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.2145/Del/2022
Assessment Year: 2018-19
And
ITA No.2146/Del/2022
Assessment Year: 2019-20

SIS Live, 4th Floor, Statesman House Building, Barakhamba Road, Connaught Place, New Delhi	**Vs.**	Assistant Commissioner of Income Tax, Circle-3(1)(2), International Taxation, New Delhi
PAN :ABRFS4787L		
(Appellant)		**(Respondent)**

Appellant by	Sh. Kamal Sawhney, Advocate Sh. Nikhil Agarwal, Advocate Sh. Nishank Vashisht, Advocate Sh. Arun Bhadauria, Advocate
Department by	Sh. Gangadhar Panda, CIT(DR) Sh. Virendra Singh, Sr. DR

Date of hearing	19.05.2023
Date of pronouncement	30.05.2023

ORDER

PER SAKTIJIT DEY, JM:

The captioned appeals have been filed by the assessee assailing the final assessment orders passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (for short 'the Act'), pertaining to assessment years 2018-19 and 2019-20.

2. Grounds raised in both the appeals are identical, except variation in figures. Therefore, for ease of reference, we reproduce hereunder the grounds raised in ITA No.2145/Del/2022:

---

of Income Tax, Circle 3(1)(2) (International tax), New Delhi ('Learned AO') has erred in passing the final assessment order dated July 07, 2022 under section 143(3) read with section 144C of the Income-tax Act, 1961 (the Act') and the Ld. Dispute Resolution Panel — 2, New Delhi (Learned DRP') has erred in issuing the directions as per section 144C of the Act, on the following grounds.

1. That, on the facts and circumstances of the case and in law, the final assessment order passed by the Learned AO is bad-in-law and liable to be quashed.

2. That. on the facts and in the circumstances of the case and in law, the Learned AO has grossly erred in making disallowance of the legal and professional expenses amounting to INR 45,342,685 claimed by the Appellant, by alleging that the Appellant has no taxable business presence in India in the form of a Permanent Establishment (PE") or business connection during the year under consideration.

   2.1. In doing so, the Learned AO has grossly erred in not appreciating the fact that the Project Office (P0') of the Appellant is still operational in view of outstanding contractual revenues and hence, the Appellant still has a taxable business presence and PE in India

   2.2. The Learned AO has grossly erred in disregarding the fact that the Appellant follows cash method of accounting and therefore, business continues to be operational until the contractual revenues are realized and the PO is closed.

3. That, on the facts and in the circumstances of the case and in law, the Learned AO has grossly erred in disallowing the brought forward business losses of the Appellant amounting to INR 564,020,407, ignoring the fact that the same are not a subject matter of assessment proceedings for the year under consideration.

4. That, on the facts and in the circumstances of the case, the Learned AO has grossly erred in following an inconsistent approach by holding that the Appellant does not have a business presence in India to disallow the legal and professional expenses, since the same is contrary to the tax position adopted by its predecessors in the assessment orders for earlier years wherein the facts and circumstances were entirely same.

5. That, on the facts and in the circumstances of the case and in law, the Learned AO has grossly erred in interpreting the provisions of the Act and the India-UK Double Taxation Avoidance Agreement (DTAA') by holding that interest income amounting to INR 8,910,553 received on inter-company receivable is taxable at the rate of 15% on gross basis as per Article 12(2) of the India-UK DTAA.

5.1. That, on the facts and in the circumstances of the case and in law, the Learned AO has grossly erred in holding that the current year losses are not eligible to be set off against the interest income amounting to INR 8,910,553 received on inter-company receivables. Further, the Learned DRP has erred in not adjudicating on this issue.

5.2. Without prejudice, the Learned AO has failed to appreciate the fact that even where it is alleged that the Appellant does not have a business presence in India (without accepting), the interest income amounting to INR 8,910,553 received on intercompany receivable will not be taxable in India as per the provisions of section 9 of the Act.

6. That, on the facts and in the circumstances of the case, the Learned AO has grossly erred in following an inconsistent approach by holding that the provisions of set-off are not applicable to non-residents since the same is contrary to the tax position adopted by its predecessors in the assessment orders for earlier years wherein the facts and circumstances were entirely same.

7 That, on the facts and in circumstances of the case and in law, the Learned AO has grossly erred in charging interest under section 234D of the Act.

8. That, on the facts and in the circumstances of the case and in law, the Learned AO has erred in initiating penalty proceedings under section 270A of the Act for underreporting of income by way of misreporting.

The above grounds and/ or sub-grounds are without prejudice to each other.

The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

3. As could be seen from the grounds raised, the core issue arising for consideration is whether the assessee has a Permanent Establishment (PE) in India so as to entitle the assessee to claim certain expenses as well as other benefits.

4. Briefly the facts are, the assessee is a non-resident partnership firm incorporated under the laws of United Kingdom (UK) and is a tax resident of UK. In the year 2010, the assessee entered into an agreement with Prasar Bharti for production and telecasting of Common Wealth Games, 2010 through Doordarshan. In terms with the contract, the assessee was to

receive an amount of Rs.246 crores. Though, the assessee undertook the contract of television broadcasting and coverage of Common Wealth Games, 2010, however, subsequently, dispute arose between the contracting parties and Prasar Bharti refused to pay the entire contract value and paid an amount of Rs.146 crores only. In terms with the contract, the assessee invoked the arbitration clause and arbitral award was passed in July, 2020. However, still unsatisfied with the award of the arbitrator, the assessee challenged it before the Hon'ble Delhi High Court. Be that as it may, as a consequence of the contract with Prasar Bharti, the assessee has set up a Project Office (PO) in India in 2010, which constitutes a Permanent Establishment (PE) in terms of Article 5 of India – UK Double Taxation Avoidance Agreement (DTAA), and started filing its return of income offering income to tax. Due to ongoing legal proceedings arising out of arbitral award, the assessee claimed that it continued to operate its PO in India and the expenditure incurred in India in connection with the legal proceedings and others were claimed to be in relation to activities of the PE. Pertinently, the assessee had been claiming these expenses in its books and the resultant loss has been allowed to be carried forward year after year. Out of the

contractual receipts, the assessee had transferred certain amounts from its overseas bank accounts to its Associated Enterprises (AE), Sports Information Services (Holdings) Ltd. (SIS holdings). On the amount transferred, the assessee earns interest income, which is offered to tax in India as business profits attributable to the PE and legal and other against expenditures are set off against such income. The resultant loss is claimed in the return of income filed. Following its earlier practice in the assessment years under dispute, the assessee set off the expenditure incurred towards legal and other fees against the interest income earned from SIS Holdings and claimed the business loss. In assessment years 2018-19, the assessee filed its return of income declaring loss of Rs.3.62 crores. Additionally, the assessee claimed brought forward loss of Rs.56.40 crores. Similarly, in assessment year 2019-20, the assessee filed its return of income declaring loss of Rs.1.79 crores and brought forward business loss of Rs.30.73 crores. While framing the draft assessment orders, the Assessing Officer observed that in the assessment years under dispute, the assessee did not conduct any business operation in India. Whereas, the assessee claimed expenses on account of legal and professional fees and set off

such expenditure against the interest income earned from SIS Holdings and ultimately claimed loss. Referring to section 5(2) and section 9(1)(i) of the Act, the Assessing Officer held, since, the assessee had no business activity or operation in India, it cannot be said that it has a PE in India. Therefore, the business expenditure claimed by the assessee cannot be allowed. Insofar as taxability of interest income is concerned, the Assessing Officer observed that such income has to be taxed on gross basis by applying the rate of 15% as per Article 12(2) of India – UK DTAA.

4. As regards the set off of brought forward business loss, the Assessing Officer observed that the assessee had taxable business presence in the form of PE only in financial year 2010 relevant to assessment year 2011-12. Thereafter, the assessee had no business operation or activity in India, thus, it cannot be said that the assessee had a PE in India. Thus, he held that the brought forward business loss has to be disallowed. In the same manner he proposed the draft assessment orders for the both assessment years in dispute. Against the draft assessment orders, the assessee raised objections before learned DRP. As regards the existence of PE in India, learned DRP fully endorsed the view expressed by the Assessing Officer. For the same reason, learned

DRP also upheld the disallowance of brought forward business losses. Learned DRP also upheld the taxability of interest income under Article 12(2) of India – UK DTAA. As regards assessee's claim that the interest income was set off against current years business losses, learned DRP directed the Assessing Officer to factually verify assessee's claim and rectify the same, if found correct.

6. Before us, learned counsel appearing for the assessee submitted that in the assessment years under dispute, the stand taken by the Assessing Officer is thoroughly inconsistent with the stand taken by him in earlier assessment years. He submitted, while considering identical issue in preceding assessment years, the Assessing Officer has accepted assessee's claim by not only allowing the business expenses connected to the PE, but has also allowed set off of such expenses against interest income. He submitted, even in the immediately preceding assessment year, i.e., assessment year 2017-18, the Assessing Officer has accepted assessee's claim of set off of business expenses against the interest income. Thus, he submitted, without any change in the factual position, the Assessing Officer cannot alter the position taken by him in the preceding assessment years, as, rule of

consistency has to be applied. In support of such contention, learned counsel for the assessee relied upon the following decisions:

i. *Radhasoami Satsang Vs. CIT (1992) 60 taxman 248 (SC)*
ii. *DIT Vs. Apparel Exports Promotion Council (2000) 244 ITR 374*
iii. *Mr. Mohan N. Karnani Vs. ACIT (ITA No.28/Mum/2023)*
iv. *Krishak Bharati Cooperative Ltd. (2012) 23 taxmann.com 265 (Delhi)*

7. Without prejudice, he submitted, since the first year of its operation in assessment year 2011-12, the assessee had a PE in India. He submitted, even the Revenue does not dispute this fact. He submitted, since assessment year 2011-12, the assessee had been filing its Income Tax returns for the PE and claiming expenses in relation to legal and profession fees and has been carrying forward the losses setting them against the interest income of the respective years. He submitted, in the assessment orders passed for the earlier assessment years, the Assessing Officer has accepted assessee's claim and allowed carry forward of business loss. He submitted, though, the Common Wealth Games were held in 2010, however, Prasar Bharti violated the terms of contract by making only part payment to the assessee and for breach of contract, arbitration proceedings are going between the

assessee and Prasar Bharti. He submitted, activity in relation to realization of contractual revenue forms intrinsic and crucial part of business, since the contract is with the object of earning profits. He submitted, the assessee follows cash method of accounting, hence, recognizes revenue only on receipt and expenses on payment basis. Thus, he submitted, while the receipts are to be taxed in the year of recovery, the expenses have to be allowed in the year in which they are paid. Learned counsel submitted, though, there is no specific provision in India – UK DTAA dealing with cessation of PE, however, guidance in this regard can be taken from OECD Commentary. Referring to paragraph 44 of the OECD Commentary on Model Convention, 2017, learned counsel submitted, PE ceases to exist with the disposal of the fixed place of business or with the cessation of any activity through it, i.e., when all acts and measures connected with the former activity of the PE are terminated. He submitted, in the facts of the present appeal, the PE in India is yet to wind up its current business transaction as the arbitration dispute is still ongoing. Therefore, it cannot be said that the PE has ceased to existence. Referring to the decision of the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt.

Ltd. (432 ITR 471), learned counsel submitted, OECD guidelines will have persuasive value. Further, he submitted, the business is deemed to continue till all the assets in relation to the business are realized and liabilities are discharged. He submitted, the business cannot be said to be completed until all contractual obligations are performed. In this context, he drew our attention to a decision of Hon'ble Madras High Court in case of B.C. Munirathinam Naidu Vs. M/s. Meena Financiers, AIR 1978 (Mad.) 46.

8. As regards disallowance of brought forward losses, learned counsel submitted, losses determined and brought forward from earlier years cannot be disallowed in the current years. For this proposition, he relied upon the following decisions:

i *CIT Vs Manmohan Das (Deceased), (1996) 59 ITR 699 (SC)*
ii *Suraj Bhan Bajaj Vs. ITO (2008) 21 SOT 22 (Delhi)*

9. As regards the finding of the Assessing Officer that the provision for carry forward and set off of losses are not applicable to a non-resident assessee, learned counsel submitted, section 71 and 72 of the Act, which provide for set off and carry forward of losses refers to assessee and not resident assessee. Therefore, the assessee will also include non-resident assessee. In this regard,

learned counsel relied upon a decision of the Coordinate Bench in case of Anchor Line Ltd., 32 ITD 403. He submitted, since as per assessment orders passed in the preceding assessment years, assessee's claim of continuation of the PE has been accepted, the interest income was eligible to be set off against the current year business loss. Without prejudice, he submitted, in case, it is held that the assessee had no PE in India, the interest income cannot be made taxable in India, as, neither it was received or deemed to be received in India, nor does it accrue in India. This is so because, the advances were made from overseas bank accounts of the assessee to the overseas accounts of SIS Holdings and the corresponding interest income was also received outside India. Therefore, it cannot be said to have been received or deemed to be received in India under section 5(2)(1) of the Act. More so, when the interest income has no nexus with India. He submitted, once the interest income does not accrue or arise in India, it is not taxable in India, both under the Act as well as under Article 12 of India – UK DTAA. In support of such contention, learned counsel relied upon the following decisions:

i. *Rolls Royce Industrial Power Ltd. Vs. ACIT (2010) 6 ITR (T) 722 (Delhi)*
ii. *Credit Agricole Indosuez Vs. JCIT (2007) 14 SIT 246*

iii. CIT Vs. MR. P. Firm, Muar (1965) 1 SCR 815
iv. Balmukund Acharya Vs. DCIT, (2009) 310 ITR 310 (Bombay HC)

10. Strongly relying upon the observations of the Assessing Officer and learned DRP, learned Departmental Representative submitted, except the arbitration proceedings, the assessee had no other activities in India in the relevant assessment years. He submitted, the assessee is not carrying on any business operations or activities in India after conclusion of Common Wealth Games in the year 2010. He submitted, the only income offered to tax by the assessee in India in all these years is the interest income from advances given to another sister concern. Thus, he submitted, assessee's claim of existence of PE in India is unacceptable. As regards the taxability of the interest income, learned Departmental Representative submitted, since, the advance to the sister concern was out of the contractual amount received by the assessee from Prasar Bharti, such interest income is deemed to accrue and arise in India, hence, taxable in India. He submitted, for carrying on business activity/operation through a PE, there should be continuity, which is absent in the present case. As regards the allowability of set off of brought forward losses, he submitted, they can be considered in the year of set off.

11. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. Undisputed factual position emerging on record reveals that the assessee entered into a contract with Prasar Bharti for television production and coverage of Common Wealth Games, 2010 on Doordarshan. For this purpose, the assessee set up a PO in India which constitutes a PE in terms of Article 5 of India – UK DTAA. In fact, not only the assessee filed Income Tax returns offering income related to the PE but the Revenue accepted the existence of PE. It is evident, though, as per contractual terms the assessee was to receive Rs.246 crores from Prasar Bharti, however, dispute arose between the parties and Prasar Bharti paid only an amount of Rs.146 crores to the assessee.

12. To settle the dispute, the assessee invoked the arbitration clause and as stated before us, the arbitral award was passed in July, 2020, which is under challenge before the Hon'ble Delhi High Court. Even after conclusion of Common Wealth Games, 2010, the assessee did not wind up its PE in India as the PE was required to look after the arbitration proceeding and other contract related issues. It is a fact on record that out of the amount received from Prasar Bharti, the assessee had advanced

certain amounts towards inter-corporate deposit to one of its overseas sister concerns, SIS Holdings and regularly receives interests on such advances. In assessment year 2013-14, the assessee had incurred certain expenditure towards legal and professional charges and other expenses. In the return of income filed for assessment year 2013-14 assessee declared loss after setting off legal and other expenses against interest income. In course of assessment proceeding, noticing that the assessee had advanced loans to its AE and earned interest income, the Assessing Officer made a reference to the Transfer Pricing Officer (TPO) to determine arm's length nature of the interest earned. It is observed, the TPO finding the rate of interest to be not at arm's length, made an upward adjustment and suggested addition to the arm's length rate of interest. In terms with the adjustments suggested by the TPO, the Assessing Officer completed the assessment after allowing the expenditure claimed by the assessee. Even, in assessment year 2017-18, the Assessing Officer raised a specific query regarding claim of expenses on the ground that the assessee had no related business activity in India. In response to the query raised, the assessee furnished its reply stating its position relating to existence of PE and

allowability of expenditure. Pertinently, after considering the submissions of the assessee, the Assessing Officer completed the assessment under section 143(3) of the Act vide order dated 25.12.2019 accepting the existence of PE as well as claim of expenses. These are uncontroverted facts emerging on record.

13. It is observed, while framing the draft assessment order, though, the Assessing Officer had admitted that the factual position remains unchanged in the impugned assessment years, however, he has departed from the position accepted both by assessee and the department in the preceding assessment years, including, he immediately preceding assessment year 2017-18 by holding that since the assessee does not have any taxable business presence in the form of a PE, the expenses can neither be allowed nor can be set off against the interest income. As discussed earlier, upto assessment year 2017-18 the department has not only accepted the existence of PE in India, but, has also allowed set off of expenses related to PE against the interest income. In fact, in the preceding assessment years, the Assessing officer has not only determined the loss but has also allowed carry forward of such loss. Thus, apparently there being no difference in facts, vis-à-vis, the preceding assessment years and

the impugned assessment years, the Assessing Officer cannot alter the position relating to existence of PE. This is so because when the parties have accepted certain factual position permeating through different assessment years, unless there is discernible change in such factual position, rule of consistency should apply. For coming to this conclusion, we have drawn support from the ratio laid down in the decisions cited before us by learned counsel for the assessee.

14. Having held so, it needs to be examined, whether a PE exists in terms of Article 5 of India – UK DTAA. As per Article 5(1) of the tax treaty, any fixed place of business through which the business of an enterprise is wholly or partly carried on is treated as PE. As per Article 5(2), the term 'PE' includes amongst others a place of management, branch, office, factory, workshop etc. It is a fact on record that the PO of the assessee is still in existence as it is looking after arbitration proceeding and other contractual issues. In other words, the PO has not been wound up. As per paragraph 44 of OECD Commentary of Model Convention, 2017 a PE ceases to exist with the disposal of fixed place of business or with the cessation of activity through it, i.e., when all acts and measures connected with the activity of the PE are terminated.

The Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra) has held that OECD Commentary will have persuasive value and can be referred for guidance to determining a particular issue.

15. Thus, keeping in perspective the OECD Commentary on cessation of PE, if we look at the facts of the present appeal, the conclusion would be, the PE is in existence as all acts and measures connected with the former activities of the PE are not terminated. Thus, in our view, PE of the assessee still exists. Once it is held that the PE of the assessee exists, then in terms of Article 12(6) of India – UK DTAA, the interest income being connected to the PE, has to be treated as business profit under Article 7 of the treaty. That being the case, expenses incurred by the PE has to be set off against the interest income. In our view, if we accept the view of the departmental authorities that the assessee does not have a PE in India, rather than it being beneficial to the Revenue, it will be prejudicial to the interest of Revenue because, irrespective of the final result in the arbitral proceedings, the receipts, which would be in the nature of business profits, cannot be brought to tax in India in absence of a

PE. For the aforestated reasons, we uphold assessee's claim on the issue.

16. As regards assessee's claim of disallowance of brought forward loss and set off of current year loss against the current years income, issues have become consequential in view of our decision qua the issue of existence of PE and taxability of interest income. Hence, the Assessing Officer has to give effect in accordance with the relevant statutory provisions.

17. In the result, the appeal is partly allowed.

18. Insofar as appeal in ITA No.2146/Del/2022 is concerned, facts being identical, our decision in ITA No.2145/Del/2022 would apply mutatis mutandis. Accordingly, appeal is partly allowed.

19. In the result, both the appeals are partly allowed.

Order pronounced in the open court on 30th May, 2023

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

Dated: 30th May, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi