IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER

ITA No.1950/Del./2016
(ASSESSMENT YEAR : 2012-13)

ITA No.2065/Del./2017
(ASSESSMENT YEAR : 2013-14)

M/s. GSA Gestions Sportives Automobiles SA, C/o SRBC & Co. LLP, 14th Floor, The Ruby 29, Senapati Bapat Marg, DADAR (West) – 400 028 (Mumbai).	vs.	DCIT, International Taxation, Noida.
(PAN : AAECG4223A)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Jay Savla, Sr. Advocate
REVENUE BY : Ms. Meenakshi Singh, CIT DR

Date of Hearing : 09.05.2022
Date of Order : 13.05.2022

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

These are appeals by the assessee against the respective orders of Assessing Officer (AO) passed pursuant to the directions of the Dispute Resolution Panel (DRP).

2. Since issues are common and connected and the appeals were heard together, these are being disposed off by this common order.

3. Since common issues are raised we are referring to grounds of appeal for Assessment Year 2012-13 as under :-

> **"Based on the facts and in the circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the order passed by the Deputy Commissioner of Income-tax, International Taxation, Noida ['Learned AO'], under Section 144 r.w.s. 144C(13) of the Income-tax Act, 1961 ('the Act') (' Assessment order'), in pursuance of the directions issued by Dispute Resolution Panel- 2 ('Hon'ble DRP'), New Delhi, on the following grounds:**
>
> **On the facts and circumstances of the case and in law, the Learned AO, based on the directions of the Hon'ble DRP, has:**
>
> **l . The Learned AO/ Hon'ble DRP erred in determining the total income of the Appellant to be Rs 3,25,43,000 for AY 2012-13.**
>
> **2. The Learned AO erred in not issuing a final assessment order under Section 144 of the Act; and thereby rendering the assessment order as null and void ab initio.**
>
> **3. The Hon'ble DRP erred in noting that the Appellant did not furnish any relevant reply to show-cause why provisions of Article 17 of the India-Switzerland Tax Treaty ('DTAA') are not applicable to the facts of the Appellant's case.**
>
> **4. The Learned AO/ Hon'ble DRP erred in holding that the receipts of the Appellant are in the nature of receipts derived from personal activities of the athletes exercised in India and hence, taxable in India under Article 17 of the DTAA without considering the detailed submissions filed with Hon'ble DRP on non-applicability of Article 17 of the DTAA.**
>
> **5. The Learned AO/ Hon'ble DRP erred in arriving at the taxable income of the Appellant based on the payments made to Formula FB Business Limited and Felipe Massa.**
>
> **6. Even assuming (without admitting) that the Appellant's receipts are taxable in India under Article 17 of the DTAA, the Learned AO/ Hon'ble DRP erred in not allowing payments made to Formula FB Business Limited and Felipe Massa as a deductible expense, inspite of the fact that tax has been deducted and deposited into the Indian Government treasury.**
>
> **7. The Learned AO/ Hon'ble DRP erred in levying interest under Section 234A, 234B and 234C of the Act.**

8. The Learned AO/ Hon'ble DRP erred in levying interest under Section 234D of the Act.

9. The Learned AO/ Hon'ble DRP erred in initiating penalty proceedings under Section 271 (1)(c) of the Act.

4. Brief facts of the case are that M/s. GSA Gestions Sportives Automobiles S.A. is incorporated in Switzerland. The company provides the rights to services of qualified motor racing drivers to teams participating in the Federation Internationale de'1 Automobile (FIA) Formula One 2011 Championship. For AY 2012-13, the AO referred to various letters/notes issued to the assessee which remained unresponded. The AO noted that the assessee is in receipt relating to Indian Grand Prix which was received in connection with business liable to tax @ 40%. He opined that the facts and material on record indicate to the existence of Permanent Establishment (PE) of assessee in terms of Article 5 of India-Switzerland Double Taxation Avoidance Agreement (Indo-Switzerland DTAA). The concluding portion of AO's order for AY 2012-13 reads as under :-

"The activities of the Assessee are blend of business and sports. The assessee has earmarked area which is used for preparatory work, maintenance and repairing of cars and for other business works. For racing all Teams use Buddha International Circuit and Track. Thus, assessee has fixed place of business capable of rendering business. It is reiterated that different yardsticks have been applied for the taxability of sports and allied activities.

In this case, the assessee has all necessary ingredients of having I'E in India viz. fixed place .of Business in India; conduct of Business

activities in India; Regularity, Continuity and Repetitiveness of the activity.

The assessee is participating regularly in the Formula One Event in India and is earning significant amounts of revenue from sponsors by way of granting them the rights to use their marks and symbols etc. It also receives revenue from the FOWC for participating in the event. All these payments/income are accruing from this business activity being carried out by the Assessee from its fixed place of business available to it in BIC, Greater Noida, Further, the event in India was held regularly from 2011 to 2013 on the basis of a prefixed schedule and itinerary proving regularity, continuity and repetitiveness of the business activity being carried out by the Assessee in India. The agreement between FOWC and JSIL is for five events which shows that the assessee was in the knowledge of period and repetition of Event from the beginning.

All this discussion clearly establishes that all the necessary conditions required for Permanent Establishment (PE) under Article 5 of India-SWITZERLAND DTAA are satisfied in this case and the assessee has its Permanent Establishment (PE) in India as it undertakes regular, continuous and repetitive business activity at its fixed place of Business available to it at BIC, Greater Noida. The Assessee earns significant amount of revenue from participation in Formula One Event in India and, as it has a PE in India, therefore, all the considerations received/ receivable by the Assessee in India is taxable in India.

However, the assessee has failed to submit the agreements between FOWC & JSIL. It is not disclosed how much consideration is received by the assessee from the organizer namely M/s Formula One World Championship Limited, UK (FOWC), M/s. Formula One Management Limited (FOM). M/s Allsport Management SA, and M/s Beta Prema 2 Limited or any other source.

3. As per the detail available on record the assessee has deducted TDS on the payment made to the Formula FB Business Limited, PAN AABCF8233E amounting to Rs.15,67,690/- and Rs.16,86,610/- on the payment made to Shri Felipe Massa, PAN AHEPH5159E out of its receipts received by the company during the year under consideration, In spite of repeated reminders the assessee failed to furnish the details of its income earned from or in relation with Indian GP. III absence of such details it is estimated that the assessee has made these payments out of its receipts in India related to Indian GP for the year under consideration and hence the amount paid to these two Drivers is estimated as the business receipt of the assessee earned during the year consideration. Since the TDS has been deducted at the rate of 10% the total amount of addition works out to

Rs.3,25,43,000/=. Which is liable for payment of taxes @ 40%+ applicable surcharge and Education Cess as per law, in view of the assessees permanent establishment in India discussed in paras above.

(Addition of Rs.3,25,43,000/=)

Computation of Income:

Since no return has been filed by the assessee hence the income is proposed to the assessed on the income of Rs.3,25,43,000/= discussed herein above.

Proposed to be assessed at Rs.3,25,43,000/=. Copy of this draft assessment order issued. Credit to be given for prepaid taxes if any after due verification. In view of the facts and circumstances of the case and various judicial pronouncement, interest U/s 234A, 234B,23'4C and 234D are proposed to be charged in this case as per Income Tax Act. Penalty proceedings U/s 271(1)(c) of the I.T. Act are to be initiated as I am satisfied, in view of the foregoing paragraphs, that the assessee has concealed the true and correct particulars of its taxable income and furnished inaccurate particulars of its income within the meaning of section 271(1)(c) of the Income Tax Act, 1961."

5. Upon assessee's objection, ld. DRP agreed that the assessee cannot be said to have a PE in India. It observed that the assessee has submitted that it did not have any agent or representative in India who was involved in negotiating and entering into contracts for and on behalf of assessee in India. Further, the contract between Formula One World Championship and JSIL is a contract between two independent parties and the assessee is not a party to the contract. The contracts entered into by GSA with Formula FB Business Ltd. and Felipe Massa were executed outside India and Formula One World Championship and JSIL were not party to this contract. Ld. DRP noted certain other submissions and agreed that since the Grand Prix was held for three days in a year, there is no element of

permanence in presence of assessee in India. It also agreed that assessee is not a team participating in FIA Championship races but it is a sports management company that provides drivers to teams participating in FIA Championship. Ld. DRP further noted that the AO has observed that the assessee is provided specific places of garages, pit stops and other sites where it sets up its equipment and other facilities, through which the assessee operates and carries out its operations related to the race and other commercial activities; that apart from using the main racing track for conducting its activity of racing, the assessee uses facilities provided at the track like the CCTV camera network, Medical Response facilities including Safety cars, etc.; that the AO has not alleged that the assessee has any permanent / fixed place in the form of office or otherwise in India. The DRP opined that use of facilities for 3 days in a year at the site of Formula One motor racing championship does not amount to having a fixed place of business in India. Ld. DRP further noted that the AO has also not identified which is the agent of the assessee in India who is habitually negotiating and signing contracts on behalf of the assessee in India. Therefore, it held that in facts and circumstances of the case, there does not exist any PE of the assessee in India.

6. After having held that the assessee does not have any existence of PE in India under Article 5 of Indo-Switzerland DTAA, the DRP observed that the same is not relevant for the purpose of taxability of receipt of assessee in India. It noted that it is undisputed that assessee is a sports management company that provides drivers to team participating in FIA Championship and, therefore, its receipts from drivers participating in Formula One Motor Championship are in the nature of receipts derived from personal activities of entertainers/athletes exercised in India; that as per OECD commentary on Article 17 of model tax treaty, Formula One racing driver is in the nature of athlete. Therefore, DRP held that applicable article in the case of assessee shall be Article 17 and not Article 7 of Tax Treaty. Referring to Article 7, the DRP concluded as under :-

> ***"6.4 It is quite clear from language of Article 17(1) / 17(2) that tor applicability of Article 17, provisions of Article 7 and 14 are not to be seen. Now, Article 7 pertains to business income which shall be taxable in India only if there existed a PE in India within meaning of Article 5 of OTAA. Therefore, receipts of the assessee which fall within purview of Article 17 become taxable in India even in absence of any PE in India. Therefore, finding of DRP supra that there exist no PE of the assessee in India shall not have any impact on taxability of receipts of the assessee in India because receipts are in nature of income derived from exercise of personal activities of racing drivers in India. During the course of proceeding before DRP, the panel afforded adequate opportunity to the assessee (0 show cause why provisions of Article 17 of DTAA are not applicable in present case. However, the assessee did not furnish any relevant reply. The AO is therefore directed to modify draft assessment order accordingly."***

7. Thereafter, the DRP dealt with other aspects of the objections and held that the argument of the assessee that its receipts are not taxable in India as there is no PE in India, is not legally tenable. Thereafter, the DRP rejected other aspects of assessee's contention by holding as under:-

> **"10.2 Regarding addition made by the AO with reference to payments made to the drivers, DRP has noted that despite repeated requests by the AO and also by DRP, the assessee has failed to furnish derail of various receipts from any source (resident or non-resident) in context of motor racing event. Under Article 17(2), receipts received by the assessee as legal entity for performance of its racing drivers in India is taxable in India, irrespective of absence or presence of any PE in India. The only information available with the AO was detail of payments made to two drivers. There is no information furnished by the assessee regarding receipts in respect of performance of drivers and it is undisputed that this information is in exclusive knowledge of the assessee and the assessee is bound legally to disclose this information. In view of non-cooperative and unresponsive nature of the assessee, the AO is constrained to take figure of income of the assessee corresponding to payments made by' the assessee to the drivers. Obviously the assessee should have earned much more. It can not be the situation that whatever the assessee has earned has been paid to the drivers and the assessee is left with no income. The panel therefore is not inclined to interfere with action of the AO. Here, it is pertinent to be made clear that the AO has taken figure of payments made to the drivers as income of the assessee in view of non-furnishing of details of receipts by the assessee. This is the bare minimum which the AO could have done. The assessee therefore can not claim that deduction of payments made to drivers should be allowed out of income adopted by the AO which shall make the income NIL. The assessee can not be allowed to take advantage out of its own non-cooperative attitude."**

8. For AY 2013-14, similar orders were passed by the Revenue authorities. Against the above order, the assessee is in appeal before us.

9. At the outset, ld. counsel for the assessee referred to the decision of Authority of Advance Rulings (AAR) in the following cases :-

(i) Order dated 27.07.2016 passed in AAR No.1430 of 2012 & AAR 1405 of 2012 by the AAR (Income Tax), New Delhi in the cases of BBSE Eventors Esportivors Ltd. and Williams Grand Prix Engineering Ltd.; and

(ii) Common order dated 27.07.2016 passed in AAR No.1235 of 2012 & AAR 1208 of 2011 by the AAR (Income Tax), New Delhi in the cases of GSA Gestions Sportives Automobiles SA and Williams Grand Prix Engineering Ltd.

10. Referring to the above AAR rulings, ld. counsel contended that in Identical situation in another assessee's case, the AAR has held that such receipts were not taxable in India and hence he pleaded that since these decisions are not available when the AO passed the order, the issue should be remitted back to the file of AO to consider the issue afresh in the light of above AAR rulings.

11. Ld. DR for the Revenue, on the other hand, objected to the above proposition and supported the order of authorities below.

12. We have carefully considered the submissions of both the parties and gone through the record. As regards the decision of AAR referred to by the ld. counsel for the assessee in the case of AAR No.1430 of 2012, it will be gainful to refer to the concluding portion of the said ruling which reads as under :-

> ***"In the present case also no business operation was carried out by BBSE in India. It merely provided services of a non-resident driver who participated in Indian event. This act cannot constitute a business connection for the purpose of procuring the consideration received by BBSE under the tax net. As regards the taxability of the consideration under Section 9(1)(vii) of Income-tax Act, we do not see any reason to hold that the nature of consideration is either technical or managerial. The Department has not provided any cogent reason to substantiate that the nature of consideration is managerial in nature. The consideration is received only for providing service of a driver to the team. There is no technical expertise involved in this and BBSE is not providing any managerial services either. Therefore, we do not agree that such consideration can be treated as fees for technical services. We have already pointed out that the consideration received by the driver has already been treated as taxable in India."***

13. Referring to the above said decision, a question was put to ld. counsel for the assessee as to whether the racing car driver in the case before us is a driver simplicitor or is he a technical expert in this field. Ld. counsel could not give a cogent reply nor he could rebut the proposition that the racing car driver is not a technically expert person. Moreover the reference by DRP to OECD commentary in the context of model tax treaty that formula one driver is in the nature of athlete is also germane and has to be considered. Furthermore, as our following discussion would show certain other aspect of the present case need some factual examination. In this view of the matter, in our considered opinion, in the present case, the issue cannot be remitted to the AO to follow the said ruling as requested by the ld. counsel of the assessee.

14. Now coming to the order of the AO passed pursuant to the DRP order, we note that there are two limbs thereof. In the first limb, the DRP has accepted that assessee has no PE existence and the DRP has accepted that the racing car driver came and performed for only three days in India. In this connection, a query was raised as to the actual duration of the said drivers' stay in India in connection with the aforesaid race, the time taken for preparation, finalization & conclusion and the certificate of the said drivers' arrival in India and departure in relation to the event. Ld. counsel for the assessee was not in a position to provide any such detail. He submitted that these aspects are factual aspects and are not readily available and the matter can be remitted to the AO for examination in this regard. We find that the aforesaid is a crucial aspect and has not been examined by the Revenue authorities below, hence we deem it proper to remit the file to the AO to examine the issue in terms of our observation as above.

15. As regards the plank on which the DRP had rejected the assessee's objection is by reference to Article 17 of the model tax treaty that the receipts are in the nature of income derived from service of personal activities of racing car drivers in India. We note that the aforesaid reference in the present case is coming under Article 16 of the DTAA between India and Switzerland which deals with the issue of artists and

athletes dealt with by the DRP. We note that this aspect of DRP's direction refers that there was no response from the assessee. But the assessee in grounds has disputed the observation that it has not given any response in this regard. We deem it proper to remit this aspect also to the AO and the assessee shall be granted an opportunity to give the submissions in this regard.

16. As regards the other aspects held adversely against the assessee regarding absence of information which have led to adverse inference being drawn, an opportunity is to be granted to the assessee to comply with as other issues are also being remitted to the file of AO.

17. Our aforesaid order applies *mutatis mutandis* to AY 2013-14 also.

18. In the result, both the appeals filed by the assessee stand allowed for statistical purposes.

Order pronounced in the open court on this 13th day of May, 2022.

Sd/-	**sd/-**
(NARENDER KUMAR CHOUDHRY)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 13th day of May, 2022

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.DRP-I, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.