

Mr. Tejveer Singh for Appellant.
Mr. Madhur Agarwal a/w. Mr. Atul K. Jasani for Respondent.

DATE : FEBRUARY 06, 2020

This order will dispose of both Income Tax Appeal Nos.1437 and 1984 of 2017.

3. Income Tax Appeal No.1437 of 2017 has been preferred by the Revenue against the common order dated 05.07.2016 passed by the Income Tax Appellate Tribunal, Mumbai Bench "L", Mumbai (Tribunal) in I.T.A.Nos.4176/ Mumbai/2009 and 4706/Mumbai/2009 for the assessment year 2005-06.

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5. However, for the sake of convenience, facts of Income Tax Appeal No.1984 of 2017 which pertains to earlier assessment year i.e., assessment year 2004-05 are being considered.

6. This appeal has been preferred by the Revenue under Section 260-A of the Income Tax Act, 1961 (briefly 'the Act' hereinafter).

7. Though three questions have been proposed in the appeal, Mr. Singh fairly submits that appellant would press the third question i.e. question No.(c), which reads as under:

"(c) Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in holding that there was no agency Permanent Establishment in the form of Taj India without appreciating that the transaction between the assessee and Taj India could not be said to be on principle to principle basis?"

8. To appreciate the controversy in question, a brief recital of the facts is considered necessary.

9. Respondent - assessee is a registered company in Mauritius and is a tax resident of that country. Assessee is engaged in telecasting the sports channel called "Ten Sports". Assessee has appointed Taj Television (India) Private Limited, referred to hereinafter as 'Taj India', as its advertising sales agent in India to sell commercial advertisement spots to prospective advertisers and other parties in India in connection with the business of programming and telecasting of Ten Sports Channel and to collect advertisement charges from the Indian advertisers. In this connection, assessee had entered into an agreement with Taj India on 08.05.2002.

10. Assessee had also appointed Taj India as its distributor to distribute the Channel 'Ten Sports' to cable systems for exhibition to subscribers in India. In this connection, an agreement dated 01.03.2002 was entered into between the assessee and Taj India.

11. In the assessment proceedings for the assessment year 2004-05, the assessing officer sought for the views of the assessee regarding non-taxability of its income in India since it did not carry any business in India through its Permanent Establishment (PE) and as to why it was filing an alternative computation of income. Assessee submitted reply. Referring to the India-Mauritius Double Tax Avoidance Agreement, more particularly Article 5 thereof, which defines Permanent Establishment, it was contended on behalf of the assessee that it was not covered by any of the clauses of the Double Tax Avoidance Agreement (DTAA) and as such, it did not have a Permanent Establishment in India. Transactions between assessee and Taj India are on a principal to principal basis and at arm's length prices. Taj India did not have any authority to enter into any contract on behalf of the assessee. Advertisement sales contracts were entered into between the advertisers and the assessee; therefore, it was contended that there was no Permanent Establishment in India. Consequently, no further tax implication arose.

12. Assessing officer vide the assessment order dated 28.12.2006 however did not agree with the contention of the assessee, and after a detailed order, recorded the conclusion that Taj India had authority to conclude contracts in the name of the assessee which authority was exercised in India habitually and repeatedly. Therefore, it was held that assessee had a Permanent Establishment in India within the meaning of Article 5.4(i) of the DTAA between India and Mauritius.

12.1. Regarding distribution revenue, assessing officer held that the same was collected through Taj India on behalf of the assessee. After considering the agreement dated 01.03.2002, assessing officer held that Taj India had the exclusive right to represent the assessee before the distribution systems / cable operators and to negotiate and procure cable distribution licence agreement for the service as authorized by the

assessee. Distribution revenue collected by Taj India was shared in the ratio of 60:40 by the assessee and Taj India. Therefore, assessing officer held that the assessee had a Permanent Establishment in India and the subscription revenue was taxable as business income.

13. Aggrieved by the above, assessee preferred appeal before the Commissioner of Income Tax (Appeals)-XXXI, Mumbai, referred to hereinafter as the 'first appellate authority'. In the appellate proceedings, the first appellate authority considered the two aspects i.e., collection of advertisement revenue and revenue earned from distribution of pay channel.

13.1. Regarding collection of advertisement revenue, the first appellate authority considered the agreement dated 08.05.2002 as well as findings returned by the assessing officer. Thereafter, it was held that Taj India was fully dependent on the assessee for its business. Taj India was therefore, a dependent agent. Consequently, after considering Article 5(4) of the DTAA, the first appellate authority vide the appellate order dated 17.10.2007 agreed with the assessing officer that assessee had agency Permanent Establishment in India as per Article 5(4) for collection of advertisement revenue. Consequently, finding of the assessing officer in this regard was sustained.

13.2. Regarding distribution revenue, first appellate authority examined the distribution agreement entered into between the assessee and Taj India on 01.03.2002 wherefrom he deduced that Taj India was appointed as the exclusive distributor in India. Taj India was not acting as agent of the assessee but had obtained right of distribution for TV channel for itself. It was found by the first appellate authority that Taj India had subsequently entered into contracts with other parties in its own name. One such contract was examined; whereafter first appellate authority noted that in such contract, assessee did not figure at all. He, therefore, came to the conclusion that assessee had given distribution rights to Taj

India for promoting and distributing TV channels in India on principal to principal basis. He opined that Taj India was not acting as agent of the assessee in India and the distribution agreement had given exclusive rights to Taj India to distribute the channel in India on its own behalf and not on behalf of the assessee. In such circumstances, it was held that Taj India did not constitute an agency Permanent Establishment within the meaning of Article 5(4) of the DTAA in respect of the distribution income. To this effect, finding of the assessing officer was set aside.

14. Assailing the order of the first appellate authority, both the Revenue and the assessee preferred separate appeals before the Tribunal. While the Revenue's appeal being I.T.A.No.412/Mumbai/2008 was against the finding of the first appellate authority as regards the distribution revenue, the appeal by the assessee being I.T.A.No.5536/Mumbai/2008 was regarding collection of advertisement revenue.

15. In so far the assessee's appeal i.e., I.T.A.No.5536/Mumbai/2008 is concerned, the same was dismissed as being time barred. Regarding appeal by the revenue on the issue of distribution revenue, i.e., I.T.A. No.412/Mumbai/2008, Tribunal held that none of the conditions as stipulated in Article 59(4) of the DTAA was applicable because Taj India was acting independently *qua* its distribution rights and the entire agreement was on principal to principal basis. Therefore, the distribution income by the assessee could not be taxed in India because Taj India did not constitute an agency Permanent Establishment under the terms of the said Article. This finding of the first appellate authority was upheld and the challenge made thereto by the Revenue was dismissed.

15.1. Hence, the Revenue is before us in appeal. Assessee has not preferred further appeal against dismissal of its appeal.

16. Learned counsel for the parties have made detailed submissions and have taken us to the orders passed by the authorities below. They

have also referred to the various provisions of the DTAA, more particularly clause 5 thereof.

17. Submissions made by learned counsel for the parties have been considered; also perused the materials on record.

18. At the outset, we may advert to the DTAA entered into between India and Mauritius. The said agreement was entered into between the two countries for avoidance of double taxation and for prevention of fiscal evasion with respect to taxes on income and capital gains and also to encourage mutual trade and investment. The Central Government in exercise of the powers conferred by Section 90 of the Act and Section 24-A of the Companies (Profits) Surtax Act, 1964 issued notification dated 06.12.1983 (as amended) directing that all the provisions of the said DTAA shall be given effect to in the Union of India.

19. As per Article 3(1)(c), the expressions ‘a Contracting State’ and ‘the other Contracting State’ mean India or Mauritius as the context requires. Article 5 thereof defines ‘Permanent Establishment’. Clause 1 says that the term ‘permanent establishment’ means a fixed place of business through which the business of the enterprise is wholly or partly carried on. As per clause 2, which is an inclusive provision, the term ‘permanent establishment’ shall include a place of management; a branch; an office; a factory; a workshop; a warehouse in relation to a person providing storage facilities to others; a mine, an oil or gas well, a quarry or any other place of extraction of natural resources; a firm, plantation or other place where agricultural, forestry, plantation or related activities are carried out; and a building site or construction or assembly project or supervisory activities in connection therewith, where such site, project or supervisory activity continues for a period of more than nine months. Clause 3 provides the exclusions to the term ‘permanent establishment’.

20. Clause 4 is relevant and is extracted hereunder:

“4. Notwithstanding the provisions of paragraphs (1) and (2) of this article, a person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State [other than an agent of an independent status to whom the provisions of paragraph (5) apply] shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if:

(i) he has and habitually exercises in that first-mentioned State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or

(ii) he habitually maintains in that first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfills orders on behalf of the enterprise.”

20.1. Clause 4 starts with a *non obstante* clause. It starts with the word ‘notwithstanding’ the provisions of paragraphs (1) and (2) of Article 5, a person acting in a contracting State for or on behalf of an enterprise of the other contracting State shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if the two conditions are fulfilled. Firstly, he has and habitually exercises in the first-mentioned State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise. Secondly, he habitually maintains in that first mentioned State, a stock of goods or merchandise belonging to the enterprise from which he regularly fulfills orders on behalf of the enterprise. Thus, the sum and substance of clause 4 of Article 5 is that a person acting in a contracting State on behalf of an enterprise of the other contracting State shall be deemed to be a permanent establishment of that enterprise in the first-mentioned contracting State if he habitually exercises in the first contracting State an authority to conclude contracts in the name of the enterprise and he habitually maintains in the first contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfills orders on behalf of the enterprise.

21. Having noted the requirement of Article 5 of the DTAA, we may

now advert as to how the matter was dealt with by the first appellate authority. As already noticed above, in so far advertisement revenue is concerned, the first appellate authority concurred with the findings of the assessing officer that the assessee had an agency Permanent Establishment in India which is Taj India within the meaning of Article 5(4) of the DTAA. Therefore, this part of the income was liable to be taxed in India.

21.1. In so far revenue earned by Taj India on account of distribution of pay channel, the first appellate authority held as under:

“3.3 I have examined the arguments of the AR and I have also examined the facts. The AR filed the Distribution Agreement, and copies of agreement entered into by the distributor with the cable operators. The AR had explained that a sub-distributor agreement was entered into between Taj India and HMA Udyog Ltd. on 11.03.2002. Copy of this agreement has been filed. Agreements with the cable operators are entered into by the sub-distributor. A sample copy of the same has also been filed. I have examined the Distribution Agreement between the appellant and Taj India. Perusal of the agreement reveals that the appellant has appointed Taj India as exclusive distributor in India. Further agreement provides that appellant shall not transmit for cable distribution, any other Ten Sports channel service that is not distributed in cable in India by Taj India. In other words, Taj India is the exclusive distributor and prohibits appellant from entering into distribution agreement with anybody else. Para-1.2 of the agreement provides that the Taj India shall have the exclusive right to represent Taj and negotiate and procure cable distribution and license agreement. Para-3.8 provides that Taj India shall be solely responsible for marketing and promoting the service to help drive cable operators' sales. The amount and type of said marketing support shall be at the discretion of Taj India. The responsibility of appellant would be of providing the services signal to Taj India. Para-7 of the agreement provides that Taj India shall have the first right to negotiate and additional 3 year term for the contract.

3.4. Perusal of the Distribution Agreement clearly provides that Taj India is not acting as agent of appellant but has obtained right of distribution of TV channel for itself and subsequently it is entering into contract with other parties in its own name. This fact is proved by the cable sub-distribution agreement dated 11.03.2002 entered into between Taj India and HMA Udyog Ltd., which has appointed HMA Udyog Ltd. as sub-distributor in India. As per the agreement, 75% of the

revenue would be the income of Taj India and balance 25% would be the income of HMA Udyog Ltd. In this agreement appellant does not figure anywhere. Agreement is entered into between Taj India and HMA Udyog for distribution of TV channel 'Ten Sports' in India. Subsequently, agreement is entered into between cable operators and sub-distributor. A sample copy has been filed of agreement dated 12.10.2002 between Agny Associates and Mr. Prakash S. for the distribution of TV channel on the cable network. Neither the appellant nor Taj India appear anywhere in the agreement. Therefore, from the perusal of the distribution agreement, sub-distribution agreement and the cable operator agreement, it becomes very clear that appellant has given the distribution rights to Taj India for promoting and distributing the TV channel in India on principal to principal basis. Taj India subsequently has given sub-distribution rights to other parties, which have in turn entered into contract with the cable operators for the distribution of TV channel. No evidence is available to show that Taj India is acting as agent of appellant for the distribution business. Perusal of the assessment order reveals that the AO has provided no reason why Taj India should be treated as agency PE for the distribution income as per Article 5(4) of the DTAA. I am accordingly of the opinion that Taj India is not acting as agent of appellant in India and the distribution agreement has given exclusive right to Taj India to distribute the channel in India on its own behalf and not on behalf of the appellant. Contracts entered into by the Taj India are by virtue of Taj India being a distributor and not an agent of appellant. In view of this it is held that Taj India does not constitute an agency PE within the meaning of Article-5(4) of the DTAA in respect of distribution income. In the preceding assessment year 2003-04, my predecessor CIT(A) had similarly set aside the findings of the AO on this issue in Para No.2.8 of his order dt. 26.02.2007 in Appeal No.CIT (A)XXXI/DDIT(IT)2(1)/IT-116/2006-07. I am in agreement with his findings on this issue. Findings of AO in this regard are set aside."

22. The first appellate authority examined the distribution agreement between the assessee and Taj India, which disclosed that Taj India was appointed as the exclusive distributor in India, Taj India being solely responsible for marketing and promoting the service to help drive cable operators' sales. Thus, the first appellate authority held that Taj India was not acting as agent of the assessee but had obtained right of distribution of TV channel for itself. It was also noticed that Taj India had independently entered into contract with other parties for the

purpose of distribution of pay channel and in such contracts, the assessee did not figure at all. Therefore, the first appellate authority held that assessee had given distribution rights to Taj India for promoting and distributing TV channel in India on principal to principal basis and there was no reason why Taj India should be treated as agency Permanent Establishment for the purpose of distribution income as per Article 5(4) of the DTAA. Therefore, the order of the assessing officer was set aside.

23. In further appeal before the Tribunal, it was held as under:

“17. We have carefully considered the entire gamut of facts as discussed in the impugned orders, rival submissions made before us, materials relied upon and the decisions relied upon. The assessee company is incorporated and registered under the Mauritius Law and is also the Tax Resident of Mauritius, therefore, qua its various streams of income, India-Mauritius DTAA has to be seen. The assessee is engaged in the business of telecasting sports channel called “Ten Sports” and for generating revenue, it has been collecting advertisement revenue and distribution of channel in India. It has appointed Taj India as its advertising sales agent to sell commercial slot / spot to the prospective advertisers and other parties in India in connection with the business of programming and telecasting of ‘Ten Sports’ Channel. As per the agreement, commission @ 10% of the advertisement revenue was paid to Taj India. The assessee has claimed that, such an income is not taxable in India, because there is no PE in India as Taj India is not a dependent agent of the assessee within the terms of Article 5(4). This contention of the assessee has been negated by the Ld. CIT(A) after discussing the issue in detail and holding that, there is no agency relationship between the assessee and the Taj India qua the advertisement income within the scope of Article 5(4). However, in the revenue’s appeal, the main issue involved in ground no.1 is with regard to taxability of distribution revenue in terms of “distribution Agreement” dated 1st March, 2002. Under the terms of the distribution agreement, the assessee has appointed Taj India as exclusive distributor in India and prohibits the assessee for entering into distribution agreement with anybody else. The Ld. CIT(A) after taking note of the ‘Distribution Agreement’ and examining various terms and clauses used therein and also taking into consideration the conduct of the parties, came to the conclusion that, Taj India is not acting as agent of the assessee but it had obtained the right of distribution of channel for itself and subsequently it is entering into contract with other parties in its own name in which the assessee is not party. The distribution of the revenue between the assessee and Taj India has been allocated in the

ratio of 60:40 and the entire relationship is principal to principal basis. The Ld. CIT(A) has also noted that, there is no evidence on record to show that Taj India was acting as agent of the assessee for the distribution business in any manner. This finding of fact of the Ld. CIT(A) is corroborated by the terms and conditions of the distribution agreement as well as sub-distributor agreement as placed in the paper book. Thus, such a finding of fact by the Ld. CIT(A) without there being any rebuttal by way of any contrary material, is affirmed. Even if we independently examine the facts of the case vis-a-vis the provisions contained in Article 5(4) to 5(6) which deals with the agency PE, it can be seen that there is no agency PE of the Assessee in India. Relevant Article 5 dealing with the agency PE is reproduced here under:-

“4. Notwithstanding the provisions of paragraphs (1) and (2) of this article, a person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State [other than an agent of an independent status to whom the provisions of paragraph (5) apply] shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if:

(i) he has and habitually exercises in that first-mentioned State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or

(ii) he habitually maintains in that first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfills orders on behalf of the enterprise.

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

6. The fact that a company, which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise) shall not, of itself, constitute either company a permanent establishment of the other.”

Thus, an agent is deemed to be a PE of a foreign enterprise, if he is not independent and habitually exercises an authority to conclude contracts in the name of the enterprise unless the activities of such person are limited to those mentioned in paragraph 4 that is, to the purchase of goods or merchandise for the enterprise; or if he has no such authority, but habitually maintains a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise. Thus, the character of an agent, who can be said to be a dependent only if, firstly, the commercial activity for the enterprise is subject to instructions or comprehensive control and secondly, he does not bear the entrepreneur risk. It is sufficient for the establishment of an agency PE that the agent has sufficient authority to bind the enterprise's participation in the business activity. Here in this case, none of the conditions as stipulated in Article 5(4) is applicable because Taj India is acting independently qua its distribution rights and the entire agreement ostensibly is on principal to principal basis as analyzed and found by Id. CIT(A). When the entire relationship qua the distribution revenue is that of principal to principal basis and the Taj India is acting independently, then it moves out from the conditions laid down in Article 5(4). Thus the distribution income by the assessee cannot be taxed in India, because Taj India does not constitute an agency PE under the terms of Article 5(4). Thus, the order of the CIT(A) is upheld and ground No.1 as raised by the revenue is dismissed.”

24. Tribunal noted that the first appellate authority, after due deliberation, had returned a finding of fact that Taj India was not acting as agent of the assessee but it had obtained the right of distribution of the channel for itself and subsequently, it had entered into contracts with other parties in its own name in which the assessee was not a party. The distribution of the revenue between the assessee and Taj India was in the ratio of 60:40 and the entire relationship was on principal to principal basis. Tribunal noted that this finding by the first appellate authority is corroborated by the terms and conditions of the distribution agreement as well as the sub-distributor agreement. After examining the requirement of Article 5 of the DTAA to constitute agency Permanent Establishment, Tribunal as a matter of fact held that none of the conditions as stipulated in Article 5(4) was applicable because Taj India was acting independently *qua* its distribution rights and the entire agreement was on principal to principal basis. Therefore, it was held that

the distribution income earned by the assessee cannot be taxed in India because Taj India does not constitute an agency Permanent Establishment under the terms of Article 5(4) of the DTAA. The order of the first appellate authority was accordingly upheld.

25. On thorough consideration of the matter, we are in agreement with the views expressed by the Tribunal. In fact, there is concurrent finding of fact between both the appellate authorities on this point. Learned standing counsel Revenue has not been able to show any perversity in such finding returned by the appellate authorities. In the absence thereof, we see no good reason to interfere with the finding of the Tribunal affirming the order of the first appellate authority.

26. Consequently, we do not find any merit in the appeal. No substantial question of law arises from the order of the Tribunal. Appeal is accordingly dismissed. However, there shall be no order as to costs.

27. In view of the above, the other appeal being Income Tax Appeal No.1437 of 2017 is also dismissed.

(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)

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