CIT(A) gets flak from ITAT for holding that assessee didn't have PE in India as per DTAA without giving reasons

Summary – The Mumbai ITAT in a recent case of Co-operative Centrale Raiffeisen., (the Assessee) held that where Commissioner(Appeals) had dealt with DTAA but had not discussed actual work and nature of job done by assessee nor had he given reasons as to how he arrived at conclusion that provisions of article 5 of DTAA of Indo-Netherland were not applicable, matter required readjudication

Facts

- The assessee, an Association of Persons (AOP), was a co-operative Membership Institution established in the Netherlands and was a part of Rabo Bank Group Worldwide.
- RPG Life Sciences Ltd.(RPG),an Indian company and other companies engaged Rabo India (RI) to advise them in their business. In turn, RI entered into an agreement with different branches of the assessee for providing the same services.
- The Assessing officer held that the assessee was in practice of using good offices of RI for conducting its own business. The contracts/agreements entered into by RI were basically for the purpose of extending business operations of the assessee into India, that the documents indicated that for every transaction RI fell back upon assessee for completion of the assignment. Thus, the Assessing Officer held that the facts proved that RI constituted PE of the assessee in India under Article 5(5) of the DTAA.
- On appeal, the Commissioner(Appeals) allowed the appeal of the assessee.
- On further appeal to Tribunal:

Held

Whether provisions of article 5(1) were applicable to assessee?

- It is found that RI had made payment to the assessee for providing advisory services to it and under the head guarantee commission, RI was paying the assessee more than 30 per cent of its income. That the basic dispute between the Assessing Officer and the assessee is as to whether the assessee had permanent establishment in India or not and as to whether the services rendered by RI could be treated activities carried out by the assessee. There is nothing on record to prove that provisions of article 5(1) of the agreement are applicable. Article 5(1) stipulates that PE for the purpose of convention meant a fixed place of business through which the business of the enterprise was wholly or partly carried on. From the facts available on record, it is clear that the assessee was not having fixed place of business in India. Therefore, the FAA had rightly held that provisions of said articles *i.e.*, 5(1) were not applicable.

Whether RI being an independent organization could not be held to be agency PE as per article 5(5) of the DTAA

- For ascertaining whether particular articles of the agreement of the Avoidance of Double Taxation between India and Netherlands were applicable or not, the exact working of RI, the correspondence between RI and the assessee and the mode of their functioning and operations would have to be examined *in toto*. The quantum of work done, the services rendered, the contracts undertaken for outsiders would have to be examined to determine whether RI was an agent having independent status or was merely working on behalf of the assessee, as alleged by the Assessing Officer. In absence of such basic material facts, it is not possible to come to a conclusion as to whether the assessee had PE in India or not. There is no material available on record to prove as to whether RI had significant independent activities on its own or not. The Commissioner(Appeals),while allowing the appeal has dealt with the DTAA and held that provisions of article 5(1)5(2) of DTAA of Indo-Netherland were not applicable. But, he has not discussed the actual work and the nature of the job done by the assessee for RI nor has he given the reasons as to how he arrived at the said conclusion. Thus, the assertion-that advisory services were rendered or that guarantee commission was received for the job outside India or that RI was rendering services independently in itself-is not sufficient to prove or disprove the claim made by the assessee. Such a claim has to proved by facts. The agreements entered into by RI with outsiders and the agreements entered in to by RI with the assessee have to examined to understand the real nature of the transaction. It also appears that some material was made available to the FAA, but it is found that he did not call for a remand report from the Assessing Officer in that regard. The role of expatriate Director deputed to India has not been inquired in to. What were his duties and what function actually he had performed, is not known. Similarly, the circumstances in which guarantee commission was paid by RI to the assessee are not discussed by the FAA. The circumstances, under which RI approached the assessee which entitled it to get roughly one third of the commission, are not known. In short, the appeal has been decided by discussing the principles governing DTAA and not mentioning as to how those principles were applicable to the facts of the case. Thus, the matter needs further investigation. Therefore, in the interest of justice, the matter is restored back to the file of the Assessing Officer to determine the issue afresh after affording a reasonable opportunity of hearing to the assessee.