No service PE if employee of Singaporean company had visited India for a period of only 2 days

Summary – The Mumbai ITAT in a recent case of Dimension Data Asia Pacific Pte. Ltd., (the Assessee) held that 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

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

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subject to tax in India and the question of determining the profits attributable to PE in India would not arise.

- 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.
- 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).
- 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.
- 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

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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 :

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