all submissions of the Appellant in this regard. In doing so, the Ld. AO erred in:*

10.1 Applying an ad-hoc methodology to attribute unreasonable profits to the alleged PE. In this regard, the AO erred in benchmarking the profits attributable to the alleged PE with the resale discounts agreed by the Appellant with its AE, DHR India, under a buy-sell distribution arrangement, which is a controlled transaction; 10.2 Ignoring the significantly higher level of functions performed, assets employed and risks assumed by DHR India under the distribution arrangement versus those alleged to have been performed by the PE, leading to excessive and unreasonable profits attribution.

***Ground 11**: On the facts and circumstances of the case, the Ld. AO/ Hon'ble DRP erred in summarily rejecting the contentions placed by the Appellant for a reasonable profit attribution, without appreciating the analysis filed by the Appellant during the course of proceedings. In doing so, the Ld. AO/ Hon'ble DRP erred in:*

11.1 Ignoring the third-party arrangement furnished by the Appellant that is comparable to the functions alleged to have been performed by the PE wherein much lower commission has been paid by the Appellant to a third party for such function; 11.2 Ignoring methodical benchmarking analysis furnished by the Appellant determining the profit attribution based on resale margins earned by independent distributors in uncontrolled transactions;

11.3 Ignoring various judicial precedence which showed that the profits already allocated to the alleged PE are much more than the attribution upheld to be arm's length in similar cases;

11.4 Ignoring the PE attribution study filed to show the methodical basis of any possible attribution

11.5 Erred in computing the percentage of profit attribution for the year under consideration.

***Ground 12**: On the facts and circumstances of the case, the Ld. AO/ Hon'ble DRP erred in disregarding the rule of consistency considering that the Ld. TPO has drawn no adverse inference for the international transactions undertaken by the Appellant and DHR India in AY 2015-16 and AY 2018-19, and the fact remains the same.*

***Ground 13**: On the facts and circumstances of the case and in law the Ld. AO has erred in levying the interest under section 234A & 234B of the Act.*

***Ground 14**: On the facts and in law, the Ld. AO erred on facts and in law in initiating penalty under section 271(1)(c) of the Act."*

3. At the outset, it is brought to our notice that the issue of existence of Agency PE/ Fixed Place PE stands adjudicated by the order of the Tribunal in the assessee's own case for AY 2017-18, 2018-19, 2019-20 and 2020-21.

4. The ld DRP upheld the draft order of the AO holding that the it shall not deviate from the view taken in the previous years on the impugned issue and do not find any ground for deviating from the previous year's directions. However, the panel has duly taken cognizance of the order of the ITAT and mentioned the same in their order.

5. For the sake of ready reference the order of the Tribunal in the case of the assessee for the AY 2017-18 in ITA No. 514/Del/2021 order dated 29.04.2022 is reproduced in its entirety:-

"***3.*** *The core issue arising in the appeal, as urged in ground no. 1 to 4, is whether the assessee has a Permanent Establishment (PE) in India. Of course, there are ancillary and incidental issues raised in other grounds, including attribution of profit to the PE, in case, it is held that the assessee has PE in India. However, at the outset, we will deal with the core issue as to whether the assessee has a PE in India.*

4. *Briefly the facts relevant for deciding the issue are, the assessee is a company incorporated in Singapore and is a tax resident of that country. As stated by the*

Assessing Officer, the assessee is engaged in the business of manufacturing and sale of scientific research instruments and peripheral. For the assessment year under dispute, the assessee had filed its return of income in India declaring nil income. In course of assessment proceeding, after calling for necessary details and examining them, the Assessing Office noticed that the products sold by assessee require maintenance, calibration, which involves servicing, repairing and supply of spares. Therefore, the assessee offers maintenance service to its customers worldwide, including India. From the details furnished, the Assessing Officer noticed that the assessee, during the year under consideration, had received revenue of Rs.8,96,73,757/- towards receipts from Annual Maintenance Contract (AMC). Since, the assessee did not offer any income in India, the Assessing Officer raised a query, as to why the receipts on account of AMC should not be brought to tax in India.

....

11. *Drawing our attention to the scope of services provided by DHR Holding India Ltd., learned counsel submitted, there is no material to show that the assessee is using the premises of DHR Holding India Pvt. Ltd. in any manner to constitute a fixed place PE. He submitted, when the assessee has sold goods to Indian customers from outside India and none of its employees have visited in India for any work, there cannot be any fixed place PE of the assessee in India. He submitted, DHR Holding India Pvt. Ltd. cannot also be treated as dependant agent PE as it has no authority to conclude any contract on behalf of the assessee. He submitted, the finding of the Assessing Officer that DHR Holding India Pvt. Ltd. habitually concludes contracts on behalf of the assessee has no basis at all. He submitted, no material has been brought on record by the Assessing Officer to demonstrate that the core activities of the assessee are being carried out in India. He submitted, the burden is entirely on the Assessing Officer to show that an agency relationship exists between the assessee and DHR Holding India Pvt. Ltd. He submitted, DHR Holding India Pvt. Ltd. is not dependant on assessee and has its own independent business. He submitted, even assuming that DHR Holding India Pvt. Ltd. is an agent of the assessee but it has to be proved on record that such agent has authority to conclude contract on behalf of the assessee. He submitted, the alleged warehouse as mentioned by the Assessing Officer is not belonging to the assessee but belongs to DHR Holding India Pvt. Ltd. for its own inventory.*

12. *Without prejudice, he submitted, the conclusion of the Assessing Officer is based entirely on the statement recorded from two employees of a customer of assessee, viz., M/s. Arbro Pharmaceuticals Pvt. Ltd. He submitted, those employees are not employees of the assessee or DHR Holding India Pvt. Ltd. Therefore, their statements, if at all adverse to the assessee, would not have any relevance. He submitted, in any case of the matter, the statements recorded from the concerned employees were neither confronted to the assessee nor any opportunity of cross examining them was offered to the assessee. Thus, he submitted, the Assessing Officer has not properly understood the legal relationship between the parties. He submitted, since the assessee did not have either fixed place PE or dependant agent PE in India, no part of its income is taxable in India. Therefore, attribution of profit to the PE in such scenario will not arise. In support of his contention, learned counsel relied upon the following decisions:*

- *(i) ADIT Vs. M/s. E Funds IT Solution Inc. (Civil Appeal No.6082 of 2015)*
- *(ii) DCIT Vs. Lubrizol Corporation, USA (2017) 83 taxmann.com 13 (Mum. - Trib.)*

13. *Strongly relying upon the observations of Assessing Officer and learned DRP, learned Departmental Representative submitted, the terms of agreements between assessee and DHR Holding India Pvt. Ltd., coupled with the statement recorded from*

two of the employees of a customer of the assessee in India clearly demonstrate that DHR India is carrying out functions of an agent of the assessee for sale of scientific equipments and spare parts manufactured by the assessee. Drawing our attention to the statement recorded under section 131 of the Act, he submitted, the Indian customers are negotiating with DHR India not only for purchases but post sales services. Further, drawing our attention to the observations of the Assessing Officer, he submitted, the assessee did not furnish documentary evidences to demonstrate that Indian customers placed orders directly on assessee. As regards the claim of the assessee that its employees never visited India, learned Departmental Representative submitted, since DHR Holding India Pvt. Ltd. provides all kinds of services, there is no need for the employees of assessee to visit India. Thus, he submitted, the Assessing Officer has rightly held that assessee has PE in India, both, unders Article 5(8) and 5(9) of India – Singapore DTAA.

14. *We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. Undisputedly, the Assessing Officer has treated DHR Holding India Pvt. Ltd., an associated enterprise of the assessee based in India, as the fixed place PE, agency PE and dependant agent PE under Article 5(1), 5(8) and 5(9) of India – Singapore DTAA. The basic facts based on which the Assessing Officer has come to such a conclusion are certain clauses in the agreements between the assessee and the DHR Holding India Pvt. Ltd. and mainly the statement recorded from two employees of one of assessee's Indian customers M/s Arbro Pharmaceuticals Pvt. Ltd. As discussed earlier and accepted by the Assessing Officer, the assessee is a manufacturer and seller of scientific equipments, spare parts and peripherals and sales them globally, including in India. The assessee has asserted from the stage of assessment proceeding itself that these sales made to Indian customers are effected directly from Singapore and no part of such sale was carried out in India. It has been submitted, in respect of such direct sales, the assessee had entered into AMC with the Indian customers and all AMC and warranty related services are sub-contracted to DHR Holding India Pvt. Ltd.*

15. *The aforesaid claim of the assessee carries some strength in view of the sample copy of invoices placed in paper-book. On perusal of such invoices, it becomes very much clear that sales to Indian customers have been directly made by the assessee from Singapore. It is also evident, in respect of such sales the assessee has also entered into AMC with Indian customers. It is the contention of learned counsel for the assessee that all AMC and warranty related work has been sub-contracted to DHR Holding India Pvt. Ltd. As stated by the Assessing Officer, the assessee had entered into three separate agreements with DHR Holding India Ltd. The first agreement between the assessee and DHR Holding India Pvt. Ltd. is Sales Commission Agreement. On a perusal of this agreement placed at page 13 of the paper-book, it is noticed that the assessee has appointed DHR Holding India Pvt. Ltd. on non-exclusive basis for providing services related to sales, installation, warranty for the products and spare parts sold directly by the assessee to customers in India. Clause 1.1 of the agreement says that the assessee may solicit or, upon an order being placed by a customer, take orders requiring delivery of products, whereas, the assessee designates DHR India Pvt. Ltd. as an authorized warranty-related service provider. Clause 1.2 stipulates the scope of services as per Exhibit - A to the agreement. The scope of services under Exhibit - A are as under:*

"EXHIBIT A

SCOPE OF SERVICES

- *Interaction and liaising in relation to orders from customers on behalf of AB Singapore.*

- *Other incidental activities like tracking delivery schedules, etc. for the customers based on directions provided by the overseas entities.*
- *Installation of products supplied by overseas entity to customers in India.*
- *Services in relation to warranty claims from customers, etc."*

16. *Clause 1.3 of the Agreement provides that DHR Holding India Pvt. Ltd. in a commercially reasonable manner, provide all customers necessary assistance and services during the warranty period, to the extent required under the terms of the relevant product warranty, irrespective of the fact, whether the product was purchased directly from the assessee or DHR Holding India Pvt. Ltd. This clause also provides that for performing installation and warranty related services, DHR Holding India Pvt. Ltd. shall be remunerated in the terms provided under Exhibit- B. Exhibit- B stipulates commission for sales related activities at 6% and commission towards installation and first year warranty of instruments at 3%. Clause 2 of the agreement provides that DHR India shall intimate the order from customer to the assessee and the assessee shall make all efforts to ship the products by the delivery date requested by DHR India and shall indemnify and hold DHR India harmless for any damages incurred by DHR India as a result delays in shipment that are caused by the assessee. Clause 2.2 says, the assessee shall arrange for and bear the cost of carriage/freight and insurance of the product and clearing the goods for export. Clause 3.1 says, after delivery of the products, DHR India or its designee shall inspect the product and notify the assessee of any damage, tampering, shortage or other discrepancy between the products and shipping documents. Clause 4.1 says, the assessee reserves the right to sell or lease directly any product for post warranty services contract for ultimate use within the territory, regardless of whether the customer placing such order is located within or outside of the territory. Clause 5.1 provides, in respect of any direct sales by the assessee within the territory, the assessee shall pay DHR India a commission applied against the net sales price of the product towards remuneration for the assistance rendered and to be rendered, and the business goodwill developed by DHR India and such commission shall be payable by the assessee to DHR India upon the issuance of the invoices for the products shipped to the customers. Clause 11 of the Treaty say, DHR India shall report all warranty claims made in respect of all products to the assessee. In case of providing any spares under warranty/maintenance, DHR India will provide for the same out of its own stock and DHR India shall have the right to get a replacement product/part free of cost from the assessee or cross charge the cost of the product/part to the assessee.*

17. *Thus, the Sales Commission Agreement not only defines the scope of services of DHR India but also makes it clear that DHR India will have to provide the services stipulated under the agreement, regardless, whether the product was purchased from assessee or from DHR India. The scope of services under Exhibit – A to the agreement indicates that the DHR India is required to do liasoning in relation to orders from customers on behalf of the assessee. It also has to do other incidental activities like, tracking of delivery schedule for the customers. It also has to do the installation of products and provide warranty services. Thus, the scope of services do not envisage or grant any authority to DHR India to conclude any contract of sale on behalf of the assessee.*

18. *The next agreement which needs to be seen is Distribution Agreement. On perusal of a copy of the agreement placed at page 24 of the paper-book, it is to be seen that under the agreement, the assessee has appointed DHR India as its non-exclusive distributor for distribution of related products and its spare parts to customers within the territory. Clause 1.1 of the agreement provides that the Products shall include all such products and its spare parts which the assessee may decide to distribute under*

the agreement and which is to be purchased by DHR India either from the assessee or from third party for resale. This Article further makes it clear that notwithstanding the agreement of appointment of DHR India, the assessee reserves the right to solicit, or upon the request of a customer, take orders requiring delivery of products either within or outside of the territory. Clause 1.2 makes it clear that DHR India shall make all reasonable efforts to distribute or sell all products on its own account. Clause 1.3 provides that the assessee shall supply DHR India with all technical data and other product information customarily made available to facilitate sales of the products. Clause 1.5 provides, DHR India shall maintain an inventory of products sufficient to meet, in its business judgment, the forecast sales for each product within the territory. Clause 2.2 provides that assessee shall arrange for and bear the cost of carriage/freight and insurance of the product, and clearing the goods for export. However, title to any product, possession and the risk of loss shall pass from assessee to DHR India once the product is delivered to the carrier contracted by the assessee to deliver the product. Clause 2.3 says, DHR India shall be the importer of record in respect of products purchased by and imported into the territory by DHR India. Further, DHR India shall be responsible for all actions necessary to obtain clearance to import all products into the territory. Clause 2.5 confers right to DHR India to cancel or reschedule any of its purchase orders for the products. However, such cancellation or rescheduling has to be in terms with the agreement. Clause 2.6 provides that during the term of this agreement, DHR India shall be entitled to purchase products from the assessee, subject to, resale or distribution discount. Clause 3 of the agreement provides for prices of products and terms for distribution activities as well as discounts to be provided thereon.

19. *Thus, a reading of the Distribution Agreement as a whole, makes it clear that the purchase of products by the DHR from assessee for the purpose of resale in India is on principal to principal basis and no agency relationship is there between the parties. This fact is further clarified from Clause 11.1 which provides that DHR India shall at all times act only as an independent contractor, and never as a legal representative of the assessee. It further provides that nothing in this agreement shall be construed to give either party the power to direct or control the daily activities of the other party, or to allow DHR India to negotiate or conclude contracts on behalf of the assessee, or to constitute the parties as principal and agent, employer and employee, franchisor and franchisee, partners, joint venture partners, co-owners, or otherwise as participants in a joint undertaking. It also makes it clear that DHR India has no right or authority to assume or create any obligation of any kind, express or implied, on behalf of the assessee to any customer or to any other person and/or to waive any right, interest, or claim that the assessee may have against any customer, or other person. Clause 11.2 makes it clear that DHR India shall indemnify the assessee against any claim made by any party resulting from DHR India's acts, omissions, or misrepresentations, regardless of the form of action. Thus, Distribution Agreement does not leave any scope to say that DHR India as a distributor of products, manufactured and sold by the assessee, is acting as an agent.*

20. *The last agreement which needs to be examined is Marketing Support Services Agreement. As per the terms of this agreement DHR India is required to provide assessee and other group companies the following marketing support services:*

- *Identifying market opportunities for AB Singapore*
- *Identifying potential customers and marketing of the products for AB Singapore*
- *Providing demonstration of the products of the overseas entities to prospective customers*

- *Conducting seminars and exhibitions for providing information (pertaining to products of overseas entities) to customers*
- *Pass on all enquiries to overseas entities for comments and quotations;*
- *Receipt of clarifications and follow-up with the potential customers*
- *Provide information and product training to the customers*
- *Advertising, publicity and public relation activities through third parties;*
- *Market surveys and studies to standardize and improve the performance of the products of overseas entities;*
- *In conjunction with tire personnel of overseas entities, prepare an annual marketing plan for the territory:*
- *Any other incidental marketing activities.*
- *Interaction with the customers for providing any clarifications from time to time*
- *Receipt of complaints from customers in relation to issues faced on the products sold'" directly by the overseas entities*
- *Ensure timely payment by the customer against deliveries made by overseas entities from time to time*
- *On overseas's entities request, act as a transmission channel to receive and transmit copies of any documents:*
- *Any other incidental activities in relation to servicing that may be required by the customers;*

21. *For providing such services, the assessee is to be remunerated at cost plus markup at arm's length basis. Clause 4 of this agreement defines the status of DHR India as an independent contractor which does not have and cannot represent itself as having any authority to enter into any obligation on behalf of the assessee or to bind the assessee contractually in any way. It also stipulates, DHR India has no authority to negotiate or conclude or procure any contract or order on behalf of the assessee or any of its group companies or otherwise bind the assessee or any other group companies in any way in this regard. It also provides that DHR India shall conduct or deal with any potential or existing customers in a manner that may lead to the belief that DHR India has the authority to conclude the terms of the contract or to bind the assessee in any manner. It also provides that DHR India may take up/provide such services to any other parties if such arrangement does not prejudice the assessee or its group associates in any manner. Thus, even the Marketing Support Agreement makes it clear that DHR India does not have any authority or power to conclude contracts or enter into any negotiations with the customers on behalf of the assessee.*

22. *Thus, the three sets of agreements read together or even on standalone basis do not in any manner give impression that DHR India is habitually concluding contract on behalf of the assessee so as to make it a PE under Article 5(8). There is nothing on record, even, to suggest that DHR India is acting as an agent wholly and exclusively for the assessee and not in regular course of its business to make it a PE under Article 5(9) of the Treaty. As it appears, the sole basis on which the Assessing Officer has treated DHR India as a fixed place PE and dependant agent PE is the statement recorded from two of the employees of an Indian customer of the assessee. However, it is the assertion of the assessee from the very beginning that the statements recorded of these persons were neither confronted, nor any opportunity of cross examination was*

granted. This assertion has not been controverted by the departmental authorities. Therefore, in our view, the Assessing Officer could not have utilized such adverse material to the detriment of the assessee without giving any opportunity to the assessee to cross examine. In any case of the matter, the persons whose statements have been utilized by the Assessing Officer are neither employees of the assessee nor DHR India. They have only stated certain facts without being aware of the legal relationship and real nature of the transaction between the assessee and DHR India.

23. *Therefore, in our view, basis such statement, it will not be safe to conclude that the assessee either has a fixed place PE or dependant agent PE. Further, the allegation of the Assessing Officer that the assessee utilizes the premises of DHR India as a warehouse to stock its goods and sales outlet is not borne out from the materials on record. The facts on record clearly reveal that the assessee's employees have never visited India. Direct sales to Indian customers were made from Singapore through shipment. The sales effected by DHR India are on its own independent status. Therefore, the products purchased by DHR India under the Distribution Agreement and kept in its inventory cannot be considered to be the products belonging to the assessee, as, they are sales transaction on principal to principal basis for resale by DHR India to Indian customers. Further, clause 11.1 and 11.2 of Sales Commission Agreement makes it clear that any replacement of products/spares under warranty/maintenance has to be provided by DHR India out of its own inventory and DHR India will have the right to either get a replacement from assessee or cross charge the cost to the assessee. Therefore, the terms of the agreements make it clear that assessee does not have a warehouse or sales outlet in India to constitute a fixed place PE in India under Article 5(1) of the Treaty. Thus, in our view, the conclusion drawn by the Assessing Officer that the assessee has fixed place PE or dependant agent PE is not borne out from any cogent material/evidence brought on record.*

24. *Unfortunately, learned DRP has not properly appreciated the facts and simply adopted the version of the Assessing Officer. There is nothing on record to suggest that the assessee is utilizing the premises of DHR Holding India Pvt. Ltd. either as warehouse for storage of its products or as a sales outlet for soliciting/procuring orders from Indian customers. Further, there is no cogent material on record to demonstrate that DHR Holding India Pvt. Ltd. habitually exercises authority to conclude contracts on behalf of the assessee or maintains stock of goods or merchandise from which it regularly deliver goods to Indian customers on behalf of the assessee or it habitually secures orders in India wholly and exclusively for the assessee. Thus, none of the ingredients of Article 5(8) are satisfied. The terms of the agreement as well as the conduct of parties do not make out a case for the Revenue that the premises of DHR India would constitute either a fixed place PE or agency PE.*

25. *Further, the revenue authorities have not brought any material on record to demonstrate that the activities of DHR India are wholly devoted on behalf of the assessee and as such it does not have any independent status and was not acting in the ordinary course of its business. We have noted, from the stage of assessment proceeding itself, the assessee has consistently urged that DHR India is having its own independent status and business and its activities are not wholly devoted to the assessee. However, the departmental authorities have rejected the claim of the assessee without bringing any contrary material on record to demonstrate that the activities of DHR India are wholly and exclusively devoted to the assessee. That being the factual position, it cannot be said that DHR India constitutes dependant agent PE of the assessee. Thus, in our view, conditions of Article 5(9) of India – Singapore DTAA are not fulfilled.*

26. *At this stage, it is necessary to observe, in case of E Funds IT Solution Inc. (supra), the Hon'ble Supreme Court has held, the burden of proving the fact that a*

foreign entity has a PE in India is on the Revenue. In the said decision, the Hon'ble Supreme Court has further elucidated that for constituting a fixed place PE, there must exist a fixed place of business in India which is at the disposal of the non-resident entity through which it carries on its own business. In the facts of the present case, it is not disputed that there is no direct presence of the assessee in India. It is an admitted factual position that none of the employees of the assessee company ever visited India in connection with assessee's business. Whatever sales of products have been effected to Indian customers is directly from Singapore. Thus, applying the ratio laid down by the Hon'ble Supreme Court, as aforesaid, it has to be held that there cannot be any fixed place PE of the assessee in India. This is so because the revenue authorities have failed to discharge their initial burden of proving such fact.

27. *As regards DHR India constituting the dependant agent PE, we have already deliberated on the issue and have held that no material has been brought by the departmental authorities to demonstrate that the Indian entity habitually exercises its authority to conclude contract etc. in terms of Article 5(8) or its activities are wholly devoted on behalf of the assessee. Thus, there cannot be any PE under Article 5(8) and 5(9) of the Indian – Singapore Tax Treaty. Thus, applying the legal principle to the facts emerging on record, we hold that the assessee does not have any PE in India. Therefore, in absence of PE, the business profits of the assessee cannot be taxed in India. Accordingly, the additions made by way of attribution of profit to the PE in India deserve to be deleted. Accordingly, we do so.*

28. *For the sake of completeness, we must observe, in course of hearing, learned counsel for the assessee had taken an alternative contention to the effect that, even assuming that assessee has a PE in India, no further attribution of profit can be made to the PE as the transaction between the assessee and DHR India was accepted to be at arm's length, both, in case of assessee and DHR India. For such proposition, he relied upon the following decisions:*

1. *DIT vs. Morgan Stanley & Co. [2007] 162 Taxman 165 (SC)*
2. *Honda Motor Co. Ltd., Japan Vs. ADIT (Civil Appeal No. 2833 of 2018, dated 14.03.2018)*
3. *Ricardo UK Ltd. Vs. DCIT (ITA No.4909/Del.2018 and Ors., dated 17.02.2021)*

29. *In reply, learned Departmental Representative submitted, no reference was made to the TPO for determining the ALP of the transaction between assessee and DHR India.*

30. *Having considered rival submissions, in principle, we agree with learned counsel for the assessee that in a particular case, where the transaction between the Indian entity and its overseas AE are found to be at arm's length, no further attribution of profit can be made to the AE. Since, we have already held that the assessee does not have a PE in India, we leave the issue at that.*

31. *In view of our aforesaid decision, the other aspect relating to attribution of profit to PE having become academic does not require adjudication. Thus, in sum and substance, ground no. 1, 2, 3 and 4 are allowed and rest of the grounds, having rendered academic, are not required to be adjudicated insofar as the present appeal is concerned. However, the issues raised in these grounds are left upon for adjudication, if need arises in future."*

7. Since the issues stands adjudicated by the Tribunal, in the absence of any change in the material facts and legal

proposition, we hold that the additions made by the Revenue cannot be sustained. In the results, appeals filed by the assessee are allowed.

8. Given that, the assessee got relief on the quantum proceedings, the stay petitions are being dismissed as infructuous.

9. Order Pronounced in the Open Court on 17/03/2023.

Sd/-

(Yogesh Kumar US)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 17/03/2023
Ajay Kumar Keot, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR