

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

Before Dr. B. R. R. Kumar, Accountant Member

Ms. Astha Chandra, Judicial member

ITA No. 1746/Del/2023 : Asstt. Year: 2017-18

ITA No. 1747/Del/2023 : Asstt. Year: 2018-19

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| ACIT, Circle-2(2)(1), International Taxation, New Delhi-110001 | Vs | Michelin ROH Co. Ltd., No. 33/4, Rama 9 Road, Huay Kwang, Bangkok, Kuay Kwang, Sub-Deistrict, Thailand-999999 |
| (APPELLANT) | | (RESPONDENT) |
| PAN No. AAICM8662R | | |

Assessee by : Sh. Nikhil Tiwari, CA

Revenue by : Sh. Sanjay Kumar, Sr. DR

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| Date of Hearing: 18.12.2023 |
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| Date of Pronouncement: 19.12.2023 |
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by Revenue against the orders of Id. CIT(A)-43, New Delhi dated 14.03.2023.

2. In ITA No. 1746/Del/2023, following grounds have been raised by the Revenue:

"1. Ground 1: That the Learned Assistant Commissioner of Income-Tax, International Taxation, Circle 2(2)(1), New Delhi ("the Learned AO") has erred both in law and on facts of the case while assessing the income of the Appellant for the relevant assessment year at INR 6,76,88,810 as against NIL returned income as per India-Thailand Double tax avoidance agreement ("DTAA").

2. Ground 2: That, the Learned AO has erred both in law and on the facts of the case in making an addition of INR 6,76,88,810 by classifying receipts from engineering

services as Fees for Technical Services as per the India-Thailand DTAA, even though the Ld. AO admitted that India Thailand DTAA doesn't have a clause specific to FTS.

3. Ground 3: That, the Learned AO has erred both in law and on the facts of the case in making an addition of INR 6,76,88,810 by classifying receipts from engineering services as Other Income as defined under Article 22 of India-Thailand DTAA by relying on the AAR Ruling in case of Lanka Hydraulic Institute Limited (2011) 199 Taxman 232 (AAR).

3.1. Ground 3.1: That, the Learned AO erred in not appreciating that in the absence of specific article dealing with Fee for technical Services in India-Thailand DTAA, income earned by the Appellant ought to be classified as Business Income as per Article 7 of India-Thailand DTAA and in the absence of permanent establishment (PE) of the Appellant in India, the same is not taxable.

3.2. Ground 3.2: Without prejudice to above, the Learned AO has erred in law in concluding that the income earned by the Appellant is taxable under Article 22, without appreciating that Article 22 of the India-Thailand DTAA provides for taxing income in country of residence, i.e. Thailand.

4. Ground 4: That on facts and circumstances of the case, the Learned AO erred in charging interest under section 234A, 234B, 234C and 234D of the Act, however, at the same time inadvertently did not compute tax on the assessed income in the computation sheet attached to the assessment order.

5. Ground 6: That on facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 270A of the Act."

3. In ITA No. 1747/Del/2023, following grounds have been raised by the Revenue:

"1. Ground No. 1: General

1.1 That the Ld. AO has erred both in law and on facts of the case while assessing the income of the Appellant for the relevant assessment year at INR 6,82,29,550 as against returned income of INR 2,704 under India-Thailand Double Tax Avoidance Agreement ("DTAA" or "tax treaty").

2. Ground No. 2: Classification of receipts from engineering services as Fees for Technical Services ("FTS")/ Other Income under India-Thailand DTAA

2.1 That the Ld. AO has erred both in law and on the facts of the case in making an addition of INR 6,82,26,850 by classifying receipts from engineering services as Fees for Technical Services under India-Thailand DTAA, even though the Ld. AO admitted that India-Thailand DTAA doesn't have a clause specific of FTS;

2.2 That, the Ld. AO has erred both in law and on the facts of the case in making an addition of INR 6,82,26,850 by classifying receipts from engineering services as Other Income as defined under Article 22 of India-Thailand DTAA by relying on the AAR Ruling in the case of Lanka Hydraulic Institute Limited (2011) 199 Taxman 232 (AAR);

2.3 That, the Ld. AO has erred in not appreciating that in the absence of specific article dealing with FTS in India-Thailand DTAA, income earned by the Appellant ought to be classified as Business Income as per Article 7 of India-Thailand DTAA and in the absence of Permanent Establishment ('PE') of the Appellant in India, the same is not taxable.

2.4 Without prejudice to the above, the Ld. AO has erred in law in concluding that the income earned by the Appellant is taxable under Article 22 of India-Thailand DTAA without appreciating the fact that Article 22 provides for taxing income in country of residence i.e. Thailand.

3. **Ground 3: Others**

3.1 That on facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under Section 270A of the Act for mis-reporting of income."

4. Since, the issue involved in both the appeals is similar, they were heard together and being adjudicated by a common order.

Fees for Technical Services:

5. The assessee is a company incorporated in Thailand and engaged in the business of providing various services such as general administration, business planning & coordination, engineering services, product research & development etc. The Assessing Officer proposed to treat services rendered in India should be treated as Fee for Technical Services (FTS) and charged to tax accordingly.

6. The assessee filed a detailed response, wherein, the assessee contended the following:

- The assessee being a tax resident of Thailand is entitled to be governed under the provisions of the Act or India-Thailand Double Tax Avoidance Agreement ("DTAA"), whichever is more beneficial.
- Under the India-Thailand DTAA, the article with respect to taxability of Fee for technical Services ("FTS") is absent.
- Further, the assessee being in the business of rendering engineering services, the same is chargeable to tax as

Business Income as per Article 7 read with Article 5 of India-Thailand DTAA.

- Since, the assessee does not have a Permanent Establishment in India as per Article 5 of India-Thailand DTAA, in income earned by the assessee is not chargeable to tax as per Article 7 read with Article 5 of India-Thailand DTAA.

7. At the outset, it was brought to our notice by both the parties that this issue has been squarely covered by the order of the Co-ordinate Bench of ITAT in assessee's own case in ITA No. 8010/Del/2019 for A.Y. 2016-17 order dated 27.05.2022. The relevant para of the said order is reproduced hereunder:

"4. Upon assessee's appeal, Id. CIT (A) noted the assessee's plea that the entire receipts are clearly in the nature of business income of the assessee. It was stated that as the income is business income, the same would be taxed in accordance with Article 7 and would not fall under Article 22. The assessee has also furnished a number of decisions to support his contention. Id. CIT (A) accepted the assessee's submission and held as under:-

"Article 22

OTHER INCOME

Items of income of a resident of a Contracting State, wherever arising, not expressly dealt with in the foregoing Articles may be taxed in that State. Such items of income may also be taxed in the Contracting State where the income arises.

5.2.1 It is clear that only the income which is not expressly dealt with in any of the Articles of the Treaty is required to be taxed under Article 22. In the present case, the assessee provides general, administrative,

business planning and coordination services to its Indian subsidiary and charges them to the services so provided. The financial statement of the assessee also shows that income of the assessee is in fact, totally on account of such services. It is, therefore, clear that the income from the services provided to the Indian entity is business income of the assessee. The argument of the AO, that it cannot be classified under Article 7 as business income since there is no PE in India, is also incorrect. The Article 7 per se, lays down the taxability of business income in respect of the contracting states. The article states that business income will be taxed in the contracting state of which the taxpayer is a resident except for cases where the business operates through a PE in the other contracting state. It is seen that the reference, in fact, to the PE for the purpose of determining the taxability in the other contracting state. The substantive part of Article 7 therefore, deals with any and every type of business income. The assessee has rendered services and consideration has been received for the same. In the present case, the main business of the assessee is to provide such service. Therefore, income clearly falls under Article 7. The Hon'ble Madras High Court in the case of Bangkok Glass Industry Co. Ltd. while dealing with Article 22 of the India Thailand Treaty has observed as under:-

" 20. As far as the order in art. 22 is concerned, we do not find any justifiable ground to uphold this portion of the order after the discussion on the extent of Income falling for consideration under royalty as defined under art. 12 and the amount paid as towards technical services falling for consideration under art. 7. Since the said income does not fall as miscellaneous income, the same cannot be brought under art. 22 ..."

5.2.2 It is clear that the aforesaid judgement is clearly applicable to the assessee's case. In the absence of article on FTS, the consideration for service which is business income is automatically taxed in accordance with Article 7, which may result in no taxability in the Indian jurisdiction in the absence of a PE, which is the case of the

assessee. However, this clearly implies that the income is covered under Article 7. Therefore, Article 22 has no application."

5. Against the above order, the Revenue has come up in appeal before us.

6. We have heard the Id. DR for the Revenue and perused the record. None appeared on behalf of the assessee. Upon careful consideration, we do not find any infirmity in the order of Id. CIT (A). The reasoning given by Id. CIT (A) and the reliance upon Hon'ble Madras High Court decision in germane and support the case of the assessee. Id. DR for the Revenue could not point out any fault in the Id. CIT (A)'s order. Hence, we agree with the view expressed by Id. CIT (A).

7. In this regard, following case laws duly support the above proposition, which have been relied upon by the assessee before the Revenue authorities :-

"Hon'ble Madras High Court ("HC") in the case of Bangkok Glass Industry Co. Ltd. [2013] 34 taxmann.com 77

In the give case, the assessee, a non-resident company of Thailand, entered into technical assistance know-how agreement with MBDL, in India for transfer of glass technology know-how. The assessee received technical know-how fees for five years, which was treated as not taxable as per article 12 of DTAA between India and Thailand.

The Assessing Officer took a view that what was transferred was sharing of knowledge and not know-how, and therefore, consideration received was not covered by definition of royalty under article 12 of DTAA. He also opined that since there was no direct nexus between the income and activities of business of the

assessee, it could also not be treated as business profit under article 7. Therefore, he held that consideration could be taxed only where the income arose under the residual clause i.e. article 22 of DTAA. Thus, the income received by the assessee was held to be taxable in India under sections 9(1)(vii) and 115(a)(iii) at 40 per cent of gross amount. The Commissioner (Appeals) held part amount to be taxable as royalty under article 12 and remaining amount representing additional attendance fee was held taxable under article 7, subject to the condition that assessee had a permanent establishment in India. On appeal, the Tribunal held that the portion of fees for technical services was not taxable under article 7 but under article 22, as per section 9(1)(vii). On further appeal, the High Court set aside the order of the Tribunal related to Article 22. The relevant extract of the ruling has been reproduced below:

".... 20. As far as the order in art. 22 is concerned, we do not find any justifiable ground to uphold this portion of the order after the discussion on the extent of income falling for consideration under royalty as defined under art. 12 and the amount paid as towards technical services falling for consideration under art. 7. Since the said income does not fall as miscellaneous income, the same cannot be brought under art. 22 ..."

*Hon'ble Delhi Tribunal in the case of Paradigm Geophysical Pty. Ltd.
[2008] 25 SOT 94*

The Hon'ble Delhi Tribunal while ruling in the case held that where the business profits of the non-resident include items of income for which specific or separate provisions have been made in other articles of the tax treaty, then those provisions would apply to the items. However, in case it is found that those provisions are not

applicable then the items of income would have to be considered in Article 7.

The relevant extract of the judgement has been reproduced below:

"... It was also contended by the revenue that if article 12(3)(g) of the DTAA was not applicable then one had to go back to the domestic law, namely, the Act and tax; the receipt as fees for technical services within the meaning of section 9(1)(vii)(b) read with Explanation 2 there under. What article 7(7) seems to convey is that where the business profits of the non-resident include items of income for which specific or separate provisions have been made in other articles of the treaty, then those provisions would apply to those items. Per contra, if it is found that those provisions are not applicable to those items of income, then the logical result would be that those items of income would remain in article 7 and would not go out of the same. Such items of income which do not fall under any other provision of the double tax treaty, would continue to be viewed as business profits covered by article 7. Fees for technical services is essentially business profit, since the rendering of such services is the business of the non-resident. In order to take out an item of income from the business profits, it is necessary under article 7(7) that there should be some other provision in the treaty dealing specifically with the item of income sought to be taken out from the business profits. If there is no other provision in the treaty or if the provision made in the treaty is not found applicable or to cover the item of income sought to be taken out from the business profits, for whatever reason, then it follows that the particular item of income should continue to remain under article 7..."

Hon'ble Delhi Tribunal in the case of Bharti Airtel Ltd. [2016] 67 taxmann.com 223

The Hon'ble Delhi Tribunal while deciding the case opined that where there is no FTS clause available in the treaty with a country, then the income in question would be assessable as business income and it can be taxed in India only if there is a permanent establishment in India and the income is attributable to activities or functions performed by such permanent establishment.

The relevant extract of the judgement has been reproduced below:

"41. The next aspect of this issue, which is raised as Ground No. 8 in the Department's Appeal is that, when the treaties do not contain FTS clause, what is the impact on taxability. Wherever FTS clause is not available in the treaty with a country, then the income in question would be assessable as business income and it can be brought to tax in India, only if the FTO has the permanent establishment in India and if the earning of income is attributable to activities or functions performed by such permanent establishment. This view is supported by the decision of the Coordinate Bench.

.....

44. In view of the above reasons, we hold that wherever under the DTAA's. Make available clause is found, then as there is no imparting, the payment in question is not 'FTS' under the Treaty and when there is no 'FTS' clause in the treaties, the payment falls under Article 7 of the Treaty and is business income."

8. The aforesaid expositions are fully applicable here in the years before us. The assessee company has no Permanent Establishment (PE) in India. The income which has been earned in this case in absence of F.T.S. clause in DTAA would fall as business income. Their nature would

not change to be that of other income. Hence, the same cannot be taxed in India in absence of a PE.

9. In the result, both the appeals of the Revenue are dismissed.

Order Pronounced in the Open Court on 19/12/2023.

Sd/-

**(Astha Chandra)
Judicial Member**

Sd/-

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

Dated: 19/12/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR