IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : I-2 : NEW DELHI

BEFORE SHRI S.V. MEHROTRA, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.5102/Del/2013
Assessment Year : 2007-08

Consulting Engineers Corporation, C/o S. Ramanand Aiyar & Co, CA, 708, Surya Kiran Building, 19, Kasturba Gandhi Marg, New Delhi. PAN: AAAAC1196J	Vs.	ADIT, Circle-1(1), International Taxation, New Delhi.

ITA No.5404/Del/2013
Assessment Year : 2007-08

DDIT, Circle-1(1), International Taxation, New Delhi.	Vs.	Consulting Engineers Corporation, C/o S. Ramanand Aiyar & Co, CA, 708, Surya Kiran Building, 19, Kasturba Gandhi Marg, New Delhi. PAN: AAAAC1196J
(Appellant)		(Respondent)

Assessee By	:	Shri M.P. Rastogi, Advocate & Smt. Lalita Krishnamurthy, CA
Department By	:	Shri B. Ramanjaneyulu, Sr. DR

Date of Hearing : 27.04.2017
Date of Pronouncement : 05.05.2017

ORDER

PER S.V. MEHROTRA, VP:

These cross appeals are filed by the assessee and the Revenue against the order passed by the CIT(A) dated 01.07.2013 for assessment year 2007-08.

2. First we take up the assessee's appeal. The assessee has raised the following grounds:-

> "1. That in the absence of a PE in India in terms of DTAA (Double Taxation Avoidance Agreement with the US, no business profit can be said to have accrued in India, accordingly the appellant is not liable to be taxed in India.
>
> 2. That as the activities of Branch in India are only preparatory and auxiliary services rendered to Head Office in the US and consequently there is no PE, hence in the absence of PE no income is liable to be taxed in India.
>
> 3. That there is no international transaction with an Associated Enterprise (AE) as contemplated under Section 92C of the Income Tax Act, 1961 hence no income ought to have been deemed under Section 92C of the Income Tax Act, 1961.
>
> 4. That the provisions of Section 92C in terms are not applicable and consequently the income attributed of Rs.20,86,409 / - is arbitrary, unjust and at any rate very excessive.
>
> 5. That the appellant functions as a Branch of the US Nonresident involving only in preparatory and auxiliary activities for US

Nonresident, the cost whereof is reimbursed by US, hence there could be no income accrued to the appellant and consequently the attribution of income at a figure of Rs.20,86,409 / - is arbitrary, unjust and bad in law.

6. That in the absence of any income embedded in the amount reimbursed by US Nonresident to its Branch (appellant), acting as a pure cost centre, the income attributed at a figure of Rs.20,86,409 / - is bad in law.

7. Without prejudice to above grounds the CIT(Appeals), after assessing the profit attributable at a figure of Rs.20,86,409 / - to the Branch in India, ought to have subjected it to a further downward adjustment for functions performed, assets employed, working capital available and risks assumed.

8. Without prejudice to above grounds the authorities erred in charging interest under, section 234B of the Income Tax Act.

9. Without prejudice to above grounds the authorities ought to have adopted the status of the appellant as individual instead of Foreign Company.

10. The above grounds are independent and without prejudice to one another.

11. Your appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal at the time of hearing."

3. Brief facts of the case are that the assessee, a premier engineering consultancy company was established in 1986 by Maharaj Jalla, a licensed professional engineer to provide quality structural, civil and geotechnical engineering consulting services. The mission of the corporation was to deliver to its clients the best quality service with the least turnaround time in the most economical way. To take advantage of

the growing trend in globalization and to arbitrage cost differences CEC established a software development unit at Delhi in 1991. The Indian Branch had filed return of income declaring taxable income of Rs.20,86,609/-. A reference was made to the Transfer Pricing Officer (TPO) for determining the arm's length price (ALP) in respect of international transaction relating to IT enabled back office services relating to engineering consultancy. The assessee's main plank of argument was that branch office in India provided back office support in structural engineering design and was merely a cost centre and got reimbursed for its expenses from head office. All risks were borne by the head office in USA. Intellectual property rights vested with the head office only. It does not have business dealings with any one except the head office. Thus, it was the assessee's plea that there was no fixed place of business in India. At the very outset, the ld. counsel for the assessee fairly conceded that in assessment years 2003-04, 2004-05 and 2006-07 (ITA Nos.1597/Del/2009, 1598/Del/2009 & 1613/Del/2011) it has throughout been held that the assessee is having a PE in India. We find that in assessment year 2003-04, in para 23, the Tribunal has, inter alia,

held that the assessee has a PE in India as per the provisions of Article 5(2)(b) and (c) of Indo-US DTAA. Therefore, ground Nos.1 to 6 are dismissed.

4. As far as profits attributable to the branch in India are concerned, which issue has been raised in ground No.7, we find that in assessment year 2002-03 and 2004-05, the Tribunal, in para 33 and 34, has observed as under:-

> "33. On careful consideration of above rival submissions, from the relevant part of the impugned order, we observe that the AO has not brought out any fact or material into existence that the risk of marketing and quality control activity have taken place and all developmental activities have taken place in India. In this situation, it cannot be said that risk is involved exclusively either on the Head office or on the PE branch office in India. Obviously, from stage of discussion and obtaining the contract till its final marketing to the respective client have been undertaken by the US Head office but at the same time this fact cannot be ignored that the PE branch office in India contributed towards all development activities at the cheaper cost of service and human resources in comparison to USA, therefore, we are of the view that for earning higher profit in comparison to USA, comparable companies as adopted in transfer pricing study, the US Head office earned higher profit due to low cost of services and human input by Indian PE. At the same time, although we note that the risk factor was also borne by the Indian PE branch, we also note this fact that certain risk in regard to capital investment, bad debts and other legal obligations were ITA No.1597,1598,1275,1172/D/2009 Asstt.Years: 2003-04, 2004-05 30 borne by the US Head office, therefore, the AO rightly adopted the global profit of the US Head office for benchmarking the percentage of profit and the AO attributed 100% profit to the Indian PE. At this juncture, from the impugned order, we also observe that the CIT(A) has

> taken into account this very fact that the Indian branch takes some risk as the important drawing and designing calculations are carried out by the Indian company and impliedly other risks as stated above were taken by the US Head office and, therefore, in the totality of these facts and circumstances, the CIT(A) was justified in holding that 50% of the profits determined by the AO after applying rule 10 were to be attributable to the operations carried out by the PE in India. 34. On the basis of foregoing discussion, we are in agreement with the action of the CIT(A) that he directed the AO to calculate attributable profit @50% of the figure arrived after applying profit rate of 8.5% for AY 2003-04 and 10.6% for AY 2004-05. Finally, we reach to a conclusion that the contentions of the assessee for wrong adoption of global profit of the US Head office are not sustainable. At the same time, we also observe that the CIT(A) was reasonable and justified in directing the AO to calculate the attributable profit at 50% of the figure arrived by the AO after applying global profit rate of US Head office for the respective assessment years under consideration in these appeals. Accordingly, ground no. 11 & 12 for AY 2003-04 and ground no. 6 & 7 for AY ITA No.1597,1598,1275,1172/D/2009 Asstt.Years: 2003-04, 2004-05 31 2004-05 of the assessee as well as ground no. 1 to 4 of the revenue in both the appeals for AY 2003-04 and 2004-05 are dismissed."

5. In assessment year 2006-07, the Tribunal has directed the Assessing Officer to recompute the income of the assessee in the light of the decision of ITAT in the assessee's own case for assessment year 2003-04 and 2004-05. We accordingly, set aside the impugned order and restore the matter to the file of the Assessing Officer with a direction to recompute the income of the assessee in the light of the decisions of the ITAT in the assessee's own case for assessment years 2003-04, 2004-05 and 2006-07.

6. Ground No.8 is consequential.

7. Ground No.9 was not pressed even before the CIT(A). Hence, dismissed.

8. The Department has raised the following two grounds:-

> "1. On the fact and in the circumstances of the case, the holding of Ld ClT(A) that most of The comparables adopted by TPO are having business profile different from that of the assessee is wrong and incorrect as the Ld CIT (A) has been failed to provide the reason as to how and upto what extent the comparables adopted by TPO are having different business profile from that of the assessee company.
>
> 2. On the facts and in the circumstances of the case, the CIT(A) erred in holding that the profit returned by the assessee exceed the profit computable as per formula directed by CIT(A) in earlier years and therefore the consistency rule should be followed, as the PE also assumes risks in respect of work done by it and the HQ earns its own profit in respect of expenses not attributable to PE and so the A.O has correctly determined the taxable profit as the income of the assessee
>
> 3. The appellant craves to add, amend, modify, or alter any grounds of appeal at the time or before the hearing of the appeal."

9. Both these grounds are with reference to profits attributable to the PE and, therefore, since we have restored the matter to the file of the Assessing Officer on this ground, both the grounds raised by the Department are also allowed for statistical purposes.

10. In the result, the appeal of the assessee is partly allowed and that of the Department is allowed for statistical purposes.

The order pronounced in the open court on 05.05.2017.

Sd/-	Sd/-
[SUDHANSHU SRIVASTAVA] JUDICIAL MEMBER	[S.V. MEHROTRA] VICE PRESIDENT

Dated, 05th May, 2017.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.