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

SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 1492/MUM/2022
(Assessment Year: 2018-19)

Swiss Re Asia Pte Ltd.,
C/O Ernst and Young LLP,
14th Floor, The Ruby, 29,
Senapati Bapat Marg,
Dadar (West), Mumbai - 400028
[PAN: AAXCS8346P] ..... **Appellant**

Deputy Commissioner of Income Tax (International Taxation), Circle – 4(2)(2), Mumbai,
16th Floor, Room No. 1624,
Air India Building, Nariman Point,
Mumbai - 400021 ..... **Respondent**

Vs

Appearance

For the Appellant/Assessee	:	Shri Percy Pardiwala Ms. Jasmin Amalsadvala
For the Respondent/Department	:	Shri Ashok Kumar Ambastha

Date

Conclusion of hearing	:	20.10.2023
Pronouncement of order	:	17.01.2024

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. The present appeal is directed against the Final Assessment Order dated, 27/04/2022, passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'], as per directions, dated 30/03/2022, issued by the CIT (Dispute Resolution Panel-2), Mumbai-2 (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act pertaining to the Assessment Year 2018-19.

2. The Appellant has raised following grounds of appeal:

1. "Ground 1

The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in proposing to assess the total income of the Appellant at Rs 700,472,416, as against NIL reported by the Appellant in its return of income.

2. Ground 2

The learned AO has, on the facts and circumstances of the case and in law, erred in holding that in relation to the reinsurance premium amounting to INR 2,366,486,719 earned by the Appellant from its Indian cedents, the Appellant has a business connection in India as per the provisions of section 9(1)(i) of the Act and a Permanent Establishment (PE) in India as per Article 5 of the India-Singapore tax treaty (IS treaty)

In this regard, the learned AO has additionally inter alia erred on the following grounds:

2.1 The learned AO has made erroneous inferences in relation to the facts of the Appellant and consequently erred in holding that Swiss Reinsurance Company Ltd, India Branch (SRIB) and Swiss Reinsurance Global Business Solutions India Private Limited (SRGBS) constitute Fixed Place PE, Service PE and Agency PE of the Appellant in India under the IS treaty.

2.2 The learned AO has erred in holding that the third party Indian cedents to be the agents of the Appellant in India.

3. Ground 3

The learned AO has, on the facts and circumstances of the case and in law, erred in holding that the Appellant has a business connection in India as per the provisions of section 9(1)(i) of the Act and PE in India as per Article 5 of the IS treaty in relation to the retrocession premium amounting to INR 9,487,303,929 earned by the Appellant from SRIB.

In this regard, the learned AO has additionally inter alia erred on the following grounds:

3.1 The learned AO has made erroneous inferences in relation to the facts of the Appellant and consequently, erred in holding that SRIB and SRGBS constitute Fixed Place PE, Service PE and Agency PE of the Appellant in India.

3.2 The learned AO has failed to consider that the facts pertaining to the retrocession premium and reinsurance premium are distinct from each other. Accordingly, the AO has erred in not providing separate reasoning/ rationale, as to why the Appellant has a business connection in India as per the provisions of section 9(1)(i) of the Act and a PE in India as per Article 5 of the IS treaty in respect of its retrocession premium.

4. Ground 4

Without prejudice to Grounds of appeal No. 2 and 3, the learned AO has, on the facts and circumstances of the case and in law, further erred in:

i) estimating 10 percent of the gross reinsurance and retrocession premium receipts attributable to the Indian operations to be the profit generally made by a reinsurance company in India; and

ii) estimating 50 percent of the profit determined above to be attributable to the Appellant in India.

5. Ground 5

The learned AO has, on the facts and circumstances of the case and in law, erred in holding that the income earned by the Appellant from rendering of various support services to SRIB amounting to INR 50,842,456 and to SRGBS amounting to INR 56,940,428, are taxable in India under Article 12 of the IS treaty.

6. Ground 6

The learned AO has, on the facts and circumstances of the case and in law, erred in levying interest under section 234B of the Act.

7. Ground 7

The learned AO erred in initiating penalty proceedings under section 270(A) of the Act for under reporting and mis reporting of income for the captioned Assessment Year."

3. The relevant facts in brief are that Swiss Re Asia Pte Ltd. (hereinafter referred to as '**SRAL**' or '**the Appellant**') is a tax resident of Singapore. The Appellant is wholly owned subsidiary of Swiss Re Asia Holding Pte Ltd. which in turn is a group entity of Swiss Re Group engaged in reinsurance business on a global basis.

3.1. Swiss Reinsurance Company Limited (for short '**SRCL**') is a global reinsurer incorporated in Switzerland forming part of Swiss Re Group.

3.2. The applicable India laws permitted the cession of a portion of insurance risk by a primary insurer to a reinsurer as well as retrocession of the reinsurance risk to another reinsurer in terms of reinsurance contract/treaty.

3.3. SRCL, acting through its Singapore Branch (hereinafter referred to as 'SRCL**–SB'**), had entered into re-insurance contracts outside India with several Indian insurance companies (i.e. Indian cedents), wherein, the Indian cedents paid a premium to SRCL to reinsure a part of the risk assumed by them.

