IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.2834/Del/2017
Assessment Year: 2012-13

DCIT (International Taxation), Circle-1(2)(2), New Delhi	**Vs.**	DHV B.V., 1 A-D, Vandan Building, 11, Tolstoy Marg, Connaught Place, New Delhi
		PAN :AADFD9348K
(Appellant)		**(Respondent)**

Appellant by	Sh. Sanjay Kumar, Sr. DR
Respondent by	Sh. Satyajeet Goel, CA

Date of hearing	19.01.2022
Date of pronouncement	08.02.2022

ORDER

PER SAKTIJIT DEY, JM:

This is an appeal by the Revenue against order dated 27.10.2016 of learned Income Tax Commissioner (Appeals), New Delhi, for the assessment year 2012-13.

2. The only effective ground raised by the Revenue reads as under:

"1. On the facts and in the circumstances of the case, whether Ld. CIT(A) has erred in holding that the income of

the assessee from contracts entered into on or after 1st April, 2003 are effectively connected to the PE of the assessee and 'not FTS' and liable to tax on net basis as per provisions of section 44DA of the Act."

3. Briefly stated facts are, the assessee is a non-resident company incorporated in Netherlands and a tax resident of that country. The assessee is engaged in the business of providing consultancy services related to various projects of civil and structural engineering, such as, road, highways, bridges, water supply, sewerage, solid waste management, environmental impact assessment, environmental engineering, urban development, rural and regional development, ports and waterways, agricultural and natural resources, irrigation and drainage, and human resources development. The assessee operates a branch office in India. For the assessment year in dispute, the assessee filed its return of income declaring total income of Rs.5,45,580/- and claimed refund of Rs.1,92,81,500/-. In course of assessment proceeding, the Assessing Officer on verifying the computation of income filed along with return of income noticed that the assessee has offered the following income:

(i) Income from National Highways Authority of India on gross basis at the rate of 20%.

(ii) Income from Indian branch office, income from Jammu and Kashmir Project and income from Kolkata project on the net basis.

4. The Assessing Officer observed, the facts of the impugned assessment year are identical to the facts of earlier assessment years, i.e., assessment years 2009-10, 2010-11 and 2011-12. He observed, in the earlier assessment years, all receipts of the assessee were taxed at gross basis. Therefore, he called upon the assessee to explain, why the receipts from India should not be taxed as fees for technical services (FTS), that too, at gross basis like in the earlier assessment years. Though, the assessee objected to the proposed action of the Assessing Officer, however, the Assessing Officer was not convinced. Observing that the factual matrix and the business model of the assessee for the impugned assessment year is identical to assessment years 2009-10, 2010-11 and 2011-12, the Assessing Officer proceeded to tax all the receipts of the assessee on gross basis, as according to him, they are effectively connected to the Permanent Establishment (PE) in India. Accordingly, he completed the

assessment by determining the total income at Rs.8,43,47,198/-. Against the assessment order so passed, the assessee preferred an appeal before learned Commissioner (Appeals).

5. After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) found that his predecessor has decided identical issue in favour of the assessee in assessment year 2011-12. Accordingly, following the said decision, he held that assessee's receipts from the contracts in India are not effectively connected with PE in India. Accordingly, he directed the Assessing Officer to tax such receipts on net basis as per section 44DA of the Act.

6. We have considered rival submissions and perused the materials on record. It is a common point between the assessee and the Revenue that the issue is squarely covered in favour of the assessee by the decision of Tribunal in assessee's own case in assessment years 2008-09, 2009-10 and 2010-11. As we find, identical issue arising in assessee's own case came up for consideration before the Tribunal in ITA No.5532/Del/2012, ITA No. 5372 & 5373/Del/2014 in assessment years 2008-09, 2009-10 and 2010-11. While deciding the issue in order dated 29.05.2018, the Tribunal has held as under:

"13. We have heard both the parties and perused all the relevant records available before us. As regard to Ground Nos. 1 and 2 for A.Y. 2008-09 appeal and Ground No. 1 for A.Y. 2009-10 & 2010-11, the CIT(A) in A.Y. 2008-09's order held as under:

> *"5. I have carefully considered the submissions made by the assessee and other material placed on record. The assessee has executed various projects in India either directly from head office or through a branch office in India which has been opened with permission from RBI. The assessee has returned income from these contracts as FTS which are taxable either on gross basis u/s 44D or on net basis u/s 44DA depending upon date of entering into contract. Both these sections viz. 44D and 44DA applies only if FTS is effectively connected with PE in India. The AO has not disputed the existence of PE in India. The AO has accepted that FTS from those contracts which are signed before 01-04-2003 are effectively connected with PE in India and hence taxable u/s 44D but he has held that FTS from contracts which are signed after 01-04-2003 are not effectively connected with PE in India and hence not taxable u/s 44DA. The AO has reasoned that project wise detail of employees for contracts executed by branch office was not furnished.*
>
> *The action of the AO does not appear to be based on proper appreciation of facts. The AO has selectively chosen to hold that contracts executed by branch office in India and entered into after 01-04-2003 are not effectively connected with PE while other contracts executed by branch office in India and entered into before 01-04-2003 are effectively connected with PE. All the contracts which are subject matter of dispute in present appeal have been negotiated and signed in India by branch head. The branch office has outsourced*

consultancy service from subsidiary namely DHV BV India Pvt. Ltd. Various invoices have been raised by branch office and bank account has been maintained and operated by branch office. The AO has not pointed out which of the relevant operations have been carried out by the head office. A project/contract has to be effectively connected either with head office or with branch office. There is no whisper by the AO of any activity from head office which can lead to conclusion that contract is effectively connected with head office. In present case, overall supervision and management has been done by the branch office and actual operational part of rendering consultancy services has been done by Indian subsidiary DHV BV India Pvt. Ltd. In view of these facts, there cannot be any other conclusion that the contract is effectively connected with branch office in India.

In view of discussion supra, I hold that contracts under dispute in present appeal are effectively connected with PE in India. The AO is directed to tax income these contracts on net basis as per provisions of section 44DA. The ground of appeal is accordingly allowed."

It is pertinent to note that all the documents especially contract agreements of the relevant period were produced before the Assessing Officer by the assessee. Despite that the Assessing Officer has overlooked the said documents and has given an incorrect finding that the assessee has not submitted the documents. The activities under each of the contract were rendered in India for more than 6 months which was not disputed by the Revenue. The details of the personnel and their duration activity shows that the contracts are required to be rendered for substantially long period of time which supports the case of the assessee that the scope of work was required to be rendered in India and the time spent in India by

the assessee/subcontractor proves that a Permanent Establishment (PE) was constituted in India. Therefore, the CIT(A) rightly held that income earned by the assessee under such contracts is effectively connected to a PE in India and is liable to tax at 40% on net income basis as per the RBI guidlines. Thus, there is no need to interfere with the findings of the order of the CIT(A). Therefore, Ground No. 1 and 2 for A.Y. 2008-09 and Ground No. 1 for A.Ys. 2009-10 & 2010-11 of the Revenue's appeals are dismissed as all the appeals are having identical facts."

7. Facts being identical, respectfully following the aforesaid decision of the Coordinate Bench, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground raised.

8. In the result, the appeal is dismissed.

Order pronounced in the open court on 8th February, 2022

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 8th February, 2022
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi