

**IN THE INCOME TAX APPELLATE TRIBUNAL “I”
BENCH, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JM &
SHRI AMARJIT SINGH, AM**

1. आयकरअपील सं./ I.T.A. No. 451/Mum/2021
(निर्धारणवर्ष / Assessment Year: 2017-18)

Swiss Reinsurance Co. Ltd, A-701, 7 th floor, One BKC Plot No. C-66, Bandra Kurla Complex, Mumbai-400 051.	बनाम/ Vs.	ACIT (Intl. Taxation), Circle-4(2)(2), 16 th floor, Air India Building, Nariman Point, Mumbai-400 021
स्थायीलेखासं ./जीआइआरसं ./PAN No. AACCS2650M		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri P. J. Pardiwala /Nishant Thakkar/Jasmin Amalasadvala, Ld. ARs
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Milind Chavan, Ld. DR

सुनवाईकीतारीख/ Date of Hearing	:	01.12.2021
घोषणाकीतारीख / Date of Pronouncement	:	10.12.2021

आदेश / ORDER

PER KULDIP SINGH (JUDICIAL MEMBER):

1. The Assistant Commissioner of Income Tax (Intl. Taxation), Circle-4(2)(2), Mumbai [hereinafter referred to as the revenue] by filing of aforesaid appeal sought to set aside

impugned order passed by AO u/s 143(3)/144C(13) for AY 2017-18 on the grounds inter alia that:-

1. Ground 1

The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in proposing to assess the total income of the Appellant at Rs 899,470,800 as against a loss of Rs 79,280,349 reported by the Appellant in its return of income.

2. Ground 2

The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in holding that the Appellant has a business connection in India as per the provisions of section 9(1)(i) of the Act and a Permanent Establishment (PE) in India as per Article 5 of the India-Switzerland Double Taxation Avoidance Agreement (IS tax treaty) and consequently, the reinsurance premium earned by the Appellant from Indian Insurance companies (hereinafter referred to as 'cedents') is taxable in India even though the risks are insured from outside India.

With regard to the above, the learned AO erred on the following grounds:

2.1 The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in concluding that the Appellant has a business connection in India as per the provisions of section 9(1)(i) of the Act.

2.2 The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in holding that the employees of Swiss Re Services India Private Limited (SRSIPL) are de facto employees of the

Appellant and they render services to the Appellant, since SRSIPL has been remunerated by the Appellant at a cost plus mark-up and such costs include the cost of the employees of SRSIPL. The learned AO has further erred in holding that SRSIPL, being a captive service provider, carries out the primary and core business of the Appellant in India. The learned AO has, therefore, also erred in holding that SRSIPL constitutes a Service PE of the Appellant in India.

2.3 The learned AO has, on the facts and in the circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in holding that the services provided by SRSIPL to the Appellant are technical and core re-insurance services like risk assessment and business facilitation to the Appellant. Further, the learned AO has also erred in holding that SRSIPL has the authority to, and does secure and solicit contracts for the Appellant in India. The learned AO has, therefore, held that SRSIPL is a Dependent Agent PE of the Appellant in India.

The learned AO has, on the facts and in the circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in holding the third party Indian cedents to be the agents of the Appellant in India on the ground that the cedents exercise 'comprehensive' control over the Appellant.

2.4 The learned AO has, on the facts and in the circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in holding that SRSIPL could also constitute a Subsidiary PE of the Appellant in India as it carries out all the acts of the parent company in India.

2.5 The learned AO has, on the facts and in the circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in estimating 10 per cent of the gross receipts attributable to the Indian operations to be the profit generally made by a re-

insurance company in India and in estimating 50 per cent of the profit determined above to be attributable to the Appellant in India.

2.6 *The learned AO has, on the facts and in the circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in holding that the remuneration paid to SRSIPL is not at arm's length price without giving any detailed reasons thereof.*

3. Ground 3

The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in not following the decision of the Hon'ble Income-tax Appellate Tribunal (ITAT), Mumbai in the Appellant's own case, on the same facts, for AY 2010-11, AY 2011-12, AY 2012-13, AY 2013-14 and AY 2015-16, wherein it was held that the Appellant neither has a business connection in India in light of Explanation 2 to section 9(1) of the Act nor does it have a PE in India under the provisions of IS tax treaty; therefore, no income earned by the Appellant from cedents would be taxable in India.

4. Ground 4

The learned AO has, on the facts and circumstances of the case, erred in considering the incorrect amount of INR 79,266,903 as loss per the return of income in the Computation form annexed to the final assessment order as against a loss of Rs 79,280,349 reported by the Appellant in its return of income.

5. Ground 5

The learned AO has, on the facts and circumstances of the case, in law and consequent to error in ground 4, erred in short granting of interest under section 244A of the Act on the refund determined in the final assessment order.

The above grounds of objections are all independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend any or all of the above grounds of appeal, at any time before or at, the time of the appeal, so as to enable the Hon'ble Income-tax Appellate Tribunal to decide this appeal according to law.

3. Briefly stated facts necessary for adjudication of the controversy at hand are:-

The Assessee is a global re-insurer, incorporated in Switzerland with branches worldwide (including Singapore). The assessee provides reinsurance services inter-alia to various Indian insurance companies (i.e. Cedents). It entered into reinsurance contracts with the insurance companies (i.e. insurers), wherein Indian insurance companies will pay a premium to Swiss Re-insurance Company Limited (SRCL) to reinsure their part of the risk against which the insurer will pay insurance compensation, on claimable loss, in case of the happening of any adverse insurable event. SRCL is also registered as a foreign institutional investor (FII) with the SEBI.

4. Assessee claimed that it does not have Permanent Establishment (PE) in India, hence not taxable for its business profits. During the year under assessment, assessee received gross reinsurance premia to the tune of Rs. 19,57,47,54,115/- (as per Form 26AS) from various Indian insurers, but has not offered such amounts to tax. However, AO in its draft order declined the contention raised by the assessee that “It does not have any PE in

India, hence its income is not taxable in India” and proceeded to hold that in view of the services agreement between assessee and Swiss Re Services India Private Limited (SRSIPL) and it works as a dependent agent of the assessee, thus constitutes a PE (DAPE) of the assessee in terms of article 5.5 of DTAA and thereby an amount of Rs. 97,87,37,706 (being 15% of the 10% of the total turnover of the assessee) is added to the total income of the assessee and compute the income of the assessee at Rs. 89,94,57,360/- under rule 10 of the I.T. Act.

5. Feeling aggrieved, assessee approached the DRP by way of challenging the draft order who has upheld the draft order by dismissing the objections raised by the assessee.

6. Feeling aggrieved the order passed by AO/DRP, assessee come up before the Tribunal by way of filing the present appeal.

7. We have heard Ld. ARs for the parties to the present appeal and perused the order passed by lower authorities in the light of the arguments addressed by the ld. A.Rs for the parties to the appeal and law on the issue in controversy.

Ground No. 1

8. This ground is general in nature, hence needs no specific findings.

Ground No. 2 & 3

9. It is categorical facts of the assessee that assessee has neither a business connection in India nor it has a PE in India under the provisions of Indo-Swiss Tax Treaty, hence income earned by the assessee is not taxable in India. Ld. AR for the assessee contended that Gr. No. 1 & 2 are successively covered in favour of the assessee since AY 2010-11 and has drew our attention towards para 12.1, 19.3 and 19.4 of impugned order passed by Ld. DRP. The factual position canvassed by Ld. AR for the assessee that this issue is covered in its favour by the earlier order of the Coordinate Bench of Tribunal and has not been controverted by the Ld. DR for the revenue.

10. We have perused the order passed by Ld. DRP who has though admitted that this issue has already been decided in favour of the assessee successively by the Tribunal since AY 2010-11, but declined to follow the order on the ground that the department has went in appeal before Hon'ble High Court qua order passed by the Tribunal for AY 2010-11. The operative part of the order passed by Ld. DRP is under:-

12. Discussion & Directions of DRP

12.1 This issue has come up before DRP in A.Y.2014-15, AY 2015-16 and AY 2016-17. In AY 2014-15 and AY 2015-16, the DRP had adjudicated the issue with following findings, which was also followed in AY 2016-17 :

"19.1 We have considered the facts of the case, written submission and the arguments of the assessee. In this

case the Hon'ble ITAT in assessee's own case for A.Y.2010-11 has decided the issue in favour of assessee.

19.2 We may observe here that the process/before the DRP is a continuation of assessment proceedings as it is only the draft assessment order which is being challenged before it. The final assessment order is yet to be passed by the assessing officer. Hence the DRP is not an appellate authority and the proceeding before DRP is continuation of assessment proceedings. This view is fortified by decision of the division bench of the Hon'ble **High Court of Bombay** in the **Writ Petition No. 1877 of 2013** in the case of **Vodafone India Services Pvt. Ltd. vs. Additional Commissioner of Income Tax & Ors.** (2014) 264 CTR 0030 (Bom) : (2013) 96 DTR 0193 (Bom) : (2014) 361 ITR 0531 (Bom) : (2014) 221 Taxman 0166 (Bom); wherein with regard to functioning of the DRP, the Hon'ble **High Court of Bombay** held that:

47. However as no final assessment order has yet been passed by the Assessing officer and the issues are still at large before the DRP the same could be urged before the DRP.....
The process before the DRP is a continuation of the assessment proceedings as only thereafter would a final appealable assessment order be passed. Till date there is no appealable assessment order. The proceeding before the DRP is not an appeal proceeding but a correcting mechanism in the nature of a second look at the proposed assessment order by high functionaries of the revenue keeping in mind the interest of the assessee. It is a continuation of the Assessment proceedings till such time a final order of assessment which is appealable is passed by the Assessing Officer. This also finds support from Section 144C(6) which enables the DRP to collect evidence or cause any enquiry to be made before giving directions to the Assessing Officer under Section 144C(5) . The

DRP procedure can only be initiated by an assessee objecting to the draft assessment order. This would enable correction in the proposed order (draft assessment order) before a final assessment order is passed. Therefore, we are of the view that in the present facts this issue could be agitated before and rectified by the DRP.

19.3 It has been ascertained that the above issue is being contested by the Department and it has filed an appeal before the Hon'ble High Court for A.Y. 2010-11. As the department has decided to go into further appeal against the said order of the Hon'ble ITAT, we do find any infirmity in the draft order of the AO/TPO in keeping the issue alive. We have also taken note of the decision of the Hon'ble Supreme Court of India; in the case of Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax (2000) 159 CTR 0001 : (2000) 243 ITR 0083, wherein it is observed that "The scheme of the Act is to levy and collect tax in accordance with the provisions of Act and this task entrusted to the Revenue,"

*19.4 In view of above, we find that the approach of the TPO is acceptable and no direction is required to be given in respect of the same. **The ground of objection is rejected accordingly.**"*

11. Bare perusal of the findings returned by Ld. DRP as extracted above shows that this issue has already been decided in favour of the assessee that "assessee has neither a business connection in India nor it has a PE in India in view of the provisions contained in Explanation 2 to section 9(1) of the Act as well as under the provisions of Indo Swiss Tax Treaty," the operative part of the order passed by the Coordinate Bench of Tribunal in assessee's own case for AY 2014-15 in ITA No.

6531/Mum/2017 dated 20.07.2021 is extracted for ready perusal as under:-

8. We have considered rival submissions and perused materials on record. The core issue arising for consideration is, whether SRSIPL constitutes a PE of the assessee in India so as to bring the business profit of the assessee to tax in India in terms of India-Switzerland DTAA. As we find, identical issue came up for consideration for the first time before the Tribunal in assessee's own case in assessment year 2010-11. While deciding the issue in ITA No.1667/Mum/2014 dated 13-02-2015, the Tribunal, after analyzing the service agreement between assessee and SRSIPL and all other relevant facts, concluded that neither the assessee has any business connection in India as per Explanation 2 to section 9(1) of the Act nor does it have any PE in India. The Tribunal, in very clear terms held that SRSIPL cannot be considered as a service/dependent agent PE of the assessee. The same view was reiterated by the Tribunal while deciding appeals for assessment years 2011-12 and 2012-13 vide ITA Nos 1350 & 1351/Mum/2016 dated 223-01-2018, for assessment year 2013-14 vide ITA No.2759/Mum/2017 dated 04-07-2017 and for assessment year 2015-16 in ITA No.4898/Mum/2018 dated 26-12-2018. Thus, from the facts discussed above it is amply clear that the issue, whether SRSIPL can be considered as a PE of the assessee in India has arisen time and again before the Tribunal and the Tribunal has consistently decided in favour of the assessee. In fact, the impugned direction of the learned DRP would reveal that though learned DRP was conscious of the fact that the Tribunal has decided the issue in favour of the assessee in assessment year 2010-11; however, since the revenue has filed an appeal against the decision of the Tribunal, learned DRP decided the issue against the assessee just for the sake of keeping it alive. However, we are unable to

accept the aforesaid reasoning of learned DRP. Therefore, respectfully following the decisions of the Tribunal in assessee's own case as referred to above, we decide the issue in favour of the assessee by holding that since SRSIPL is not a PE of the assessee, the profits earned from re-insurance business cannot be brought to tax in India in terms of Article 7 of India Switzerland DTAA. Accordingly, addition is deleted. These grounds are allowed.

12. So, following the order passed by Coordinate Bench of Tribunal, we are of the considered view that assessee has neither a business connection in India in the light of the Explanation 2 of section 9(1) of the Act nor it have PE in India under the provision of Indo-Swiss Tax Treaty, hence business income of the assessee computed by AO under rule 10 of the I.T. Act to the tune of Rs. 89,94,57,360/- is not sustainable, hence, order to be deleted. Consequently, ground no. 2 & 3 is determined in favour of the assessee.

Ground No. 4 & 5

13. Ld. AR for the assessee brought on record copy of the application dated 23.03.2021 seeking rectification of the order passed by the AO to the extent that correct amount of Rs. 7,92,66,903/- as loss in the return of income in the computation form annexed as against loss of Rs. 7,92,80,349/- reported by the assessee in its return of income be made and to rectify the order qua short granting of interest u/s 244A of the Act on the refund determined in the final assessment year. Since it prima facie appears to be a mistake apparent on record, AO is directed to

rectify the mistake within 2 months. Accordingly, Ground no. 4 & 5 are decided in favour of the assessee for statistical purposes.

14. In view of what has been discussed above, the appeal filed by the assessee is hereby allowed for statistical purposes.

Order pronounced in the open court on 10th December 2021.

Sd/- (Amarjit Singh)	Sd/- (Kuldip Singh)
लेखा सदस्य /Accountant Member	न्यायिकसदस्य / Judicial Member
मुंबई Mumbai;	दिनांक Dated : 10.12.2021
Sr.PS. Dhananjay	

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
 2. प्रत्यर्थी/ The Respondent
 3. आयकरआयुक्त(अपील) / The CIT(A)
 4. आयकरआयुक्त/ CIT- concerned
 5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
 6. गार्डफाईल / Guard File
- आदेशानुसार/ BY ORDER,**

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai