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

\+ ITA 691/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -2 .....Appellant

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, Mr. Pratyaksh Gupta,Advs.

versus

MTR CORPORATION LIMITED .....Respondent

Through: Mr. Durgesh Shankar, Mr. Samar K., Ms. Tara Shahani, Ms. Akanksha Mohan and Ms. Aanya Saluja, Mr. Akshat, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% **30.08.2024**

1. The Principal Commissioner impugns the order of the **Income Tax Appellate Tribunal**[1] dated 16 May 2023 and posits the following questions of law for our consideration: -

> "2.1 Whether on the facts and circumstances of the case, the Ld. ITAT has erred in not adjudicating on the issue of Business Connection of the Assessee, during the subject year under consideration?
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> 2.2 Whether on the facts and circumstances of the case, the Ld. ITAT has erred in evaluating the Permanent Establishment of the Assessee in India, by evaluating the Business Connection in the present case under a restrictive definition of Fixed Place PE?

[1] Tribunal

2.3 Whether on the facts and circumstances of the case, the Ld. ITAT has erred in holding that the stay of seconded employees of the Assessee in India for more than 182 days does not fulfil the conditions of Permanent Establishment of Assessee in India?

2.4 Whether on the facts and circumstances of the case, the Ld. ITAT has grossly erred in observing that the Revenue has accepted the tax position of the assessee in earlier years, without appreciating that the no assessment proceedings were conducted in earlier years & the same has to be examined on a year to year basis?"

2. The solitary question which was addressed before us was with respect to the correctness of the conclusions rendered by the Tribunal on the question of existence of a Fixed Place **Permanent Establishment**[2].

3. According to the appellants, the case of the respondent assessee was liable to be placed under Section 44DA of the **Income Tax Act, 1961**[3]**.** That provision reads as under: -

"44DA.Special provision for computing income by way of royalties, etc., in case of non- residents.-- (1) The income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by a non-resident (not being a company) or a foreign company with Government or the Indian concern after the 31st day of March, 2003, <u>where such non-resident (not being a company) or a foreign company carries on business in India through a permanent establishment situated therein</u>, or performs professional services from a fixed place of profession situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed place of profession, as the case may be, shall be computed under the head "Profits and gains of business or profession" in accordance with the provisions of this Act:

Provided that no deduction shall be allowed,-

(i) in respect of any expenditure or allowance which is not wholly and exclusively incurred for the business of such permanent establishment or fixed place of profession in India; or

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[2] PE
[3] Act

(ii) in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to its head office or to any of its other offices:

[Provided further that the provisions of section 44BB shall not apply in respect of the income referred to in this section.]

(2) Every non-resident (not being a company) or a foreign company shall keep and maintain books of account and other documents in accordance with the provisions contained in section 44AA and get his accounts audited by an accountant as defined in the Explanation below sub-section (2) of section 288 and furnish along with the return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.

Explanation. For the purposes of this section,

(a) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(b) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(c) <u>"permanent establishment" shall have the same meaning as in clause (ma) of section 92F</u>.]"

4. As is manifest from a reading of that provision, there is an imperative requirement of the foreign entity carrying on business in India through a PE. It is pertinent to note that the expression "permanent establishment" stands defined in Section 92F as under:-

"92 F. Definitions of certain terms relevant to computation of arm's length price, etc. In section 92, 92A, 92B, 92C, 92D and 92E, unless the context otherwise requires,-

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<u>[(iiia) "permanent establishment", referred to in clause (iii), includes a fixed place of business through which the business of the enterprise is wholly or partly carried on;]</u>

[(iv) "specified date" shall have the same meaning as assigned to "due date" in Explanation 2 below sub-section (1) of section 139;

(v) "transaction" includes an arrangement, understanding or action in concert,-

(A) whether or not such arrangement, understanding or action is formal or in writing; or

(B) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding.]"

5. Undisputedly, and for the relevant **Assessment Year**[4], there was no taxing convention or avoidance treaty which governed the transactions in question. The respondents were thus left to examine the issue of taxability solely on the anvil of whether a fixed place of business had come into existence in terms defined by the aforenoted provision.

6. While dealing with this aspect, the Tribunal has in Paras 14 and 15 of the order impugned before us held as follows:-

> "14. We have already referred to the definition of PE under section 92F(iiia) of the Act, wherein, it has been defined to include fixed place of business from where the assessee carries on its business wholly or partly. <u>In our view, the facts on record do not reveal that the space and facilities provided to the assessee by DAMEPL can be construed to be a fixed place of business from where the assessee carries on its business wholly or partly.</u> In case of ADIT Vs. E-Funds IT Solution Inc. (supra), the Hon'ble Supreme Court has observed that the principal test to ascertain, whether an establishment has a fixed placed of business or not, is to see whether such physically located premise is at the disposal of the enterprise. The Hon'ble Court has observed. merely giving access to a place to the enterprise for the purpose of project will not amount to putting the premise at the disposal of the enterprise. <u>Putting the premise at the disposal of an enterprise would mean, when the enterprise has right to use the said place and has control thereupon. The Hon'ble Court has held that the burden is entirely on the Revenue to establish that the enterprise has effective control over the premise</u>.
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> 15. <u>In the facts of the present appeal, the Revenue has failed to establish through corroborative evidence that the assessee is having control over the premise. Admittedly, it is the DAMEPL which is having control over the premises and the assessee has been given access to the premise and provided certain space and facilities. No</u>

[4] AY

corroborative evidence has been brought on record to demonstrate that the assessee carries on business in India wholly or partly through a fixed place of business. That being the factual position emerging on record, applying the ratio laid down in the judicial precedents cited before us by the learned council for the assessee, we hold that the assessee does not have any PE in India. That being the fact, the provisions of section 44DA would not be applicable. Therefore, in our view, the income offered by the assessee under section 115A read with section 9(1)(vii) of the Act has to be accepted. More so, considering assessee's contention that in the preceding assessment years, similarly declared income has been accepted has not been controverted by the Revenue. Accordingly, we delete the addition made by the Assessing Officer under section 44DA of the Act."

7. Before us, the appellants have failed to establish that the aforesaid view as taken could be said to possibly suffer from a manifest or patent illegality or be perverse. The Tribunal has, on facts come to the conclusion that no fixed place of business existed and which was the only facet which was argued before us. In view of the aforesaid, we find no justification to interfere with the view as expressed.

8. Consequently, we are of the considered opinion that the appeal fails to raise any substantial question of law. The appeal shall stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 30, 2024/*neha*