3.4. As a consequence of the amendments made in the IRDAI Regulations, SRCL had to setup its branch in India (hereinafter referred to as '**SRCL-IB**') which commenced business w.e.f 01/02/2017 and thereafter; all new reinsurance contracts/treaties with the Indian Cedents were underwritten by SRCL-IB. However, all the residual reinsurance contract/treaties which were entered into prior to 01/02/2017 between SRCL-SB and the Indian Cedents continued to remain in force with the SRCL-SB.

3.5. Pursuant to a re-organization of the Swiss Re Group, w.e.f 01/01/2018, the Appellant commenced its reinsurance business in Singapore, inter alia, with a view to take over the existing business of the SRCL-SB. Accordingly, the SRCL-SB transferred all of its business, and assets and liabilities (including the existing reinsurance contracts with the Indian Cedents prior to 01/02/2017) to the Appellant in terms of retrocession contracts/treaties.

3.6. During the relevant previous year, the Appellant earned reinsurance premium from old contracts with Indian Cedents that were transferred/retroceded by SRCL-SB to the Appellant (hereinafter referred to as 'Run-Off Portfolio'). In addition the Appellant earned reinsurance premium from Indian Cedents and received service fee in terms of intra-group service agreement entered by the Appellant with SRCL-IB and Swiss Global Business Solutions India Private Limited [formerly known as Swiss Re Shared Services (India) Private Limited] (for short '**SGB**'). SGB is an Indian company which provided IT enabled back-office services to Swiss Re Group entities across the globe. SGB rendered standardized services to Swiss Re Group Companies (including to the Appellant) and did not have a license in India for undertaking reinsurance activities. Thus, during the Financial Year 2017-18 relevant to the Assessment Year 2018-19, the Appellant/Assessee had earned the following incomes:

SNo.	Incomes of the Appellant for the AY 2018-19	Amount (INR)
(a)	Reinsurance Premium from Indian Cedents for the reinsurance services provided to the Indian Cedents during the relevant previous year under various Reinsurance Treaties	236,64,86,719
(b)	Retrocession premium from SRCL-IB in terms of retrocession agreement between the Appellant and SRCL-IB	948,73,03,829
(c)	Fee for technical services from SRCL-IB	5,08,42,456
(d)	Fee for technical services Swiss Reinsurance Global Business Solutions India Pvt. Ltd. ('SGB')	5,69,40,428

3.7. The Appellant-Company filed its return of income for the Assessment Year 2018-19 on 30/11/2018 declaring 'Nil' income claiming exempt income of INR 10,77,82,885/- and seeking refund of INR 6,19,00,110/-. The case of the Appellant was selected for scrutiny.

3.8. During the assessment proceedings, in response to a queries by the Assessing Officer, it was contended by the Appellant that (a) reinsurance premium income and retrocession premium income earned by the Appellant is in the nature of business income and in absence of Permanent Establishment (for short 'PE') of the Appellant in India in terms of Article 5 of the Double Taxation Avoidance Agreement between India and Singapore (for short 'DTAA'), the same is not liable to tax in India as per Article 7 of the DTAA, and (b) Income received by the Appellant from SRCL-IB and SGB for support services (such as communication services, IT support services, legal services, executive management services, human resource support services etc.) are not taxable in India in terms of Article of the DTAA as Fee for Technical Services since the aforesaid services do not 'make available' to SRCL-IB & SGB technical knowledge, experience, skill, know-how or processes, which enables SRCL-IB & SGB to apply the technology contained therein in terms of Article 12(4) of the DTAA. In support the Appellant filed the submission, dated 16/04/2021.

3.9. However, the Assessing Officer was not convinced. After examining the terms of Intra-Group Service Agreement between SRCL-IB and the Appellant (effective from 01/01/2018) and Intra-Group Service Agreement between SBG and the Appellant (effective from 01/01/2018), the Assessing Officer concluded that (a) SRCL-IB/SGB was to act as agents of the Appellant for performance of services in India; (b) SRCL/SGB were required to maintain records for inspection/audit by the Appellant (c) SRCL-IB/SGB provided services which were in the nature of core business carried on by the Appellant and therefore, Appellant carried on business activity in India. Further, after examining the terms of the Life Retrocession

Agreement – Life Business and the Non-Life Retrocession Agreement between SRCL-IB and the Appellant, both, executed on 01/04/2017, the Assessing Officer noted that (a) SRCL-IB was responsible for maintaining all the information relating to the original ceding company, claims and general risk management practices, outsourcing functions, make changes in the profile of the risk portfolio which may affect Appellant's risk exposure; (b) SRCL-IB pays to the Appellant 50% share of the premium while the Appellant pays to SRCL-IB 8.5% overriding commission; and (c) in the event of a claim, SRCL-IB was to settle its share of claim in accordance of the re-insurance conditions. On the basis of the aforesaid, the Assessing Officer concluded as under:

(i) SRCL-IB and SGB constituted Fixed Place PE of the Appellant in India. SRCL-IB and SGB perform core business in the reinsurance business, being actuarial services, underwriting services & claims handling services, in India and therefore, negligible critical functions are left to be performed outside India. All the vital and primary functions such as underwriting, assessment of risk as well as handling of claims takes place in India. The employees of SRCL-IB/SGB performing these functions/services, though on the payroll of SRCL-IB/SGB, function under the control of the Appellant who compensates SRCL-IB/SGB for such services at cost plus mark-up basis.

(ii) The Appellant has a Service PE in India. SRCL-IB and SGB undertake technical work related to re-insurance business of the Appellant in India for periods aggregating to more than 90 days in India within the 12 month period forming part of the relevant previous year.

(iii) The SRCL-IB and SGB act as agent of the Appellant in India while performing various services which form part of core-business services of the re-insurance business of the Appellant in India. SRCL-IB and SGB were dependent upon the Appellant, both, economically and legally/contractually and therefore, could not be regarded as agents of independent status. Further, SRCL-IB and SGB through their management of entire customer relations were habitually securing orders for the Appellant.

3.10. Having held that the Appellant had a PE in India, the Assessing Officer proceeded to compute income attributable to the PE of the Appellant in India. By invoking provision contained in Rule 10(i) of the Income Tax Rules, 1962 (for short 'the Rules') the Assessing Officer computed profits of the Appellant at the rate of 10% of the Gross Receipts and thereafter, attributed 50% to the PE of the Appellant in India.

3.11. The Assessing Officer also rejected the contention of the Appellant that the fee received from SRCL-IB and SGB was not liable to tax in India and held that payments were received by the Appellant form SRCL-IB and SGB for providing specialized, technical inputs and services and the same were taxable in India as Fees for Technical Services under Section 9(1)(vii) of the Act and also under Article 12(4)(b) of the DTAA.

3.12. Thus, vide Draft Assessment Order, dated 02/06/2021, passed under Section 143(3) read with Section 144C(1) of the Act proposed addition of INR 59,26,89,532/- as business income and INR 10,77,82,884/- as Fee for Technical Services in the hands of the Appellant.

3.13. Being aggrieved, the Appellant filed objection before DRP against the Draft Assessment Order, dated 02/06/2021. The DRP, vide order dated 30/03/2022, rejected the objections. Subsequently, the Assessing Officer passed Final Assessment Order, dated 27/04/2022 which was rectified vide, order dated 29/04/2022 whereby addition proposed vide Draft Assessment Order, dated 12/06/2021, were made to the returned income.

4 Being aggrieved, the Appellant is now in appeal before us on the grounds reproduced in paragraph 2 above.

4.1. Learned Senior Counsel for the Appellant, inviting our attention to paragraph 8.2.4 of the order passed by the DRP submitted that the DRP had rejected the objection only to keep the issue alive even through the DRP had accepted the contention of the Appellant that issues identical to the issues raised in the present appeal stood decided in favour of the assessee by the decisions of the Mumbai Bench of the Tribunal in the case of Swiss Reinsurance Company Limited (SRCL) pertaining to the Assessment Years 2010-11 to 2015-16. In the aforesaid decision, in identical facts and circumstances, the Tribunal had held that Swiss Re Services India Private Limited, a wholly-owned Indian subsidiary of SRCL providing SRCL with basic market intelligence and admin support services in India, neither had a business connection as per the provisions of Explanation 2 to section 9(1) Act nor a permanent establishment in India as per the provisions of the Double Taxation Avoidance Agreement Between India and Switzerland. The Tribunal had rejected identical submission made by the Revenue and, therefore, concluded that no part of the income earned by SRCL from Indian cedents was taxable in India.

4.2. Advancing arguments on merits the Learned Senior Counsel

submitted that as under:

(i) The Appellant does not carry out any business/operations in India. The Assessing Officer has, while arriving at conclusion that the Appellant carries on business in India, merely placed reliance on the retrocession agreements pertaining to the Run-Off Portfolio. With effect from January 2018, no fresh reinsurance contracts were executed by the Appellant directly with Indian cedents. Only the existing contracts were transferred by SRCL-SB to the Appellant. Accordingly, there was no underwriting or risk taking activity by the Appellant in relation to the Run-Off Portfolio as alleged by the Assessing Officer. Further, the business origination processes/activities in relation to the Run-Off Portfolio were already performed by SRCL-SB in the preceding years prior to the retrocession to the Appellant of the reinsurance contracts executed by the SRCL-SB with Indian cedents. Therefore, in respect of the Run-Off Portfolio, the question of SRCL-IB/SGB securing or concluding any contracts on behalf of the Appellant did not arise. Further, without prejudice to the aforesaid, the capital and major risk taking function which is reinsurance takes place outside India. SRCL-IB and SGB are separate legal entities and are governed by their own independent board/management. The employees of SRCL-IB/SGB work under the direction, supervision, control and management of SRCL-IB/ SGB. Services rendered by SRCL-IB & SGB are merely supportive and non-core activities for which, both, are remunerated at an arm's length price on a cost plus mark-up basis.

(ii) The Appellant does not have any premises of SRCL-IB or

SRGBS at its disposal. Merely because the Appellant remunerates SRGBS and SRIB for support services based on cost-plus basis cannot lead to a conclusion that the employees of SRCL-IB and SGB are facto employees of the Appellant.

(iii) SRCL-IB and SGB are not agents of the Appellant as alleged by the Assessing Officer. SRIB and SRGBS are independent service providers having principal to principal relationship with the Appellant. The reinsurance income earned by SRCL-IB from Indian cedents constitutes a major portion of the income of SRCL-IB and, therefore, it cannot be said that SRCL-IB is economically dependent on the Appellant. Further, neither SRCL-IB nor SGB has authority to secure or conclude contracts on behalf of the Appellant

(iv) The Appellant does not have a Service PE in India as no technical work is rendered by the Appellant in India through its employees or otherwise. No employees or other personnel of the Appellant visited India to provide any services (other than for stewardship activities) to SRCL-IB or SGB. Further, the Appellant was recipient of services from SRIB and SRGBS and, accordingly, it cannot be said that SRAPL provided services in India through its employees for the benefit of a third-party recipient.

(v) The service fees received by the Appellant from SRCL-IB & SGB are in the nature of support services rendered on year to year basis. The aforesaid services do not make available any technical knowledge, skill or experience to SRCL-IB/SGB. The Learned AO has inter alia placed reliance on the

judgment of Cochin ITAT in the case of US Technology Resources (P.) Ltd. v. ACIT [2013] 39 taxmann.com 23 (Cochin ITAT). However, the said decision has been reversed by the Kerala High Court in the case of US Technology Resources (P.) Ltd. v. CIT [2018] 97 taxmann.com 642 (Kerala)

5 Per contra, the Learned Departmental Representative refuted the submission advanced on behalf of the Appellant that the issue raised in the present appeal stand decided in favour of the Appellant by the decisions of the Mumbai Bench of the Tribunal in the case of Swiss Reinsurance Company Limited on which reliance was placed by the Appellant. Learned Departmental Representative submitted that in the aforesaid decisions the Tribunal was examining the existence of PE in terms of Article 5 of the Double Taxation Avoidance Agreement between India and Switzerland (for short 'Indo-Swiss Tax Treaty'). Article 5(4) of the Indo-Swiss Tax Treaty contained special provision related to reinsurance business which was absent in Article 5 of the Double Taxation Avoidance Agreement between India and Singapore.

5.1. Supporting the addition made by the Assessing Officer, the Learned Departmental Representative reiterated the stand taken by the Assessing Officer and made following oral submissions which were supported by written submission:

(i) The Appellant has a Fixed Place PE in India as premises of SRCL-IB and SGB were at the disposal of the Appellant and the Assessing Officer has, in paragraph 9.10.5 of the final assessment order, has clearly brought out that business of the Appellant, both, for reinsurance and retrocession premium has been partly carried on through such premises/fixed place

in India. Therefore, some part of profits of the Appellant on account of retrocession premium was also required to be attributed to the Fixed Place PE and has been rightly done so by the Assessing Officer.

(ii) On the analysis of the Intra-group Service Agreement between the Appellant and SRCL-IB it was clear that SRCL-IB was to act as an agent of the Appellant for the performance of services in India. SRCL-IB was required to keep all the records of the services provided by it and to produce the same for inspection/audit by the Appellant as and when required by the Appellant. As per paragraph 12.2 of Intra-Group Service Agreement with SRCL-IB, the Appellant had the right to request for any other information relating to the services and their performance by the SRCL-IB at any time. Further as per paragraph 12.4 of the said Agreement, SRCL-IB was under obligation to allow the Appellant and other entities of Swiss Re Group, their entities and any applicable regulatory authority reasonable and effective access to any of the SRCL-IB premises, personnel and relevant records in relation to the services to the extent required by them to comply with good governance and all applicable legal and regulatory requirements. Such controlling and intrusive conditions could not have been agreed upon by the parties transaction on Principal to Principal basis. It was, therefore, evident that SRCL-IB India was an Agent of the Appellant in India. SRCL-IB/SGB provides services which were in the nature of core-services essential to the business of the Appellant. The aforesaid services include Actuarial Support Services, Client Mgmt & Bus. Support Services, Finance Support Services, Global Partnerships Services, Human

Resources Support Services, IT Support Services, Legal Services, Underwriting Support Services, Claims and Liabilities Mgmt Support, Reinsurance Centre Support Services. The aforesaid services were carried out by the Appellant in India through SRCL-IB and SGB. A perusal of the Inter-group Services Agreement between SRCL-IB/SGB, and the Appellant reveals that SRCL-IB/SGB was subject to detailed instructions and control on every aspect of its working from the Appellant as well as other group companies. SRCL-IB was not legally independent while it was performing range of functions for the Appellant. Further, SRCL-IB was also not economically independent. SRCL-IB was providing services only to the Assessee and their group companies. Therefore, SRCL-IB cannot be regarded as an Agent of Independent status within the meaning of Article 5(9) of the DTAA. From perusal of both the intra-group service agreements, it was clear that SRCL-IB and SGB were habitually securing orders for the Appellant as SRCL-IB/SGB were managing entire customer relations starting from liaisoning with the clients, conducting discussion with them to understand reinsurance needs, pain points in existing products, marketing support, to obtaining their request for proposal, working on it to obtain other information from clients to prepare a draft of underwriting proposal. SRCL-IB/SGB performed all core activities on behalf of the Appellant in India and the final entry into contracts though undertaken de facto by the Appellant were based on the vital inputs and functions performed by SRCL-IB and SGB in India. There hardly remained any further critical function to be performed outside India except for signing the contract. Hence, it can be held that SRCL-IB and SGB exercise the

authority to significantly influence the decisions leading to signing of the contract by the Appellant outside India without any further input outside India. SRCL-IB & SGB clearly constituted Dependent Agent PE of the Appellant in India. Therefore some part of the profits of the assessee on account of reinsurance premium is required to be attributed to the DAPE & fixed place PE of the assessee & it is humbly prayed that the order of the AO may be upheld in this regard.

(iii) The Appellant had a business connection in India - Reliance in this regard was placed on paragraph 9.10.2 to 9.10.3 of the Assessment Order.

(iv) The service fee received by the Appellant from SRCL-IB & SGB are in the nature of fee for technical services. In this regard, placing reliance on paragraph 9.11.5 and 9.11.6 of the Final Assessment Order, the Ld. Departmental Representative submitted that the Assessing Officer has clearly brought out that the services provided by the Appellant were technical in nature and made available technical knowledge, skill and experience.

6 In rejoinder, the Learned Senior Counsel additionally submitted as under:

(i) Learned Assessing Officer had not provided any separate reasoning/rationale as to why the Appellant has a business connection in India as per the provisions of section 9(1)(i) of the Act and a PE in India as per Article 5 of the DTAA for its retrocession business.

(ii) The submission of the Learned Departmental Representative that the Appellant has a Fixed Place PE in India is

misconceived since access has been provided to the Appellant by SRCL-IB/SGB for the limited purpose of inspection/audit of support services and it does not mean that the premises of SRCL-IB or SGB were at the disposal of the Appellant for the conduct of its reinsurance business. The mere fact that there is a right of access does not mean that the place is at the disposal of the person who has access.

(iii) SRCL-IB and SGB acted as agent of the Appellant for the performance of services in India based on the "Providers Authority to act on behalf of Recipient clause (Clause 5.1) in the Intra-Group Service Agreement. However, pursuant to the aforesaid clause, SRCL-IB and SGB were not granted any blanket authority to act on behalf of the Appellant in performance of support services in India. Such authority could have been given only in writing. During the year under consideration, the Appellant did not provide any such written confirmation under the aforesaid clause to SRCL-IB and SGB to act on its behalf. Accordingly, it cannot be said that SRCL-IB/SGB had authority to act as agent of the Appellant during the relevant previous year.

(iv) Neither SRCL-IB nor SGB assist/ support the Appellant in performing its responsibilities in the retrocession business nor do they render to the Appellant any support services in relation to the retrocession business undertaken by the Appellant.

7 We have heard the rival submission and perused the material on record. We have also taken into consideration the judicial precedents cited during the course of hearing and have taken into consideration the submission filed by the Learned Departmental Representative

and the Synopsis filed on behalf of the Assessee.

7.1. We would first deal with the primary contention advanced on behalf of the Appellant that the objection raised by the Appellant were rejected by the DRP only to keep the issue alive while admitting that issue stood decided in favour of the Appellant in the case of Swiss Reinsurance Company Limited (SRCL) a sister concern of the Appellant.

7.2. Copy of the decisions of the Tribunal in the case of Swiss Reinsurance Company Limited (SRCL) pertaining to Assessment Years 2010-11 to 2015-16 have been placed before us (placed at pages 159 to 209 of the paper-book).

7.3. On perusal of order dated, 13/02/2015, passed in the case of SRCL in appeal pertaining to Assessment Year 2010-11 (ITA No. 1667/Mum/2014) we find that in similar facts and circumstances and the Tribunal had, overturning the findings of the Assessing Officer, held that (a) SRCL did not have a business connection in India, and (b) SRIPL, as wholly owned subsidiary of SRCL, did not constitute a PE of the SRCL in India in terms of Article 5 of the Indo-Swiss Tax Treaty. The facts of that case, as succinctly capture by the Tribunal, are as under:

> *"2. Swiss Re-Insurance Company Limited i.e. the assessee is a company incorporated in Switzerland which receives income from providing reinsurance to various Cedants in India. The re-insurance premium received by the assessee is claimed as business income and it is further claimed that in absence of any Permanent Establishment (PE) in India the entire business income is not taxable in India.*
>
> *2.1 During the course of assessment proceedings, the assessee filed necessary details and information in support of its claim. After carefully going through the information/details furnished by the assessee the AO observed that the business of the assessee is to provide reinsurance services to the clients in India. The AO further*

observed that in the course of such business Swiss Re-Services India Pvt. Ltd. (SRSIPL), which is an Indian Company and wholly owned subsidiary of the assessee is a PE of the assessee in India. The AO further noticed that the assessee through its Singapore Branch has entered into service agreement since 01/04/2009 with SRSIPL for obtaining risk assessment services, market insurance and administrative support in India and in turn remunerate/compensate SRSIPL on a cost + 12% margin. The AO was of the opinion that since the assessee has remunerated SRSIPL and all its employees on a cost + basis, it is clear that the personnel and staff have rendered services to the assessee as de-facto employees. The AO was of the firm belief that the Indian subsidiary SRSIPL provides technical and core reinsurance services, therefore, Dependent Agency Permanent Establishment (DAPE) comes into play. The AO further noted that as per the domestic Income Tax Act, 1961, since the income of the assessee is being earned from India on a regular and continuous basis, the income of the assessee is taxable in India in terms of section 9(1)(i) of the Act. The assessee has regular flow of income emanating from India, hence, the assessee has clear cut business connection in India.

2.2 The AO gave the assessee an opportunity to substantiate its claim that the reinsurance premium receipts of the company are not taxable in India. The assessee filed a detailed reply explaining the nature of activities of the assessee. It was explained and strongly contended that services provided by SRSIPL do not create existence of a PE in India. It was explained that SRSIPL is a separate legal entity and its entire control and management is in India. The decisions regarding its business are taken and executed in India. It is both legally and functionally independent company. It was explained that the employees of SRSIPL render services to SRSIPL and not to the assessee, either as assessee's employees or on behalf of SRSIPL. It was pointed out to the AO that the pricing between SRSIPL and the assessee is at arms length. The profit earned by SRSIPL belongs to it and cannot be treated as profits of the assessee and such profits are assessed to tax in India in the hands of SRSIPL.

2.3 Referring to the service agreement between the assessee and SRSIPL it was pointed out to the AO that it is specifically mentioned that SRSIPL is neither an agent nor a broker or legal representative of assessee and hence, acting on principle to principle basis, therefore, the question of falling of agency PE does not arise. Attention was drawn to Article 5(5) of the DTAA between India and Switzerland and

it was explained that the relationship between the assessee and SRSIPL do not satisfy the conditions mentioned under the aforesaid Article of the DTAA. Referring to Article 5(4) of the tax treaty, it was brought to the notice of the AO that an insurance company is liable to tax if collects insurance premium in India and ensures risk of Indian residents or their agents except in the case of reinsurance services. The assessee concluded by stating that it neither has a service PE nor an agency PE in India, therefore, no income can be attributed to India on account of PE in India.

2.4 The AO considered the detailed submissions and the contentions made by the assessee. However, the submissions made by the assessee did not find favour with the AO who at para 9.3.2 of his order observed as under:

> *9.3.2. From perusal of the facts and circumstances of the case, it emerges that the arguments of the assessee are not tenable on account of the following reasons:*
> *i, The re-insurance contract is an agreement between the insurer and the reinsurer, whereby a part of the risk gets transferred from one party to another. The party accepting the risk is termed as the reinsurer and the party transferring the risk is termed as the reinsured/reassured or cedant.*
>
> *ii. The income of the assessee is being earned from India on a regular and continuous basis. In view of this, the income of the assessee is taxable in India in terms of Sec. 9(1)(i) of the Indian income Tax Act, 1961 i.e. the Domestic Income Tax Act.*
>
> *iii. The assessee is having regular flow of income emanating from India under the domestic Act; hence the assessee has a clear-cut business connection in India. The arguments of the assessee on this account are flawed.*

2.5 The AO further proceeded by treating SRSIPL as a PE of the assessee in India. The AO treated SRSIPL not only as a service PE of the assessee but also as agency PE/ DAPE. Having held all that the AO went on to attribute the taxable profit and calculated the attribution at 50% of income and completed the assessment.

2.6 Strong objections were raised before the DRP but without any success. Aggrieved by this the assessee is before us.

5. Having heard the rival submissions, we have carefully perused the orders of the authorities below and the relevant documentary evidences brought to our notice in the light of judicial decisions relied upon by both sides. To begin with, let us first consider the relevant clauses of the service agreement between Singapore Branch of the assessee and Swiss Re-services India Pvt. Ltd. i.e. SRSIPL.

> *"1.1.3 Forwarding routine communication from the Branch of SRZ to the Clients (other than contracts of re-insurance and confirmation of liability) after translating in local language, where required.*
>
> *1.6 The Company hereby acknowledges and confirms that it is not the agent, broker or legal representative of the Branch of SRZ for any purposes whatsoever, and agrees that at no time shall it represent itself to be the agent or broker of the Branch of SRZ in India. The Company agrees to indemnify and hold the Branch of SRZ harmless with respect to any breach of this Section by the Company.*
>
> *5.6 Company will remain for all purposes an independent contractor under this Agreement. Nothing in this Agreement will be deemed to constitute or will be construed as constituting a partnership, joint venture or principal-agency relationship between the Company and the Branch of SRZ. All Company personnel will be considered solely Company employees or gents, and Company will be responsible for (i) compliance with all Laws relating to such personnel and (ii) payment of all wages, Taxes and other cost and expenses relating to such personnel (including unemployment, social security and other payroll taxes) and compliance with all withholding requirements as required by Law."*

5.1 Before we proceed to examine, whether SRSIPL and its activities constitute PE of the assessee or whether SRSIPL can be considered as a Service PE/ Agency PE of the assessee, it would be appropriate at the outset to consider the decision of the Hon'ble Delhi High Court in the case of E-Funds IT Services (supra), wherein Hon'ble Court has held that establishing subsidiary in the other treaty country would not result in creating and establishing a PE of a foreign holding company in the said third country. Thus, at the outset the subsidiary SRSIPL of the assessee does not constitute a PE of its holding company i.e. the assessee. Now let us see whether there is any business connection of the assessee in India. The answer lies in Explanation – 2 to section 9(1) of the Act.

" Section 9(1) -Explanation 2
For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident:-
(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the nonresident; or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or
(c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:

Provided that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business :

Provided further that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such non-resident and other nonresidents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status."

