TAXMANN®
www.taxmann.com
•Direct tax Laws •Corporate Laws •Indirect Tax Laws
•International Taxation •Accounts and Audit

[2016] 67 taxmann.com 326 (Mumbai - Trib.)

IT/ILT: Where assessee, a non-resident, received management fee from its Indian subsidiary but Assessing Officer made assessment at sum 10 times higher to returned income and raised demand, stay on said demand should be granted to assessee in view of CBDT Instruction No. 96

■■■

[2016] 67 taxmann.com 326 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'L'

Dimension Data Asia Pacific (Pte.) Ltd.

v.

Deputy Commissioner of Income-tax, (International Taxation) Mumbai*

SANJAY ARORA, ACCOUNTANT MEMBER
AND AMARJIT SINGH, JUDICIAL MEMBER
S.A NO. 72/MUM/2016
[ASSESSMENT YEAR 2011-12]
MARCH 8, 2016

Section 9 , read with sections 195 and 220, of the Income-tax Act, 1961 and articles 5 and 12 of DTAA between India and Singapore - Income - Deemed to accrue or arise in India (Permanent Establishment) - Assessment year 2011-12 - Assessee (DD Asia) rendered management support service to DDIL (India) and had received management service fee - It claimed that said fee was not taxable in India as it had not made available any technical knowledge to DDIL (India) and further, presence of its employees to constitute PE was less than prescribed period in DTAA - However, Assessing Officer held 90 per cent of income as business income - Assessee approached Tribunal - Meanwhile, assessee filed stay application contending that though case was fixed on 29-11-2017 before Tribunal but department was pressing hard for unreasonable demand which was 10 times higher to returned income - Moreover, question of PE was required to be decided by Tribunal in appeal before it - Whether in view of CBDT Instruction No. 96, assessee had prima facie case for stay on demand - Held, yes [Paras 6 and 7] [In favour of assessee]

Circulars and Notifications : Instruction No. 96, dated 21-8-1969

FACTS

- The assessee (DD Asia), Singapore based company, was engaged in the business of rendering profit management support services to its 100 per cent Indian subsidiary, (DDIL) and had received a management fee pursuant to the Agreement for provision of Management, General Support and Administrative services entered into between them. DD Asia claimed the said receipt as non-taxable in India, not being in the nature of Fees for Technical Services under article 12(4) of the Double Tax Avoidance Agreement between India and Singapore as it had not made available to DDIL, any technical knowledge, experience, skill know-how or

processes which enabled DDIL to apply the technology contained therein. Accordingly, refund was claimed for the taxes withheld on the management fees.

- The Assessing Officer noted that during year the employees of the petitioner had visited India for a period of 98 days. Accordingly, he held that DD Asia had a Permanent Establishment (PE) in India and attributed the entire management fees to the alleged PE. Further, the Assessing Officer allowed only 10 per cent as expenses and held balance 90 per cent as business income of the alleged PE.
- The assessee submitted that the presence of the employees was less than the threshold prescribed in article 5(6) and, therefore, it could not constitute a PE with regard to the services rendered pursuant to the management fee received by it.
- The Commissioner (Appeals) confirmed said order.
- Thereafter, appeal was filed before Tribunal, which has been fixed for hearing on 29-11-2017.
- The contention of the assessee was that though the case was fixed on 29-11-2017 but the department was pressing hard for unreasonable demands, which was 10 times higher to returned income and, therefore, the demand should be liable to be stayed in the interest of justice.

HELD

- It is apparent on record that the Assessing Officer assessed the sum at Rs. 20 crores, *i.e.*, 10 times to the returned income. Said demand is liable to be stayed in view of the CBDT Instruction No. 96, dated 21-8-1969. [Para 6]
- The assessee admitted that the 9 days services was rendered in India which is less than the threshold period of 30 days as per article 5(6) of the India-Singapore Double Tax Avoidance Agreement and it contested the 89 days because it did not render any kind of service for payment and entered into the project for which no fees of management was charged and only travelling cost were recovered from BSNL. Undoubtedly, the question of PE is still required to be decide by the Tribunal in the appeal before it. Moreover, it is also observed that the fee of the assessee is reimbursed on cost plus 10 per cent basis whereas the Assessing Officer allowed deduction of only 10 per cent and taxed 90 per cent of the management fees as business income. As per agreement the assessee has earned a mark-up of only 10 per cent and the TPO in the assessee's own case has accepted the mark up of 10 per cent to be at Arm's length price. No doubt, in view of the said circumstances the maximum income that could be attributed in India would be 10 per cent. Consequently, tax demand raised is far less than the tax deducted at source in case of the petitioner (i.e. Rs. 23,601,635). Moreover TDS is also more than the tax liability if assessed upon the receipt at the rate of 10 per cent. In view of the said circumstances, the assessee has a *prima facie* case in his favour.
- Therefore in the given facts and circumstances and without going into merits of the case the demand is liable to be stayed in the interest of justice. [Para 7]

CASE REVIEW

DIT v. *NGC Network Asia LIC* [2009] 313 ITR 187 (Bom.) (para 7); *Soul* v. *Dy. CIT* [2010] 323 ITR 305 [2008] 173 Taxman 468 (Delhi); *Taneja Developers & Infrastructure Ltd.* v. *Asstt. CIT* [2010] 324 ITR 247 (Delhi); *Valvoline Cummins Ltd.* v. *Dy. CIT* [2008] 307 ITR 103/171 Taxman 241 (Delhi); *N. Jegatheesan* v. *Dy. CIT* [2015] 64 taxmann.com 339 (Mad.) and *J.R. Tantia Charitable Trust* v. *Asstt. CIT* [2013] 34 taxmann.com 166/[2014] 149 ITD 176 (Jodh.) (para 6) *followed.*

CASES REFERRED TO

Soul v. *Dy. CIT* [2010] 323 ITR 305/[2008] 173 Taxman 468 (Delhi) (para 5), *Taneja Developers & Infrastructure Ltd.* v. *Asstt. CIT* [2010] 324 ITR 247 (Delhi) (para 5), *Valvoline Cummins Ltd.* v. *Dy. CIT* [2008] 307 ITR 103/171 Taxman 241 (Delhi) (para 5), *N. Jegatheesan* v. *Dy. CIT* [2015] 64 taxmann.com 339 (Mad.) (para 5), *J.R. Tantia Charitable Trust* v. *Asstt. CIT* [2013] 34 taxmann.com 166/[2014] 149 ITD 176 (Jodh.) (para 5) and *DIT* v. *NGC Network Asia LLC* [2009] 313 ITR 187 (Bom.) (para 7).

Sunil Moti Lala *for the Appellant.* **D. Prabhakar Reddy** *for the Respondent.*

ORDER

Amarjit Singh, Judicial Member - The order shall disposed off an application for stay moved by the assessee i.e. Dimension Data Asia Pacific Ptd. Ltd. (Formerly known as Datacraft Asia Pte. Ltd.) (DDIL) incorporated in Singapore. The petitioner is engaged in the business of profit management support services to group entities in Asia Pacific Region. During Assessment Year 2011-12 the Petitioner has rendered management support services to its 100 percent Indian subsidiary, DDIL and has received a management fee of INR 225,691,365/- pursuant to the Agreement for provision of Management, General Support and Administrative services entered into between the said parties. In the return of income filed for the year under consideration, DD Asia claimed the said receipt as non- taxable in India, not being in the nature of Fees for Technical Services under Article 12(4) of the India-Singapore Double Tax Avoidance Agreement (DTAA) as it had not made available to DDIL, any technical knowledge, experience, skill know-how or processes which enabled DDIL to apply the technology contained therein. Accordingly, refund was claimed for the taxes withheld on the management fees.

2. During the A.Y. 2011-12, the employees of the Petitioner had visited India for a period of 98 days, for two specific and independent reasons:

a. 9 days - in connection with providing services under the Agreement for provision of Management, General Support and Administrative services entered into between the Petitioner and DDIL mainly for the purposes of DDIL's internal and/or client meetings in pursuance of which the Petitioner earned Rs. 225,691,365 as management fees.

b. 89 days - in connection with the contract entered into by DDIL with BSNL for the purpose of setting up Internet Data Centers of India. The employees of the Petitioner being more qualified, were sent to assist DDIL in setting up the IDC business. The Petitioner did not charge any fees for the said services and only recovered the employee's travelling cost from DDIL without any mark-up/on a cost to cost basis.

3. While completing the assessment order u/s. 143(3) r.w. Section 144C(1) of the Income Tax Act, 1961(Act) held that DD Asia has a Permanent Establishment (PE) in India and attributed the entire management fees to the alleged PE Further, the learned AO allowed only 10% as expenses and held balance 90% as business income of the alleged PE. It is asserted by the assessee that the presence of the employees for a period of 9 days was less than the threshold prescribed in Article 5(6) of the India-Singapore DTAA and therefore could not constitute a PE with regard to the services rendered pursuant to the management fee received by the Petitioner. 89 days were not required to be recorded for the expenses of PE in India as no profits resulted from the said activity as the main objective of determining the existence of a PE was to attribute and tax resultant profits. The particulars of tax demand is hereby mentioned below:—

(Amount in INR)

PARTICULARS	AMOUNT
The amount of tax demanded	85,778,517

The amount of tax disputed therefrom	85,778,517
Amount of tax outstanding	85,778,517
Less: Tax deducted at source	23,601,635
Net Tax liability	62,176,882
Interest under Section 234B	36,062,602
Total demand	98,239,480

4. The appeal was filed before the learned CIT(A) who dismissed the appeal therefore the appellant has filed the present appeal before Hon'ble Income Tax Appellate Tribunal which has been fixed on 29.11.2017.

5. We have heard the arguments advanced by the learned representative of the parties and have gone through the record carefully. The contention of the learned representative of the assessee is that the case is fixed on 29.11.2017 and the department is pressing hard for his unreasonable demands to the tune of Rs. 98,239,480/-, therefore, the demand is liable to be stayed in the interest of justice. It is stated that the Assessing Officer has assessed the income of Rs. 20 crore (appx), i.e., about 10 times to the returned income, violating CBDT Instruction No.96 dated August 21, 1969, therefore requisite demand is required to be stayed and also place reliance upon *Soul* v. *Dy.CIT* [2010] 323 ITR 305/[2008] 173 Taxman 468 (Delhi High Court), *Taneja Developers & Infrastructure Ltd.* v. *Asstt. CIT* [2010] 324 ITR 247 (Delhi High Court), *Valvoline Cummins Ltd.* v. *Dy. CIT* [2008] 307 ITR 103/171 Taxman 241 (Delhi High Court), *N. Jegatheesan* v. *Dy. CIT* [2015] 64 taxmann.com 339 (Madras High Court) and *J.R. Tantia Charitable Trust* v. *Asstt. CIT* [2013] 34 taxmann.com 166/[2014] 149 ITD 176 (Jodh.)

6. It is also argued that the Petitioner is not a permanent establishment in India because 9 days services was rendered which is less than the threshold of 30 days as per Article 5(6) of the India-Singapore Double Tax Avoidance Agreement and 89 days activity was in India and 89 days stayed in connection with the shareholder activity/BSNL project for which the assessee company did not charge any fees and only travel cost was recovered, therefore, it is not essential period for PE but the Assessing Officer has wrongly accounted the same hence the provision of PE is not liable to be applicable upon the assessee. It is also argued that without the prejudice of earlier arguments that the petitioner was remunerated on cost plus 10% basis but the Assessing Officer made arbitrary deduction of only 10% as expenses and taxed 90% of management fees as administrative expenses which is quite wrong. Keeping in view the argument learned representative of the parties and perused the record carefully it is apparent on record that the Assessing Officer assessed the Rs. 20 crores times to the returned income which is under question. Therefore, we are of the view that the demand is liable to be stayed in view of the CBDT Instruction No.96 dated August 21, 1969 and also law settled in *Soul* (*supra*), *Taneja Developers & Infrastructure Ltd.* (*supra*), *Valvoline Cummins Ltd.* (*supra*), *N. Jegatheesan* (*supra*) and *J.R. Tantia Charitable Trust* (*supra*).

7. The appellant admitted the 9 days services was rendered in India which is less than the threshold period of 30 days as per Article 5(6) of the India-Singapore Double Tax Avoidance Agreement and the appellant contested that the 89 days because he did not render any kind of service for payment and entered into the project for which no fees of management was charged only travelling cost were recovered from BSNL. Undoubtedly, the question of PE is still required to be decide by the Tribunal in the appeal before it. Moreover, it is also observed that the fee of the appellant is reimbursed on cost plus 10% basis whereas the Assessing Officer allowed deduction only 10% and taxed 90% of the management fees as business income. As per agreement the appellant has earned a mark-up of only 10% and the TPO in the Petitioner's own case has accepted the mark up of 10% to be at Arm's Length Price. No doubt, in view of the said circumstances the maximum income that could be attributed in India would be Rs. 2,05,17,397 (i.e. 10% of Rs. 205,173,968). Consequently, tax demand raised to the tune of Rs. 8,664,497 (i.e. 42.33% of Rs. 2,05,17,397) which is far less

than the tax deducted at source in case of the Petitioner (i.e. Rs. 23,601,635). Moreover TDS is also more than the tax liability if assessed upon the receipt @ 10%. In view of the said circumstances, it is argued that the assessee has a prima facie case in his favour. Reliance placed upon *DIT(International Taxation*) v. *NGC Network Asia LLC* [2009] 313 ITR 187 (Bom.). Therefore in the given facts and circumstances and without going into merits of the case we are of the view that the demand is liable to be stayed in the interest of justice. We ordered accordingly till the pendency of the appeal. The case is fixed for 11.04.2016 for hearing. There is no need to issue the notice to the parties being this order has been pronounced before parties and they are well aware of the date of hearing. The demand of the Revenue is hereby stayed till the disposal of the appeal.

8. As a result, stay application filed by the assess stands allowed.

pooja

---

*In favour of assessee.