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[2018] 99 taxmann.com 270 (Mumbai - Trib.)

IT/ILT : Where employees of assessee, foreign company had visited India for a period of only 2 days, pre-condition contained under article 5(6)(b) of India-Singapore DTAA was not satisfied and, accordingly, employees of assessee could not be considered as service PE in India and consequently, in absence of a PE in India, management fee received by assessee would not be subject to tax in India

[2018] 99 taxmann.com 270 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'L'

Dimension Data Asia Pacific Pte. Ltd.

v.

Deputy Commissioner of Income-tax (International Tax) 2(1)2, Mumbai*

MAHAVIR SINGH, JUDICIAL MEMBER
AND G. MANJUNATHA, ACCOUNTANT MEMBER
IT APPEAL NOS. 1635 AND 1636 (MUM.) OF 2017
[ASSESSMENT YEARS 2012-13 AND 2013-14]
OCTOBER 12, 2018

Section 9 of the Income-tax Act, 1961, read with articles 5 and 12 of DTAA between India and Singapore - Income - Deemed to accrue or arise in India (Permanent establishment) - Assessment years 2012-13 of 2013-14 - Assessee, a Singapore based company, rendered management support services to its wholly-owned subsidiary in India i.e. DDIL, for which it charged fee at cost plus 10 per cent, i.e., management fee - Assessee sent its employees from Singapore to India from time to time to provide DDIL with assistance and guidance in setting up 6 internet data centers for which it charged a separate fee for said technical services, i.e., service fee - Accordingly, assessee earned gross receipts from these two distinct sources of income, i.e. management fee and service fee - Assessing Officer considering aggregate number of days, for which employees of assessee visited India for rendering/earning management services/management fee and technical services/technical fee, held that assessee had services PE in India - Accordingly, Assessing Officer attributed entire receipts to activities in India - Whether since in assessment year 2012-13, employees of assessee had visited India for a period of only 2 days on account of management fee, pre-condition contained under article 5(6)(b) was not satisfied and, accordingly, employees of assessee could not be considered as Service PE in India and consequently, in absence of a PE in India, Management fee would not be subject to tax in India - Held, yes - Whether qua service fee since employees of assessee had visited India for a period of 64 days in assessment year 2013-14, pre-condition contained under article 5(6)(b) was satisfied and, accordingly, employees of assessee constituted a service PE in India - Held, yes - Whether service fee was taxable as Fee for technical services for both years - Held, yes [Paras 10-14] [Partly in favour of assessee/Matter remanded]

FACTS

- The assessee-Singapore based company was engaged in the business of providing management support services to its group entities to the Asia Pacific Region. During the relevant assessment year, assessee, rendered management support services to its wholly-owned subsidiary in India *i.e.* DDIL for which it charged fee at cost plus 10 per cent, *i.e*., the management fee.
- In prior year DDIL was awarded a contract by BSNL to set up 6 internet data centers. In connection therewith, the assessee sent its employees from Singapore to India from time to time and whenever required to provide DDIL with assistance and guidance in setting up of 6 internet data centers for which it charged a separate fee for the said technical services *i.e.* service fee. Accordingly, the assessee earned gross receipts from these two distinct sources of income *i.e.* management fee and service fee.
- The Assessing Officer and DRP considering the aggregate number of days, for which employees of the assessee visited India for rendering/earning management services/management fee and technical services/technical fee, held that the assessee had service PE in India. Accordingly, the Assessing Officer attributed the entire receipts to activities in India and allowed the *ad hoc* deduction of 10 per cent of expenditure and thereby treated the balance amount as the taxable income in India *i.e.* as business profit. The Assessing Officer taxed the same at the rate of 40 per cent.
- On appeal:

HELD

- As per section 90(2), the assessee is entitled to claim benefits of the Double Tax Avoidance Agreement to the extent the same are more 'beneficial' as compared to the provisions of the Act. While doing so, in cases of multiple sources of income, an assessee is entitled to adopt the provisions of the Act for one source while applying the provisions of the DTA for the other.
- In this assessment year 2012-13, since the employees of the assessee had visited India for a period of only 2 days, on account of management fee, the pre-condition contained under article 5(6)(b) of DTA is not satisfied and, accordingly, the employees of the assessee could not be considered as Service PE in India. Consequently, in the absence of a PE in India, the management fee would not be subject to tax in India and the question of determining the profits attributable to PE in India would not arise. [Para 10]
- As regards the taxability of fees for technical services under India-Singapore DTAA in the absence of Service PE, under the provisions of the India-Singapore DTAA, the service fee would be taxable as fees for technical services under article 12(4)(b) as the assessee makes available technical knowledge, experience skill, etc. to DDIL. Since DDIL did not have qualified technical experts with experience in setting up of IDCs on request, the assessee sent it's employee who were experts in the field of IDCs to assist and provide guidance to DDIL enabling it to carry out the setting up of the IDCs on it's own. Since the service fee would be taxable as fees for technical services under article 12(4)(*b*), the said services would fall outside the purview of service PE under article 5(6). Accordingly, under the provisions of article 12(2), the service fee would be chargeable to tax at the rate of 10 per cent. [Para 11]
- As far as assessment year 2013-14 is concerned, in this assessment year the provisions of the Act, both receipts *viz*., the service fee and the management fee, falls under the purview of section 9(1)(vii), read with *Explanation* 2 thereto which defines fees for technical services. In view of the above provision, the maximum possible taxability in the hands of the assessee on each of the sources of income would be at the rate of 10 per cent under section 115A(1)(*b*). Accordingly, *vis-à-vis* the service fee the assessee agreed to offer the said receipt to tax as fees for technical services under section 9(1)(vii). Alternatively, also, even under the provisions of

the India-Singapore DTAA, the service fee would be taxable as fees for technical services under article 12(4)(*b*), as the assessee makes available technical knowledge, experience, skill etc. to DDIL. Since DDIL did not have qualified technical experts with experience in setting up of IDCs on request, the assessee sent its employees who were experts in the field of IDCs to assist and provide guidance to DDIL enabling it to carry out the setting up of the IDCs on its own. Since the service fee would be taxable as fees for technical services under article 12(4)(*b*), the said services would fall outside the purview of Service PE under article 5(6). [Para 12]

- Since the employees of the assessee had visited India for a period of 64 days on account of management fee, the pre-condition contained under article 5(6)(*b*) was satisfied and, accordingly, the employees of the assessee constituted a service PE in India. In light of the above, it would be essential to determine the profits attributable to the said service PE as per the provisions of article 7. [Para 13]

- The assessee stated that pursuant to the agreement, the assessee has provided Management, General Support and Administrative Services for an agreed management fee which is calculated at 110 per cent of all direct and indirect costs incurred by the assessee for rendering of services *i.e.* INR 30,18,10,059 for the year under review. Article 7(1) provides for the attribution of profits to a Permanent Establishment and not receipts. The assessee stated that the Assessing Officer erred in treating the gross receipts of INR 30,18,10,059 as the profit attributable to the service PE and ought to have determined the profit clement in the said receipt at 10 per cent of the costs or 10/110 of the gross receipts of 30,18,10,059 *i.e.* INR 2,74,37,278. The assessee filed the agreement wherein it is specified in that DDIL shall pay the assessee management fee calculated based on 110 per cent of all direct and indirect costs incurred by the assessee in rendering of the management services and that all direct and indirect costs incurred for the provision of the services shall be allocated to the Company DDIL, based on a formula. The above contention of the assessee needs verification of facts by the Assessing Officer. and Hence, the Assessing Officer is directed to decide the issue afresh :

CASE REVIEW

IBM World Trade Corpn. v *Addl. DIT (IT)* [2015] 58 taxmann.com 132 (Bang.); *IMB World Trade Corpn* v *Dy. DIT (IT)* [2012] 20 taxmann.com 728/54 SOT 39 (Bang.) (para 10); *Sumitomo Corpn.* v. *Dy. CIT* [2008] 114 ITD 61 (Delhi); *Sumitomo Corpn.* v. *Dy. CIT* [2014] 43 taxmann.com 2 (Delhi - Trib.) and *Kreuz Subsea Pte Ltd.* v. *Dy. DIT (IT)* [2015] 58 taxmann.com 371/69 SOT 368 (Mum. - Trib.) (para 11) *followed.*

CASES REFERRED TO

Dimension Data Asia Pacific (P.) Ltd. v. Dy. CIT (International Taxation) [2017] 81 taxmann.com 377 (Mum. - Trib.) (para 4), *Dimension Data Asia Pacific (P.) Ltd.* v. *Dy. CIT* [2018] 96 taxmann.com 182/257 Taxman 442 (Bom.) (para 4), *IBM World Trade Corpn.* v. *Addl. DIT* [2015] 58 taxmann.com 132 (Bang.) (para 9), *IMB World Trade Corpn.* v. *Dy. DIT (IT)* [2012] 20 taxmann.com 728/54 SOT 39 (URO) (Bang.) (para 10), *Sumitomo Corpn.* v. *Dy. CIT* [2008] 114 ITD 61 (Delhi) (para 11), *Sumitomo Corpn.* v. *Dy. CIT* [2014] 43 taxmann.com 2 (Delhi - Trib.) (para 11), *Kreuz Subsea (P.) Ltd.* v. *Dy. DIT (IT)* [2015] 58 taxmann.com 371/69 SOT 368 (Mum. - Trib.) (para 11) and *DIT (International Taxation)* v. *NGC Network Asia LLC* [2009] 313 ITR 187 (Bang.) (para 17).

Sunil Motilala, AR *for the Appellant.* **Samuel Darse**, DR *for the Respondent.*

ORDER

Mahavir Singh, Judicial Member - These two appeals by the assessee are arising out of the orders of Dispute Resolution Panel-I (WZ), [in short 'DRP'] in Objection Nos.73 & 74, directions dated 01.12.2016. The Assessments were framed by the Dy. Commissioner of Income Tax (international

Taxation)-Range 2(1)(2), Mumbai (in short 'DCIT') for the assessment years 2012-13, 2013-14 *vide* orders of even date 27.01.2017 under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The first common issue in these appeals of assessee is as regards to whether the assessee has permanent establishment in India or not in view of the given facts and circumstances of the case. For this assessee has raised identical worded grounds and the grounds raised in both the years is as under: —

"For AY 2012-13

Ground No. I - 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 Honorable DRP without appreciating the evidence and submissions filed, erred in holding that the Appellant has a Service PE in India under Article 5(6) of India Singapore Tax Treaty.

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

1.3 The learned Assessing Officer and the Honorable DRP failed to appreciate that the technical service resulting in the Service Fee income would be covered by Article 12 of India Singapore Tax Treaty and hence would not result into in a Service PE in India.

1.4 On the facts and in the circumstances of the case and in law, the learned Assessing Officer and the Honorable DRP without appreciating the evidence and submissions filed, erred in holding that the Appellant has a Service FE in India under Article 5(6) of India Singapore Tax Treaty as regards Management fee.

1.5 The learned Assessing Officer and the Honorable DRP failed to appreciate that the Appellant's employees had visited India only two days in connection with Management Fee income and the same being less than the threshold limit of thirty days the same would not give rise to a Service PE in India under Article 5(6) of the India Singapore Tax Treaty and also the same could also not be aggregated with one seventy one days for which the Appellant's employees had visited India for the BSNL IDC project which was distinct and separate from Management Service activity.

For AY 2013-14

Ground No. I - Appellant Considered Constituting 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 Honorable DRP without appreciating the evidence and submissions filed, erred in holding that the Appellant has a service PE in India under Article 5(6) of India Singapore Tax Treaty.

1.2 On the facts and in the circumstances of the case and in law, the learned Assessing Officer and the Honorable DRP, without appreciating the evidence and submissions filed, erred in holding that the Appellant has a Service PE in India under Article 5(6) of India Singapore Fax Treaty for the Service Fee Income.

1.3 The learned Assessing Officer and the Honorable DRP failed to appreciate that the technical service resulting in the Service Fee income would be covered by Article 12 of India Singapore Tax Treaty and hence would not result into in a Service PE in India.

1.4 On the facts and in the circumstances of the case and in law, the learned Assessing Officer and the Honorable DRP. without appreciating the evidence and submissions filed, erred in

holding that the Appellant has a Service PE in India under Article 5(6) of India Singapore Tax Treaty for Management Fee income.

1.5 The learned Assessing Officer and the Honorable DRP failed to appreciate that the Appellant's employees had visited India for 64 days in connection with shareholders activity and the same could not be considered for determination of Service PE under Article 5(6) of the India Singapore Tax Treaty for the Management Fee income.

1.6 The learned Assessing Officer and the Honorable DRP failed to appreciate that the Appellant's employees had visited India for 26 days in connection with the Service Fee income and the same could not he considered for determination of Service PE under Article 5(6) of the India Singapore Tax Treaty since it was less than the threshold limit of 30 days and also the same could not be aggregated with 64 days for which the Appellant's employees had visited India for an activity which was distinct and separate from Service Fee activity."

3. At the outset, the learned Counsel for the assessee stated that the DRP has simply followed its own order in assessee's own case for AY 2011-12 and has not adjudicated the issue independently. The learned Counsel for the assessee drew our attention to the findings recorded by the DRP in both the assessment years i.e. AY 2012-13 and 2013-14 and the relevant finding as recorded in AY 2012-13 reads as under: —

"2.2 As the facts obtaining in this year are in pari material, with the facts in A.Y. 2011-12, respectfully following the above decision, the grounds of objections are rejected.

3. The Assessing Officer shall give effect to the above directions in accordance with the provisions of section 144C (13) of the IT Act."

4. Apart from the above, nothing was discussed on facts, the learned Counsel for the assessee stated that the Tribunal in AY 2011-12 in ITA *Dimension Daber Asia Pacific (P.) Ltd. v. Dy. CIT (International Taxation)* [2017] 81 taxmann.com 377 (Mum. - Trib.) remanded the matter back to the file of the AO and the same was challenged in writ jurisdiction before Hon'ble Bombay High court and Hon'ble Bombay High Court has quashed the assessment order as without jurisdiction in writ petition No.921 of 2018 dated 06.06.2018 *Dimension Daber Asia Pacific (P.) Ltd.* v. *Dy. CIT* [2018] 96 taxmann.com 182/257 Taxman 442 by observing in Paras 7 to 12 as under: —

"7. We note that, it is an undisputed position before us, that the petitioner is a Foreign Company and an eligible assessee as defined in Section 144C(15)(b)(ii) of the Act. It has been held by this Court in *International Air Transport Association* (*supra*) that a Foreign Company is entitled to being assessed in accordance with Section 144C of the Act. It is the above Section 144C of the Act, which provides a separate scheme for the manner in which the Assessing Officer would pass assessment orders under the Act and a separate procedure to challenge an draft order *i.e*. before an assessment order which is subject to appeal under the Act is passed. The entire object is to ensure that the disputes of Foreign Companies are resolved expeditiously and final assessment orders are not passed without a re-look to the proposed order (draft order), if so desired by the Foreign Company. In essence, it obliges the Assessing Officer to first pass a draft of the proposed assessment order indicating the proposed variation in the income returned. This draft Assessment Order is to be passed under Section 144C(1) of the Act, which entitles an eligible assessee such as a Foreign Company to approach the DRP with its objection to the Draft Assessment order. This is so provided, so that an eligible assessee can have his grievance addressed before the final assessment order is passed. In case, an assessee does not object to the draft assessment order, then a final assessment order is passed in terms of the draft assessment order by the Assessing Officer. It is only on passing of the final assessment order that the assessee, if aggrieved by it, would be able to approach the appellate authorities under the Act. These special rights are made available under Section 144C of the Act to an eligible assessee such as the petitioner. Therefore, it cannot be ignored by passing an final order under Section 144(13) of the Act without preceding it with a Draft Assessment order as required therein.

8. The contention of the Revenue that the requirement of passing a draft Assessment Order under Section 144C of the Act would only extend to the orders passed in the first round of proceedings or in respect of an order passed by the Assessing Officer in remand proceedings by the Tribunal which has entirely set aside the original assessment order. This distinction which is sought to be drawn by the Revenue is not borne out by Section 144C of the Act. In fact, the Delhi High Court in *JCB (India) Ltd.* (*supra*) held that, even in partial remand proceedings from the Tribunal, the Assessing Officer is obliged to pass a draft assessment order under Section 144C(1) of the Act. According to us, the Assessing Officer, is obliged to, in terms of Section 144C of the Act to pass a Draft Assessment Order in all cases where he proposes to assess the Foreign Company under the Act by making a variation in the returned income. In this case, the impugned order dated 31st January, 2018 has been passed in terms of Section 143(3) read with Section 144C read with Section 254 of the Act and it certainly makes a variation to the returned income filed by the petitioner. This even if, one proceeds on the basis that the returned income stands varied by the order of the Tribunal in the first round, to the extent the petitioner accepts it. Therefore, the Assessing Officer correctly invokes Section 144C of the Act in the impugned order. Once having invoked Section 144C of the Act, the Assessing Officer is obliged to comply with it in full and not partly. This impugned order was passed consequent to the order of the Tribunal dated 5th May, 2017 restoring some of the issues before it to the Assessing Officer for fresh adjudication.

9. This "fresh adjudication" itself would imply that it would be an order which would decide the lis between the parties, may not be entire lis, but the dispute which has been restored to the Assessing Officer. According to us, the order dated 31st January, 2018 is not an order merely giving an effect to the order of the Tribunal, but it is an assessment order which has invoked Section 143(3) of the Act and also Section 144C of the Act. This invocation of Section 144C of the Act has taken place as the Assessing Officer is of the view that it applies, then the requirement of Section 144C(1) of the Act has to be complied with before he can pass the impugned order invoking Section 144C(13) of the Act. In fact, Section 144C(13) of the Act can only be invoked in cases where the assessee has approached the DRP in terms of sub-section 144(C)(2)(b) of the Act and the DRP gives direction in terms of Section 144C(5) of the Act. In this case, the assessment order has invoked Section 144C(13) of the Act without having passed the necessary draft Assessment Order under Section 144C(1) of the Act, which alone would make an direction under Section 144C(5) of the Act by the DRP possible. Thus, the impugned order is completely without jurisdiction.

10. Moreover, so far as a Foreign Company is concerned, the Parliament has provided a special procedure for its assessment and appeal in cases where the Assessing Officer does not accept the returned income. In this case, in the working out of the order dated 5th May, 2017 of the Tribunal results in the returned income being varied, then the procedure of passing a draft assessment order under Section 144C(1) of the Act is mandatory and has to be complied with, which has not been done.

11. In the above view, the impugned order is without jurisdiction. Thus, the plea of alternate remedy advanced by the Revenue so as to not entertain this petition, does not merit acceptance in the present facts.

12. In the above view, the impugned order dated 31st January, 2018 has been passed without complying with the mandatory requirements of Section 144C of the Act which is applicable to a Foreign Company such as the petitioner. Therefore, the impugned order is quashed and set aside. Needless to state, this order would not, in any way, stop the Revenue from taking such steps as are available to it in law and the petitioner also from contesting the action of the Revenue in accordance with law, if it so desires."

5. The learned Counsel for the assessee clearly admitted that there Is no adjudication on merits and facts in AY 2011-12. Hence, independent of finding of AO and DRP and of Tribunal, we are

considering the facts as mentioned in AYs 2012-13 and 2013-14. The facts in AY 2012-13 in ITA No. 1645/Mum/2017 are as under.

6. The assessee is a Private Limited Company incorporated in Singapore and is engaged in the business of providing management support business to its group entities to the Asia Pacific Region. During the relevant assessment year assessee rendered management support services to its wholly owned subsidiary in India i.e. Dimension Data of India LTD (Formerly known as Datacraft Asia Pte. Ltd) (DDIL) majorly from Singapore. These management support services are rendered in pursuant to agreement for provisions of management, Journal support and administrative services for which it charged fee at cost plus 10% *i.e*. the management fee. The learned Counsel for the assessee narrated the facts before us that in prior year DDIL, assessee's wholly subsidiary was awarded a contract by BSNL to set up 6 internet data centers. In connection therewith, the assessee sent its employees from Singapore to India, from time to time and whenever require, to provide DDIL with assistance and guidance in setting up of 6 internet data centers for which it charge a separate fee for the said technical services i.e. service fee. Accordingly, the assessee earned gross receipts from these two distinct sources of income i.e. management fee and service fee. The learned Counsel for the assessee then explained that the number of days, for which the assessee's employees were sent to India for the said services during the AY 2012-13 and the amount earned has been tabulated as under: —

Sr. No	*Particulars*	*Amount (in INR)-AO/6*	*Number of solar days.*
1.	Management fee	16,90,73,060	2 days
2.	Service fee	4,01,55,912	171 days
	Total	20,92,28,972	173 days

7. The AO and DRP considering the aggregate number of days, for which employees of the assessee visiting India for rendering/ earning management services/ management fee and technical services / technical fee there existed the threshold limit of 30 days as provide under Article 5(6) of the India Singapore Double Taxation Avoidance Agreement (DTAA). It was held that the assessee has services PE in India. Accordingly, the AO attributed the entire receipts to activities in India and allowed the adhoc deduction of 10% of expenditure and thereby treated the balance amount of Rs. 18,83,06,075/- as the taxable income in India *i.e*. as business profit. The AO taxed the same at the rate of 40%. Aggrieved, now assessee came in appeal before us.

8. The learned Counsel for the assessee also explained that the number of days, for which the assessee's employees were sent to India for the said services during the AY 2013-14 and the amount earned has been tabulated as under: —

Sr. No.	*Particulars*	*Amount (in INR)-AO/5*	*Number of solar days.*
1.	Management fee	30,18,10,059/-	64 days
2.	Service fee	1,45,18,591/-	26 days
	Total	31,63,28,650/-	90 days

9. Before us, the learned Counsel for the assessee argued that the service fee can be considered for Fee for Technical Services (FTS) under section 97 of the Act but argued that the management fees are not taxable in term of section 90(2) of the Act as the assessee is entitled to claim the benefit of DTAA to the extent the same are more beneficial as compared to the provisions of section of the Act. The learned Counsel for the assessee argued that the provisions of the Act applies to both the receipts i.e. the service fee and management fee falls under the purview of section 9(1)(vii) of the Act read with explanation 2 thereto, which defines fee for technical service are includes, "including any lump sum consideration for the rendering of any managerial, technical, or consultancy

services". He argued that under the provisions of section of the Act maximum possible taxability in the hands of the assessee on which all the sources of the income would be at the rate of 10% under section 115A(1)(b) of the Act. Accordingly, he offered the service fee received to tax as fee for technical services under section 9(1)(vii) of the Act and stated that the same should be taxed at the rate of 10% under section 115A(1)(b) of the Act. As regards to the management fee under India Singapore DTAA, in the absence of service PE and as per the provisions of section 90(2) of the Act, the assessee is entitled to claim the benefit of DTAA to the extent the same of which is more beneficial as compared to the provisions of the Act. To support this argument, the learned Counsel for the assessee argued that while doing so, in case of multiple services in India and assessee is entitled to adopt the provisions of the Act for one source and for other sources of income, the beneficial provisions of section of DTAA can be applied. For this he relied on the decision of co-ordinate Bench of Bangalore ITAT in the case of *IBM World Trade Corpn.* v. *Addl. DIT* [2015] 58 taxmann.com 132 (Bangalore - Trib.). In view of the above, he argued that as regards to the management fees the assessee opts to be governed by the India Singapore DTAA. He stated that both the assessee and the AO, both are of the view that the management fee income is business income under Article 7 of the India Singapore DTAA and accordingly, the same is taxable only if the assessee is a permanent establishment in India under Article 5 of the DTAA.

10. We have heard rival contentions and gone through facts and circumstances of the case. We have gone through the provision of section 90(2) of the act and are of the view that as per Section 90(2), the assessee is entitled to claim benefits of the Double Tax Avoidance Agreement to the extent the same are more "beneficial" as compared to the provisions of the Act. While doing so, in cases of multiple sources of income, an assessee is entitled to adopt the provisions of the Act for one source while applying the provisions of the DTA for the other. This view of ours is supported by the order of this ITAT Bangalore Bench in the case of *IBM world Trade Corpn.* (*supra*) and *IMB World Trade Corpn* v. *Dy. DIT (IT)* [2012] 20 taxmann.com 728/54 SOT 39 (Bang) (URo). We find from the facts of this case as regards the management fee, the assessee opted to be governed by the India-Singapore DTAA. In fact, both the assessee and the AO are of the view that the Management fee income is business income under Article 7 of the India-Singapore DTAA which would be taxable only if the assessee had a Permanent Establishment in India under Article 5 of the DTAA. As per Article 5(6)(b) of the India-Singapore DTAA, "An enterprise shall be deemed to have a permanent establishment in a Contracting State if it furnishes services, other than services referred to in paragraphs 4 and 5 of this Article and technical services as defined in Article 12, within a contracting through employees or other personnel, but only if… (b) activities are performed for a related enterprise (within the meaning of Article 9 of this Agreement) for a period or periods aggregating more than 30 days in any fiscal year. We find that in this AY 2012-13, since the employees of the assessee had visited India for a period of only 2 days on account of Management fee, the pre-condition contained under Article 5(6)(b) of DTA is not satisfied and accordingly the employees of the assessee could not be considered as Service PE in India. Consequently, in the absence of a PE in India, the Management fee would not be subject to tax in India and the question of determining the profits attributable to PE in India would not arise.

11. As regards to taxability of service as fees for technical services under India-Singapore DTAA in the absence of Service PE, we are of the view that under the provisions of the India- Singapore DTAA, the Service fee would be taxable as fees for technical services under Article 12(4)(b) as the assessee makes available technical knowledge, experience skill etc to DDIL. Since DDIL did not have qualified technical experts with experience in setting up of IDCs on request, the assessee sent it's employee who were experts in the field of IDCs to assist and provide guidance to DDIL enabling it to carry out the setting up of the IDCs on it's own. Since the Service Fee would be taxable as fees for technical services under Article 12(4)(b) of the DTAA, the said services would fall outside the purview of service PE under Article 5(6) of the DTA which provides "6. An enterprise shall be deemed to have a permanent establishment in a Contracting State if it furnishes services, other than services referred to in paragraphs 4 and 5 of this Article and technical services as defined in Article 12." Accordingly, we are of the view that under the provisions of Article 12(2) of the DTAA, the Service Fee would be chargeable to tax at the rate of 10 percent. This view of ours

is supported by the orders of this ITAT in the cases of *Sumitomo Corpn* v. *Dy. CIT* [2008] 114 ITD 61 (Delhi), *Sumitomo Corpn* v. *Dy. CIT* [2014] 43 taxmann.com 2 (Delhi - Trib.) and of Bombay ITAT in the case of *Kreuz Subsea (P.) Ltd.* v. *Dy. DIT (IT)* [2015] 58 taxmann.com 371/69 SOT 368 (Mum. - Trib.).

12. As far as AY 2013-14 are concerned, we are of the view that in this assessment year the provisions of the Act, both receipts *viz*, the Service Fee and the Management fee, falls under the purview of Section 9(1)(vii) read with Explanation 2 thereto which defines fees for technical services which include *.."any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services."* According to us, in view of the above provision, the maximum possible taxability in the hands of the assessee on each of the sources of income would be @10 per cent under Section 115A(1)(b) of the Act. Accordingly, *vis-à-vis* the Service Fee the assessee agreed to offer the said receipt to tax as fees for technical services under Section 9(1)(vii) of the Act. Alternatively, also, even under the provisions of the India-Singapore DTAA, the Service Fee would he taxable as fees for technical services under Article 12(4)(b) as the assessee makes available technical knowledge, experience, skill etc. to DDIL. Since DDIL did not have qualified technical experts with experience in setting up of IDCs on request, the assessee sent its employees who were experts in the field of IDCs to assist and provide guidance to DDIL enabling it to carry out the setting up of the IDCs on its own. Since the Service Fee would he taxable as fees for technical services under Article 12(4)(b) of the DTAA, the said services would fall outside the purview of Service PE under Article 5(6) of the DTAA which provides '6 An enterprise shall he deemed to have a permanent establishment in a Contracting State if it furnishes services, other than services referred to in paragraphs 4 and 5 of this Article and technical services as defined in Article 12.."

13. Since the employees of the assessee had visited India for a period of 64 days on account of Management fee, the pre-condition contained under Article 5(6)(b) of the DTAA was satisfied and accordingly the employees of the assessee constituted a Service PE in India. In light of the above, it would be essential to determine the profits attributable to the said Service PE as per the provisions of Article 7 of the DTAA.

14. The learned Counsel for the assessee before us, stated that pursuant to the Agreement, the assessee has provided Management. General Support and Administrative Services for an agreed management fee which is calculated at 110 percent of all direct and indirect costs incurred by the assessee for rendering of services i.e. INR 30,18,10,059/-for the year under review. As evident from extract above, Article 7(I) of the India-Singapore DTAA provides for the attribution of profits to a Permanent Establishment and not receipts. The learned Counsel for the assessee stated that the AO erred in treating the gross receipts of INR 30,18,10,059/- as the profit attributable to the Service PE and ought to have determined the profit clement in the said receipt at 10 percent of the costs or 10 / 110 of the gross receipts of 30,18,10,059/- i.e. INR 2,74,37,278. The assessee filed the Agreement wherein it is specified in Pans 4 and 5 that DDIL shall pay the assessee management fee calculated based on 110% of all direct and indirect costs incurred by the assessee in rendering of the management services" and that all direct and indirect costs incurred for the provision of the services shall be allocated to the Company 'DDIL, based on a formula. We are of the view that the above contention of the assessee needs verification of facts by the AO. Hence, we direct the AO to decide the issue by considering the following:

i. The service fee is taxable as fee for technical services in both the years *i.e*. AY 2012-13 and 2013-14.

ii. The management fee for AY 2012-13, being in the nature of business profit under the India-Singapore DTAA is not taxable in India as the assessee does not have a service PE because the condition of article 5(6)(b) of the DTAA is not satisfied for the reason that the no. of days of stay of employees is 2 days only.

iii. As regards to AY 20113-14, the management fee earned by assessee, the profit attribute

to management service PE as per article 7(1) of India Singapore DTAA can be considered.

15. Both the issues in these appeals of assessee are set aside to the file of the AO to decide in term of the above direction after carrying out verification of facts.

16. The next issue in these appeals of assessee is as regards to charging of interest 234(b) of the Act.

17. We find that the assessee is a non-resident and the liability of payment of advance tax is not on the assessee for the reason that the payer has to deduct tax at source under section 195 of the Act at the time of payment. This issue is covered by the decision of Hon'ble Bombay High Court in the case of *DIT (International Taxation)* v. *NGC Network Asia LLC* [2009] 313 ITR 187. Hence, while computing tax on income the AO will not charge interest under section 234 B of the Act. We direct the AO accordingly.

18. In the result, both the appeals of assessee are partly allowed for statistical purposes.

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*Partly in favour of assessee.