5.2 A perusal of the facts of the case in hand go to show that none of the conditions specified in clause (a)(b) & (c) above are satisfied. Therefore, it cannot be said that the assessee is having any business connection in India. Now let us see whether the assessee has any PE within the purview of Article-5 of India Swiss Treaty, wherein is provided as under:

"(l) the furnishing of technical services, other than services as defined in Article 12, within a Contracting State by an enterprise through employees or to her personnel, but only if:-

(i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve month period; or

(ii) the services are performed within that State for a related enterprise (within the meaning of paragraph 1 of Article 9) for a period or periods aggregating more than 30 days within any twelve –month period."

7.4. In the above set of facts, the Tribunal after considering rival submissions similar to those made during the appellate proceedings before us, granted relief to the assessee in that case. The reasoning given by the Assessing Officer, which is identical to the reasoning given by the Assessing Officer in the present case, did not appeal to the Tribunal and was, therefore, rejected. The Tribunal concluded that the SRCL undertaking reinsurance business did not have any business connection in India in terms of Explanation 2 to Section 9 of the Act, and that Indian subsidiary of SRCL did not constitute Fixed Place, Service or Agency PE of SRCL in India. Thereafter, vide order, dated 04/07/2017, passed in appeal in the case of M/s Swiss Reinsurance Company Limited (SRCL) for the Assessment Year 2013-14 (ITA No. 2759/Mum/2017), the Tribunal held as under:

5. In this regard, we may gainfully refer to paragraph 28 of the direction of the Dispute Resolution Panel as under:-

"28. Directions of the DRP

28.1 We have considered the submissions of the Assessee. The order of the ITAT is binding on all the lower authorities. We have already directed in case of Ground of objection No.1 that the AO should follow the order of the ITAT for A.Y. 2010-11. The department is permitted to file an appeal against the DRP's directions. This objection is therefore disposed off.

28.2 The AO is directed from the original records to see if any appeal has been filed before the Hon'ble Mumbai High Court on any of the above raised objections. If that be the case, the AO is directed to keep the issue alive in the interest of revenue and

make suitable adjustments / additions on the issues raised above.

29. The Assessing Officer shall give effect to the above directions as per provisions of section 144C(13) of the Incometax Act, 1961."

6. This aspect has been duly acknowledged by the Assessing Officer in his order as under:-

"10. The assessee had contested the above contention before the Hon'ble Disputes Resolution Panel-2, Mumbai. Hon'ble DRP vide its order u/s 144C(5) of the I.T. Act, 1961 dated 28.09.2016 has given its findings relying on the decision of the Hon'ble ITAT in the assessee's own case for A.Y. 2010-11 and the decision of the Hon'ble DRP in Assessee's own case for A.Y. 2011-12 and 2012-13. Hon'ble Mumbai ITAT in paragraphs 5.2 to 5.06 of its order held that the assessee does not have service PE in India and respectfully following the said order the DRP has held that the SRSIPL is not an agent of the assessee in India and it neither concludes any contracts on behalf of the assessee nor solicit any orders for the assessee. Further, the services provided by SRSIPL to the assessee are merely preparatory and auxiliary in nature. Further, the Hon'ble ITAT has also relied on Article 5(4) of the DTAA which specifically excludes the reinsurance business from constituting a PE in India. Accordingly, SRSIPL does not constitute a PE of the assessee in India under Article 5(5) of the DTAA and no question of attributing any profits to the PE arises."

7. Subsequently in a Corrigendum, the Assessing Officer added as under:-

"10. As discussed above, in para 28.2 of its directions, the DRP has directed the AO to make adjustments / additions if the ground of the additions were contested by the revenue before the Hon'ble High Court. The said para is reproduced below: `

The AO is directed from the original records to see if any appeal has been filed before the Hon'ble Mumbai High Court on any of the above raised objections. If that be the case,the AO is directed to keep the issue alive in the interest of revenue and make suitable adjustments / additions on the issues raised above.'

Since, the issues involved are contested by the revenue before the Hon'ble High Court on the very same grounds as narrated in this order, the additions / adjustments are being made as under:

xx xx

8. Since the issue is squarely covered in favour of the assessee by the Tribunal's decision in its own case and the appeal has been filed by the Revenue solely to keep the matter alive before the Hon'ble High Court, we set aside the orders of the Assessing Officer and decide the issue in favour of the assessee.

9. In the result, this appeal filed by the assessee stands allowed."

7.5. The aforesaid decision was followed by the Tribunal while deciding appeal preferred by SRCL (a) for the Assessment Year 2011-12 (ITA No. 1350/Mum/2016) and Assessment Year 2012-13 (ITA No. 1351/Mum/2016) vide common order, dated 22/01/2018, (b) for Assessment Year 2015-16 (ITA No. 4898/Mum/2018), vide order dated 26/12/2018 and (c) for Assessment Year 2014-15 (ITA No. 6531/Mum/2017) vide order, dated 20/07/2021.

7.6. On perusal of the order, dated 04/07/2017, passed by the Tribunal in the case of M/s Swiss Reinsurance Company Limited (SRCL) in ITA No. 2759/Mum/2017, it can be seen that the DRP had, despite noting that the issue stood decided in favour of the assessee in that case, rejected the objections only with the object of keeping the issue alive, and therefore, the Tribunal decided the appeal in favour of the assessee in that case taking note of the fact that the DRP has rejected objection only to keep the issue alive.

7.7. We note that in identical manner the DPR has disposed off the objections raised by the Appellant in the case before us holding as under:

"8.2.4 Now, it is seen that the arguments and the ratio given by the AO in his present draft order for making the impugned addition already stand adjudicated by the ITAT in the case of a sister concern in identical facts and circumstances. However, it is to be hastily added here that all the same, the department has not accepted the decision of the Hon'ble ITAT in SRCL and further appeal against the same is pending before the Hon'ble Bombay HC. This is an accepted fact. Further, the Hon'ble Bombay HC in the Vodafone decision has already held that the DRP proceedings are nothing but an extension of the assessment proceedings only. Therefore, in order to keep the issue alive, the additions made by the AO have to be confirmed only and consequently, the objections of the assessee have to be rejected only. Concludingly, all the objections from ground 1 to 4 stand rejected in the final analysis."

7.8. Thus, it is clear that the DRP was of the view that the issues raised were covered in favour of the Appellant by the decision of the Tribunal in the case of Swiss Reinsurance Company Limited (SRCL). However, in order to keep the issue alive the DRP rejected the objections raised by the Appellant. The Appellant in now in appeal before us and has contended that the additions made should be deleted as the DRP has returned a finding that that the issue stand covered in favour of the Appellant by the aforesaid decision of the Tribunal. We find merit in the aforesaid contention of the Appellant. The finding returned by the DRP is binding upon the Assessment Officer in terms of Section 144C(13) of the Act. The case now set up by the Learned Departmental Representative, even if assumed to be meriting consideration, is contrary to the finding returned by the DRP. The Revenue is not in appeal against the order passed by the DRP as after omission of Section 253(2A) of the Act by the Finance Act, 2016 with effect from 01/06/2016, no appeal can be filed by the Assessing Officer against the order passed by DRP giving directions under Section 144C(5) of the Act. Since for the Assessment Year 2018-19 Assessing Officer is not permitted to challenge the findings returned by the DRP in appeal before the Tribunal, the Revenue

cannot be permitted to set up a case against the directions passed by the DRP. Therefore, taking a view consistent with the view taken by the Tribunal in the case of SRCL in order dated 04/07/2017, passed in appeal for the Assessment Year 2013-14 (ITA No. 2759/Mum/2017), we delete the additions made by the Assessing Officer in view of the finding returned by the DRP that the '*impugned addition already stand adjudicated by the ITAT in the case of a sister concern in identical facts and circumstances'.* Other contentions dealing with the merits, having been rendered academic, are not adjudicated upon and are, therefore, left open.

8 As regards the taxability fee received by the Appellant from SRCL-IB/SGB is concerned, we note that Assessing Officer had concluded that the services provided to SRCL-IB and SRGBS were be chargeable to tax in India in terms of Article 12 as the services are highly technical in nature which have made available the technology to SRCL-IB and SGB for further exploitation and use as income-generating inputs. The DRP also observed that services provided were of enduring nature and were being provided continuously on a year-on-year basis. Hence, the same were liable to be treated as Fee for Technical Services.

8.1. We note that while examining the applicability of provisions contained in Section 9(1)(vii) of the Act read with Explanation 2, the Assessing Officer had, in paragraph 9.11.5, noted that even the rendering of any services by a technical or other personnel without any technology being transferred would also fall within the ambit of fee for technical services. At the same time, in paragraph 9.11.6 of the Final Assessment Order while examining the applicability of provisions contained in Section 12(4) of the DTAA, the Assessing Officer has noted that in order to satisfy the requirement of 'make

available' contained therein the recipient of service should be in a position to utilize the knowledge or know how in future on his own. However, on perusal of the Assessment Order, we find that the Assessing Officer has brought nothing on record to show that the services rendered made available any technical knowledge, know-how, skill, expertise to SRCL-IB/SGB which enables SRCL-IB/SGB to independently perform their function without support of the Appellant in the future. The findings returned by the Assessing Officer that the services provided by the Appellant enable SRCL-IB/SGB to provide onwards services cannot lead to an automatic conclusion/inference that some technical knowledge, skill or experience was made available by the Appellant to SRCL-IB/SGB. In view of the aforesaid, the conclusion drawn by the Assessing Officer that the services under consideration qualify as fee for technical services in terms of Article 12 of the DTAA cannot be sustained. During the course of hearing, the Appellant had placed reliance on the decision of the Tribunal in the case of Jefferies LLC v. DCIT (ITA NO. 5674/MUM/2017), wherein it was held by the Tribunal that services provided by the group entities or holding companies to its subsidiaries as day to day management and support services to run their business would not be regarded as fees for technical services in case, such services do not make available technical knowledge, skill or experience.

9 In view of the above, addition of INR 59,26,89,532/- (held by the Assessing Officer to be business income) and addition of INR 10,77,82,884/- (held by the Assessing Officer to be Fee for Technical Services) are deleted. Accordingly, Ground No. 1, 2, 3 and 5 are allowed. Ground No. 4 is disposed of as being infructuous. Ground No. 6 dealing with levy of interest under Section 234B of the Act is disposed of as being consequential, while Ground No. 7 challenging the initiation of penalty proceedings under Section 270(A) of the Act

is dismissed as being premature.

10 In result, the appeal preferred by the Assessee is allowed.

Order pronounced on 17.01.2024

Sd/-	***Sd/-***
(S. Rifaur Rahman)	**(Rahul Chaudhary)**
Accountant Member	**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 17.01.2024
Alindra, PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai