

**IN THE INCOME TAX APPELLATE TRIBUNAL DELHI  
(DELHI BENCH 'D' : NEW DELHI)  
BEFORE SH. G.S.PANNU, HON'BLE VICE PRESIDENT  
AND  
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No. 286/Del/2023  
(Assessment Year : 2013-14)**

Mosdorfer GMBH 408, Maker Bhavan No. 3, 21, New Marine Lines, Mumbai PAN : AAGCM6984N	Vs.	ACIT, International Tax Circle 2(2)(1)
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Appellant by	S/Sh. Girish Dave & Tanzil Padvekar, Advs.
Revenue by	Sh. Vizay B. Vasanta, CIT-DR

Date of hearing:	10.11.2023
Date of Pronouncement:	20.11.2023

**ORDER**

**PER ANUBHAV SHARMA, JM:**

The appeal has been filed by assessee against the assessment order dated 20.12.2022 for assessment year 2013-14 passed by Circle Int. Tax, 2(2)(1), u/s 147 r.w.s. 144C(13) of the Income Tax Act, 1961 in pursuant to the directions of Dispute Resolution Panel-2, New Delhi.

2. The brief facts of the case are that the case of assessee was reopened u/s 147 of the Act, after recording reasons to believe that income of assessee for A.Y. 2013-14 has escaped assessment. AO had examined NMS data and

observed that during the year under consideration, assessee invested Rs. 4,44,00,000/- to acquire shares and received payment of Rs. 79,73,433/-. In response to the notice u/s 148 dated 30.03.2021, assessee had filed return on 25.05.2021 declaring total income of Rs. 78,36,879/- and claimed refund of Rs. 13,660/- against tax credit of Rs. 7,97,348/-.

2.1 The assessee company was founded in 1978 in Aurtria. The objects of the company are the development and the industrial production of overhead accessories and damping systems from steel and metal as well as other steel and metal goods, which can be manufactured by pressing, forging, bending, welding and shaping by metal cutting as well as the industrial operation of a galvanizing plant. The company has a subsidiary in India named Mosdorfer India Private Limited which was incorporated in India in 2007.

2.2 During the course of assessment proceedings, in response to the notice dated 13.01.2022, the assessee filed its submission dated 19.01.2021 and submitted that during the year the assessee has received the following revenue directly/indirectly from India:

Nature of Revenue	Amount of revenue (In Rs.)
Software related services	9,94,173
Consultancy and professional services	71,726
Interest received on fully convertible debenture	60,72,254
Supervision & Repair charges received	6,98,727
Reimbursement of expenses received	1,36,660

2.3 Apart from the above, Mosforfer GMBH has also received an amount of EURO 6911796 from India on account of supplied/exported goods and other tangible assets. Further, out of the total receipts the assessee has declared Rs.

78,36,879/- and claimed Rs 1,36,660/- as exempt income as reimbursement of actual expenses incurred on behalf of the subsidiary company.

2.4 As with regard to first issue covered by ground no. 2, the AO had vide notice dated 02.03.2022 raised query for assessee to provide the documentary evidence such as agreement/contract etc w.r.t. cost reimbursement received during the year from Indian subsidiary and reason for not considering these receipts as income for the year.

2.5 In response to the above notice the assessee vide its reply dated 07.03.2022 submitted that there is no formal agreement as such with the Indian entity with respect to the receipts made during the year and the expenses of Rs. 1,36,660/- is back to back reimbursement crossed charged to India entity without any mark up. Therefore, the same be not considered as taxable income.

2.6 Ld. AO however concluded that;

*“During the assessment proceedings, the assessee has not provided any documentary evidence in support of its claim that the reimbursement charge was paid by Indian entity on purely cost to cost basis with any markup and submitted mere a written submission that the income received by it is in the nature of reimbursement and not chargeable to tax which is not tenable in absence of any documentary evidence. During the year, the assessee has provided consultancy & professional services and supervision & repair to its Indian subsidiary. Since, the assessee has provided certain consultancy & professional services and Supervision & Repair charges from Indian entity therefore, it is clear that the income received by the assessee on account of reimbursement income pertains to the technical services provided by the assessee during the year. Accordingly, the nature of the receipts is also comes under the ambit of FTS under the provisions of the Act as well as DTAA India-Germany*

*In view of the above facts, the income of Rs. 1,36,660/- is added back to the income of the assessee on account of FTS income under the provisions of DTAA.”*

3. Next during the course of proceedings, AO observed that the assessee has executed sale of exported goods and other tangible assets in India. AO took note of the fact that the assessee has submitted vide its reply dated 19.01.2022 that apart from Rs. 79,73,433/ the assessee has also received an amount of Rs. 47,47,71,207/- [equivalent to EURO 0911796 @ NR.66.69 as on 28.03.2013] from India on sale of exported goods and other tangible assets. Accordingly a show cause notice was issued on 10.03.2022 by AO to the assessee to provide the following information and show cause as to why the income received on account of supply/export goods or other tangible assets should not be considered as income for the year:-

- 1. Please provide copy of agreement/contract alongwith invoices for supply of goods and other tangible assets entered with Indian entities during FY 2012-13. Please also provide details of all the Indian parties to whom the goods/tangible assets were supplied during the year.*
- 2. Please provide details about insurance made regarding transfer of goods to various Indian parties alongwith documentary evidence.*
- 3. Please provide bill of lading of goods supplied from Austria to various Indian entities.*
- 4. Please provide custom clearance certificate for the goods supplied in India during the year.*
- 5. Please also explain as to why the income receipts from supplied/export goods and other tangible assets should not be considered as income for the year.*

3.1 In response to the above notice the assessee on 14.03.2022 made following submissions;

*"As per our earlier response, Mosdorfer GMBH has supplied/ exported goods and other tangible assets of EURO 6,911,796 from Austria to various Indian customers on a principal-to-principal basis. As per CBDT circular no. 23 [F. No. 7A/38/69-IT (A-II)] dated July 23,1969, the non resident selling good or tangible assets from abroad to Indian Importer on a principle-to-principal basis will not be considered as income/ receipt accrued or deemed to accrue or arise in India under section 9 of the income tax Act*

*Further, as stated earlier the above sale of goods and tangible assets has been made directly on a principle-to-Principal basis and therefore such receipts or income will not be considered as income for the year.*

*Also, Mosdorfer GMBH does not have any fixed place of business whether through Branch office /Project offices/Liaison office/Godown, Warehouses and construction or other business sites in India. Also, Mosdorfer GMBH has no employee working in India. Therefore, Mosdorfer GMBH does not have any business connection or a permanent establishment in India.*

*With respect to document required as per point number 1 to 4, we would like to humbly submit that because document mentioned in point number 1 to 4 are pertaining to 2012-13, it is not practical for the Company to extract these documents in such a short period of time. We would also like to submit that as per Austrian regulation, the Company is required to keep the document and evidence for 7 years from the end of the financial years.*

*Therefore, we humbly submit that it will not be possible for the Company to extract the above document in such a short period of time."*

3.2 The reply filed by the assessee was found not tenable by the AO as he believed that the assessee has not provided any documentary evidence in support of its claim. Further, the contention of the assessee for short period of time was also not considerable as vide earlier notice dated 13.01.2022 the assessee was asked to provide all the agreement or contract operative during the year. However

in response to same filed on 19.01.2022 the assessee has not furnished any agreement or documentary evidence related to transaction undertaken by it.

3.3 The AO observed that on perusal of the 26AS for the relevant assessment year, it is established that during the year the assessee has received various payments from its Indian subsidiary Mosdorfer India Private Limited. The assessee has not provided any list or any documentary evidence to establish that the goods were exported in India to any other entity apart from its Indian subsidiary. The AO observed that the assessee has provided software related services, consultancy and professional services and supervision & repair services to its Indian subsidiary. AO took note of the fact that the assessee has a subsidiary in India namely Mosdorfer India Private Limited and as per the ROI filed for A.Y, 2013-14 the assessee held 74% shareholding of it. Further that the assessee is procuring business in India by Mosdorfer India Private Limited. AO noticed that as per the services rendered to Mosdorfer India Private Limited during the year it is clear that the assessee has not only supplied goods or tangible assets to its Indian subsidiary but also supervise it and provided repair service for it. The AO, thus concluded that to provide such services the assessee has deputed its expatriate personnel to supervise and to provide repair services to Mosdorfer India Private Limited. Accordingly, the AO held that the assessee has fixed place of business in India in the form of Mosdorfer India Private Limited. Further, the 'core business' of the assessee is conducted through Mosdorfer India Private Limited. Therefore, the assessee has a permanent establishment in India through Mosdorfer India Private Limited. Accordingly, a reasonable profit from the business income is liable to be attributed to the assessee's PE in India.

3.4 The AO observed that since, the assessee has not furnished copy of any global balance sheet and P&L account for the relevant period so in the absence of

any details furnished by the assessee, he shall invoke Rule 10 of the Income Tax Rules by considering 10% profit on presumptive basis and considering the activities of assessee, 35% of the such profit is liable to tax in India as business income. Accordingly, Rs. 1,66,16,994/- (Rs. 47,47,71,267/- x 10% x 35%) was proposed as attributable towards PE of assessee in India.

4. As before Ld. DRP, the assessee filed additional evidence and Ld. DRP sought the report of Ld. Assessing officer on the issues and evidences filed by the Assessee. Thereafter as with regard to the issue no. 1, covered by ground no 1 here in the appeal, DRP rejected the objections of assessee with following findings ;

*“DRP finds that the assessee has still not given any cogent explanation as to the nature of payment of 1,36,660/- which it claims to be an expenses cross charged to Indian entity on a back to back reimbursement basis. The assessee has provided consultancy and professional services to Mosdorfer India Private Limited. The reimbursement expenses which is substantially FTS in nature and therefore liable for taxation on account of FTS income under the relevant clause of DTAA between the India and Austria. The assessee’s objection on the above is rejected.”*

5. As with regard to issue no 2 as covered by ground no. 3 to 5 and 7 to 10, the Ld. DRP observed as follows:-

*“On perusal of the issues it is seen there the main crux in this case is regarding as to whether the assessee had a permanent establishment in India through its subsidiary M/s Mosdorfer India Pvt. Ltd. and, whether a reasonable profit from the business income is liable to be attributed to the Assessee Company’s PE in India.*

*Permanenet Establishment (PE) under Double Tax Avoidance Agreement (DTAA) is to be understood with reference to the definition of Permanent Establishment provided in Article 5 in the relevant*

*DTAA. Under the DTAA, right of the contracting States to tax the business profits of an enterprise of other contracting State arises only if the enterprise carries on its business in the first mentioned State through a 'PE situated therein. PE is generally classified into six categories:*

- i. Place of Management or Place of Effective Management (POEM);*
- ii. Fixed Place PE (branch, office, factory, workshop, warehouse, sales outlet, website, etc.);*
- iii. Construction PE (building site or construction);*
- iv. Installation or assembly project PE (Criteria duration of each installation project);*
- v. Service PE, i.e.,*
- vi. Dependent Agency PE. i.e., the enterprise does not have any economic or functional independence.”*

*It is seen from the structure of the assessee that Mosdorfer GMBH has a global footprint it has a subsidiary in India namely Mosdorfer India Pvt. Ltd., of which the assessee has a 74% shareholding. The Indian business of the assessee is being procured through M/s Mosdorfer India Pvt. Ltd., the assessing has been supplying goods and services to various customers in India through the use of Indian subsidiary and also provides it with necessary service and supervision. Therefore it can be safely concluded that assessee has a fixed place permanent establishment in India and its business is being conducted through its subsidiary namely M/s. Mosdorfer India Pvt. Ltd. The Assessing Officer has invoked rule 10 of Income Tax Rules by considering 10% profit on presumptive basis and considering the activities of assessee, 35% of the such profit is liable to tax in India as business income. The DRP finds the AO's estimation of profit reasonable and therefore rejects the assessee's objections on the above.”*

6. Heard and perused the record. The grounds raised here in appeal are as follows;

*“1) On the facts and in the circumstances of the case and in law, Learned Assessing Officer ("AO" in short) has erred in assessing and determining the total income at Rs.2.45.90,533/- as against income returned of Rs.78,36,879/-.*



2) *On the facts and in the circumstances of the case and in law, Learned AO has erred in making addition of Rs.1,36,660/- being reimbursement of expenses received on back to back services rendered to the Indian Subsidiary Mosdorfer India Pvt. Ltd. ("MIPL" in short) for which necessary evidence is furnished.*

3) *On the facts and in the circumstances of the case and in law, Learned AO has erred in determining income of Rs.1,66,16,994/- on presumptive basis attributable towards Permanent Establishment ("PE" in short) of the Appellant in India.*

4) *On the facts and in the circumstances of the case and in law, Learned Dispute Resolution Panel ("DRP" in short)/AO has erred in holding that the Appellant has a PE in India which finding has no basis in law and on facts.*

5) *On the facts and in the circumstances of the case and in law, Learned DRP/AO has erred in holding that the Indian Subsidiary, MIPL is PE of the Appellant in Contravention of Paragraph 8 of Article 5 of Agreement dated 20/09/2001 for avoidance of double taxation & prevention of fiscal evasion between India and Austria ("DTAA" in short).*

6) *On the facts and in the circumstances of the case and in law, Learned DRP/AO has erred in rejecting addition evidence furnished by the Appellant without any valid reason.*

7) *On the facts and in the circumstances of the case and in law, Learned DRP/AO has erred in holding that the Appellant has procured business in India bythrough its Indian Subsidiary, MIPL which finding is based on pure surmises & conjectures.*

8) *On the facts and in the circumstances of the case and in law, Learned DRP/AO has erred in holding that business of the Appellant is being conducted through its subsidiary, MIPL.*

9) *On the facts and in the circumstances of the case and in law, Learned DRP/AO has erred in law in holding that the Appellant has not provided documentary evidence in support of its direct exports from locations outside India at the project offices outside India of its Indian Customers/Clients, which evidence has duly been provided in fact.*

*10) On the facts and in the circumstances of the case and in law, Learned DRP/AO has erred in invoking Rule 10 of the Income Tax Rules ("Rules in short) and estimating 10% profits on presumptive basis and applying 35% of such profit as liable to tax in India.*

*11) The Appellant craves leave to alter, modify, revise, add/delete ground (s) with the leave of Hon'ble Bench."*

7. It is pertinent to mention that ground no 1 is general in nature and Ld. AR has argued on all grounds except ground no 6.

8. As with regard to **ground no 2**, Ld. AR has primarily reasserted the aforesaid facts arguing that Ld. Tax Authorities below have fallen in error in not taking into consideration the evidence which were sufficient to establish that expense of Rs. 1,36,660/- was merely by way of reimbursement of the lab test report expenses and assessee on its own had not added any value to the test reports given by another entity.

8.1 On the other hand, Ld. DR has submitted that Testing of any equipment is an expert and technical services.

9. In regard to **ground no . 3 to 5 and 7 to 10**, it was submitted Ld. AR that the ld. Tax Authorities have completely failed to appreciate the documentary evidence in the form of invoices and bill lading which established that all orders were received outside India, the supplies were out of India and amounts were also received out of India. It was submitted that infact there was no business connection to bring Section 9 of the Act in operation.

10. On the other hand, Ld. DR has submitted that agreement were not filed to examine the nature of transactions which was rebutted by Ld. AR by arguing that there were no agreement with buyers as such and on the basis of orders as places goods were sold. Ld. DR also submitted that remand report has rebutted all the

allegations of lack of opportunity of hearing by AO. To this Ld. AR submitted that remand report did not controvert the evidence filed before the DRP.

11. After taking into consideration the submissions and matter on record it comes up that in regard to ground no. 2, Ld. Tax Authorities below have completely failed to take into consideration the relevant piece of evidences filed as additional evidence like Management Note available at page no. 147 on paper book giving details of transaction. It will be relevant to reproduce the same;

*“Company propose to reimburse testing charges to Mosdorfer GMBH with respect to payment ade by Mosdorfer GMBH to Laboratory based in Praha Bechovic on behalf of the Company. The payment was made by mosdorfer GMBH with respect to performance test of quadruple rigid with respect to project Construction of 765KV S/C Quad ACSR Bersimis Line (1<sup>st</sup> Circuit) – from Anta (Distt Baran) To Phag (Distt. Jaipur) of RRVPNL (Rajastan Rajya Vidyut Prasaran Ltd) to be executed by Mosdorfer India. Considering the existing business relationship of mosdorfer GMBH with the Laboratory, the invoice was raised on mosdorfer GMBH and the same proposed to be reimbursed by Mosdorfer India.”*

12. Then at page no. 148 of PB, the copy of invoices from the concerned test laboratory was filed and page no. 149 to 155 the report given by the concerned laboratory was provided and the reimbursement invoice of 1900EUR made available at page no. 156. The Ld. DRP have fallen in error in considering the same to be in consultancy and professional services to the Indian associates. In spite of accepting that it was a reimbursement expense the DRP considered it to be substantially FTS in nature. We are of considered view that the assessee had not added any value to the laboratory report. Assessee had not played any role except for being a medium to procure a report from a laboratory having higher credibility. The same cannot at all be in the nature of FTS, as erroneously held by

Tax authorities. **Thus, we are inclined to decide the ground no. 1 in favour of the assessee.**

13. In regard to ground no. 3 to 5 and 7 to 10, it will be appropriate to take them collectively as the same are based on common set of facts where the tax authorities have found existence of fixed place PE on allegation that the assessee is procuring its Indian business of supplying goods and services to various customers in India through the use of Indian subsidiary and also provides it with necessary services and supervision. However to establish this, the AO has not brought on record any evidence but has drawn inference for the failure of assessee to provide necessary evidences to AO. The case of assessee is that assessee was not given sufficient time to file the relevant evidences.

14. But before DRP when additional evidences were filed and remand report was called the AO had not rebutted the additional evidences and DRP also seems to have not gone into appreciating the additional evidences in the right context. The case of assessee is that the sale is directly made to the Indian customer and the Indian subsidiary does not perform any services with respect to the sale made to Indian entities. As from page no. 159 to 317 of PB assessee has provided copies of invoices of supplies made to KEC International Ltd., Kalpatru Power, Siemens Ltd. and Mosdorfer India Pvt. Ltd. to show by way of bill of lading that the consignee were situated outside India. The payments were received outside India. The Indian subsidiary had made payments on account of software and consultancy fees, interest on FCCD, Designing fees for Tools and consultancy charges, reimbursement of Testing expenses as discussed in ground no. 2 repair and labour charges as recovered. These items have been considered as taxable in the return and withholding tax has been appropriately deducted by the Indian subsidiary.

15. It appears that the Tax Authorities below have fallen in error to hold the existence of a PE on the basis of the mere assumption that as assessee company has a subsidiary in India and therefore whatever sales in the form of export is made by it to Indian entities, same is assumed to be with indulgence of Indian subsidiary without substantiating as to how Indian subsidiary was privy to the purchases by other entities. There is substantial force in the arguments of Ld. AR that without examining the buyers how any inference could be drawn about the role of Indian subsidiary.

16. We are of firm view that the Tax Authorities below have fallen in error in not appreciating the evidences in the form of bill of lading showing delivery outside India and also that the payments were made outside India. They have fallen in error to take note of the fact that the export to Indian counterparts was on principals to principal basis. The Assessee company is not alleged to have any fixed place of business in the form of branch office/project office/ liaison office/ godown or warehouse or any other business site in India. No employee of the assessee company was found working in India. Thus, to hold a PE on basis of existence of a subsidiary of assessee in India cannot be sustained. We are accordingly inclined to hold that there was no PE of assessee in India and consequential attribution of the profit had no basis. The ground no. 3 to 5 and 7 to 10, are accordingly decided in favour of the assessee.

17. As a consequences of determination of grounds in favour of appellant the **appeal of assessee is allowed.**

**Order pronounced in the open court on 20<sup>th</sup> November, 2023.**

**Sd/-**

**(G.S.PANNU)  
VICE PRESIDENT**

*Date:- 20.11.2023*

**Sd/-**

**(ANUBHAV SHARMA)  
JUDICIAL MEMBER**

**dk**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

AR, ITAT  
New Delhi