

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "D" NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER  
AND  
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

**(Through Video Conferencing)**

ITA No.5901/DEL/2016  
Assessment Year: 2013-14

Asstt. Commissioner of Income Tax (International Taxation), Circle-2(2)(1), New Delhi.	v.	M/s. Mitsui & Co. Ltd., Plot No.-D1, 4 <sup>th</sup> Floor, Salcon Ras Vilas, District Centre, Saket, New Delhi.
TAN/PAN: AAACM5469Q		
(Appellant)		(Respondent)

CO No.28/DEL/2017  
Assessment Year: 2013-14

M/s. Mitsui & Co. Ltd., Plot No.-D1, 4 <sup>th</sup> Floor, Salcon Ras Vilas, District Centre, Saket, New Delhi.	v.	Asstt. Commissioner of Income Tax (International Taxation), Circle-2(2)(1), New Delhi.
TAN/PAN: AAACM5469Q		
(Appellant)		(Respondent)

Appellant by:	Shri Ved Jain, Sr. Adv. & shri Akshit Goel, CA		
Respondent by:	Shri Seetpal Gulati, CIT.		
Date of hearing:	15	10	2020
Date of pronouncement:	27	11	2020

**ORDER**

**PER AMIT SHUKLA, JUDICIAL MEMBER:**

The aforesaid appeal has been filed by the Revenue and Cross Objection by the assessee against the impugned order dated 22.09.2016 passed by Ld. CIT(A)-XLIII, New Delhi for

the quantum of assessment passed u/s.143(3)/144C for the Assessment Year 2013-14. In the Revenue's appeal, following grounds have been raised:-

1. *On the facts and in the circumstances of the case, whether the Ld. CIT(A) erred holding that only 20% of the gross trading profit out of the operations in India, was attributable to the permanent Establishment of Mitsui & Co. Ltd. ("Assessee") in India as against 50% as was determined by the Assessing Officer.*
2. *On the facts and in the circumstances of the case, whether the Ld. CIT(A) erred in allowing deduction of commission to the Permanent Establishment of the assessee at Rs. 1,32,13,29,525/- as against Rs. 35.30.09,057/- which was determined by the Assessing Officer."*

Whereas in the Cross Objection, assessee has raised the following grounds:-

1. *On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad, both in the eyes of law as well as on facts.*
2. *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in upholding the view of the AO that Mitsui India Pvt. Ltd. has been constituted as a Dependent Agency Permanent Establishment of the assessee company in India.*
3. *Without prejudice to the above and in the alternative, the learned CIT(A) has erred in not accepting the fact that the transaction between the assessee and Mitsui India Pvt. Ltd. being at arm's length only, no further profit could be attributable to the assessee.*
4. *On the facts and circumstances of the case, the learned CIT(A) has erred in holding 20% of the gross trading profits to be attributable to the operations of assessee in India without there being any basis for the same.*

5(i) *On the facts and circumstances of the case, the learned CIT(A) has erred in confirming the addition of Rs.64,02,653/- made by the AO on account of Guarantee fees.*

*(ii) That the addition has been confirmed despite the fact that the said income appearing in Form 26AS is not taxable in the hands of the assessee.*

6 (i) *On the facts and circumstances of the case, the learned CIT(A) has erred in confirming the addition of Rs.6,84,72,989/- made by the AO on account of Network Maintenance Service Fees.*

*(ii) That the addition has been confirmed despite the fact that the said income appearing in Form 26AS is not taxable in the hands of the assessee.*

7. (i) *On the facts and circumstances of the case, the learned CIT(A) has erred in confirming the addition of Rs.5,24,118/- made by the AO on account of Usance Interest on LC from Shri Ram Pistons and Rings Ltd.*

*(ii) That the addition has been confirmed despite the fact that the said income appearing in Form 26AS is not taxable in the hands of the assessee.*

8. (i) *On the facts and circumstances of the case, the learned CIT(A) has erred in confirming the addition of Rs.5,57,215/- made by the AO on account of Usance Interest on LC from DSM Sinochem Pharmaceuticals India Pvt. Ltd.*

*(ii) That the addition has been confirmed despite the fact that the said income appearing in Form 26AS is not taxable in the hands of the assessee.*

*9. That the respondent craves leave to add, amend or alter any of the grounds of appeal.”*

2. The facts in brief are that the assessee-company is

incorporated in Japan and had a subsidiary in India, Mitsui India Pvt. Ltd. (MIPL). In India, assessee has undertaken several projects in connection with big natural installment and power projects during the relevant year through its project office. The Assessing Officer held that Mitsui India Pvt. Ltd., i.e., subsidiary of assessee-company is a Dependent Agent Permanent Establishment (DAPE) of Mitsui, Japan in India. Accordingly he has attributed profit attributable to Indian operations by taking 50% of such profits i.e. Rs.40,43,19,773/- was attributed on total trading turnover in India. Total income of PE was computed at Rs. 5,13,10,716/- as per computation, given at page 4 of the impugned assessment order.

3. The Ld. CIT (A) has upheld the action of the Assessing Officer, holding that Mitsui India Pvt. Ltd. is a DAPE of the assessee-company. However, he has deleted the income attributed to the PE after observing and holding as under:

*“Further the profit attributable to Indian operations is restricted to 20% / as held by me in preceding AY 2009-10, 2010-11, AY2011-12 and AY 2012-13. The A.O. has worked out profit of INR 80,86,39,545/- @ 2.04%, based on the “non Consolidated Balance Sheet” of Mitsui & Cop Japan when applied on the total trading turnover in India, of {INR} 39,639,193,403/-. The 50% of such profits i.e. Rs.40,43,19,773/- was attributed on total trading turnover in India by the AO.*

*By applying profit, attributable rate of 20% on the total trading*

*T.O, in India the profit on Indian operation shall come to Rs. 16,17,27,909/- as against Rs.40,43,19,773/- computed by the AO.*

*5.11 Further M/s. Mitsui India Pvt. Ltd. has been paid a commission of Rs. 132,13,29,595/- on the total sale. The AO has restricted this commission to Rs.35,30,09,057/- by applying percentage at 0.8905556%. In the year under consideration the report of the TPO in the case of Mitsui India P Ltd has been received and TPO has accepted the payment of Rs. 1,32,13,29,595/- at an arm's length. Accordingly the commission to the extent of Rs. 132,13,29,595/- has to be allowed as claimed by the assessee in view of TPO's report. Accordingly I hold that the AO was not justified, in restricting the commission allowable to Rs. 35,30,09,057/- as against Rs. 132,13,29,595/-paid by the assessee.*

*In view of the above, the income of Rs. 16,17,27,909/-accruing to India stands fully consumed by the payment of Rs. 132,13,29,595/- made to agent in India and there is no income left to be taxed in India. It is a matter of record that the DAPE was paid commission of Rs. 132,13,29,595/- which has also been taxed in India as against gross profit at the rate of 20% i.e. Rs. 16,17,27,909/-attributable to Indian operations as calculated hereinabove. In view thereof, the action of the AO, in considering income of Rs. 5,13,10,716/- from Permanent Establishment (DAPE) is hereby held to be unjustified and addition made on this account is accordingly deleted.”*

4. After hearing both the parties and on perusal of the impugned order and the issues involved, we find that grounds

no.1 and 2 in Revenue's appeal and grounds no.3 to 5 in assessee's cross objection are common which has been pointed out by the ld. counsel before us that, the same is covered by the order of the ITAT in assessee's own case right from the Assessment Years 2005-06 to 2008-09 and 2010-11, wherein ITAT has consistently held that MIPL is not a DAPE of assessee company. The Assessing Officer has followed the earlier year order wherein Mitsui India Pvt. Ltd. has been held to DAPE of the assessee-company and has attributed 50% of the gross trading profits of MIPL as income of the assessee-company and the commission paid by the assessee to MIPL was registered @ 0.8905556% of the total sale. The Ld. CIT (A) has though uphold the action of the Assessing Officer that the MIPL is a DAPE but has attributed only 20% of the gross trading profit of MIPL. Ld. CIT(A) further held that commission paid by the assessee-company to MIPL have been accepted at Arm's Length Price to the TPO that no discount of commission has to be made that since the commission paid was more than 20% attributed to DAPE, the entire addition made by the Assessing Officer was deleted. The Revenue is in appeal against the order of Ld. CIT (A) questioning the order of gross profit of sales and deleting the disallowance of commission.

5. Now that the issues are covered in favour of the assessee by the order of the ITAT for the Assessment Year 2005-06 in ITA No.2335/Del/2011 order dated 14.09.2017, wherein it has been held that MIPL is not DAPE of the assessee-

company. The said order has been followed from Assessment Years 2006-07 to 2008-09 and 2010-11. Once MIPL is not held to be DAPE of assessee-company, then ostensibly no income can be attributed to the assessee company under Article 7 of DTAA, and therefore, there cannot be any question of computing income of PE or any disallowance of commission which is otherwise at Arms' Length Price as accepted by the TPO. Similar grounds raised by the Revenue has been dismissed by the Tribunal vide its latest order dated 09.09.2020 for the Assessment Year 2010-11. Thus, the grounds raised by the Revenue are dismissed and the grounds no.3 to 5 as raised by the assessee in Cross Objection is allowed. The other grounds are treated as academic in nature and tax neutral; therefore, same are dismissed as infructuous.

5. In the result, the appeal of the Revenue is dismissed and the Cross objection of the assessee are partly allowed.

**Order pronounced in the open Court on 27<sup>th</sup> November, 2020**

Sd/-  
**[N.K. BILLAIYA]**  
**ACCOUNTANT MEMBER**

DATED: 27<sup>th</sup> November, 2020

Pkk

Sd/-  
**[AMIT SHUKLA]**  
**JUDICIAL MEMBER**