

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.3254/Mum/2023
(Assessment Year :2020-21)**

RGA International Reinsurance Company Designated Activity Company, Ireland C/o. Ernst and Young LLP, 17 th Floor, The Ruby 29, Senapati Bapat Marg, Dadar (W) Mumbai-400 028	Vs.	Deputy Commissioner of Income Tax (International Taxation)-4(1)(1) Mumbai
PAN/GIR No. AADCR1226K		
(Appellant)	..	(Respondent)

Assessee by	Shri Anish Thacker / Shri Lekh Mehta
Revenue by	Shri B Panda
Date of Hearing	30/01/2024
Date of Pronouncement	31/01/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been passed against final assessment order dated 28/07/2023 passed u/s.143(3) r.w.s. 144C(13) for the A.Y.2020-21 passed in pursuance of directions given by the DRP dated 27/06/2023.

2. Though assessee has raised various grounds of appeal, however, the arguments have been placed with respect to ground Nos. 9 - 14 wherein assessee has contended that its operation neither constitute business connection in India nor does it has fixed place PE in India nor does it have a dependent agent PE in India for total income of Rs.14,46,73,768/- cannot be taxed. Before us, it has been stated that this issue stands covered by the decision of the Tribunal in assessee's own case for the A.Y.2018-19 and 2019-20 which has followed earlier three Tribunal orders.

3. The brief facts are that assessee, M/s. RGA International Reinsurance Company Designated Activity company is a company incorporated in Ireland on 23/06/2003 and is a tax resident of Ireland. The assessee is eligible to claim the benefits of the India-Ireland Double Taxation Avoidance Agreement (India-Ireland Treaty). The assessee has the Tax Residency Certificate for the period from 01/04/2019 to 31/03/2020 The assessee is a global re-insurance company and has been operating in France, Spain, Germany, etc

4. With respect to India, the assessee has entered into life reinsurance contracts with Indian Cedents (i.e Indian insurance companies) from outside India Such business has been undertaken from the year 2003.

5. The key function in re-insurance is the acceptance of the risk that an insurance company transfers (cedes) to a re-insurer. Once RGA IRELAND has decided that it will underwrite the risk assumed by the Indian Cedents, it will enter into a contract with the Indian Cedents. In doing so, RGA IRELAND will enter into negotiations, discuss the pricing terms and finalise the terms and conditions of the contracts, all of which activities are done by RGA IRELAND outside India. Given the niche life reinsurance business undertaken by RGA IRELAND with Indian Cedents, the Indian Cedents usually directly reach out to RGA IRELAND as and when the requirement arises. The agreements (i.e. the treaties) entered into by RGA IRELAND with Indian Cedents are on a long-term basis and not on a year on year basis. Such contracts were entered in prior years and are as such valid for many years. On account of continuance of such contracts, the assessee receives reinsurance premium from Indian Cedents for reinsuring a part of their risk. Further, if an insurance claim devolves, the assessee settles the claim with the Indian Cedents with respect to the portion of the risk re-insured by it.

4. During the year under consideration, RGA Ireland also provided retrocession services to the India Branch of RGA Life Reinsurance Company of Canada (RGA India Branch). The assessee receives retrocession premium from RGA India Branch. Such arrangement was in place from 01/04/2017.

5. Pursuant to the set-up of RGA Canada's - India Branch, the new reinsurance treaties with Indian Cedents were entered into by RGA Canada's India Branch. RGA IRELAND did not enter into any new treaties with Indian Cedents post set up of RGA Canada - India Branch with effect from 1 April 2017 (the India Branch, ie, RGA Canada - India Branch actually commenced business from this date). However, all the older reinsurance treaties (ie, treaties entered into by RGA IRELAND prior to commencement of business by RGA Canada - India Branch) between RGA IRELAND and the Indian Cedents remained with RGA IRELAND under which RGA IRELAND earns premiums from the Indian Cedents.

6. Since the assessee does not have a business connection in India as per section 9 of the Income- tax Act, 1961 (the Act) or a Permanent Establishment as per Article 5 of the India-Ireland Treaty, the assessee filed its Return of Income under section 139 of the Act for the captioned AY on 15/02/2021 declaring 'Nil' income and claimed the entire tax deducted at source amounting to INR 13,11,67,860 as refund

7. The Id. AO in the draft assessment order alleged that RGA International Reinsurance Company constitutes a fixed place PE in India dependent agent PE of RGA IRELAND in India. He has also alleged that unrelated three parties i.e. Indian Cedents constitutes DAPE of RGI IRELAND in India. Accordingly, he proposed addition of Rs.14,46,73,768/-by applying Rule 10 of Income Tax Rules and attributing 10% as gross profit and

considering 50% of such profits from Indian operations. Further, the learned AO determined the tax liability on the said additions by applying a tax rate of 40 percent (plus applicable surcharge and cess). The learned AO assessed a total income of Rs 14,46,73,768 and reduced the refund from INR 13,11,67,860/-.

8. The ld. DRP has rejected the objections except for objections not to treat Indian cedents as DAPE of assessee in India and the receipts to be considered for attribution should be only actual receipts and not the amount appeared in Form 26AS.

9. We have heard both the parties and also perused the observation and finding of the ld. AO and ld. DRP as well as Tribunal orders for earlier years. First of all the reason as to why there is no business connection in terms of Section 9(1)(1) of the Act is that-

- RGA Services performs its activities in an independent manner RGA Services render services not only to the assessee but also to other Companies within the RGA Group and hence, it is not economically dependent on the assessee. Further, the assessee remunerates RGA Services on an arm's length basis and RGA Services only acts as interface between Indian Cedents and assessee.
- Even otherwise this aspect is wholly irrelevant since in a case in which a double taxation avoidance agreement comes into play, such as the present case, the provisions of the Act cannot be pressed into service unless these provisions are more beneficial.

10. In so far as assessee RGA services does not constitute a fixed place PE in India as per Clause 5 of the treaty on account of the following reasons:-

RGA Ireland does not conduct any insurance business in India. RGA Ireland does not have any premises or office space for undertaking reinsurance business activity in India. RGA Services does have an office in india, but the Appellant has no control over the said office. No employee of RGA Ireland visited India in the year under appeal.

► The reinsurance treaties are signed by the Appellant outside India. RGA Services does not negotiate the fee and terms and conditions of the reinsurance treaties. The terms and conditions for the treaties are agreed and concluded between the Appellant and the Indian Cedents. RGA Services does not decide the price to be quoted to the Indian Cedents.

Additionally, activities carried out by RGA Services are preparatory/ auxiliary in nature. The Appellant remunerates RGA Services on an arms-length basis (ie cost mark up of 18%) RGA Services is a separate legal entity having its own personnel. The premises of RGA Services are used for conducting its business operations of rendering marketing and support services from which it derives revenue. RGA Services does not have the regulatory approvals from IRDAI to accept reinsurance, nor does it have the required infrastructure or personnel to undertake reinsurance business. Further RGA Ireland also accepts re-insurance from other jurisdictions as well

Further, only activities in the form of administrative and ancillary support services was provided by RGA Services to RGA Ireland which are provided below

a. Claims Support

RGA Services acts as a communication channel between RGA Ireland and Indian Cedents (w.rt existing treaties) to obtain and provide clarifications requested by the Indian Cedents from time

to time Third party Indian Cedents may approach RGA Ireland for claims settlement (with respect to their existing arrangements) RGA Ireland in turn approaches RGA Services for its assistance with respect to evaluation of the claim settlement request of its clients. RGA Services evaluates the proposal from a medical and a financial perspective. The personnel of RGA Services reviews the documents regarding the medical history of the life reinsured, death records and other claim documents. If required, they could also request for additional documents.

b. Data Synopsis and ancillary support services

The data collected by RGA Services are synopsisized for claims request and for facultative underwriting request. Such synopsis is shared with RGA Ireland who in turn takes the final decision to settle claims. Further, the function also includes monitoring of premiums received with respect to various re-insurance policies, amount of premium received during a particular period etc.

► Additionally, it may be noted that the core business activities of RGA Ireland are not undertaken in India through any fixed place. The core business is the bearing of the re-insurance risk. The risk is borne by RGA Ireland which is based on the capital of RGA Ireland which lies in Ireland, i.e., risk is borne outside India and not in India. RGA Ireland has the infrastructure, personnel and capital to carry out reinsurance activities from outside India. Accordingly, the core activity of the Appellant (reinsurance business) cannot be said to be carried out in or from India

► Further, based on the above facts and the definition of preparatory and auxiliary services provided in the Treaty it is submitted that as per the nature of services rendered by RGA Services to RGA Ireland the same qualify to be preparatory and auxiliary services and thus fall in the exclusionary clause for the following reasons.

► RGA Services acts as a communication channel between the Indian Cedents and RGA Ireland RGA Services collects synopsisizes and processes the claims information and forwards the same to RGA Ireland. From an Indian regulatory perspective,

Roy Services is not permitted to undertake the core activities i.e reinsurance business in India.

11. Lastly, with regard to RGA services do not constitute DAPE of RGA IRELAND on account of the following:-

► The agreement between RGA services and RGA Ireland is on a principal-to-principal basis where the role performed by RGA Services is different from RGA Ireland RGA Services renders services to other associated enterprises within RGA Group and hence, it is not economically dependent on the Appellant

► RGA Services does not conclude the terms of the reinsurance treaties or enter into any contracts with any insurance companies RGA Services does not secure contracts for and on behalf of the assessee. The terms and conditions for the treaties are agreed and concluded between the Appellant and the Indian Cedents. RGA Services does not decide the price to be quoted to the Indian Cedents. The activities carried out by RGA Services are preparatory/ auxiliary in nature The Appellant remunerates RGA Services on arms-length basis (ie cost mark up of 18%) RGA Services does not undertake and is not permitted by the IRDAI to undertake reinsurance activities. RGA Services does not undertake core and primary reinsurance services like risk-assessment. Further, RGA Services is not a dependent agent of RGA Ireland

► RGA Services acts only as a communication channel between the Indian Cedents and RGA Ireland RGA Services only inputs the data into the system and final decisions of acceptance/ rejections is taken by the assessee. RGA Services does not procure any orders on behalf of RGA Ireland in India. The assessee does not give any detailed instructions or exercise any control on RGA Services with respect to RGA Service's business, and all the contracts are signed by the assessee outside India and by its employees In no circumstances are the contracts signed in India, and RGA Services does not have any authority to

conclude any contracts on behalf of the assessee nor does it secure any orders for the assessee.

12. This contention of the assessee has been accepted by the Tribunal and adjudicated in assessee's own case in the following manner:-

►AY 2018-19 and 2019-20 in ITA No. 803 and 2330/Mum./2022 dated 6 September 2023 (enclosed at page nos. 56 to 109) wherein it has been held as under

25. This is not the first time revenue has raised this issue. However, in the previous Assessment Years also the similar issues were raised and the Coordinate Bench has considered the issue under consideration and decided the issue in favour of the assessee in ITA. No. 1022/Mum/2021 for AY 2017-18 by following the decision in assessee's own case for the A. Y 2015-16, for the sake of clarity it is reproduced below-

9. In the present case also, it has not even been the case of any of the authorities below that any particular premises were at the disposal of the assessee The DRP has referred to the existence of business connection under section 9(1) of the Indian Income Tax Act 1961, but then that aspect of the matter is wholly irrelevant because in a case in which a double taxation avoidance agreement comes into play, as admittedly, in this case, the provisions of the Income Tax Act 1961 cannot be pressed into service unless these provisions are more beneficial to the assessee The DRP has simply observed that since the core business activities are conducted by RGA India, RGA India constitutes the fixed place PE As we we have seen above, unless a particular place is at the disposal of the assessee, that place cannot be said to constitute the PE of the assessee. In any case, the core reinsurance activity is the assumption of risk, and that assumption of risk has been done outside India. There is thus no occasion to attribute

reinsurance profit attribution to RGA India Whatever activities are carried out by RGA India have been duly paid for by the assessee, and the transfer pricing assessment has accepted that position. Once that position is accepted, there cannot be any further profit attribution for services rendered by the RGA In view of these discussions, and bearing in mind the entirety of the case, we disapprove the stand of the authorities below, and hold that there was no fixed place permanent establishment on the facts of this case. As regards the existence of the dependent agency permanent establishment, that aspect of the matter, In the light of the coordinate bench decision in the case of ADIT Vs Asia Today Ltd [(2021) 129 taxmann.com 35 (Mum)], is wholly tax-neutral and does not, therefore, need our adjudication.

10. In view of these discussions, we hold that the assessee did not have a fixed place permanent establishment in India, that the question of assessee having a dependent agency PE is wholly academic in the sense that, as the law stands now, the existence of the DAPE is wholly tax neutral in India. Accordingly, the business profits earned by the assessee on account of the reinsurance business have no tax implications in India. In view of these findings, all other issues raised in the appeal are academic and call for no adjudication as of now"

26. In the above decision, the Coordinate Bench have considered the issue of existence of business connection u/s. 9(1) of the Act and addressed the issue of Fixed Place Permanent Establishment and held that unless a particular place is at the disposal of the assessee that place cannot be said to constitute Permanent Establishment of the assessee. Further, they observed that the core reinsurance activity is assumption of risk and that assumption of risk has been done outside India hence there is no occasion to attribute reinsurance profit attribution to RGA Services. Whatever activities are carried out by RGA Services have been duly paid for by the assessee, and the transfer pricing assessment has accepted that position. Once that position is accepted, there cannot be any further profit attribution for services rendered by the RGA Services and they held that there was no fixed place permanent establishment on the facts of this case, with

regard to issue of dependent agency permanent establishment (DAPE), they relied on the decision of ADIT v Asia Today Ltd [(2021) 129 taxmann.com 35 (Mum)] and held that it is wholly tax-neutral and does not, therefore, need their adjudication. Accordingly, they held that the DAPE is wholly academic in the sense and the existence of DAPE is whole tax neutral in India. From the above decision, we observe that the Coordinate Bench has considered the issue of non-existence of Fixed Place Permanent Establishment and however, not given a clear finding on DAPE

27. However, before us, Ld DR made an elaborate submissions and submitted that the earlier decisions have been given on the basis of the 'single taxpayer approach', holding that once an arm's length payment is made to a dependent agent PE, no further profits can be taxed in the hands of foreign enterprise. By relying on the decision of the DIT (International Taxation) v Morgan Stanley & Co. Inc. (supra) he submitted that there are two taxpayers in the source country which are Dependent agent enterprise and Dependent agent permanent establishment (DAPE). He raised certain issues that the dependent agent performs certain functions on behalf of the foreign principal that cause attribution of risks or assets of foreign principal to host country, Le, country of source country besides performing its own functions for which it is otherwise taxable in India. The Dependent agent is performing additional functions for and on behalf of the foreign company which are not part of its profile and for which it is not being remunerated by the foreign company. He also raised issue of profits/losses may be attributed to the DAPE by host country based on those assets used, risks assumed and functions performed and the DAPE is entitled to deduction in host country for arm's length compensation/remuneration paid to dependent agent enterprise

28. Ld. DR submitted that Profits can be attributed to DAPE even if arm's length price has been paid to a Dependent Agent. He objected to assertion that 'once the Indian Dependent Agent is taxed on its own income nothing further would be taxable in the hands of the non-resident foreign company' He is of the view that the functions performed by the RGA Services are intertwined in the

various functions of reinsurance activities which has standalone services offered by the RGA Services which was already compensated. However, as per the OECD commentary on Article 7(2) which requires a total factual analysis on the basis of functions performed, assets used and risk assumed. He submitted that OECD emphasis that profit attributable to the DAPE are separate from the profits attributable to the dependent agent itself

29. Further, he relied on the decision of DIT (International Taxation) v Morgan Stanley & Co. Inc. (supra) to submit that associated enterprise (also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In the risks assumed by the enterprise, in such a case, there would be need to attribute profits to the PE for those functions/risks that have not been considered.

30. From the above submissions, we observe that Ld DR harping on the functions performed by the RGA Servers which may be integral part of the reinsurance business wherein the reinsurer may analyse various functions before or after taking reinsurance business which may include claim support, actuarial services, administration and other support services and settlement services which may be part and parcel of the whole insurance business

31. Ld. DR is of the view that the RGA Services not only provides services but also shares the assets and risk which were not being considering in the TP analyses. We are finding it difficult on this line of argument that the main functions of a reinsurance business is assuming the risk which the main insurer transfers. The whole object of assuming risk is the main business of the reinsurer. From the record we observe that RGA Services offers all sorts of functions and services relating to execution of the reinsurances processes without assuming any risk. Even the tax authorities including Ld. DR has not brought on record any material to show that RGA Services has assumed any risk or invested any assets in executing the reinsurance functions.

32. Further, we observe that the RGA Services does not have any license from IRDAI to undertake reinsurance business or even to act as a reinsurance broker. It shows that RGA Services can never

be allowed to function as a reinsurer or broker in India. It could only offer various functions in the line of reinsurance business. What is relevant to be an agent is the agent should be in a position to replace the principle in executing any contract and should be having the similar level playing role or rights in execution of such contracts, the issue of dependent or independent is different aspect of analysis. First, the other person is eligible to function as an agent or not as a broker, in the given case RGA Services does not have any recognition in India to conclude any contract in line of reinsurance. Therefore, it can never be allowed to act as an agent in India, not even assume or conclude contract on behalf of the principal ie the assessee.

33. Further, we observe that even Ld. DR has not brought on any material to show that RGA Services has utilized its assets or assumed any risk in this line of reinsurance business. Merely because its whole functions are depend on the services which will be utilized by the Foreign principal does not make it as an dependent agent.

35. As discussed above, RGA Services is not capable to act as an agent considering the fact they do not have the licence to function as a reinsurance or broker from the IRDAI and also the reinsurance agreements were signed outside India. The provisions of DAPE does not apply to the present case. The various arguments made by the Ld. DR fails in this case, considering the fact that nowhere it is brought on record to show that RGA Services has invested any assets or assumed any risk. Therefore, we are inclined to reject the various submissions made by Ld. DR and allow the grounds raised by the assessee.

36. In the result, appeal filed by the assessee is allowed."

13. In so far as ground No.10 is concerned, non-application of MIL, it has been upheld by the ld. AO, we find that said provisions are applicable from 1st April 2020 i.e. F.Y.2020-21 and not for the year under consideration which has been clearly stated in the MIL notification in the following manner:-

Unless it is stated otherwise elsewhere in this document, the provisions of the MLI have effect with respect to the Convention.

• In India:

With respect to taxes withheld at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or after 1 April 2020; and With respect to all other taxes levied by India, for taxes levied with respect to taxable periods beginning on or after 1 April 2020.

14. The issue with regard to short grant of TDS of Rs. 8,76,335/- we direct the ld. AO to allow TDS credit as claimed in the return of income in the norms stated above.

15. Lastly, initiation of penalty proceedings and u/s.270A of the Act and levy of interest are consequential and therefore, the same are dismissed.

16. In the result, appeal of the assessee is partly allowed.

Order pronounced on 31st Jan, 2024.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai; Dated 31/01/2024
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai