

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

IT(TP)A No. 343/Bang/2024
Assessment Year : 2016-17

M/s. Western Digital Technologies Inc., 3355, Michelson Drive, Suite 100 Irvine, California 92612, United States of America. PAN: AACCW9270F	Vs.	The Deputy Commissioner of Income Tax (International Taxation), Circle – 2(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Ajay Rotti, CA
Revenue by	:	Shri Sunil Kumar Agarwal, CIT-DR

Date of Hearing	:	11-06-2024
Date of Pronouncement	:	31-07-2024

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal arises out of the final assessment order dated 05.01.2024 passed by the Ld.DCIT, International Taxation, Circle – 2(1), Bangalore for A.Y. 2016-17 on following grounds of appeal:

“The grounds stated hereunder are independent of and without prejudice to one another. The Appellant submits as under:

1. Directions of the Hon'ble Dispute Resolution Panel are bad in law and liable to be quashed

1.1. The Hon'ble Dispute Resolution Panel (‘the Hon'ble Panel’) has erred in incorrectly adjudicating the grounds of objections filed by the Appellant, without considering the facts and circumstances of each of the grounds of objections. Therefore, the directions issued by the Hon'ble Panel are bad in law and liable to be quashed.

2. Permanent Establishment

2.1. The Hon'ble Panel erred in upholding the action of the Deputy Commissioner of Income Tax International Taxation, Circle - 2(1) [‘the Learned Assessing officer’ or ‘the Ld. AO] in not appreciating the fact that during the FY relevant to AY 2016-17, SanDisk India Device Design Centre Private Limited (‘SanDisk India’) and the Appellant were not associated enterprises.

2.2. The Hon'ble Panel and the Ld. AO erred in facts in not appreciating that there were no marketing support services rendered by SanDisk India to the Appellant during AY 201617.

2.3. The Hon'ble Panel erred in facts and in law in upholding the action of the Ld. AO in concluding that SanDisk India constitutes Dependent Agency Permanent Establishment (‘PE’) of the Appellant in India.

2.4. The Ld. AO erred in not considering the fact that in the absence of any transactions between SanDisk India and the Appellant, the question of Dependent Agency PE does not arise.

3. Reimbursement of salaries paid to seconded employees treated as Fees for Technical service

3.1. The Hon'ble Panel erred in upholding the action of Ld. AO in treating the reimbursements of salaries paid to seconded employees as fees for technical services in the hands of the appellant.

3.2. The Hon'ble Panel erred in upholding the action of the Ld. AO who without application of the mind has erred in law and on facts, in not considering the fact that the

Company had not seconded any employee to SanDisk India during the said year and accordingly the question of receiving any reimbursement of salary of seconded employees does not arise.

3.3. The Ld. AO has erred in law and on facts, without applying the mind and without appreciating the facts submitted, in making an adjustment treating a non-existing reimbursement as fees for technical services.

4. Margin to be attributed

4.1. Without prejudice to the above grounds that the Appellant does not have a PE in India, the Ld. AO erred in facts and the Hon'ble Panel erred in upholding such action of attributing 30% of the sales to India as business income.

4.2. Without prejudice to the ground that the Assessee does not have a PE in India, the Ld. AO erred in not providing an opportunity of being heard before attributing 30% of the sales to India as business income.

5. Interest under sections 234A of the Act

5.1. The Ld. AO has erred in law and on facts in levying interest under section 234A of the Act.

5.2. Without prejudice to the above, the Ld. AO erred in considering October 31, 2016 as the due date for filing return of income and not November 30, 2016 for computing interest under section 234A of the Act.

6. Interest under section 234B of the Act

6.1. The Ld. AO has erred in law and on facts in levying interest under section 234B of the Act.

7. Initiation of penalty proceedings under section 271(1)(c), 271A, 271AA and 271BA of the Act

7.1. The Hon'ble Panel erred in law by upholding the action of the Ld. AO, in initiating penalty proceedings under section 271(1)(c), 271A, 271AA and 271BA of the Act.

8. Relief

8.1. The Appellant prays that directions be given to grant all such relief arising from the preceding grounds as also all reliefs consequential thereto.

8.2. The Appellant craves leave to add to or alter, by deletion, substitution or otherwise, any or all of the above

grounds of appeal, at any time before or during the hearing of the appeal.”

2. Brief facts of the case are as under:

2.1 The assessee is a NR and a leading developer, manufacturer and provider of data storage devices and solutions. It is submitted that, the assessee’s portfolio includes three primary offerings:

- Datacenter Devices and Solutions;
- Client Devices; and
- Client Solutions.

It is also submitted that the assessee markets its products under the WD brand and sells its products through distribution, retail, and direct channels worldwide.

2.2 It is submitted that, on 12.05.2016, the assessee completed its acquisition of the SanDisk Group. SanDisk India Device Design Centre Pvt. Ltd. (‘SanDisk India’), a company registered in India was held by SanDisk Corporation, USA. Pursuant to the acquisition of SanDisk Corporation, USA by the assessee, SanDisk India’s ultimate holding company changed from SanDisk Corporation, USA to the assessee before us. The assessee and SanDisk thus became part of the same group from 12.05.2016 onwards. It is submitted that, prior to the acquisition, the assessee and SanDisk were not associated enterprises upto F.Y. 2015-16, relevant to assessment year under consideration.

2.3 The assessee submitted that, there was survey proceeding undertaken at SanDisk India on 16.01.2019 and 17.01.2019 and the employees of Marketing Support Service Division of SanDisk were administered on oath. Based on the survey proceedings conducted on SanDisk India on 16.01.2019, the Ld.AO issued notice u/s. 148 of the act, on the assessee before us for the year under consideration being 2016-17. The reasons for reopening recorded by the Ld.AO was that, the sales and marketing team of SanDisk India creates an agency permanent establishment of assessee in India.

2.4 It is submitted that during the year under consideration, the SanDisk LLC, USA was in receipt of reimbursement from SanDisk India towards reimbursement of salary expenses of expats. The Ld.AO was of the opinion that, the marketing support team of SanDisk India creates a PE of assessee and treated the reimbursement of salary expenses of the seconded employees made by SanDisk India to SanDisk LLC, USA as FTS in the hands of the assessee. The Ld.AO also concluded that, as MSS activity performed by SanDisk India create a dependent Agency PE of the assessee and attributed 30% of the revenue from operations in India as business Income attributable to PE in India.

Aggrieved by the draft assessment order, assessee filed objections before the DRP.

2.5 During the proceedings before the DRP, the assessee submitted that for the relevant year under consideration, assessee and SanDisk India were not even associated enterprises and that there was no marketing support services that was rendered by SanDisk India to the assessee. The assessee before DRP vehemently submitted that therefore the question of dependent agency PE of assessee in India does not arise. The DRP called for the remand report from the assessing officer on the aspects that was alleged by the assessee. The Ld.AO however passed remand report as under:



उपआयकर आयुक्त का कार्यालय(अंतरराष्ट्रीय कराधान) सर्कल-2(1) बेंगलुरु,
OFFICE OF THE DEPUTY COMMISSIONER OF INCOME- TAX (INTERNATIONAL
TAXATION), CIRCLE-2(1), BENGALURU

(पता :कक्षसं.440, वी.एम.टी.सी.,भवन, चौथीमंजिल,80फिटरोड, कोरामंगला, बेंगलुरु-95)
(Address: Room No.440, BMTC Building, 4TH Floor,80ft Road, Koramangala, Bengaluru-95.)

दूरभाष .नं .Ph. No. 080-25626363,ई-मेल/ Email: - bangalore.dcit.it2. It@incometax.gov.in

F.No. Remand Report/DCIT(IT)/C-2(1)/2023-24

Date: 23/11/2023

सेवामें/To

The Dispute Resolution Panel-2,
Kendriya Sadan, 4th Floor, C-Wing,
Bengaluru- 560034.

(Through Proper channel)

Sir,

विषय /Sub: Submission of remand report in the case of M/s Western Digital
Technologies Pvt Ltd (PAN: AACCW9270F)- AY 2016-17

संदर्भ/ Ref: Letter vide DIN No. ITBA/DRP/F/17/2023-24/1057191379(1)
dated 18/10/2023

Kindly refer to the above.

2. In the case of the assessee company, M/s Western Digital Technologies Pvt Ltd (PAN: AACCW9270F)- AY 2016-17 a draft assessment order u/s 144C(1) of the Income Tax Act, 1961 was passed on 31.03.2023. Against the draft order the assessee company has raised objections on certain grounds before the Ld. DRP. Therefore, a remand report has been called for from this office on the following matters.

3. i) The Assessing Officer is directed to take into account, inter alia, the Form 3CEB, Financial Statement and TP Study Report of M/s Sandisk India for year ending 31.03.2016 and accordingly submit a report as to how the 'sales and marketing' team of M/s Sandisk India can be held to constitute a dependent agent PE of the Assessee company for the previous year relevant to AY2016-17 when there was no transaction between the Assessee company and M/s Sandisk India during the subject year and the two entities were not related parties or associated enterprises to each other.



Comments: A survey was conducted in the case of M/s San Disk India Device Design Centre Pvt Ltd. During the survey and post survey proceedings it was found that the activities of the Marketing Support Service (MSS) segment team of San Disk India are deemed to create an Agency Permanent Establishment. The survey and post survey proceedings revealed that functions undertaken by employees of MSS segment of San Disk India are much more than from the functions which have to be performed as per the marketing service agreement and they have involved in the process of price negotiations, concluding contracts, securing orders for products of Western Digital Technologies (WDT) USA.

During the course of survey u/s 133A(2A) of the Income Tax Act it was found that WDT is making sales to Indian parties and the same has been confirmed from the statements recorded from employees of marketing support service segment and sale department of San Disk India. Subsequently, the assessee furnished the details of sales made in India during the year. However, it was not able to distinguish between sales made of WDT or San Disk. In the TP Study report of Western Digital technologies for the FY 2015-16 relevant to AY 2016-17, the assessee has stated that "The company markets its products under the WD, HGST and SanDisk brands" albeit with a qualification that WDT acquired SanDisk group in the AY 2017-18. However, the assessee has not submitted anything on record to prove the same.

The assessee further claimed that San Disk India was not involved in such sales and did not provide any marketing support services to WDT during year. The assessee's contention that it is not availing marketing services from Indian entity is not acceptable as it has been established during survey that the Indian entity is acting as an agency PE and the assessee has done sales in India. It is pertinent to note that the assessee has admitted for having made sales to India but categorically failed to establish its claim that the San Disk India was not involved in any marketing services.

San Disk India has shown in its Transfer Pricing Memorandum for FY 2015-16 that there has been reimbursement of Expat Salary expenses during the FY under consideration and there has been provision for Marketing Support Services by San Disk India during the FY 2015-16. However, there is no bifurcation of the services rendered AE wise. Thus it is difficult to ascertain whether the contention of the

assessee company regarding the fact that to that it has not availed any marketing services from Indian entity during the FY under consideration.

It is a fact that the assessee has made sales in India during the FY 2015-16 relevant to AY 2016-17. The role of San Disk India in sale of the assessee's products in India is extremely vital. San Disk India (presently known as Western Digital India) had the authority to conclude contracts/deal. San Disk India's activities were not limited only to sales support services.

4. *u) The Assessing Officer is also directed to submit a report on the basis of arriving at the 30% margin in the entire revenue from India during that year, in this respect, the AO may give an opportunity to the Assessee and accordingly submit the report.*

Comments: It is seen that San Disk India is a PE of the assessee, considering that all Indian operations of the assessee are connected with San Disk India. In view of the above, profit attribution was required to be made in the case of the assessee. Since the assessee had not furnished any details regarding its global income and other indices during the course of assessment proceedings, therefore it was difficult to make FAR analysis in the case of the assessee. Therefore, the AO was constrained to attribute profit based on estimation. Reference is made to the case of Daikin wherein Hon'ble ITAT, Delhi had estimated profit at the rate of 10% relating to direct sales and 30% of profits attributable to operations carried out by DAPE in India. Accordingly, a net profit of 30% on revenue from operations has been estimated as business income of the assessee.

5. In view of the above, the remand report is submitted for kind perusal.

Yours faithfully,



(Kiran. S, IRS)

Dy. Commissioner of Income Tax,
International Taxation, Circle-2(1),
Bengaluru.

2.6 The DRP after considering the remand report called for the objections from the assessee which was filed by the assessee on 30.11.2023. The DRP thereafter observed as under:

“5.1.5 The remand report received from the AO had been forwarded to the assessee company. The assessee

company has filed its comments/objections on the remand report vide their letter dated 30.11.2023. On perusal of the assessee objections and the AO report, the Panel is of considered view that the view taken by the AO has been fortified by the findings of the survey, where numerous evidences were gathered in this regard. The AO in the draft order as well as in remand report clearly brought out the facts of the case and abundantly established that Assessee Company is having DAPE in India in the form of San Disk India. Therefore, the Panel did not find any reason to interfere with the view taken by the AO.

5.1.6 Regarding profit allocation to the PE, the Panel is of the considered opinion that having concluded that SanDisk India is a PE of the assessee in India, considering that all Indian operations of the assessee are connected with SanDisk India. The profit attribution is required to be made in the instant case. Further, the AO has relied on the case of Daikin Industries v ACIT (ITA No 1623 of 2015 New Delhi Income Tax Appellate Tribunal, May 28 2018) for attributing the profit to the PE of assessee. In the said judgment, ITAT Delhi had estimated profit at the rate of 10% relating to direct sales and 30% of profits attributable to operations carried out by DAPE in India. Therefore, in view of the above judgment, the action of the AO for attributing profit to the PE of Assessee Company is justified. Thus, the Panel did not find any reason to interfere with the view taken by the AO. Hence, the grounds raised by the assessee on these grounds are hereby rejected.”

2.7 On receipt of the DRP directions, the Ld.AO while passing the impugned order held that SanDisk India is a dependent agent of assessee in India for the year under consideration, and therefore declaring the salary that was paid by SanDisk India to its AE on behalf of the seconded employees was held to be taxable in the hands of the assessee in India at the profit that was attributable at 30% and held it to be business income in the hands of the assessee in India.

Aggrieved by the order of the Ld.AO, the assessee is in appeal before this *Tribunal*.

2.8 The arguments advanced by the Ld.AR are as under:

A) The Ld.AR at the outset submitted that all the grounds raised in the present appeal are in respect of one single issue of considering SanDisk India to be a dependent agent PE of assessee in India for the year under consideration and thereby attributing 30% of the sales to India as business income in the hands of the assessee is beyond the scope of law envisaged under the statute.

B) The Ld.AR submitted the assessing officer treated the reimbursement of salaries paid by SanDisk India to SanDisk LLC, USA for the year under consideration in respect of seconded employees as fee for technical services in the hands of the assessee even though the assessee was not even an AE to SanDisk India, or had any transaction with SanDisk India. He submitted that, the assessee acquired SanDisk LLC USA on 12.05.2016 and therefore any related party transaction took place between the assessee and SanDisk India started only from F.Y. 2016-17 i.e.; A.Y.: 2017-18.

C) The Ld.AR submitted that for the year under consideration, the assessee and the SanDisk LLC USA/SanDisk India were two different entities and there were no related party transaction or any relation between assessee and SanDisk

India in any manner whatsoever. The Ld.AR submitted that from the statement of profit and loss for the year ending on 31.03.2016 of SanDisk India, it is clearly ascertainable that SanDisk India had not rendered any services to assessee. It is submitted that the above fact was brought to the notice of the DRP as well as the assessing officer during the assessment proceedings.

D) The Ld.AR placing reliance on Form 3CEB of SanDisk India submitted that, SanDisk India had not transacted with the assessee during the relevant year under consideration. He referred to clauses 13 and 19 of Form 3CEB and submitted that, SanDisk India made payments to SanDisk LLC, USA and other SanDisk group concerns and not with assessee. He thus submitted that there is no question of treating the amount paid to SanDisk LLC, USA as fee for technical services in the hands of assessee.

E) The Ld.AR referring to the TP study of assessee submitted that, it does not have any reference to SanDisk India and any intercompany services between assessee and SanDisk India which is beyond the scope of report for financial year 2015-16. He thus submitted that for financial year relevant to AY 2016-17, assessee and SanDisk India were not even associated enterprises. He submitted that SanDisk India was captive service provider engaged in rendering software development services and information technology enabled services and marketing support services only to its group

companies being SanDisk LLC, USA group. This fact is verifiable from Form 3CEB filed by SanDisk India placed as pages 183-200 of the paper book.

F) The Ld.AR submitted that survey proceedings took place at the premises of SanDisk India on 16.01.2019, which is after the acquisition of SanDisk LLC, USA by the assessee. He submitted that, any material or transaction between assessee and SanDisk India existed/took place only after 12.05.2016 being the date of acquisition, which is the subsequent assessment year to the year under consideration. The Ld.AR submitted that, in the remand report, the assessing officer is factually wrong in observing that, the sales made by the assessee during financial year 2015-16 relevant to AY under consideration is through SanDisk India and that the role of SanDisk India in the sale of assessee's products is vital. The Ld.AR also submitted that the assessing officer is wrong in concluding that SanDisk India had authority to conclude contract /deals on behalf of assessee and that the activities of SanDisk India were not limited only to sales support services.

G) The Ld.AR referring to the remand report by the assessing officer submitted that, the factual observations noted therein are based on surmises and conjectures without any documentary evidence. He submitted that the Ld.AO has erred in observing that assessee is not able to distinguish between the sales made by assessee or SanDisk. He

submitted that this observation is factually incorrect as assessee never had any transaction with SanDisk India or SanDisk LLC, USA during the year under consideration.

The Ld.AR thus vehemently submitted that, additions made by the Ld.AO is without any basis and documentary support.

2.9 On the contrary, the L.DR relied on the orders passed by the authorities below and placed emphasis on the observations of the Ld.AO in the remand report dated 23.11.2023.

We have perused the submissions advanced by both sides in the light of records placed before us.

3.1 It is noted that the reassessment proceeding was initiated on the assessee post survey conducted on SanDisk India dated 16.01.2019. It is an admitted fact that the assessee acquired SanDisk Corporation USA on 12.05.2016 (FY 2016-17 relevant to AY 2017-18), thereby became the holding company of SanDisk India post 12.05.2016. It is noted that, during the survey proceedings, the employees of SanDisk India in marketing support service division, were administered on oath following which reassessment proceedings were initiated in the case of assessee for A.Y. 2016-17, based on the statements recorded of the employees. It is noted that the revenue proceeded on a fact that assessee transacted with SanDisk India even prior to the date of acquisition, which is unfounded and without any documentary support.

3.2 We have also perused in great detail the transfer pricing report, the financials of assessee as well as SanDisk India for assessment year 2016-17. It is noted that, no related party transaction is found to be existing between the assessee and SanDisk India. The transfer pricing study report of SanDisk India placed at page 201 with specific reference to page 205, reveals the transaction entered into between SanDisk India and SanDisk LLC, USA along with other group entities located in Israel, Malaysia, Ireland, Taiwan.

3.3 In respect of the transfer pricing documentation of assessee, we note that, the assessee undertakes recording of transaction having fiscal year January to December, and the reporting for fiscal year 2016 ended on 01.07.2016. For this reason, there is a mention of acquisition of SanDisk by the assessee at page 151 of the paper book. However, as under Income tax Act, it is always the financial year starting from 1st April ending on 31st March which is to be taken into consideration, and the date of acquisition falls outside the scope of Financial year 2015-16 relevant to assessment year under consideration.

3.4 We also note that, at pages 108 to 114, the assessee placed details of party-wise sales made during financial years 2011-12 to 2017-18, wherein there is no transaction between the assessee and any of the group concern of SanDisk synergies. The revenue has also not established at any point of time that these sales were effectuated through SanDisk India or that SanDisk India was involved in such sales for the year under consideration. It is

therefore noted that for assessment year 2016-17 (the year under consideration), the revenue has failed to establish by way of documentary evidences, involvement of SanDisk India in providing sales and marketing services to assessee as alleged by them.

3.5 It is noted that based on the survey materials collected post the date of acquisition (12.05.2016), the revenue authorities cannot impute any relation between assessee and SanDisk India for the year under consideration being assessment year 2016-17 which is prior to the date of acquisition. It is noted that, the financials of the assessee as well as SanDisk India along with their respective TP study reports for A.Y. 2016-17 placed in the paper book speaks contrary to the factual observations of the Ld.AO in the remand report.

3.6 It is further surprising to note that, the addition made by the Ld.AO in the hands of assessee as FTS amounting to Rs.3,66,94,537/- is the reimbursement of expat salary expenses paid by SanDisk India to SanDisk LLC for the period 01.04.2015 to 31.03.2016. The financial recording to that effect is placed at page 200 of the paper book which is not in dispute. The same is scanned and reproduced as under:

Sr.No.	Name and address of the associated enterprise with whom the international transaction has been entered into	Description of transaction	Amount paid or payable in the transaction		Method used for determining the arm's length price [See section 92C(1)]
			(i) as per books of account	(ii) as computed by the assessee having regard to the arm's length price	
	Clause 19(a)	Clause 19(b)	Clause 19(c)		Clause 19(d)
1	SanDisk LLC, USA 951, SanDisk Drive, Milpitas, California -95035, USA	Reimbursement of employees' contribution to employee stock purchase plan	86,974,966	86,974,966	Other Method (Refer to note below)
2	SanDisk LLC, USA 951, SanDisk Drive, Milpitas, California -95035, USA	Reimbursement of expat salary expense	36,694,537	36,694,537	Other Method (Refer note 2 & 3 below)
	Total		123,669,503	123,669,503	

We hold that the above addition in the hands of assessee for year under consideration as FTS in the case shear non-application of mind by the revenue authorities.

3.7 It is noted that, the authorities have tried to make out a business connection between assessee and SanDisk India for the year under consideration by concluding that the marketing support services rendered by SanDisk India constitutes an agency PE of assessee in India. However, the authorities failed to appreciate for assessment year 2016-17, as there has been no transaction in any manner whatsoever between assessee and SanDisk India, there is no question of creation of an agency PE of assessee in India through SanDisk India. The revenue has miserably failed to establish by way of any documentary evidence that for A.Y. 2016-17, SanDisk India was acting on behalf of

assessee in India in order to constitute a deemed permanent establishment under Article 5(4) of India-u/s. DTAA.

3.8 Be that as it may, the revenue has not brought any interrelated transaction between assessee and SanDisk India on record to establish that assessee and SanDisk India were associated enterprises during the financial year relevant to AY 2016-17. Therefore in our considered opinion, the observations of the Ld.AO in attributing 30% of business profits of SanDisk India in the hands of assessee for the year under consideration do not have any legs to stand in the eyes of law.

3.9 We therefore, based on the above discussion and observations hold that SanDisk India cannot be held to be a dependent agency PE of assessee in India for the year under consideration and no addition could be made in the hands of assessee as FTS or any attribution of profits earned by SanDisk India could be made in the hands of assessee for the year under consideration as there is no relation or there do not exist any transaction that has been brought on record between assessee and SanDisk India.

Accordingly, we allow ground nos. 1 to 3 raised by the assessee.

4. Ground no.4 is a without prejudice ground raised by assessee that do not require any adjudication as we have held that SanDisk India does not constitute dependent agency Permanent Establishment of assessee in India in the preceding paragraphs.

5. Ground nos. 5-7 are consequential in nature and do not require any adjudication.

6. Ground no. 8 is general in nature.

In the result, the appeal filed by the assessee stands allowed.

Order pronounced in the open court on 31st July, 2024.

Sd/-
(LAXMI PRASAD SAHU)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 31st July, 2024.
/MS /

Copy to:

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|---------------|------------------------|
| 1. Appellant | 2. Respondent |
| 3. CIT | 4. DR, ITAT, Bangalore |
| 5. Guard file | 6. CIT(A) |

By order

Assistant Registrar,
ITAT, Bangalore