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

\+ ITA 1292/2018

DAIKIN INDUSTRIES LIMITED ..... Appellant

Through: Mr. S.S. Tomar, Adv. for Mr. Vishal Kalra, Adv.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, NEW DELHI ..... Respondent

Through: Mr. Ruchir Bhatia, SSC along with Mr. Anant Mann and Mr. Pratyakash Gupta, JSCs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

% **27.05.2024**

1. This appeal is preferred against the order of the Income Tax Appellate Tribunal [‘**Tribunal**’] dated 28 May 2018 and has proposed the following questions of law for our consideration: -

> i. Whether on the facts and circumstances of the case and in law, the order passed by the Hon'ble Income Tax Appellate Tribunal ("Tribunal") is perverse on the facts and circumstances of the case and in law?
>
> ii. Whether on the facts and circumstances of the case and in law, the Hon'ble Tribunal erred in upholding that the Appellant had a DAPE in India as per the provisions of paragraph (7) of Article 5 of India Japan DTAA on the basis of conjecture and surmises?
>
> iii. Whether on the facts and circumstances of the case and in law, the order of the Hon'ble Tribunal is perverse as it erred in holding that sub para (c) of paragraph (7) of Article 5 is clearly applicable as DAIPL was securing orders in India for the Appellant?
>
> iv. Whether on the facts and circumstances of the case and in law, the Hon'ble Tribunal erred in upholding the action of the lower authorities holding that DAIPL constituted DAPE in terms of subparagraphs (a) and

(c) of Para(7) Article 5 to de-horse any iota of evidence brought on record by the lower authorities to substantiate the same?

v. Whether on the facts and circumstances of the case and in law, the order of the Hon'ble Tribunal is perverse as it erred in not appreciating the submissions/documents filed before the lower authorities to demonstrate that DAIPL was not (a) securing orders; (b) habitually concluding contract; and (c) have the authority to conclude any contracts on behalf of the Appellant?

vi. Whether on the facts and circumstances of the case and in law, the order passed by the Hon'ble Tribunal holding DAIPL as DAPE of the Appellant was perverse as it overlooked that DAIPL was not dependent on the Appellant and it fell under the exclusionary para (8) of Article 5 of the DTAA?

vii. Whether on the facts and circumstances of the case and in law, the order passed by the Hon'ble Tribunal is perverse as at one point it observes that the case of the Appellant is that DAIPL is an independent person and in the same breath it observes that it is not the case of the Appellant that paragraph (8) of Article 5 is attracted in the instant case?

viii. Whether on the facts and circumstances of the case and in law, the order of the Hon'ble Tribunal suffers from the vice ofperversity while ignoring the transfer pricing reports of the Appellant and DAIPL which clearly demonstrated the functions performed and the remuneration paid was held to be at ALP warranting no further attribution?

ix. Whether on the facts and circumstances of the case and in law, the order of the Hon'ble Tribunal suffered from the vice of perversity as it rejected attribution to the alleged PE on the basis of global profitability especially when all details were filed before the lower authorities and was accepted by (i) DRP in A Y 2008-09 and (ii) ignoring coordinate Bench decision in the case of Convergys Customer Management Group Inc vs ADIT: [2014] 159 TTJ 42 (Del) cited during the course of hearing?

x. Whether on the facts and circumstances of the case and in law, the order of the Hon'ble Tribunal is perverse as it came to a different conclusion then the ratio laid down by the coordinate bench which is against the principles of judicial proprietary?

xi. Whether on the facts and circumstances of the case and in law, the Hon'ble Tribunal erred in attributing the *ad hoc* percentage of 30% of the total estimated profit at the rate of 10% of the sales made in India and arbitrarily ignoring the attribution of profits on accepted global profitability?

2. We had on the last occasion taken note of the order of the Tribunal and which had provided for the issue of attribution of profits to the Permanent Establishment ['**PE**'] being remitted for the

consideration of the Assessing Officer.

3. We are today informed that the aforesaid exercise has been completed with no additions being attributed to the PE.

4. In view of the aforesaid, the question relating to Dependent Agent PE [‘**DAPE**’] and Fixed Place PE [‘**FPPE**’] are essentially rendered academic, bearing in mind the judgment rendered by the Supreme Court in **Honda Motor Company Limited, Japan vs. Assistant Director of Income Tax, Noida & Ors.** [(2018) 6 SCC 70].

5. In view of the aforesaid, we dispose of the instant appeal. However, the issue of DAPE and others aspects connected therewith are kept open to be addressed in ITA 1293/2018.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MAY 27, 2024

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