INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE
DR. BRR KUMAR, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

SA No. 437/Del/2023
ITA Nos. 2681 & 3377/Del/2023
Asstt. Years: 2020-21 & 2021-22

Clifford Chance PTE Ltd. 25th Floor Tower 3, 12 Marina Boulevard Marina Bay Financial Centre Singapore 999999 PAN AAECC1770C	Vs.	ACIT Civic Centre, New Delhi-110 002
(Appellant)		(Respondent)

Assessee by:	S/Shri Ajay Vohra, Sr. Adv., Neeraj Jain, Advocate, Ms. Shaily Gupta, Kunal Pandey and Archit Kabra, CA
Department by:	Shri Vizay B. Vasanta, CIT-DR
Date of Hearing:	18.12.2023
Date of pronouncement:	14.03.2024

O R D E R

PER ASTHA CHANDRA, JM

The appeals filed by the assessee are directed against the two separate final assessment orders dated 28.07.2023 & 29.10.2023 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 **(the "Act")** in pursuance to the directions of Ld. Dispute Resolution Panel **("DRP")** pertaining to the Assessment Year **("AY")** 2020-21 & 2021-22 respectively. Since common issues are involved, both the appeals were heard together and are being disposed of by this common order.

2. The assessee has raised the following grounds of appeal:

AY 2020-21

"1. That the assessing officer erred on facts and in law in completing assessment under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 ('the Act') at an income of Rs. 15,55,45,693 as against the returned income of Nil under normal provisions of the Act, wherein demand amounting to Rs. 8,45,18,275 has been raised.

Re: Validity of assessment proceedings/ order

2. That on the facts and circumstances of the case and in law, the impugned assessment completed vide order dated 28.07.2023 passed by the assessing officer under section 143(3) read with section 144C of the Act ('impugned order') being barred by limitation is illegal, bad-in-law and is void ab initio and thus liable to be quashed.

3. That on the facts and circumstances of the case and in law, the directions issued by the Ld. Dispute Resolution Panel ('DRP') in absence of Document Identification Number ('DIN'), though intimated subsequently, is non-est and invalid and thus liable to be quashed,

3.1 That on the facts and circumstances of the case and in law, the final assessment order passed in conformity with invalid directions of DRP is, therefore, invalid and barred by limitation.

4. That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation under section 153 of the Act and is liable to be quashed.

4.1 That on the facts and circumstances of the case and in law, since the impugned order is non-est, invalid, the additions made therein are invalid, beyond jurisdiction and bad in law.

Re: Constitution of Service PE/Virtual Service PE in India

5. That the assessing officer erred on facts and in law in holding that the appellant constituted a permanent establishment ('PE') in India under Article 5(6) of the India-Singapore Tax Treaty ("Treaty').

6. That the assessing officer erred on facts and in law disregarding the details of stay furnished by the appellant to hold that the appellant constituted a Service PE based on physical presence of employees in India.

6.1 That the assessing officer erred on facts and in law in considering the days spent by employees in India on vacation and business development as well as multiple counting of common days spent in India for the purposes of the duration threshold in Article 5(6) of the Treaty, acting on the basis of mere conjectures and surmises.

7. *That the assessing officer erred on facts and in law in holding that the appellant constituted 'Virtual Service PE', which is against the settled law, on the ground that in terms of para 6 of Article 5 of the Treaty what is important is the aggregate duration of provision of services by the non-resident within India and Singapore and duration of physical presence of the employees in India is not material.*

7.1 *That the assessing officer erred on facts and in law in misconstruing the nexus rule provided in para 6 of Article 5 of the Treaty of* ***furnishing services within a contracting state through employees or other personnel, if activity of that nature continues for more than 90 days,*** *which imply physical presence of such employees in India.*

Re: Attribution to alleged service PE

8. *Without prejudice, the assessing officer erred on facts and in law in arbitrarily computing the profits attributable to the alleged PE of the appellant in India by attributing the entire amount of revenue of Rs.15,55,45,693 earned from India, without any cogent basis.*

9. *Without prejudice, the assessing officer erred on facts and in law in not applying the attribution rule provided in section 9 of the Act which mandate the income of the business deemed to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India.*

10. *Without prejudice, the assessing officer erred on facts and in law by attributing the entire amount of revenue of Rs. 15,55,45,693 earned from India which includes the revenue earned in respect to the services provided from Singapore, thereby not following Article 7(1) of the Treaty.*

11. *Without prejudice, the assessing officer erred on facts and in law in not following decisions in appellant's own case for the previous assessment years wherein income was attributed to the alleged PE by bifurcating the amount of the invoice based on number of hours for which work was carried out in India and outside India.*

12. *Without prejudice, the assessing officer erred on facts and in law by not excluding the amount of expenses reimbursed to the appellant from determining income liable to tax in India.*

Re: Others

13. *That the assessing officer erred on facts and in law in levying interest under section 234A of the Act without appreciating that the income tax return was filed within the extended due date for filing the tax return.*

14. *That the assessing officer erred on facts and in law in levying interest under section 234B of the Act.*

15. That the mechanical endorsement in the impugned order to the effect that penalty under section 270A of the Act is initiated for "under reporting of income in consequence of misreporting of income" is illegal and bad in law."

AY 2021-22

"1. That the assessing officer erred on facts and in law in completing assessment under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 ('the Act') at an income of Rs. 7,97,64,414 as against the returned income of Nil under normal provisions of the Act, wherein demand amounting to Rs. 4,35,45,740 has been raised.

Re: Validity of assessment proceedings/order

2. That on the facts and circumstances of the case and in law, the impugned assessment completed vide order dated 29.10.2023 (signed on 30.10.2023) passed by the assessing officer under section 143(3) read with section 144C of the Act ('impugned order') being barred by limitation is illegal, bad-in-law and is void ab initio and thus liable to be quashed.

3. That on the facts and circumstances of the case and in law, assessing officer while passing the assessment order mentioned the objections raised in the case of some other assessee/applicant, hence impugned order passed in a haste manner, without any application of mind and thus liable to be quashed.

4. That on the facts and circumstances of the case and in law, the directions issued by the Ld. Dispute Resolution Panel ('DRP') in absence of Document Identification Number ('DIN'), though intimated separately, is non-est and invalid and thus liable to be quashed.

4.1 That on the facts and circumstances of the case and in law such DIN, which does not even exist on the Income Tax portal, is invalid and non-est.

4.2 That on the facts and circumstances of the case and in law, the final assessment order passed in conformity with invalid directions of DRP is, therefore, invalid and barred by limitation.

5. That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation under section 153 of the Act and is liable to be quashed.

5.1 That on the facts and circumstances of the case and in law, since the impugned order is non-est, invalid, the additions made therein are invalid, beyond jurisdiction and bad in law.

Re: Constitution of Service PE / Virtual Service PE in India

6. *That the assessing officer erred on facts and in law in holding that the appellant constituted a permanent establishment ('PE') in India under Article 5(6) of the India-Singapore Tax Treaty ('Treaty').*

7. *That the assessing officer erred on facts and in law disregarding the fact that no employees of the appellant visited India to hold that the appellant constituted a Service PE based on physical presence of employees in India.*

8. *That the assessing officer erred on facts and in law in holding that the appellant constituted 'Virtual Service PE', which is against the settled law, on the ground that in terms of para 6 of Article 5 of the Treaty what is important is the aggregate duration of provision of services by the non-resident within India and Singapore and duration of physical presence of the employees in India is not material.*

8.1 *That the assessing officer erred on facts and in law in misconstruing the nexus rule provided in para 6 of Article 5 of the Treaty of* ***furnishing services within a contracting state through employees or other personnel, if activity of that nature continues for more than 90 days****, which imply physical presence of such employees in India.*

RE: Attribution to alleged service PE

9. *Without prejudice, the assessing officer erred on facts and in law in arbitrarily computing the profits attributable to the alleged PE of the appellant in India by attributing the entire amount of revenue of Rs.7,76,53,507 earned from India, without any cogent basis.*

10. *Without prejudice, the assessing officer erred on facts and in law in not applying the attribution rule provided in section 9 of the Act which mandate the income of the business deemed to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India.*

11. *Without prejudice, the assessing officer erred on facts and in law by attributing the entire amount of revenue of Rs.7,76,53,507 earned from India without appreciating that the revenue earned was in respect to the services provided from Singapore, thereby not following Article 7(1) of the Treaty.*

12. *Without prejudice, the assessing officer erred on facts and in law in not following decisions in appellant's own case for the previous assessment years wherein income was attributed to the alleged PE by bifurcating the amount of the invoice based on number of hours for which work was carried out in India and outside India.*

13. Without prejudice, the assessing officer erred on facts and in law by not excluding the amount of expenses reimbursed to the appellant from determining income liable to tax in India.

Re: Alleged addition of income received from ICICI Bank

14. That the assessing officer erred on facts and in law in adding an amount of Rs. 10,87,258 to the total income merely on the basis that amount is appearing in Form 26AS ignoring the fact that the appellant had neither raised any invoice nor received any payment from ICICI Bank Limited and without appreciating such the corresponding TDS credit had not been claimed while filing return of income.

14.1 That the assessing officer erred on facts and in law in not bringing any material/evidence on record that the alleged income was received by the appellant.

14.2 Without prejudice, the assessing officer erred on facts and in law in not granting The corresponding TDS credit amounting to Rs. 2,76,943 withheld on the aforesaid payment.

Re: Alleged addition of interest on income tax refund which is vet to be received

15. That the assessing officer erred on facts and in law in making an addition of Rs. 10,23,649 on account of interest on income tax refund determined for AY 2019-20 based on mercantile system of accounting, without appreciating that no refund and/or interest on income tax refund was received by the appellant.

15.1 Without prejudice, the assessing officer erred on the facts and in law in taxing the interest income at the rate of 40 percent and not at the rate of 15 percent, the Outrunt. leno beneficial rate mentioned in article 11 of India-Singapore tax treaty

15.2 Without prejudice, the assessing officer erred on facts and in law in not granting the corresponding TDS credit amounting to Rs. 4,25,838 withheld by the department.

Re: Others

16. That the assessing officer erred on facts and in law in levying interest under section 234A of the Act without appreciating that the income tax return was filed within the extended due date for filing the tax return.

17. That the assessing officer erred on facts and in law in levying interest under section 234B of the Act.

18. That the mechanical endorsement in the impugned order to the effect that penalty under section 270A of the Act is initiated for "under reporting of income in consequence of misreporting of income" is illegal and bad in law."

3. It is a stay granted matter in AY 2020-21.

4. Briefly stated, the assessee is engaged in providing legal advisory services to several international clients including in India. It is a tax resident of Singapore and has opted to be governed by the provisions of India-Singapore Double Taxation Avoidance Agreement **("India-Singapore DTAA").** For the AY 2020-21, the assessee filed its return of income on 29.12.2022 declaring Nil income and claimed credit of taxes deducted at source **("TDS")** of Rs. 3,32,21,770/-. For AY 2021-22 the assessee filed its return of income on 7.03.2022 declaring Nil income and claimed credit of TDS of Rs. 82,80,990/-. The assessee's cases were selected for scrutiny under CASS. Statutory notice(s) under section 143(2) and 142(1) of the Act were issued and served upon the assessee in response to which the assessee duly furnished the information called from time to time.

4.1 During the relevant AYs, the assessee entered into legal advisory contracts with the Indian clients. In AY 2020-21, part of the advisory services were rendered remotely outside India and while there were situations where employees of the assessee travelled to India for rendering services. In AY 2021-22, the services were rendered remotely from outside India and no employees had visited India for provision of services. During the assessment proceedings, the Ld. Assessing Officer **("AO")** observed that the assessee had a gross total receipt of Rs. 15,55,45,693/- for the AY 2020-21 and Rs. 7,76,53,507/- for the AY 2021-22 from rendering services to Indian clients but the same have been claimed as exempt in its ITR by the assessee. The assessee was asked to show cause as to why the said receipts be not taxed on account of constitution of service Permanent Establishment **("PE")** of the assessee in India. The assessee filed detailed submissions before the Ld. AO which were not found to be tenable. He proceeded to pass the draft assessment order dated 30.09.2022 for AY 2020-21 and 29.12.2022 for AY 2021-22 under section 143(3) r.w. section 144(C) of the Act proposing to make addition of Rs. 15,55,45,693/- and Rs. 7,97,64,414/-

respectively to the total income of the assessee on account of constitution of service PE of the assessee in India.

5. Aggrieved, the assessee filed objections before the Ld. DRP who vide its order dated 31.05.2023 for AY 2020-21 and 11.09.2023 for AY 2021-22 directed the Ld. AO to reconsider the facts/information and material placed on record by the assessee during the assessment proceedings, before passing the final assessment order.

5.1 Pursuant to the above directions, the Ld. AO passed final assessment order on 28.07.2023 under section 143(3) r.w. section 144(C)(13) of the Act for AY 2020-21 holding that the assessee constituted service PE based on physical presence of employees in India and also virtual service PE on the ground that in terms of para 6 of Article 5 of the India-Singapore DTAA what is important is the aggregate duration of provision of services by the non-resident within India and Singapore and duration of physical presence of the employees in India is not material. He, therefore attributed 100% of the gross receipts of Rs. 15,55,45,693/- to such service PE. For AY 2021-22, he passed the final assessment order on 30.10.2023 holding that – (i) assessee constituted virtual service PE in India and further attributed 100% of the gross receipts amounting to Rs. 7,76,53,507/- to such alleged virtual service PE on the basis of the order passed in the AY 2020-21; (ii) income of Rs. 10,87,258/- is to be added to the total income on the ground that the assessee had allegedly received income from ICICI Bank amounting to Rs. 10,87,258/- which was not offered to tax; and (iii) interest on income tax refund pertaining to AY 2019-20 amounting to Rs. 10,23,649/- was added to the total income of the assessee.

6. Dissatisfied, the assessee is in appeal(s) before the Tribunal and all the grounds relate thereto.

7. In both the AYs under consideration, the main common grievance of the assessee relate to the finding of the Ld. AO that the assessee constituted service PE/ virtual service PE in India and consequent attribution of the entire receipts of Rs. 15,55,45,693/- in AY 2020-21 and Rs. 7,76,53,507/- in AY 2021-22 to such alleged service PE/ virtual service PE of the assessee in India.

8. So far as the constitution of service PE of the assessee in India on account of physical presence of employees of the assessee in India for provision of services to its Indian clients is concerned, the Ld. AR submitted that during the AY 2020-21 the assessee had no office/fixed base in India and the aggregate stay of the employees in India was only 44 days which is less than 90 days as provided in Article 5(6)(a) of the India-Singapore DTAA. Given that the threshold of 90 days is not met the assessee does not constitute a service PE in India. He submitted that to constitute a service PE there should be furnishing of service within the source state meaning thereby actual performance of service in the source state i.e. India. In support he relied on the decision of the Hon'ble Supreme Court in the case of ADIT vs. E-Funds IT Solution Inc. 86 taxmann.com 240 (SC).

8.1 As regards the computation of threshold date for constitution of service PE he submitted that during AY 2020-21 two employees of the assessee, namely Rahul Guptan and Shashwat Tewary travelled to India for rendering services to Indian clients. Although they were present in India for 120 days in total, their vacation period, days involving business development activities (business development days) and common days have been excluded from the total number of days after which the total days for which the services were furnished in India comes out to be 44 days. He submitted that these two employees were on leave for 36 days during the relevant AY. To demonstrate the same he took the Bench through the time sheet for aforesaid employees wherein annual leave has been captured (page 19 and 20 of the Paper Book) and leave record extracted from HR system of

the assessee company for its two employees (page 55 to 103 of the Paper Book). Further he submitted that the assessee had also furnished a declaration that these employees did not work on client project during their vacation period in India. (page 104 of the Paper Book). He submitted that all these facts were present before the lower authorities. In support he relied on the judgment of the Delhi Tribunal in the case of Linklaters LLP vs. DDIT [(TS-210-ITAT-2019) (Mum)]/106 taxmann.com 195 (Mumbai-Trib).

8.2 As regards exclusion of business development days, Ld. AR submitted that employees of the assessee spent 35 days on business development activities in India which is non-revenue generating. The business development activities undertaken by the employees of the assessee were solely to conduct business meetings which consisted of activities like identification of customers, technical presentation/providing information to prospective customers, developing market opportunities, making quotations to customers etc.. There is no element of furnishing of service involved in business development days and hence should be excluded for computation of threshold limit of 90 days. In support the Ld. AR relied on the time sheets of the employees who visited India.

8.3 As regards exclusion of common days, the Ld. AR submitted that the number of days spent by a foreign enterprise in India should be measured on the number of days spent by the foreign enterprise in India through employees or other personnel and not based on the man days by aggregating common days spent by more than one individual. In support he placed reliance on the decision of the Mumbai Tribunal in Clifford Chance vs. DCIT (2002) 82 ITD 106 Mumbai and Linklaters LLP (supra).

8.4 He further submitted that the services provided by the assessee does not make available any technical knowledge, experience, skill, know-how which may enable the Indian client to be able to apply the same

independently and hence these are not in the nature of FTS under the provisions of India-Singapore DTAA.

9. The Ld. DR, on the other hand, relied on the order of the Ld. AO. He argued that the Indian client was charged even for business development days as noted by the Ld. AO. One more employee, Mr. Jonatham Crandall visited India, however no details about his visit have been provided by the assessee.

10. In rebuttal, the Ld. AR submitted that from the time sheet of Mr. Rahul Guptan it is evident that on 14th January, 2020 he was travelling to India and on that day no services were provided to client apart from some non-billable work done for the assessee. Further the time sheets contain the day wise itinerary of the employees which also contain the information regarding the services that were non-revenue generating in nature. As no client work was performed on that particular day it was considered as business development day. All this material was placed before the Ld. AO. However, he did not consider the same. Regarding the presence of Mr. Jonatham Crandall in India, the Ld. AR submitted that Mr. Jonatham Crandall was present in India for providing services from 2nd June, 2019 to 3rd June, 2019 and from 18th July, 2019 to 19th July, 2019. These days are already covered under common days with Rahul Guptan and Shashwat Tewary and accounted for while calculating number of days during which services were performed in India.

11. The Ld. AO has also alleged constitution of virtual service PE in both the AYs 2020-21 and 2021-22. The Ld. AO held that the services were provided by the employees of the assessee to the clients in India for a period of more than 90 days, physical presence of employees is not relevant and accordingly constituted virtual service PE in India on account of the nexus rule provided in Article 5(6) of India-Singapore DTAA. According to him, there is no mandate in the tax treaty that the employees providing services

within India must be stationed in India and services provided from outside India are to be considered for constitution of service PE in India.

11.1 The Ld. AR submitted that the conclusion of the Ld. AO is not based on correct appreciation of facts and position in law. During the relevant AYs the assessee did not have any premises at its disposal in India through which it carried on business. In fact in AY 2021-22 no associates/employees had visited India to render services to Indian clients. The condition of rendering services in India for atleast 90 days for the purpose of constituting service PE in India as per Article 5(6)(a) of the India-Singapore DTAA is not met. Furnishing of services within the source state means actual performance of services in the source state. Therefore only when the services are furnished by the employees within India during the financial year, such services shall be taken into consideration for computing service PE threshold. In support thereof the Ld. AR relied on OECD commentary on this subject. He reiterated that as per Article 5(6) of the India Singapore DTAA the assessee should actually furnish services in India by way of physical presence of its employees in India for the purpose of computing the threshold of 90 days. As the services have been furnished remotely outside India the assessee does not constitute a virtual service PE in India.

11.2 He further submitted that the Ld. AO has relied on the decision of Bangalore Tribunal in the case of ABB FZ LLC 83 taxman.com 86 and OECD Interim Report 2018 under the OECD/G20 BEPS Project Titled "Tax challenges arising from Digitalisation" which focuses on the context of virtual service PE. If the view taken by the Ld. AO is to be applied then virtually all foreign entities rendering services to India customers from overseas would result in constituting service PE in India which would be absurd and illogical.

12. We have heard the rival submissions of the parties and perused the records.

12.1 Article 5 (6) of the India-Singapore DTAA states as under:-

"An enterprise shall be deemed to have a permanent establishment in a Contracting State if it furnishes services, other than services referred to in paragraphs 4 and 5 of this Article and technical services as defined in Article 12, within a Contracting State through employees or other personnel, but only if:

(a) activities of that nature continue within that contracting state for a period or periods aggregating more than 90 days: or

(b) activities are performed for a related enterprise (within meaning of Article 9 of this Agreement) for a period or periods aggregating more than 30 days in any fiscal year."

In terms of the above provisions the following conditions need to be cumulatively satisfied for constitution of a service PE in India:

(i) employees or the other personnel of the foreign entity (assessee) should be present in India;

(ii) there should be furnishing of services (other than services referred to paragraphs 4 and 5 of this Article and technical services as defined in Article 12) within a contracting state (India) through employees or other personnel of such foreign entity (assessee); and

(iii) activities of that nature i.e. such furnishing of services should continue for a period exceeding 90 days in a fiscal year (relevant AY) or 30 days when such services are rendered to related enterprises.

The term "fiscal year" means the previous year as defined under section 3 of the Act which is the relevant AYs in the present case and the threshold of 90 days is to be applied since the services are rendered to independent Indian client by the assessee and not to its related enterprise.

12.2 As per Article 7 of India-Singapore DTAA, the profits of a foreign enterprise (not falling within the purview of any other Article dealing with specific items of income i.e. FTS) can be taxed in India only if business is carried on through a PE situated in India. It is an undisputed fact that during AY 2020-21 part of the advisory services were rendered remotely outside India and part of services were rendered in India through the employees of the assessee who travelled to India for rendering such services. Whereas in AY 2021-22 none of the employees of the assessee travelled to India and the services were rendered from outside India which was duly evidenced by submission of statement showing details of employees who had visited India during the relevant AYs, copy of passport of employees and copy of statement showing date of arrival and date of departure to / from India before the Ld. AO/DRP. It is also an undisputed fact that the assessee had no office/fixed base in India during the relevant AYs and is governed by the beneficial provisions of India-Singapore DTAA.

12.3 Thus applying the provisions of Article 5(6)(a) to the present case, in our considered view to constitute a service PE actual performance of service in India is essential and accordingly only when the services are rendered by the employees within India with their physical presence during the financial year relevant to the AYs under consideration shall be taken into account for computing threshold limit for creation of a service PE of the assessee in India. The Hon'ble Supreme Court in the case of E-funds IT Solutions Inc. (supra) observed that requirement of service PE is that services must be furnished "within India".

12.4 It is an undisputed fact that the employees of the assessee were present in India for total number of 120 days in AY 2020-21 and none of the employees were present in India in AY 2021-22. Out of the total 120 days the vacation period amounted to 36 days which has been substantiated by the assessee by furnishing the relevant evidence thereof. In the case of Linklaters LLP (supra) the Mumbai Tribunal has held that period of holidays

has to be excluded while computing the threshold limit for constitution of service PE. Therefore, if the vacation days (36 days) are excluded from the total days for which the employee of the assessee were present in India (i.e. 120 days) the same would come to 84 days which is less than the threshold of 90 days provided under Article 5(6)(a) of the India-Singapore DTAA for constitution of service PE of the assessee in India. Further, to arrive at the threshold, the Ld. AO has considered business development days comprising of 35 days as well as common days comprising of 5 days which in our considered view should be excluded while computing the threshold of service PE as no services were provided to customers in India on the days spent on business development activities and the computation of threshold should not be based on man days by aggregating common days spent by more than one individual. In effect, the services have been furnished by the assessee only for 44 days in India after excluding vacation period, Business Development days and common days and accordingly the assessee does not constitute service PE in India as per India-Singapore DTAA during the AY 2020-21.

12.5 So far as AY 2021-22 is concerned, as discussed above physical rendition of services in India beyond the threshold period is a prerequisite for creation of service PE and as none of the employees of the assessee were physically present in India during the AY 2021-22, in our view, the assessee does not constitute service PE even in AY 2021-22.

12.6 Further in both the AYs under consideration the Ld. AO is of the view that the assessee constituted virtual service PE in India. In our view the finding of the Ld. AO is not based on the correct appreciation of facts understanding of law enshrined in Article 5(6)(a) of the India-Singapore DTAA. The Ld. AO while rejecting the assessee's claim of having no virtual service PE in India has strongly relied on the decision of the Bangalore Tribunal in the case of ABB FZ LLC 83 taxmann.com 86 and also placed reliance on the concept of virtual service PE mentioned in OECD Interim

report (2018) under the OECD/G20 BEPS Project titled "Tax challenging arising from Digitalisation". In our considered view the reliance placed by the Ld. AO in the case of ABB FZ LLC is misplaced as the facts of that case and the context in which this decision was rendered by the Mumbai Tribunal differs from the facts of the assessee's case in hand. In ABB FZ LLC the main issue was whether FTS is chargeable to tax in India when India-UAE DTAA does not contain an Article for taxation of FTS. In ABB FZ LLC case services provided by the assessee to its Associated Enterprise in India was considered as FTS which was not disputed and the Tribunal held that in the absence of provision in India-UAE DTAA to tax FTS, same would be taxed as per Article 7 of the DTAA applicable for business profit and in the absence of PE in India the income of the assessee was held to be non-taxable in India. Whereas in the case(s) at hand the services are furnished to independent Indian clients and the taxability of FTS income under the Act viz. a. viz the treaty was determined which is not the assessee's case.

12.7 As regards the reliance placed by the Ld. AO on OECD Interim Report (2018), we have carefully considered the arguments put forth by the Ld. AR. The Ld. AR argued that the OECD Interim report (2018) focuses on the concept of virtual service PE as a measure towards digitalization of economy which favours the view expressed by some countries that the requirement of physical presence is no longer relevant for the application of service PE. This view has been officially endorsed in Saudi Arabia only but not in India. The Ld. AR submitted that the Ld. AO has also accepted the fact that there is minority view on the subject as of now and no judicial precedents are available on the same which have attained finality. In our considered view the assessee does not constitute virtual service PE in India as no provision regarding establishment of virtual service PE are mentioned under India-Singapore DTAA and hence the present service PE provision under the India-Singapore DTAA which requires physical rendition of service in India should only be applied. This view is supported by the OECD Interim Report 2018 itself wherein it is clearly mentioned that in the absence of any

amendments to the tax treaty provisions themselves, these measures can be challenged by the tax payers before the courts.

12.8 In the light of above factual matrix, the arguments put forth by the parties and the judicial precedents relied upon by the Ld. AR, we hold that the assessee does not constitute service PE/virtual service PE in AY 2020-21 and 2021-22. The receipts of Rs. 15,55,45,693/- by the assessee in AY 2020-21 and Rs. 7,97,64,414/- in AY 2021-22 are in the nature of business profits of the assessee not taxable in India in the absence of the PE of the assessee in India in terms of Article 7 r.w. Article 5(6)(a) of the India-Singapore DTAA. Accordingly, ground Nos. 5 to 7.1 in AY 2020-21 and ground No. 6 to 8.1 in AY 2021-22 are allowed.

13. Ground Nos. 8 to 12 in AY 2020-21 and ground Nos. 9 to 13 in AY 2021-22 relate to attribution of business profits i.e. impugned receipts of the assessee to the alleged service PE/virtual service PE of the assessee in India which has become academic in view of our decision in favour of the assessee in para 12.8 above.

14. Ground No. 1 in both the AYs are general in nature.

15. In ground Nos. 2 to 4.1 in AY 2020-21 and ground Nos. 2 to 5.1 in AY 2021-22 the assessee has challenged the validity of the impugned assessment order on account of absence of Document Identification Number (DIN) on the directions/order of the Ld. DRP and the assessment order being barred by limitation under section 153 of the Act. These grounds have not been argued and hence not adjudicated upon.

16. The assessee has challenged levy of interest under section 234A of the Act in ground No. 13 and ground No. 16 in AY 2020-21 and 2021-22 respectively on the ground that the income tax return was filed within the extended due date for filing the return. Interest under section 234A is levied

only in cases where the assessee does not furnish its return of income or furnishes it after the due date prescribed under section 139 of the Act. The Ld. AR submitted that the assessee filed its return of income within the prescribed (extended) due date applicable to the relevant AYs under consideration which is supported by the copies of the ITRs filed before the lower authorities. Hence we deem it fit and proper to restore this issue to the file of the Ld. AO for verification as to the filing of date of return viz-a-viz the due date of filing of return for the AYs 2020-21 and 2021-22 and decide it afresh in accordance with law.

17. Ground No. 14 and ground No. 17 in AY 2020-21 and 2021-22 respectively relate to levy of interest under section 234B of the Act. The Ld. AR drew our attention to the proviso inserted in section 209(1)(d) of the Act by the Finance Act, 2012 w.e.f. 01.04.2012 which is reproduced below:-

> *"Provided that for computing liability for advance tax, income-tax calculated under clause (a) or clause (b) or clause (c) shall not, in each case, be reduced by the aforesaid amount of income-tax which would be deductible or collectible at source during the said financial year under any provision of this Act from any income, if the person responsible for deducting tax has paid or credited such income* ***without deduction of tax*** *or it has been received or debited by the person responsible for collecting tax without collection of such tax."*

17.1 The Ld. AR submitted that proviso inserted in section 209(1)(d) of the Act by the Finance Act, 2012 w.e.f. 01.04.2012 would apply only in a scenario where person responsible for deducting tax has paid or credited such income without deduction of tax. In the case(s) at hand, income has been received by the assessee after deduction of tax at source and therefore the said proviso to section 209(1)(d) of the Act is not applicable. He submitted that as per section 209(1)(d) of the Act r.w. proviso thereto, where in case of a non-resident company, tax deductible at source has been paid, it would not be permissible for the Revenue to charge any interest under section 234B for alleged failure to pay advance tax by such assessee. This issue is covered by the decision of the Coordinate Bench of the Tribunal in

the case of Amadeus IT Group SA vs. ACIT (ITA No. 1742/Del/2023) dated 16.10.2023.

17.2 We have perused the order (supra) of the Tribunal in Amadeus case and observe that the impugned issue now stands settled in favour of the assessee by the Hon'ble Delhi High Court in the appeal filed by the Revenue against the order (supra) of the Tribunal in Amadeus case. Respectfully following the decision(s) (supra) of the Delhi Tribunal which is affirmed by the Hon'ble Delhi High Court, we hold that levy of interest under section 234B of the Act is not called for. Accordingly, interest levied under section 234B of the Act is hereby deleted.

18. Ground No.15 in AY 2020-21 and ground No. 18 in AY 2021-22 relating to initiation of penalty proceedings under section 270A of the Act is pre-mature and hence not adjudicated.

19. In AY 2021-22 the assessee has raised two more grounds relating to alleged addition of income received from ICICI Bank by the Ld. AO and addition of interest on income tax refund pertaining to AY 2019-20 which is yet to be received by the assessee. We will now proceed to consider these grounds.

20. The Ld. AO made addition of Rs. 21,10,907/- to the total income of the assessee on the ground that the same was appearing in Form 26AS for AY 2021-22 and that such amount was received by the assessee during the year under consideration which was not offered to tax while filing the return of income. The break-up of the above amount is tabulated below:-

Sl. No.	**Name of the party**	**Section under which TDS was deducted**	**Income as per Form 26AS**	**TDS as per Form 26AS**
1.	ICICI Bank Ltd.	Section 195	Rs. 10,87,258/-	Rs. 2,76,943/-
2.	ACIT, CPC	Section 195	Rs. 10,23,649/-	Rs. 45,25,838/-
		Total	**Rs. 21,10,907/-**	**Rs. 7,02,781/-**

21. The Ld. AR submitted that the assessee had neither raised any invoice nor received any payment from ICICI Bank Limited during the relevant AY. The assessee while filing the return of income had neither reported the impugned receipt of Rs. 10,87,258/- nor claimed corresponding TDS credit thereon. The assessee has filed a copy of declaration regarding the same before the Ld. AO during the course of assessment proceedings (page 143 of the Paper Book refers). However, the same has not been considered by the Ld. AO while passing the final assessment order. No contrary material/evidence has been brought on record by the Revenue to prove that the assessee had received any payment from ICICI Bank Limited. In light of these submissions, we direct the Ld. AO to verify the claim of the assessee and if found to be correct by him, grant corresponding credit of TDS to the assessee in accordance with law.

22. With respect to the addition of interest income on income tax refund allegedly received by the assessee during the relevant AY, the Ld. AR submitted that the department had determined interest of Rs. 10,23,649/- on income tax refund and tax amounting to Rs. 4,25,838/- has been withheld by the department on the aforesaid interest amount. The Ld. AR submitted that neither the income tax refund amount nor interest amount was received by the assessee in AY 2021-22 and even till date which is verifiable from the NSDL status wherein only details of TDS having been

deducted is reflected and the fact of remittance of refund to SBI is not stated. (Page 144 of the Paper Book) He also submitted that without prejudice, if at all the interest income should be taxed @ 15% provided under Article 11 of India-Singapore DTAA instead of 40% rate applied by the Ld. AO.

23. We have considered the above submissions of the Ld. AR and in our view the impugned additions of income from ICICI Bank Ltd. and interest income on income tax refund solely on the basis of the fact that such amounts are appearing in Form 26AS is not sustainable in law and hence liable to be deleted. In support reliance is placed on the decision of the Jabalpur Tribunal in the case of Ravinder Pratap Thareja vs. ITO 60 taxmann.com 304 wherein it is held that merely because a payment is reflected in Form 26 and is shown to have been made to the assessee, it cannot be brought to tax in his hands when the said money is not received by the assessee. Support may also be drawn in this regard from the decision of the Surat Bench of the Tribunal in the case of Dr. Swati Mahesh Vinchurkar vs. DCIT 130 taxmann.com 320 wherein the Tribunal placing reliance on the decision of Ravinder Pratap Thareja's case (supra) held that once the assessee denied that she has not earned such income as reflected in her Form 26AS, the onus is shifted on the Revenue Authorities to prove that such income belongs to the assessee.

24. The assessee has claimed that it has not received any payment from ICICI Bank and any refund and interest on refund from the Income Tax Department on which TDS has been deducted which is reflected in Form 26AS. In this view of the matter and judicial precedents cited above we restore the matter to the file of the Ld. AO to verify the claim of the assessee and if found as a result of his enquiry that the assessee has not received the impugned payments during the relevant AYs, the impugned addition to the income of the assessee shall stand deleted and the Ld. AO shall grant corresponding TDS credit to the assessee in accordance with law.

25. In the result, the appeals of the assessee for both the AYs 2020-21 and 2021-22 are allowed for statistical purposes.

26. In view of our decision on merits in ITA No. 3377/Del/2023 for AY 2021-22, the Stay Application No. 437/Del/2023 becomes infructuous and is hereby dismissed.

Order pronounced in the open court on 14th March, 2024.

sd/-	**sd/-**
(DR. BRR KUMAR)	**(ASTHA CHANDRA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 14/03/2024
Veena

Copy forwarded to-

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	