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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 622/2023**

COMMISSIONER OF INCOME TAX (INTERNATIONAL

TAXATION)-2

.....Appellant

Through: Mr. Sanjay Kumar and Ms.
Easha, Advocates.

versus

M/S KRONES AKTIENGESELLSCHAFTRespondent

Through: Mr. Ajay Vohra, Senior
Advocate with Mr. Neeraj Jain,
Mr. Anshul Sachar and Mr.
Tavish Verma, Advocates.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

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22.08.2024

1. The Principal Commissioner seeks to question the validity of the judgment handed down by the Income Tax Appellate Tribunal [**'Tribunal'**] dated 30 December 2022 and posits the following questions of law for our consideration: -

"A. Whether on the facts and circumstances of the case, the Ld. ITAT erred in holding that assessee company does not have existence of dependent PE in India?

B. Whether on the facts and circumstances of the case, the Ld. ITAT erred in ignoring the facts that the assessee company has a fixed place PE in India?

C. Whether on the facts and circumstances of the case, the Ld. ITAT erred in holding that since KIPL has been remunerated by the assessee for commission activities on arm's length basis, no further attribution is required in lieu of law laid down by the Hon'ble Supreme Court in the case of Morgan Stanley 292 ITR 416 despite



the fact that M/s Krones India Pvt. Ltd. (KIPL) is performing functions which are wider in scope than what is mentioned in its TP study report?”

2. We note that insofar as the issue of Fixed Place Permanent Establishment [‘PE’] is concerned, although the same was duly examined and answered by the Assessing Officer [‘AO’] against the assessee, when the matter reached the desk of the Commissioner of Income Tax (Appeals) [‘CIT (A)’], the said authority essentially held against the respondent on the ground of a Dependent Agent PE [‘DAPE’] being found to exist in India. In view of the aforesaid, it chose not to answer the question of whether the AO was correct in assuming that a Fixed Place PE existed.

3. The respondent-assessee had assailed the aforesaid order rendered by the CIT(A) and which has led to the passing of the order impugned before us. Although the appellant calls upon us to also examine the aspect of whether a Fixed Place PE existed, we find that no arguments on that score appear to have been addressed before the Tribunal. The appellant is also not shown to have filed any cross-objections seeking to agitate that issue before the Tribunal. The question with respect to a Fixed Place PE, thus cannot be said to be one which arises from the order of the Tribunal.

4. In view of the aforesaid, the contestation on the instant appeal then would have to be confined to the validity of the findings returned with respect to DAPE.

5. Mr. Kumar, learned counsel has drawn our attention to some of the salient findings which had come to be rendered by the AO while examining the issue of DAPE. We deem it apposite to extract the following from the order passed by the AO:-



“As already discussed supra, KIPL was undertaking activities/ functions that were beyond the scope of activities leading to earning of commission. KIPL was actively involved in completion of various agreements entered into by Krones AG by way of installation/ commissioning of machineries/ after sales service etc. To claim that KIPL has been adequately compensated at arm's length in view of the fact that no adverse inference is drawn by the Transfer Pricing officer is also not acceptable. It was not possible for the TPO to comment on the actual functions carried out by KIPL in the capacity of the dependent agent PE of the assessee in India. Furthermore, these functions performed by KIPL would also not have been reported by DA IPL in its Form 3CEB and TP study. Hence, the arm's length transaction and no further attribution argument cannot be relied upon by the assessee in the present case.

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The assessee has categorically submitted that the work of Pepsico, Jainpur project was carried out by KIPL in India. The supplies in respect of the instant installation and commissioning has been made by Krones AG. Here, it is important to point out that PE includes construction site and installation project. For a subsidiary/ subcontractor undertaking the installation and commissioning of the contracts, the presence or the absence of PE can only be ensured if the PE is not instrumental in performance of contracts which are outside its purview (such as offshore supplies and services). In the instant case, the services of installation and commissioning are performed by KIPL. These services are instrumental and essential to the core for the successful completion of the contract.”

6. As is manifest from the above, the AO had found that for the completion of various agreements entered into by the respondent- assessee and which entailed installation and commissioning of machinery or providing after sales services, the Indian subsidiary Krones India Pvt. Ltd [**KIPL**] had been adequately compensated at arm's length.

7. In view of the above and in our considered opinion, since no further question of attribution would have arisen, the aforesaid findings clearly pale into insignificance.

8. Insofar as the other findings, to which our attention was drawn by Mr. Kumar, we note that the AO had itself found that the work of



Pepsico, Jainpur project was one which was awarded to KIPL and that the respondent-assessee had only affected certain supplies.

9. More fundamentally, we take note of the following conclusions which have come to be rendered by the Tribunal: -

“18. A perusal of the agreement shows that KIPL does not carry out any manufacturing or processing activity in India using intangibles of the assessee and therefore, assumption of the Assessing Officer is factually incorrect. It further comes out from the agreement that research and development function and the risk in respect of technical obsolescence is assumed by the assessee only and not by KIPL as assumed by the Assessing Officer.

19. The plant as supplied has to be made to the specifications of each customer. The contracts for supplies are directly negotiated, concluded and signed by the assessee with the Indian customers, based on referrals made by KIPL as per its agreement with the assessee. Supplies are made on CIF basis by the assessee directly to the customers who bore the responsibility with respect to clearing, forwarding, loading and unloading, transportation and insurance.

20. KIPL is only required to coordinate KIPL the delivery and payment with the customer as part of its activities with respect to the order, for which it gets the commission. His allegation that KIPL habitually secures and concludes orders on behalf of the assessee is factually incorrect. In our understanding of the facts, mere undertaking marketing by meeting customers by one enterprise does not constitute habitually securing and concluding order on behalf of the other enterprise.

21. In our considered opinion, for an enterprise to be considered as habitually securing orders wholly or almost wholly for the other enterprise, it is essential that the enterprise frequently accepts orders on behalf of the other enterprise or habitually represents to persons offering to buy goods or merchandise that acceptance of an order by such enterprise constitutes the agreement of the other enterprise to supply goods or merchandise under the terms and conditions specified in the order and further the other enterprise takes actions that give purchasers the basis for a reasonable belief that such person has authority to bind the other enterprise.

22. We are of the considered view that KIPL is only undertaking marketing enterprise and contracts are finalized by the assessee and signed by the assessee outside India. Therefore, KIPL cannot be said to be habitually securing and concluding order on behalf of the assessee.



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24. It can be seen from the financials that the commission income of KIPL is only Rs.6,74,61,516/- on total revenue of Rs. 59,08,86,477/- which comes to around 11.5% of total revenue which means that 89% of the Revenue of the assessee is from its own sources. Therefore, it cannot be said that KIPL is economically dependent on the assessee

25. In so far a maintaining stock/inventory is concerned, the Assessing Officer has based his findings on completely wrong facts. As can be seen from the above, the assessee is as-a maintaining its own trading inventory. Therefore, the allegation of the Revenue is based on erroneous facts.

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32. Considering the facts in totality, we are of the considered view that the observations made in the TP Study Report of KIPL regarding scope of its business activities do not result in holding KIPL as DAPE of the assessee and further, since KIPL has been remunerated by the assessee for commission activities on arm's length basis, no further attribution is required in lieu of law laid down by the Hon'ble Supreme Court in the case of Morgan Stanley 292 ITR 416.”

10. On the basis of the aforesaid and bearing in mind the principles with respect to DAPE which were enunciated by us in **Progress Rail Locomotive Inc. vs. Deputy Commissioner of Income Tax (International Taxation) and Ors.** [2024 SCC OnLine Del 4065], we find that appeal fails to raise any substantial questions of law. It shall consequently stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 22, 2024/vp