IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1648 OF 2012

Director of Income Tax (IT)-I	}	**Appellant**
versus		
M/s. Delmas France	}	**Respondent**

Mr. Tejveer Singh for the Appellant.

Mr. F. V. Irani with Mr. Sameer Chitnis i/b. M/s. Crawford Bayley and Co. for the Respondent.

CORAM :- S.C.DHARMADHIKARI & A.A.SAYED, JJ.

DATED :- NOVEMBER 15, 2014

P.C. :-

This Appeal challenges the order passed by the Income Tax Tribunal, Bench at Mumbai dated 11th January, 2012 in Income Tax Appeal No. 9001/Mum/2010. The assessment year is 2006-07.

2) The five questions at page Nos. 3 and 4 formulated by the Revenue's Advocate are termed as substantial questions by Shri. Tejveer Singh. He submits that the Assessee in this case is incorporated and is tax resident of France. It is in the business of operation of ships in International traffic. The Assessee claims that it did not have any permanent establishment in India and therefore, its business profits cannot be taxed in India.

3) The Assessment Officer admits that there is an Indian agent of the Assessee. He was responsible for concluding contracts of the Assessee and also various other functions, such as broking, liaison and contact contracting parties for loading of cargo etc. This agent was also managing an office of the Assessee. These circumstances would indicate that the Assessee having permanent establishment in India. It is in this light that Mr. Singh supports the finding of the Assessing Officer in rejecting the Assessee's claim on applicability of section 44B of the Income Tax Act, 1961 with respect to freight earning of Rs.23,66,57,986/-. The Assessing Officer estimated this income at 10% of the total freight earnings. The draft assessment order of the Assessing Officer was challenged by the Assessee before the Dispute Resolution Panel (DRP). After receiving directions from this DRP, the Assessing Officer passed his order, which was challenged before the Tribunal by the Assessee and leading to the impugned order.

4) Mr. Singh submits that the Assessing Officer was right in the conclusion that he has reached, and in that regard para 4.10 of the Assessing Officer's order at running page 27 has been brought to our notice by Mr. Singh. He submits that the factual position as brought out in this order would indicate that the case falls under Article 5(1) of the Double Taxation Avoidance Agreement (DTAA). All the ingredients or

components of this Article are satisfied. If this was the position and the Assessing Officer indeed given such a finding, then, irrespective of the concession given by the departmental representative, the Tribunal should have examined the matter from the point of applicability of Article 5(1) and not rested its conclusions on applicability of Article 5(5) and Article 5(6) of this DTAA. He therefore submits that the above questions are substantial questions of law.

5) With regard to question No. 5, Mr. Singh does not dispute that the point has been answered in favour of the Assessee and against the Revenue by a Division Bench of this Court in the case of ***Director of Income Tax (International Taxation) vs. NGC Network Asia LLC.*** reported in **(2009) 313 ITR 187**.

6) Mr. Irani appearing on behalf of the Assessee submits that all the findings and which have been brought to our notice and assailed before us by the Revenue are factual. The Tribunal may have reproduced all the components or parts of the Article 5, yet, its essential conclusion is based on Article 5(6). Mr. Irani invited our attention to Article 5(6) and paragraph No. 9 of the Tribunal's order, where, it records the concession of the departmental representative that he does not dispute that the permanent establishment in this case is an aspect which would be governed by Article 5(5) read with Article 5(6) of the

DTAA. In these circumstances, Mr. Irani submits that allowing the Revenue to now raise all together different issues and about applicability of Article 5(1) and 5(2) would cause serious prejudice and would require this Court to consider something which is expressly given up. Therefore, the factual findings on Article 5(5), Article 5(6) of the DTAA and as rendered in the present case do not raise any substantial question of law. Mr. Irani therefore submits that the Appeal may be dismissed.

7) In the present case, the Revenue proceeded on the footing that the presence of the Assessee in India is through an agent. How that agent works and functions and whether the business of the Assessee being carried out through an Indian agent would establish its permanent presence in India is a matter which fell for determination and consideration of the Tribunal. The Tribunal has clarified that it may have referred to the DTAA Articles or parts thereof, but the decision is confined to the facts of the case and for the assessment year before the Tribunal. Meaning thereby, it was not deciding any larger issue or controversy.

8) In the present case, we are concerned with Article 5 of the DTAA. To the extent relevant for us that Article reads as under:

"Article 5 – Permanent Establishment

1. For the purposes of this Convention, the term permanent establishment means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term permanent establishment includes especially:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(g) a warehouse in relation to a person providing storage facilities for others;

(h) a premises used as a sales outlet;

(i) an installation or structure used for the exploration of natural resources provided that the activities continue for more than 183 days.

(*3 and 4 .... not relevant for our purposes)*

5. Notwithstanding the provisions of paragraphs 1 and 2 where a person other than an agent of an independent status to whom paragraph 6 applies is acting in one of the Contracting States on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State, if:

(a) he has and habitually exercises in that Contracting State an authority to conclude contracts on behalf of the enterprise, unless, his activities are limited to the purchase of goods or merchandise for the enterprise; or

(b) he has not such authority, but habitually maintains in the first-mentioned Contracting State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

6. An enterprise of one of the Contracting States shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other Contracting State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph if it is shown that the

transactions between the agent and the enterprise were not made under at arm's length conditions.

(7. .... *not relevant for our purposes)*"

9) There is substance in the contention of Mr. Irani that the departmental representative appeared before the Tribunal and fairly stated that the matter should be examined in the light of applicability of Article 5(5) read with Article 5(6). The combined effect of this fair suggestion and concession is that firstly notwithstanding anything contained in Article 5(1) and (2) whether a person other than the agent of Indian State to whom paragraph 6 of Article 5 applies is acting in one of the Contracting States on behalf of an enterprise of other Contracting State, that enterprise shall deemed to have been a permanent establishment in the first mentioned Contracting State. That is also provided he exercises habitually an authority to conclude contracts on behalf of the enterprise and his activities are not relevant to purchase of goods or merchandise for the enterprise. He may also be having no such authority, but if he maintains habitually in the first mentioned Contracting State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, then, the business of an enterprise is wholly or partly carried out within the meaning of Article 5(5) and the said enterprise has a permanent establishment in India. Insofar as Article 5(5) and para 6 is concerned,

there is a deeming fiction, and by virtue of that, the enterprise of one of the Contracting States is deemed not to have permanent establishment in other Contracting State merely because it carries on business in that other Contracting State through broker, general commission agent or any other agent of an independent status, provided that such persons are acting in ordinary course of their business. Then comes the provision, whether activities of an agent who may be an agent of independent status but devoted wholly or almost wholly to that enterprise, but he will not be considered an agent of an independent status within the meaning of this paragraph if it is shown that the transactions between the agent and the enterprise were not made under at arm's length conditions.

10) In the present case, what was essentially brought to the notice of the Tribunal was that this is an important aspect relating to the transactions, but they have not been examined in the manner indicated by us above by the Assessing Officer, therefore the matter should be restored to file of the Assessing Officer for specific adjudication of the transactions between the Assessee and the agent. The Tribunal did not accept this. Not because of any broad legal principle, but there being no finding of this nature on record at all. If the Assessing Officer or the DRP failed to render the finding and which

would indicate the applicability of the Article and as pressed by the departmental representative, then, to our mind, the Tribunal was under no obligation to remand the matter back to the Assessing Officer. The Tribunal has rightly observed that even during the course of the proceedings before it, no material was placed on record, which would *prima facie* demonstrate or even indicate that the transactions between the principal namely the Assessee and the agent are not under at arm's length conditions. Once this onus is not discharged by the Revenue and the Tribunal has confined its observations and conclusions to the facts and circumstances peculiar to the Assessee's case and for the particular assessment year, then, we agree with Mr. Irani that this Appeal does not raise any substantial question of law. However, we do not find any basis for the submission made by Mr. Singh that the Tribunal should have examined the matter in the light of applicability of Article 5(1)(2) of the DTAA. The departmental representative has given up that because there was no finding rendered by the Assessing Officer. The Tribunal as rightly held was not obliged to go into the same. Even on this ground the Tribunal's order cannot be faulted.

11) As a result of the above discussion, this Appeal fails. It is accordingly dismissed. No order as to costs.

(A.A.SAYED, J.) **(S.C.DHARMADHIKARI, J.)**

J.V.Salunke,PA