

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ “एल” मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL “L” BENCH, MUMBAI
BEFORE S/SHRI JASON P BOAZ,(AM) and SAKTIJIT DEY, (JM)

ITA NO.684/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2011-12)

Dimension Data Asia Pacific Pte.Ltd,(Formerly known as Datacraft Asia Pte. Ltd), C/o Dhruva Advisors LLP, 12 th Fl., Discovery of India Building, Dr.Annie Besent road, Worli, Mumbai-400018	<u>बनाम/</u> Vs.	The Dy. Commissioner of Income Tax (International Taxation), 2(1)(2), 17 th floor, Air India Building, Nariman Point, Mumbai-400021
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./PAN : AADCD4348L

अपीलार्थी की ओर से / Assessee by	:	S/Shri Sunil Moti Lala and Tushar Hathiramani
प्रत्यर्थी की ओर से/Revenue by	:	S/Shri Jasbir Chauhan and M V Rajguru

सुनवाई की तारीख /Date of Hearing	:	28.4.2017
घोषणा की तारीख /Date of Pronouncement	:	5.5.2017

आदेश / ORDER

PER SAKTIJIT DEY, JUDICIAL MEMBER,

The aforesaid appeal at the instance of the assessee is directed against the assessment order passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 for the assessment year

2011-12 in pursuance to the direction of the Dispute Resolution Panel (DRP).

2. Briefly stated, facts which are necessary for deciding the issue raised in the present appeal are, the assessee company, a tax resident of Singapore, entered into an agreement with Dimension Data India Limited (DDIL) to provide advisory services in the field of management, sales, marketing, finance and administration, human resources and information technology. For providing such services to DDIL, the assessee earned management fees of Rs.22,56,91,365/- which the assessee did not offer as income in India. In course of assessment proceedings, relying upon various provisions of India-Singapore Double Tax Avoidance Agreement (DTAA) assessee contended that in absence of a Permanent Establishment (PE), the fees earned from DDIL is not taxable in India. The AO, however, was not convinced with the submissions of the assessee. On the basis of material available on record, the AO observed that employees of the assessee company had visited India during the relevant previous year for rendering services to DDIL and stayed for more than 30 days. Therefore, even as per the DTAA, there is a PE in India. He, therefore, held that the fees received amounting to Rs.22,56,91,365/- is the business receipt of the assessee. Alleging that the assessee had not given any details of expenditures incurred for earning such income the AO resorted to Rule 10 of the Income Tax Rules, 1962. The AO estimated allowable

expenditures at 10% of the fees received of Rs.22,56,91,365/-. Thereby arriving at net taxable income of Rs.20,31,22,230/-. The assessee challenged the determination of business income by the AO before the DRP, inter alia, on the ground that there being no PE in India the income earned is not taxable. The DRP, however, did not agree with the contention of the assessee and held that the assessee has a PE in India, therefore, the business income earned for providing management support services to its subsidiary is taxable in India. It is pertinent to mention here, before the DRP, the assessee had also made alternative claim that in case, it is held that the assessee has PE in India and the fees received from DDIL is taxable, in that case only the profit attributable to the operation in India of the PE is taxable and not the entire management fees. It was further contended, as the assessee has earned profit of 10% on cost, allowance of expenditure at 10% is unjust. The DRP after considering the aforesaid submissions of the assessee though agreed on principle that the income only to the extent attributable to PE is taxable in India, however, held that in absence of any supporting evidences submitted by the assessee regarding activities of its employees in India and details regarding expenses incurred in relation to the fees charged, the entire fees received of Rs.22.56 crores is attributable to the PE. The DRP further observed that the claim of the assessee that the fees received is on cost Plus 10% mark-up basis is merely submissions without any supporting details and

evidences, hence, cannot be accepted. Accordingly, the DRP confirmed the income determined by the AO. On the basis of the direction of the DRP, the AO passed the impugned assessment order. Being aggrieved, the assessee is before us with the following grounds :

1. Ground No. 1 - Appellant Considered to Constitute a Permanent Establishment (PE) in India

1.1. On the facts and in the circumstances of the case and in law, the learned Assessing Officer and the Honourable DRP, without appreciating the evidence and submissions filed, erred in holding that the Appellant has a PE in India under Article 5(6) of India Singapore Tax Treaty.

2. Ground No. 2 -Attribution of entire management fee to the alleged PE in India

2.1. On the facts and in the circumstances of the case and in law, the learned Assessing Officer and the Honourable DRP, erred in attributing the management fee (of Rs.225,691,365) received in pursuance to the Agreement for provision of Management, General Support and Administrative services to the alleged PE.

2.2. Alternatively and without prejudice to the above, on the facts and in the circumstances of the case and in law, the learned Assessing Officer and the Honourable DRP further erred in attributing entire management fee earned of Rs. 225,691,365 to the alleged PE instead of restricting the same only to such management fee which was earned from services rendered in India

3. Ground No. 3 - Allowability of expenses to the alleged PE in India

On the facts and in the circumstances of the case and in law, the learned Assessing Officer and the Honourable DRP erred in allowing an arbitrary deduction of only 10% as expenses and taxing 90% of the management fee as business income instead of taxing 10% thereof, ignoring the evidences provided in support of fact that the Appellant had earned only 10% mark-up on management fees.

The Appellant prays that the learned Assessing Officer be directed to assess only 10% of the management fee to the extent the same is found to be attributable to the alleged PE in terms of Ground No 2 above.

4. Ground 4 - Levy of interest of INR 36,062,602 under Section 234B

4.1. On the facts and in the circumstances of the case and in law, the learned Assessing Officer and Honourable DRP erred in levying interest under Section 234B of the Act, amounting to Rs. 36,062,602/- without appreciating the fact that provisions of Section 234B of the Act are not applicable to the Appellant, who being a non-resident, is not liable to pay advance tax under section 208 of the Act since its entire revenues/ receipts are subject to withholding tax in India”

3. At the outset, the Id.AR appearing for the assessee submitted that on the instructions of his client he does not want to press ground no.1. Accordingly, ground no.1 along with its sub-ground is dismissed as not pressed. As far as ground no.2 and 3 are concerned, the Id. AR submitted that the assessee has entered into agreement with DDIL for providing management support services at cost plus mark up basis and as per terms of the agreement, it is remunerated at cost + mark-up of 10% for providing management support services to DDIL. Ld.AR submitted, before the DRP assessee had a raised specific objection stating that only 10% of the fees received can be treated as income of the assessee from providing of management support services and after allowing expenditure net income has to be computed. In this context, the Id.AR drew our attention to the relevant clauses of the agreement, a copy of which is at page (1) of

the paper book. Ld.AR submitted, the turnover relating to Indian operation is 10.22% of the total turnover, therefore, the assessee has attributed cost @ 10.22% to Indian operation out of the total cost and computed mark-up of 10% on that. In this context, he referred to the details of expenditures incurred during the relevant previous year for the entire global operations at page 20 of the paper book. Ld.AR submitted, in view of the above facts the adhoc allowance of expenditure at 10% of the total fees received is arbitrary and contrary to the facts and material brought on record. He submitted that Tribunal while disposing of the assessee's Stay Application No.72/Mum/2016 in order dated 8.3.2016 has also appreciated these facts. He submitted, even the TPO, while passing the order under section 92CA on reference made by the AO has accepted that 10% mark-up was the maximum income earned by the assessee. He submitted that on that basis the profit attributable to PE in India would be an amount of Rs.6,57,833/-. To demonstrate such fact, the assessee's AR furnished following working before us.

Particulars			Source of information
Total employees of DD Asia	A	163	Directors Certificate
Working days in a year	B	264	Assuming 22 days/month
Total man days (considering entire year for all employees)	C=A*B	43,032	163 x 264
Ratio of DDIL's turnover to the global turnover	D	10.22	Written submissions dated 6 July 2015 (PB/20)
Total man days allocated based on turnover ratio(For INXA)	E=C/D	4,211	Proposition for India @10.22%
Man days of employees in India	F	135	Submissions filed on 22.9.2015(PB/41)
Gross income earned by DD Asia from DDIL	G	225,691,365	Final assessment order
Net income/profit earned by DD Asia	H	20,3517,397	G x 10/110 (See

from India operation			objections before DRP and ITAT stay order
Profit attributable to PE	$I=H/E*F$	657,833	

The Id. AR, therefore, submitted that even assuming that there is a PE, the income which is attributable to the PE and can be assessed at the hands of the assessee is far less than what the departmental authorities have determined.

4. The DR relying upon the observations of the DRP/AO submitted that the assessee having not furnished any supporting evidences before the departmental authorities to substantiate its claim, the determination of taxable income was proper.

5. We have considered the rival contentions and material on record. Since the assessee gave up the issue relating to existence of PE in India as raised in ground no.1, we are proceeding on the footing that the assessee has PE in India. Having held so, the issue remains to be decided is what is the quantum of profit earned by the assessee and what income out of such profit is attributable to the PE in India. It is the contention of the AR that the assessee is remunerated at cost +(plus) mark-up of 10%. On perusal of the agreement dated 29.5.2001, the assessee and DDIL the aforesaid claim of the assessee appears to be correct. However, as perused from the assessment order and more particularly, the observations of the DRP in paragraphs 2.5 and 2.5.1 of its order, specific allegation is that the assessee had not produced any evidence with regard

to the expenditures incurred from earning of fees from India operations. Though, the AR before us had submitted the working of profit attributable to the PE in India, however, on a specific query raised by the Bench, the AR fairly submitted that working of profit attributable to the India PE was not submitted either before AO or DRP. Thus, as could be seen, assessee's claim and contentions with regard to the profit element of fees received from DDIL and income attributable to the India PE has not been properly considered either by the AO or by the DRP, may be for absence of relevant material being submitted by the assessee or for some other reason. At this stage, we do not intend to enter into the controversy whether the assessee has submitted supporting evidences to justify the expenditure claimed. Suffice to say, the assessee's claim that the profit attributable to India PE, as per the working furnished before us and which forms part of this order requires proper examination by the AO. It is relevant to observe, though, as per section 9(1) of the Act all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, shall be deemed to accrue or arise in India, however, Explanation (1) to section 9(1) makes it clear, in case of a business of which all operations are not carried out in India, only such part of the income as is reasonably attributable to the operations carried out in India shall be deemed to accrue or arise in India.

Therefore, the income of the assessee has to be determined keeping in view the aforesaid legal principle. In view the aforesaid facts, since the assessee's contention with regard to the exact profit attributable to PE in India has not been properly analysed/examined, therefore, we are inclined to remit the issue to the file of the AO for fresh adjudication. It is open for the assessee to furnish all material/evidences to justify its claim that profit worked out as per the chart submitted before us is the income actually attributable to the PE in India. Due opportunity must be given to the assessee to produce any other evidences and material before the AO on this account. The AO is directed to properly consider and examine the submissions of the assessee in the light of the evidences and material brought on record and decide the issue as per law. It goes without saying, the AO must afford reasonable opportunity of being heard to the assessee before deciding the issue. Ground no.2 and 3 are allowed for statistical purposes.

6. Ground no.4 is challenging levy of interest u/s 234B of the Act for non-payment of advance tax.

7. We have heard parties and perused the material on record. The assessee being a non-resident, the liability is on the payer to deduct tax at source u/s 195 of the Act at the time of payment and there is no liability on the assessee to pay advance tax. This view of ours is supported by the ratio laid down by the Hon'ble Jurisdictional High Court in the case of

Director of Income-tax (International Taxation) v. NGC Network Asia LLC
 [2009] 222 CTR 85 (Bombay)= (2009) 313 ITR 187 (Bom). In view of the
 above levy of interest u/s 234B of the Act is unsustainable. This ground is
 allowed.

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

Order pronounced in the open court on 5th May, 2017.

Sd

sd

(JASON P BOAZ)
 लेखा सदस्य / Accountant Member

(SAKTIJIT DEY)
 न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated :5.5.2017
 SRL,Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

True copy

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