आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल ' **मुंबई ।**

IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

सर्वश्री नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य **एवं** अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER &

SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 1667 /Mum/2014

(**निर्धारण वर्ष** / Assessment Year : 2010-11

Swiss Re-insurance Company Limited, Mythenquai 50/60, P.O.Box No.8022, Zurich, Switzerland.	**बनाम**/ Vs.	Dy. Director of Income-tax International Taxation 2(1), Scindia House, Ballard Estate, NM Road, Mumbai – 400 038.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCS 2650M		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Appellant by:**	S/Shri P.J.Pardiwal & Shri Madhur Agarwal
प्रत्यर्थी की ओर से/**Respondent by:**	Ms. S. Padmaja

सुनवाई की तारीख / **Date of Hearing :10.02.2015**

घोषणा की तारीख /**Date of Pronouncement :13.02.2015**

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

This Appeal by the assessee is directed against the order made under section 143(3) of the Income Tax Act,1961 (the Act) r.w.s 144C(13) of the Act pertaining to A.Y. 2010-11. The order is dated 21/01/2014. The assessee has raised three substantive grounds of appeal. The first grievance of the assessee is that the AO erred in law in holding that Swiss Reinsurance Co. Ltd. had business connection in India.

2. Briefly stated, the facts are as under:

Swiss Re-Insurance Company Limited i.e. the assessee is a company incorporated in Switzerland which receives income from providing reinsurance to various Cedants in India. The re-insurance premium received by the assessee is claimed as business income and it is further claimed that in absence of any Permanent Establishment (PE) in India the entire business income is not taxable in India.

2.1 During the course of assessment proceedings, the assessee filed necessary details and information in support of its claim. After carefully going through the information/details furnished by the assessee the AO observed that the business of the assessee is to provide reinsurance services to the clients in India. The AO further observed that in the course of such business Swiss Re-Services India Pvt. Ltd. (SRSIPL), which is an Indian Company and wholly owned subsidiary of the assessee is a PE of the assessee in India. The AO further noticed that the assessee through its Singapore Branch has entered into service agreement since 01/04/2009 with SRSIPL for obtaining risk assessment services, market insurance and administrative support in India and in turn remunerate/compensate SRSIPL on a cost + 12% margin. The AO was of the opinion that since the assessee has remunerated SRSIPL and all its employees on a cost + basis, it is clear that the personnel and staff have rendered services to the assessee as de-facto employees. The AO was of the firm belief that the Indian subsidiary SRSIPL provides technical and core reinsurance services, therefore, Dependent Agency Permanent Establishment (DAPE) comes into play. The AO further noted that as per the domestic Income Tax Act, 1961, since the income of

the assessee is being earned from India on a regular and continuous basis, the income of the assessee is taxable in India in terms of section 9(1)(i) of the Act. The assessee has regular flow of income emanating from India, hence, the assessee has clear cut business connection in India.

2.2 The AO gave the assessee an opportunity to substantiate its claim that the reinsurance premium receipts of the company are not taxable in India. The assessee filed a detailed reply explaining the nature of activities of the assessee. It was explained and strongly contended that services provided by SRSIPL do not create existence of a PE in India. It was explained that SRSIPL is a separate legal entity and its entire control and management is in India. The decisions regarding its business are taken and executed in India. It is both legally and functionally independent company. It was explained that the employees of SRSIPL render services to SRSIPL and not to the assessee, either as assessee's employees or on behalf of SRSIPL. It was pointed out to the AO that the pricing between SRSIPL and the assessee is at arms length. The profit earned by SRSIPL belongs to it and cannot be treated as profits of the assessee and such profits are assessed to tax in India in the hands of SRSIPL.

2.3 Referring to the service agreement between the assessee and SRSIPL it was pointed out to the AO that it is specifically mentioned that SRSIPL is neither an agent nor a broker or legal representative of assessee and hence, acting on principle to principle basis, therefore, the question of falling of agency PE does not arise. Attention was drawn to Article 5(5) of the DTAA between India and Switzerland and it was explained that the relationship between the assessee and SRSIPL do not

satisfy the conditions mentioned under the aforesaid Article of the DTAA. Referring to Article 5(4) of the tax treaty, it was brought to the notice of the AO that an insurance company is liable to tax if collects insurance premium in India and ensures risk of Indian residents or their agents except in the case of reinsurance services. The assessee concluded by stating that it neither has a service PE nor an agency PE in India, therefore, no income can be attributed to India on account of PE in India.

2.4 The AO considered the detailed submissions and the contentions made by the assessee. However, the submissions made by the assessee did not find favour with the AO who at para 9.3.2 of his order observed as under:

> *9.3.2. From perusal of the facts and circumstances of the case, it emerges that the arguments of the assessee are not tenable on account of the following reasons:*
>
> *i, The re-insurance contract is an agreement between the insurer and the reinsurer, whereby a part of the risk gets transferred from one party to another. The party accepting the risk is termed as the reinsurer and the party transferring the risk is termed as the reinsured/reassured or cedant.*
>
> *ii. The income of the assessee is being earned from India on a regular and continuous basis. In view of this, the income of the assessee is taxable in India in terms of Sec. 9(1)(i) of the Indian income Tax Act, 1961 i.e. the Domestic Income Tax Act.*
>
> *iii. The assessee is having regular flow of income emanating from India under the domestic Act; hence the assessee has a clear-cut business connection in India. The arguments of the assessee on this account are flawed.*

2.5 The AO further proceeded by treating SRSIPL as a PE of the assessee in India. The AO treated SRSIPL not only as a service PE of

the assessee but also as agency PE/ DAPE. Having held all that the AO went on to attribute the taxable profit and calculated the attribution at 50% of income and completed the assessment.

2.6 Strong objections were raised before the DRP but without any success. Aggrieved by this the assessee is before us.

3. Ld. Counsel for the assessee vehemently submitted that the revenue authorities have grossly erred in (i) treating the assessee having a Dependent Agency Permanent Establishment; (ii) the assessee has a clear cut business connection in India; (iii) treating SRSIPL as service PE and (iv) treating as SRSIPL as Agency PE. Ld. Counsel stated that the assessee does not fulfill any of the mandatory conditions for the aforementioned allegations. Referring to Article 5(4) of the Indo-Swiss Treaty, Ld. Counsel for the assessee stated that the Article categorically excludes cases of reinsurance services. Ld. Counsel further drew our attention to the agreement between the assessee and SRSIPL and pointed out that the services provided by the SRSIPL does not include contracts of reinsurance and confirmation of liability. In the process, the Ld. Counsel relied upon the decision of the Hon'ble Delhi High Court in the case of E-Funds IT Solutions, 42 taxamann.com 50 and the decision of the Mumbai Tribunal Bench in the case of Varian India Pvt. Ltd., 33 taxamann.com 249. Ld. Counsel also relied upon the decision of the Mumbai Tribunal Bench in the case of eBay International AG, 25 taxamann.com 500. It is the say of the Ld. Counsel that the observations made by the AO in relation to SRSIPL vis-à-vis the assessee are against the facts of the case and not supported by the provisions of law.

4. Per contra, the Ld. DR supporting the findings of the AO stated that the services rendered by SRSIPL to the assessee make it an Agency PE. Further, the work was taken by the assessee from SRSIPL Dependent Agency PE. In support of the contention the Ld. DR relied upon the Ruling in AAR No.542 of 2001, (*274 ITR 501*) , ITAT Delhi Bench in the case of Motorola Inc. v. DCIT *95 ITD 269.* Ld. DR also relied upon the decision of the Hon'ble Supreme Court in the case of DIT (IT) vs.Morgan Stanley & Company, 292 ITR 416(SC) and Hon'ble Delhi High Court in the case of Centrica India Offshore P. Ltd. Vs. CIT, 44 taxamann.com 300 and Hon'ble Karnataka High Court in the case of Jebon Corporation India vs. CIT, 245 CTR 300(Kar).

5. Having heard the rival submissions, we have carefully perused the orders of the authorities below and the relevant documentary evidences brought to our notice in the light of judicial decisions relied upon by both sides. To begin with, let us first consider the **relevant clauses** of the service agreement between Singapore Branch of the assessee and Swiss Re-services India Pvt. Ltd. i.e. SRSIPL.

> *"1.1.3 Forwarding routine communication from the Branch of SRZ to the Clients (other than contracts of re-insurance and confirmation of liability) after translating in local language, where required.*
> *1.6 The Company hereby acknowledges and confirms that it is not the agent, broker or legal representative of the Branch of SRZ for any purposes whatsoever, and agrees that at no time shall it represent itself to be the agent or broker of the Branch of SRZ in India. The Company agrees to indemnify and hold the Branch of SRZ harmless with respect to any breach of this Section by the Company.*
> *5.6 Company will remain for all purposes an independent contractor under this Agreement. Nothing in this Agreement will be deemed to constitute or will be construed as constituting a partnership, joint venture or principal-agency relationship between*

the Company and the Branch of SRZ. All Company personnel will be considered solely Company employees or gents, and Company will be responsible for (i) compliance with all Laws relating to such personnel and (ii) payment of all wages, Taxes and other cost and expenses relating to such personnel (including unemployment, social security and other payroll taxes) and compliance with all withholding requirements as required by Law."

5.1 Before we proceed to examine, whether SRSIPL and its activities constitute PE of the assessee or whether SRSIPL can be considered as a Service PE/ Agency PE of the assessee, it would be appropriate at the outset to consider the decision of the Hon'ble Delhi High Court in the case of E-Funds IT Services (supra), wherein Hon'ble Court has held that establishing subsidiary in the other treaty country would not result in creating and establishing a PE of a foreign holding company in the said third country. Thus, at the outset the subsidiary SRSIPL of the assessee does not constitute a PE of its holding company i.e. the assessee. Now let us see whether there is any business connection of the assessee in India. The answer lies in Explanation – 2 to section 9(1) of the Act.

*" **Section 9(1) -Explanation 2***

For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident:-

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

(c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents

controlling, controlled by, or subject to the same common control, as that non-resident:

Provided that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business :

Provided further that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such non-resident and other non-residents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status."

5.2 A perusal of the facts of the case in hand go to show that none of the conditions specified in clause (a)(b) & (c) above are satisfied. Therefore, it cannot be said that the assessee is having any business connection in India. Now let us see whether the assessee has any PE within the purview of Article-5 of India Swiss Treaty, wherein is provided as under:

"(l) the furnishing of technical services, other than services as defined in Article 12, within a Contracting State by an enterprise through employees or toher personnel, but only if:-

(i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve month period; or
(ii) the services are performed within that State for a related enterprise (within the meaning of paragraph 1 of Article 9) for a period or periods aggregating more than 30 days within any twelve –month period."

5.3 Assuming that conditions of (i) & (ii) mentioned herein above are fulfilled, we do not find that the employees of SRSIPL are providing services to the assessee as if they were the employees of the assessee. Therefore, condition laid down under Article-5 of the Treaty are also not fulfilled to treat SRSIPL as PE of the assessee. Article 5(4) of the Treaty reads as under:-

> *"Notwithstanding the preceding provisions of this Article, an insurance enterprise of Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 6 applies."*

5.4 Thus, it can be seen that reinsurance has been specifically excluded by the Treaty. Let us also now consider the relevant extract of OECD commentary of Article 5- Taxation of Services. Clause 42.30 reads as under:

> *" 42.30 The provision applies to services performed by an enterprise. Thus, services must be provided by the enterprise to third parties. Clearly, the provision could not have the effect of deeming an enterprise to have a permanent establishment merely because services are provided to that enterprise. For example, services might be provided by an individual to his employer without that employer performing any services (e.g. an employee who provides manufacturing services to an enterprise that sells manufactured products). Another example would be where the employees of one enterprise provide services in one country to an associated enterprise under detailed instructions and close supervision of the latter enterprise; in that case, assuming the services in question are not for the benefit of any third party, the latter enterprise does not itself perform any services to which the provision could apply.*

42.31 Also, the provision only applies to services that are performed in a State by a foreign enterprise. Whether or not the relevant services are furnished to a resident of the State does not matter; what matters is that the services are performed in the State through an individual present in that State."

5.5 Considering the services rendered by SRSIPL in the light of the OECD commentary, SRSIPL cannot be considered as PE of the assessee. The decision relied upon by Ld. DR do not support the Revenue on the facts of the present case, like in the case of Delhi Bench of the Tribunal in the case of Motorola Inc. (supra, the facts were that the employees of the assessee had worked both for the assessee as well as its Indian subsidiary. The employees also had the right to enter the office of the Indian subsidiary either for the purpose of working for Indian subsidiary or for the purpose of working for the assessee and the Indian subsidiary provided perquisite to the employees of the assessee and the assessee paid salaries to the employees, on these facts the Indian subsidiary was considered as place of business. However, facts of the case in hand clearly show that the employees of the SRSIPL has only provided services to SRSIPL and there is no noting on record to prove that the employees had provided services to the assessee or the assessee is paying their salaries or perquisites. The decision of the Hon'ble Supreme Court in the case of Morgan Stanley (supra) has been duly considered by the Hon'ble Delhi High Court in the case of E-Funds IT Solutions (supra). The decision in the case of Jebon Corporation of Indi(supra) is not at all relevant on the facts of the case in hand.

5.6 To sum up, the assessee does not have any business connection in India in the light of Explanation-2 to section 9(1) of the Act. The assessee does not have any PE in India. The facts on record show that

there is neither Service PE nor Agency PE in the form of SRSIPL. Considering the facts in totality in the light of the relevant provisions of the law and the DTAA and the judicial decisions referred to herein above, we have no hesitation in setting aside the assessment order and accordingly we direct the AO not to treat the income of the assessee as taxable under the Act. With this Ground No.1, 2 and all its sub-grounds are allowed.

6. Ground No.2.3 relates to the attribution of income to the PE in India. As we have held that the income of the assessee is not taxable this ground become otiose.

7. Ground No.3 relates to the levy of interest under section 234B of the Act. We find that at para-10.6 the DRP following the decision of Hon'ble Bombay High Court in the case of NGC Network Asia LLC, 313 ITR 187 has directed the AO not to levy interest as the assessee is from a foreign country. The AO has not followed the direction of the DRP. We accordingly, direct the AO to follow the directions of the DRP. Ground No.3 is treated as allowed for statistical purposes.

8.In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on the 13th day of Feb.2015.

Sd/- *Sd/-*
(AMIT SHUKLA) (N.K. BILLAIYA)
न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक Dated : 13.02.2015
व.नि.स./ *VM* , Sr. PS

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

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**