

**IN THE INCOME TAX APPELLATE TRIBUNAL
“I” BENCH, MUMBAI**

**BEFORE SHRI PAWAN SINGH, JM &
MS PADMAVATHY S, AM**

**I.T.A. No.946/Mum/2025
(Assessment Year: 2022-23)**

Hempel Singapore Pte. Ltd., 1A International Business Park, # 03-01 Singapore-609933 C/o Hempel Paints (India) Pvt. Ltd. Unit No. 2, 4 th Floor, Art Guild House, Phoenix Market City, LBS Marg, Kurla (West), Mumbai-400070 PAN: AADCH3737M	Vs.	DCIT, International Tax Circle- 2(2)(2), Room No. 606, 6 th Floor, Kautilya Bhavan, C-41 to C-43, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051.
Appellant)	:	Respondent)

Appellant / Assessee by : Shri Madhur Agarwal / Punit Shah,
AR

Revenue / Respondent by : Shri Krishna Kumar- Sr. DR

Date of Hearing : 08.04.2025
Date of Pronouncement : 11.04.2025

ORDER

Per Padmavathy S, AM:

This appeal by the assessee is against the order of the Deputy Commissioner of Income Tax. International Tax Circle-2(2)(2), Mumbai passed under section 147 r.w.s. 144C(13) of the Income Tax Act, 1961 (the Act) dated 27.12.2024 for AY 2022-23. The assessee raised the following grounds of appeal:

“1: Assessment Order barred by limitation

1.1 On the facts and circumstances of the case and in law, the Final Assessment Order dated 27 December 2024, passed by the learned AO under section 143(3) read with section 144C(13) and Section 144B of the Income-tax Act, 1961 (the Act'), having being passed beyond limitation provided in terms of Section 153 of the Act, is void-ab-initio, illegal, bad in law and therefore liable to be quashed.

The Appellant prays that the impugned assessment order passed by the Learned AO is bad in law and liable to be quashed.

Ground No. 2: Attribution of profits

2.1 On the facts and circumstances of the case and in law, the Hon'ble DRP/Learned AO erred in further attributing Rs. 13,29,01,802 as income of the Permanent Establishment ('PE') of the Appellant, taxable in India.

2.2 On the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO erred in not appreciating that the Appellant has attributed the appropriate profits having regard to the operations that are carried out in India as required under section 9 of the Income-tax Act, 1961 ('IT Act').

The Appellant prays that the income reported in the return of income of the Appellant be accepted.

2.3 On the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO erred in not appreciating that the Appellant has attributed the appropriate profits to its Permanent Establishment in India as per Article 7 of the Double Taxation Avoidance Agreement (DTAA) between India and Singapore.

The Appellant prays that the income reported in the return of income of the Appellant be accepted.

2.4 On the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO erred in attributing additional profits on ad-hoc basis to the PE of the Appellant, without considering the fact that the Appellate has paid an arm's length commission to the agent and such payment of commission extinguishes any further attribution of income to the PE of the Appellant in India.

The Appellant prays that the income reported in the income reported in the return of income of the Appellant be accepted.

2.5 On the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO further erred in:

2.5.1 not following the order of the Hon'ble ITAT for AY 2014-15. AY 2015-16 and AY 2017-18;

2.5.2 rejecting the transfer pricing study report without any basis,

2.5.3 alleging that the PE has not been compensated for market risk, product liability risk and credit risk attributable to it;

2.5-4 rejecting the comparable companies as functionally different;

2.5.5 not undertaking the fact finding exercise and failed to substantiate their assumption by not bringing anything on records;

2.5.6 computing the arms' length price of the transaction without referring the issue to the Transfer Pricing Officer, which is in gross violation of Instruction No. 3 of 2016 issued by the CBDT:

2.5.7 determining an ad-hoc attribution of profits, without any basis/comparative study.

2.6 On the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO erred in:

2.6.1 not appreciating that no further attribution of income is warranted, once the international transaction has been accepted to be at arm's length in the assessment proceeding of the Indian agent ie. Hempel Paints (India) Pvt. Ltd. ('Hempel India') who is recipient of such commission income:

2.6.2 not considering the fact that for the same nature of transaction there could not be multiple arm's length price i.e. while performing the agency function the Ld. AO/Hon'ble DRP has determined 25% of the sales made in India on ad-hoc basis as income attributable to the PE, however while remunerating Hempel India for performing same function/agency services, the Ld. AO has concluded 8.17% commission on sales as expense deductible while computing the profits of PE. Thus, for the same nature of transaction the Ld. AO/ Hon'ble DRP has determined two different remunerations i.e. 25% of the sale for income side on ad-hoc basis and 8.17% on sale for expense side;

2.6.3 not appreciating that no 'significant people function' was performed by the PE of the Appellant in India and thus, no further attribution was warranted.

Ground No. 3: Incorrect levy of interest under Section 234B of the Act

3.1 On the facts and in the circumstances of the case and in law, the Learned AO has erred in levying interest under section 234B of the Act.

The Appellant prays that the Learned AO be directed to re-compute the interest under section 234B of the Act as per the law.

Ground No. 4: Initiating penalty proceedings under section 270A of the Act

4.1 On the facts and circumstances of the case and in law, the learned AO has erred in initiating penalty proceedings under section 270A of the Act for under reporting of income in consequence of misreporting.

The Appellant prays that the penalty proceedings ought to be dropped.”

2. The assessee is a non-resident company incorporated under the laws of Singapore and is a tax resident of Singapore. The assessee is engaged in the business of selling protective coating / paints including marine protective container Yacht Coating. The assessee in order to cater to its business with Indian Customers is availing sales support services of Hempel Paints (India) Pvt. Ltd (Hempel India). The assessee filed the return of income for AY 2022-23 on 24.11.2022 declaring a total income of Rs. 8,94,79,500/-. The case was selected for scrutiny and the statutory notices were duly served on the assessee. The AO treated Hempel India as the Dependent Agent Permanent Establishment (DAPE) of the assessee and accordingly attributed 25% of the sale value net of expenses as profits attributable to assessee's PE in India to make additions accordingly. Assessee raised further objections before the DRP. The DRP confirmed the addition made by the AO by placing reliance on its own directions in assessee's case for AY 2017-18. The assessee is in appeal before the Tribunal against the final order of assessment passed by AO as per the directions of the DRP.

3. We heard the parties and perused the material on record. The ld. AR during the course of hearing submitted that the Co-ordinate Bench in assessee's own case for AY 2017-18 (ITA 1205/Mum/2021 dated 01.08.2022) has considered the similar issue and deleted the addition made by the AO. The ld. AR further submitted that the DRP has relied on its own order for AY 2017-18 which substantiates that the fact for the year under consideration are identical to AY 2017-18 and accordingly the decision of the Co-ordinate Bench is applicable for the year under consideration also. The ld. DR did not controvert the submission of the ld. AR. We notice that the Co-ordinate Bench while considering the identical issue for AY 2017-18 in assessee's case held that

“9. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee’s own case in Hempel Singapore Pte Ltd vs DCIT, in ITA No. 7296/Mum/2017, vide order dated 08/02/2019, for the assessment year 2014–15, while holding that when the commission has been found to be at arm’s length price in the hands of the recipient Indian subsidiary i.e. Hempel India, nothing more would be left to be taxable in India by attributing further income to the PE of the foreign enterprise, observed as under:

“7. We have carefully considered the rival submissions. The appellant before us is a resident of Singapore and has business activities in India. Admittedly, it has appointed its 100% owned subsidiary, Hempel India as a sales agent, who is rendering sales support services. It is compensating its Indian subsidiary at cost plus 8.17% mark-up as commission on sales effected through the agent in India. There is no dispute about the existence of assessee's agency PE in India. A foreign company is liable to be taxed in India on so much of its business profits as is attributable to its PE in India. In the present case, the point sought to be made by the assessee is that the commission payment to Hempel India by the assessee is adequate and justified on the basis of transfer pricing analysis, which has indeed been affirmed by the income-tax authorities in the case of Hempel India for the instant assessment year. Therefore, according to the assessee, no further income could be attributable to its agency PE again. In other words, as per the assessee, once transfer pricing analysis of the transaction between assessee and its agent in India has been undertaken, there is no further need to attribute profits to the agency PE so long as the remuneration to the Indian agent has been held to be at an arm's length price. Undoubtedly, the proposition sought to be canvassed by the assessee has the approval of

Hon'ble Supreme Court in the case of M/s. Morgan Stanley & Co. Inc (supra). The judgment of the Hon'ble Bombay High Court in the case of SET Satellite Singapore Pte Ltd. (supra) is also on the same lines in terms of which it is safe to draw the premise that if appropriate arm's length price has been found to have been applied and paid, nothing more would be left to be taxable in India by attributing further income to the PE of the foreign enterprise. The aforesaid proposition, in our view, is fully attracted in the present case having regard to the fact that for the instant assessment year the commission has been found to be at arm's length price in the hands of the recipient Indian subsidiary, i.e. Hempel India in view of the assessment order dated 27.10.2017 (supra).

8. Before parting, we may also refer to the judgment of the Hon'ble Delhi High Court in the case of DIT vs BBC Worldwide Ltd., ITA Nos. 1341 of 2010 & ors. dated 30.09.2011, which has been relied upon by the assessee before us. In the said case also, the aforesaid proposition was sought to be canvassed on behalf of the assessee therein. The Revenue opposed the same by pointing out that the relevant transfer pricing reference was not in the case of the nonresident assessee therein, but in the case of the Indian recipient. The Hon'ble High Court specifically repudiated the aforesaid plea and held that once it was treated as arm's length price in the hands of the recipient, a different view cannot be taken in the case of assessee non resident who had paid the same commission to its agent. The Hon'ble High Court deemed it fit to apply the proposition approved in the case of M/s. Morgan Stanley & Co. Inc (supra) as well as in the case of SET Satellite Singapore Pte Ltd. (supra) even in a situation where the transfer pricing reference was in the context of Indian recipient of income. In our considered opinion, the ratio of the judgment of the Hon'ble Delhi High Court in the case of BBC Worldwide Ltd. (supra) is fully attracted in the present case and, therefore, the addition of ₹5,15,05,000/- to the returned income is clearly untenable in the facts of the instant case. We hold so.”

10. We further find that similar findings were also rendered by coordinate bench of the Tribunal in assessee"s own case in Hempel Hempel Singapore Pte. v/s DCIT, in ITA No. 6601/Mum./2018, vide order dated 03/04/2019, for the assessment year 2015–16. The learned Departmental Representative could not show us any reason to deviate from the aforesaid orders and no change in facts and law was alleged in the relevant assessment year. The issue arising in the present case is recurring in nature and has been decided in favour of the assessee by the decision of the coordinate bench of the Tribunal for preceding assessment years. Thus, respectfully following the orders passed by the coordinate bench of the Tribunal in assessee"s own case cited (supra), we uphold the plea of the assessee and delete the impugned addition. Accordingly,

ground no. 1 read with ground no. 4 raised in assessee's appeal are allowed. In view of the above, other grounds need no separate adjudication."

4. It is also brought to our attention that the impugned issue is recurring in nature and that the Co-ordinate Bench has been consistently deciding the issue in favour of the assessee in earlier year also. Considering the fact that no new material has been brought on record for the year under consideration by the revenue to controvert the above findings of the Co-ordinate bench, we see no reason to take a different view. Accordingly, respectfully following the decisions of the Co-ordinate Bench in assessee's own case, we hold that the addition made by the AO is not sustainable. Ground No.2 raised by the assessee in this regard is allowed.

5. Ground No.1 pertains to the legal issue that the order of assessment dated 27.12.2024 is barred by limitation. Since we have allowed the appeal on merits the legal contention raised by the assessee have become academic and left open accordingly.

6. Ground No.3 is with regard to levy of interest under section 234B and Ground No.4 pertains to levy of penalty under section 270A of the Act. These grounds being consequential in nature do not warrant any separate adjudication.

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

Order pronounced in the open court on 11-04-2025.

Sd/-
(PAWAN SINGH)
Judicial Member

**SK, Sr. PS*

Sd/-
(PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai

4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai