

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' : NEW DELHI

BEFORE SHRI G.D.AGRAWAL, VICE PRESIDENT AND
SHRI I.C. SUDHIR, JUDICIAL MEMBER

ITA Nos.2015/Del/2008, 2435/Del/2010 & 5026/Del/2011
Assessment Years : 2003-04, 2004-05 & 2005-06

M/s Brown & Sharpe INC,
A-5, Sector-4,
Noida, Gautam Budh Nagar,
U.P. – 201 301.
PAN : AACCB2482G.
(Appellant)

Vs. Assistant /Deputy Commissioner of
Income Tax,
Circle, Noida.
(Respondent)

Appellant by : Shri Salil Agarwal, Advocate.
Respondent by : Shri Sanjeev Sharma, CIT-DR.

ORDER

PER G.D.AGRAWAL, VP :

These appeals by the assessee are directed against separate orders of learned CIT(A), Ghaziabad dated 05.02.2007, 16.03.2010 and 16.08.2011 for the AY 2003-04 to 2005-06 respectively.

2. In all these appeals, common grounds have been raised. Therefore, we shall discuss in detail the grounds as well as facts for AY 2003-04.

3. In this year, the assessee has raised as many as 20 grounds. However, they are all against the determination of income at ₹24,86,703/- as against the declared loss of ₹38,86,254/-.

4. At the time of hearing before us, it is stated by the learned counsel that the assessee i.e. M/s Brown & Sharpe INC is incorporated

in USA and it is 100% subsidiary of Hexagon AB (Publ), Sweden. That during the accounting year, the assessee started a liaison office in India for which permission of the RBI was taken. That the liaison office was established only as a communication channel between the assessee and its customers or prospective customers in India. That as per the condition put forth by the RBI while permitting the assessee to establish a liaison office in India, the liaison office was debarred from rendering any consultancy or any other services directly or indirectly. That the RBI had never alleged that the assessee has violated the conditions put forth by RBI while granting permission to establish a liaison office in India. He stated that the liaison office never rendered any services for procurement of order or sale of the product of the assessee company. Therefore, there was no income earned in India. He further stated that the liaison office is only receiving the reimbursement of expenses incurred from the head office. He, therefore, submitted that merely because the assessee company has opened the liaison office in India, it is not liable to be taxed. In this regard, he relied upon the following decisions:-

- (i) Angel Garment Ltd. – [2006] 287 ITR 341 (AAR).
- (ii) U.A.E. Exchange Centre Ltd. Vs. UOI & Another – [2009] 313 ITR 94 (Delhi).
- (iii) K.T. Corporation – [2009] 181 Taxman 94 (AAR-New Delhi).
- (iv) Sojitz Corporation Vs. Assistant Director of Income Tax (International Taxation) – [2008] 117 TTJ (Kol) 792.
- (v) Mondial Orient Ltd. Vs. ACIT (International Taxation) – [2010] 129 TTJ (Bang) 560.

5. The learned counsel further submitted that the reimbursement of expenses cannot be said to be income of the assessee. In support of this contention, he relied upon the decision of Hon'ble Jurisdictional

High Court in the case of CIT Vs. Industrial Engineering Projects Pvt. Ltd. – [1993] 202 ITR 1014.

6. Learned DR, on the other hand, relied upon the order of the Assessing Officer as well as learned CIT(A) and by referring to pages 2 to 4 of the assessment order, he pointed out that the Assessing Officer had examined in detail whether the liaison office has rendered any services for effecting the sales of the assessee's product or not and on examination of the service agreement of the employees, he found that the employees were offered the sales incentive plan by setting the performance target for which they were allowed to receive up to 25% of the annual remuneration as incentive. He also stated that the liaison office had employed not only the Chief Representative Officer but also the Technical Support Manager. The Assessing Officer had examined the Chief Representative Officer i.e. Shri Anoop Prasad Verma and his statement was recorded. From his statement, it was evidently clear that the liaison office was promoting the brand products of the assessee and the performance of the employees was being judged by the number of orders that the company received. He, therefore, submitted that the liaison office was not simply a communication channel and as claimed by the assessee but it was rendering the services for promotion and sales of the products of the assessee company. That apart from getting permission from RBI for opening the liaison office, the assessee company is registered with the Registrar of Companies for establishment of place of business in India. He referred to the certificate issued by the Registrar of Companies, NCT of Delhi and Haryana in this regard. He also stated that the assessee itself had filed the return of income not only for this year but also for all subsequent years claiming the loss under the head 'income from business or profession'.

7. We have carefully considered the submissions of both the sides and perused the material placed before us. The learned counsel for the assessee has argued at length to buttress his point that the liaison office of the assessee did not render any services in India so as to saddle with the liability of income tax in India and in support of which he relied upon the various decisions. Therefore, before adverting to the facts of the assessee's case, it would be important to see the ratio laid down in the various decisions relied upon by the learned counsel.

8. In the case of U.A.E. Exchange Centre Ltd. (supra), Hon'ble Jurisdictional High Court held as under:-

“Under article 5(2)(c), amongst others, permanent establishment includes an office. However, article 5(3) which opens with a non obstante clause, is illustrative of instances where under the DTAA various activities have been deemed as ones which would not fall within the ambit of the expression “permanent establishment”. One such exclusionary clause is found in article 5(3)(e) which is : maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character. The only activity of the petitioner's liaison offices in India was to download information which was contained in the main servers located in the UAE based on which cheques were drawn on banks in India whereupon the cheques were couriered or dispatched to the beneficiaries in India, keeping in mind the instructions of the NRI remitter. Such an activity could not be anything but auxiliary in character. The instant activity was in “aid” or “support” of the main activity. It fell within the exclusionary clause.”

9. In the case of Angel Garment Ltd. (supra), the Authority for Advance Rulings held as under:-

“The applicant, a non-resident company incorporated in Hong Kong, proposed to set up a liaison office in India for collecting information and samples of garments and

textiles from manufacturers, traders and exporters and passing on the information to the head office in Hong Kong and co-ordinating and acting as the channel of communication between the applicant and Indian exporters and follow up with Indian exporters for timely export of goods. The entire expenses of the proposed liaison office were to be met through remittances from the applicant's head office in Hong Kong. On these facts the applicant applied to the Authority for an advance ruling on the question whether the applicant could be said to have received income taxable in India. On the facts stated the Authority ruled that a plain reading of Explanation 1(b) to section 9(1)(i) of the Income-tax Act, 1961, indicating that no income would be deemed to accrue or arise to a non-resident through or from operations confined to the purchase of goods in India for the purpose of export. The proposed activities of the liaison office of the applicant in India were to be confined to purchase of goods for export. It was immaterial whether the export of goods was to Hong Kong or to any other country. The applicant company could not, therefore, be said to earn income from the proposed activities under the provisions of the Income-tax Act."

10. In the case of K.T. Corporation (supra), the Authority for Advance Rulings held as under:-

"The applicant, a Korean company, is telecommunication carrier/reseller. It has opened a Liaison Office ('LO') in India with the permission of the Reserve Bank of India (RBI) to act as a communication channel between the head office of the applicant and the Indian companies within the parameters listed out by the RBI. Pursuant to the opening of the LO, the applicant entered into an agreement with Vodafone Essar South Ltd. (VESL), an Indian company which is also a telecommunication carrier/reseller, to provide certain services to each other. In the above backdrop, the applicant has sought advance ruling on question as to whether its LO in India constitutes a permanent establishment in terms of the aforesaid agreement. It contends that LO in India only carries out preparatory or auxiliary activities, such as: (i) holding of seminars, conferences; (ii) receiving trade enquiries from the customers; (iii) advertising about the technology being

used by the applicant in providing the wired/wireless services and to answer the queries of the customers; (iv) collecting feedback from the prospective customers/consumers, trade organizations, etc., and it has neither played any role in pre-bid survey, etc., before entering into the agreement with VESL nor has involved itself in the technical analysis of any project, and, therefore, it cannot be considered to be a PE in terms of clauses (d), (e) and (f) of Para 4 of article 5 of the Treaty between India and Korea.”

11. In the case of Sojitz Corporation (supra), Kolkata Bench of ITAT held as under:-

“Liaison offices of the assessee in India whose activities are restricted to collecting and sending of information from India to Japan fall within the exclusionary cl. (e) of art. 5 of the DTAA between India and Japan and, therefore, the said liaison offices cannot be treated as PE of the assessee in India, and therefore the action of authorities below in estimating the income of the assessee on the basis of having PE was not sustainable.”

12. Let us now see the facts of the assessee's case so as to arrive at the conclusion whether any of the above decisions would be applicable to the case of the assessee. In the assessment order, at page 2, the Assessing Officer has recorded that the liaison office of the assessee has employed Chief Representative Officer Shri Anoop Prasad Verma and Technical Support Manager Shri Rajeev K. Datar. The employees, besides fixed remuneration, were offered sales incentive plan by fixing the performance target for which they were allowed to receive up to 25% of the annual remuneration as sales incentive. Though during the assessment proceedings Shri Anoop Prasad Verma i.e. Chief Representative officer of the liaison office had stated that sales incentive plan was not actually acted upon but, nevertheless, it is not in dispute that in the employment contract between the assessee and the employees, there was a sales incentive plan and employees were

to be provided with the remuneration based upon the achievement of the target for the sales of the goods of the assessee company in India. The statement of Shri Anoop Prasad Verma was also recorded by the Assessing Officer and, in reply to question 14, he stated "*The employee of the liaison office was assigned the task to promote Brown & Sharpe Brand's products and to understand the Indian market. The performance judged by number of direct orders that the company received as well as extend the awareness of the Brown & Sharpe Company in India.*" The above factual finding recorded by the Assessing Officer could not be controverted by the assessee either before the CIT(A) or before us. Further, the assessee company registered itself with the Registrar of Companies for carrying on the business in India and the certificate issued by the Registrar of Companies reads as under:-

"I hereby certify that Form No.44 dated 13.9.2002 filed U/s 592 of the Companies Act, 1956 notifying establishment of place of business in India with effect from 31.7.2002 by M/s Brown & Sharpe INC. Company originally incorporated in U.S.A. has been registered.

Given under my hand at New Delhi this day of 14th Nov. Two Thousand Two."

13. The assessee itself filed the return of income on 28.11.2003 declaring net loss of ₹38,86,255/-. The computation of income is at page 26 of the paper book from which it is evident that the loss is computed under the head 'profits & gains of business & profession". In the computation, the assessee added back the depreciation which was debited to the books of account as per Companies Act and claimed the depreciation as per the Income-tax Act. Thus, the assessee itself took a stand that it derives income from business or profession in India. On these facts, none of the decisions relied upon by the learned counsel

would be applicable because in the case of U.A.E. Exchange Centre Ltd. (supra), the liaison office of the assessee in India was only to download information which was contained in the main server located in UAE based upon which the cheques were drawn in India. On these facts, Hon'ble Jurisdictional High Court held that such an activity was only auxiliary in character. In the case of Angel Garment Ltd. (supra), the liaison office was only collecting information and sample of garments and textile from manufacturer and traders and passing on the information to the head office in Hong Kong and coordinating as channel of communication between the assessee and the customers. On these facts, the Authority for Advance Rulings held that the applicant company could not be said to have earned income from the proposed activities under the provisions of the Income-tax Act. In the case of K.T. Corporation (supra), the liaison office in India carried out only preparatory or auxiliary activities such as holding seminars, conferences, receiving trade enquiries, collecting feedbacks, advertising about the technology being used by the assessee etc. On these facts, the Authority for Advance Rulings held that the liaison office cannot be termed as PE in terms of treaty between India and Korea. In the case of Sojitz Corporation (supra), the liaison office of the assessee in India was only collecting and sending the information from India to Japan. On these facts, the ITAT Kolkata Bench held that the authorities below were not justified in estimating the income of the assessee on the ground that the assessee was having a PE in India. But, the facts in the case of the assessee are altogether different. The assessee company is registered with the Registrar of Companies in India for carrying on the business. The liaison office, apart from having Chief Representative Officer and other staff, is also having a Technical Expert. The employees of the assessee company are promoting the sales of the goods of the assessee company as per service conditions. There is a sales incentive plan by which employees are provided the

incentive for achieving the sales target and the performance of the employees is being judged by the orders secured by the assessee company. All these activities clearly establish that the liaison office of the assessee was promoting the sales of the assessee company in India and, therefore, the Assessing Officer was fully justified in holding that the income attributable to liaison office is taxable in India.

14. Now, coming to the determination of income by the Assessing Officer, the learned counsel for the assessee has vehemently contended that the liaison office has only received the reimbursement of the expenses and, under no circumstances, the reimbursement of expenses can be termed as the income of the assessee. In support of this contention, the learned counsel relied upon the decision of Hon'ble Jurisdictional High Court in the case of Industrial Engineering Projects Pvt. Ltd. (supra), wherein their Lordships held as under:-

“Held, (i) that reimbursement of expenses can, under no circumstances, be regarded as a revenue receipt and in the present case the Tribunal had found that the assessee received no sums in excess of expenses incurred. The Tribunal was, therefore, justified in deleting the disallowance under section 37(2A) of the Income-tax Act, 1961, and rule 6D of the Income-tax Rules, 1962.”

(emphasis by underlining supplied by us)

15. There cannot be any dispute with the legal contention of the learned counsel that the reimbursement of the expenses can never be income. Hon'ble Jurisdictional High Court has also held that the reimbursement of expenses can under no circumstances be regarded as a revenue receipt. However, in this case, as a matter of fact, what the Assessing Officer taxed is the amount received by the assessee over and above the reimbursement of the expenses. In fact, from the

amount received from the head office, the Assessing Officer had deducted the expenses incurred by the assessee and it is only the excess amount received by the assessee which has been treated as income. That in the above mentioned case, Hon'ble Jurisdictional High Court has upheld the order of the ITAT because in that case, the amount received by the assessee from the foreign company was equal to the expenses incurred. Thus, the actual expenditure incurred by the assessee was reimbursement by the foreign company and no sum in excess of the expenses incurred was reimbursed. But, the facts are altogether different in the case of the assessee. In the case under appeal before us, in all the three years, the liaison office received more amount than the expenses actually incurred by the liaison office. The Assessing Officer himself has not treated reimbursement of expenses as income. The amount received by liaison office over and above the expenses actually incurred, year after year, was treated as income. To that extent, the above decision of Hon'ble Jurisdictional High Court would in fact support the case of the Revenue rather than the assessee.

16. In view of the above, we do not find any justification to interfere with the orders of authorities below. The same are sustained.

17. In the result, all the appeals of the assessee are dismissed.
Decision pronounced in the open Court on 17th January, 2014.

Sd/-

(I.C. SUDHIR)
JUDICIAL MEMBER

Sd/-

(G.D.AGRAWAL)
VICE PRESIDENT

Dated : 17.01.2014
VK.

Copy forwarded to: -

1. Appellant : **M/s Brown & Sharpe INC,
A-5, Sector-4,
Noida, Gautam Budh Nagar,
U.P. – 201 301.**
2. Respondent : **Assistant /Deputy Commissioner of
Income Tax, Circle, Noida.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar