

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल' मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI
BEFORE SHRI SANJAY ARORA, AM AND SHRI AMARJIT SINGH, JM

S.A. No.72/Mum/2016
Arising out of I.T.A. No.684/M/16
(निर्धारण वर्ष / Assessment Year: 2011-12)

| | | |
|---|----------------------|---|
| Dimension Data Asia Pacific Pte. Ltd (Formerly known as Datacraft Asia Pte. Ltd.) C/o. Dhruva Advisors LLP 12 th Floor, Discovery of India Building, Dr. Annie Besant Road, Worli, Mumbai - 400018 | बनाम / Vs. | Deputy Commissioner of Income Tax (International Tax)(2)(1)(2) 17 th Floor, Air India Building, Nariman Point, Mumbai - 400021 |
| स्थायी लेखा सं/.जीआइआर सं/.PAN/GIR No. : AADCD4348L | | |
| (अपीलार्थी/ Appellant) | .. | (प्रत्यर्थी / Respondent) |

| | |
|----------------|-------------------------|
| Assessee by: | Shri Sunil Moti Lala |
| Department by: | Shri D. Prabhakar Reddy |

सुनवाई की तारीख / Date of Hearing: 04.03.2016
घोषणा की तारीख /Date of Pronouncement: 08.03.2016

आदेश / ORDER

PER AMARJIT SINGH, JM:

The order shall disposed off an application for stay moved by the assessee i.e. Dimension Data Asia Pacific Ptd. Ltd. (Formerly known as Datacraft Asia Pte. Ltd.) (DDIL) incorporated

in Singapore. The petitioner is engaged in the business of profit management support services to group entities in Asia Pacific Region. During Assessment Year 2011-12 the Petitioner has rendered management support services to its 100 percent Indian subsidiary, DDIL and has received a management fee of INR 225,691,365/- pursuant to the Agreement for provision of Management, General Support and Administrative services entered into between the said parties. In the return of income filed for the year under consideration, DD Asia claimed the said receipt as non-taxable in India, not being in the nature of Fees for Technical Services under Article 12(4) of the India-Singapore Double Tax Avoidance Agreement (DTAA) as it had not made available to DDIL, any technical knowledge, experience, skill know-how or processes which enabled DDIL to apply the technology contained therein. Accordingly, refund was claimed for the taxes withheld on the management fees.

2. During the A.Y. 2011-12, the employees of the Petitioner had visited India for a period of 98 days, for two specific and independent reasons:

- a. 9 days – in connection with providing services under the Agreement for provision of Management, General Support and Administrative services entered into between the Petitioner and DDIL mainly for the purposes of DDIL's internal and / or client meetings

in pursuance of which the Petitioner earned Rs.225,691,365 as management fees.

- b. 89 days – in connection with the contract entered into by DDIL with BSNL for the purpose of setting up Internet Data Centers of India. The employees of the Petitioner being more qualified, were sent to assist DDIL in setting up the IDC business. The Petitioner did not charge any fees for the said services and only recovered the employee's travelling cost from DDIL without any mark-up / on a cost to cost basis.

3. While completing the assessment order u/s. 143(3) r.w. Section 144C(1) of the Income Tax Act, 1961(Act) held that DD Asia has a Permanent Establishment (PE) in India and attributed the entire management fees to the alleged PE. Further, the learned AO allowed only 10% as expenses and held balance 90% as business income of the alleged PE. It is asserted by the assessee that the presence of the employees for a period of 9 days was less than the threshold prescribed in Article 5(6) of the India-Singapore DTAA and therefore could not constitute a PE with regard to the services rendered pursuant to the management fee received by the Petitioner. 89 days were not required to be recorded for the expenses of PE in India as no profits resulted from the said activity as the main objective of determining the existence of a PE was to attribute and tax resultant profits. The particulars of tax demand is hereby mentioned below:-

(Amount in INR)

| PARTICULARS | AMOUNT |
|--------------------------------------|---------------|
| The amount of tax demanded | 85,778,517 |
| The amount of tax disputed therefrom | 85,778,517 |
| Amount of tax outstanding | 85,778,517 |
| Less: Tax deducted at source | 23,601,635 |
| Net Tax liability | 62,176,882 |
| Interest under Section 234B | 36,062,602 |
| Total demand | 98,239,480 |

4. The appeal was filed before the learned CIT(A) who dismissed the appeal therefore the appellant has filed the present appeal before Hon'ble Income Tax Appellate Tribunal which has been fixed on 29.11.2017.

5. We have heard the arguments advanced by the learned representative of the parties and have gone through the record carefully. The contention of the learned representative of the assessee is that the case is fixed on 29.11.2017 and the department is pressing hard for his unreasonable demands to the tune of Rs.98,239,480/-, therefore, the demand is liable to be stayed in the interest of justice. It is stated that the Assessing Officer has assessed the income of Rs.20 crore (appx), i.e., about 10 times to the returned income, violating CBDT Instruction No.96 dated

August 21, 1969, therefore requisite demand is required to be stayed and also place reliance upon **Soul v. DCIT [2010] 323 ITR 305 (Delhi High Court)**, **Taneja Developers & Infrastructure Ltd. v. ACIT [2009] 222 CTR 0521 (Delhi High Court)**, **Valvoline Cummins Limited v. DCIT [2008] 307 ITR 103 (Delhi High Court)**, **N. Jegatheesan v. DCIT – [2015] 64 taxmann.com 339 (Madras High Court)** and **JR Tantia Charitable Trust v. ACIT [2013] 155 TTJ 0535 (Jodhpur ITAT)**.

6. It is also argued that the Petitioner is not a permanent establishment in India because 9 days services was rendered which is less than the threshold of 30 days as per Article 5(6) of the India-Singapore Double Tax Avoidance Agreement and 89 days activity was in India and 89 days stayed in connection with the shareholder activity / BSNL project for which the assessee company did not charge any fees and only travel cost was recovered, therefore, it is not essential period for PE but the Assessing Officer has wrongly accounted the same hence the provision of PE is not liable to be applicable upon the assessee. It is also argued that without the prejudice of earlier arguments that the petitioner was remunerated on cost plus 10% basis but the Assessing Officer made arbitrary deduction of only 10% as expenses and taxed 90% of management fees as administrative expenses which is quite wrong. Keeping in view the argument learned representative of the parties and perused the record carefully it is apparent on record that the Assessing

Officer assessed the Rs. 20 crores times to the returned income which is under question. Therefore, we are of the view that the demand is liable to be stayed in view of the CBDT Instruction No.96 dated August 21, 1969 and also law settled in **Soul v. DCIT [2010] 323 ITR 305 (Delhi High Court)**, **Taneja Developers & Infrastructure Ltd. v. ACIT [2009] 222 CTR 0521 (Delhi High Court)**, **Valvoline Cummins Limited v. DCIT [2008] 307 ITR 103 (Delhi High Court)**, **N. Jegatheesan v. DCIT – [2015] 64 taxmann.com 339 (Madras High Court)** and **JR Tantia Charitable Trust v. ACIT [2013] 155 TTJ 0535 (Jodhpur ITAT)**.

7. The appellant admitted the 9 days services was rendered in India which is less than the threshold period of 30 days as per Article 5(6) of the India-Singapore Double Tax Avoidance Agreement and the appellant contested that the 89 days because he did not render any kind of service for payment and entered into the project for which no fees of management was charged only travelling cost were recovered from BSNL. Undoubtedly, the question of PE is still required to be decide by the Tribunal in the appeal before it. Moreover, it is also observed that the fee of the appellant is reimbursed on cost plus 10% basis whereas the Assessing Officer allowed deduction only 10% and taxed 90% of the management fees as business income. As per agreement the appellant has earned a mark-up of only 10% and the TPO in the Petitioner's own case has accepted the mark up of 10% to be at

Arm's Length Price. No doubt, in view of the said circumstances the maximum income that could be attributed in India would be Rs.2,05,17,397 (i.e. 10% of Rs.205,173,968). Consequently, tax demand raised to the tune of Rs.8,664,497 (i.e. 42.33% of Rs.2,05,17,397) which is far less than the tax deducted at source in case of the Petitioner (i.e. Rs.23,601,635). Moreover TDS is also more than the tax liability if assessed upon the receipt @ 10%. In view of the said circumstances, it is argued that the assessee has a prima facie case in his favour. Reliance placed upon **DIT V. NGC Network Asia LLC (2009) 313 ITR 187 (Bom)**. Therefore in the given facts and circumstances and without going into merits of the case we are of the view that the demand is liable to be stayed in the interest of justice. We ordered accordingly till the pendency of the appeal. The case is fixed for 11.04.2016 for hearing. There is no need to issue the notice to the parties being this order has been pronounced before parties and they are well aware of the date of hearing. The demand of the Revenue is hereby stayed till the disposal of the appeal.

8. As a result, stay application filed by the assess stands allowed.

Order pronounced in the open court on 8th March, 2016

Sd/-

Sd/-

(SANJAY ARORA)

(AMARJIT SINGH)

लेखा सदस्य / ACCOUNTANT MEMBER न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 8th March, 2016

MP

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त)अपील (/ The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण ,मुंबई / DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण ,मुंबई / ITAT, Mumbai