

Ab Sciex Pte Ltd., Singapore vs Acit,Circle Int. Tax. 1(1)(1), New ... on 29 April, 2022

Author: G.S. Pannu

Bench: G.S. Pannu

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

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.514/Del/2021
Assessment Year: 2017-18

AB Sciex Pte Ltd., Block 33, 46 Marsiling Industrial Estate, 30406, Singapore 739256 PAN :AANCA1192P (Appellant)	Vs. Assistant Commissioner of India Tax, Circle -Intl. Tax -1(1)(1), Delhi (Respondent)
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Appellant by	Sh. Ajay Vohra, Sr. Advocate Ms. Suchitra Kanodia, CA
Respondent by	Sh. Sanjay Kumar, Sr. DR

Date of hearing	17.01.2022 & 27.04.2022
Date of pronouncement	29.04.2022

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeal has been filed by the assessee assailing the final assessment order dated 16.04.2021 passed under section 143(3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') for the assessment year 2017-18, in pursuance to direction of learned Dispute Resolution Panel (DRP), New Delhi.

2. Grounds raised by the assessee are as under:

AY: 2017-18 (AB Sciex Pte Ltd., Singapore) Grounds with respect to allegation of constitution of Permanent Establishment ('PE') in India Ground 1: On the facts and circumstances of the case and in law. the Ld. AO as well as DRP has erred in assessing the total income of the Appellant under section 143(3) read with section 144C of the Act, for the assessment year ('AY') 2017-18 at INR 4,46,50.443 as against

the Nil. returned income.

Ground 2: On the facts and in the circumstances of the case and in law, the Ld. AO as well as DRP has erred in holding that the appellant has a Fixed Place PE in India by ignoring facts of the case and provisions of the law and merely placing reliance on a third party statement in response to summon issued to ii under section 131 of the Act. The allegations are unfounded, without any cogent material and on the basis of surmises and conjectures.

Ground 3: On the facts and circumstances of the case and in law, the Ld. AO as well as DRP has erred in holding that DHR Holding India Private Limited ('DLIR India') constitutes a dependent agency PE of the Appellant in India by ignoring facts of the case and provisions of the law and merely placing reliance on a third party statement in response to summon issued to it under section 1.31 of the Act. The allegations are unfounded, without any cogent material and on the basis of surmises and conjectures.

Ground 4: On the facts and circumstances of the case and in law, both the Ld. AO as well as DRP has erred in alleging that the Appellant has fixed place PE and dependant agency PE in India without appreciating the additional evidences filed by the Appellant during the course of DRP proceeding, which are crucial for establishing the non-existence of PE in India.

Grounds with respect to attribution of profits to the alleged PE Ground 5: The Ld. AO and the Hon'ble DRP grossly erred in law, in attributing profits to the alleged PE on an unrealistic and ad-hoc basis which are in complete violation of the various legal principles, applicable provisions of DTAA (Double tax Avoidance Agreement) and international guidance set out in this regard.

Ground 6: The Ld. AO and the Horn bie DRP grossly erred in law in ignoring the jurisprudence of the Hon'ble Supreme Court in the case of DIT vs. Morgan Stanley [2007] 7SCC 1 holding that once the AE is remunerated on arm's length basis, there should be no further attribution.

AY: 2017-18 (AB Sciex Pte Ltd., Singapore) Ground 7: On the facts and circumstances of the case, the Ld. AO/ Hon'ble DRP erred in attributing excessive profits to the alleged PE on an ad-hoc and arbitrary basis, by not considering commercial and economic factors governing the business of the Appellant and completely ignoring all submissions of the Appellant in this regard. In doing so, the Ld. AO erred in:

7.1 Applying an ad-hoc methodology to attribute unreasonable profits to the alleged PE. In this regard, the AO erred in benchmarking the profits attributable to the alleged PE with the resale discounts agreed by the Appellant with its AE, DHR India, under a buy-sell distribution arrangement, which is a controlled transaction;

7.2 Ignoring the significantly higher level of functions performed, assets employed and risks assumed by DHR India under the distribution arrangement versus those alleged to have been performed by the PE, leading to excessive and unreasonable profits attribution.

Ground 8: On the facts and circumstances of the case, the Ld. AO/ Hon'ble DRP erred in summarily rejecting the contentions placed by the Appellant for a reasonable profit attribution, without appreciating the additional evidences and analysis filed by the Appellant during the course of DRP proceeding. In doing so, the Ld. AO/ Hon'ble DRP erred in:

8.1 Ignoring a third-party arrangement furnished by the Appellant that is comparable to the functions alleged to have been performed by the PE;

8.2 Ignoring an analysis furnished by the Appellant determining the profit attribution based on resale margins earned by independent distributors in uncontrolled transactions.

Ground 9: On the facts and circumstances of the case, the Ld. AO/ Hon'ble DRP erred in double counting the revenue earned by the Appellant from sale of annual maintenance contracts to customers in India while determining the profit attribution to the alleged PE. Ground 10: On the facts and in law, the Ld. AO erred on facts in law in initiating penalty under section 270A and 271BA of the Act when the facts of the case and provisions of the law do not warrant such initiation of penalty proceedings.

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3. The core issue arising in the appeal, as urged in ground no. 1 to 4, is whether the assessee has a Permanent Establishment (PE) in India. Of course, there are ancillary and incidental issues raised in other grounds, including attribution of profit to the PE, in case, it is held that the assessee has PE in India. However, at the outset, we will deal with the core issue as to whether the assessee has a PE in India.

4. Briefly the facts relevant for deciding the issue are, the assessee is a company incorporated in Singapore and is a tax resident of that country. As stated by the Assessing Officer, the assessee is engaged in the business of manufacturing and sale of scientific research instruments and peripheral. For the assessment year under dispute, the assessee had filed its return of income in India declaring nil income. In course of assessment proceeding, after calling for necessary details and examining them, the Assessing Office noticed that the products sold by assessee require maintenance, calibration, which involves servicing, repairing and supply of spares. Therefore, the assessee offers maintenance service to its customers worldwide, including India. From the details furnished, the Assessing Officer noticed that the assessee, during the year under consideration, had AY: 2017-18 (AB Sciex Pte Ltd., Singapore) received revenue of Rs.8,96,73,757/- towards receipts from Annual Maintenance Contract (AMC). Since, the assessee did not offer any income in India, the Assessing Officer raised a query, as to why the receipts on account of AMC should not be brought to tax in

India.

5. In response, the assessee submitted that it did not have any PE in India under Article 5 of India - Singapore Double Taxation Avoidance Agreement (DTAA). Further, it was submitted, receipts from routine maintenance services provided to Indian customers are not subject to tax in India. The assessee submitted, the routine and emergency visit to customers place are provided by its Associated Enterprise (AE), namely, DHR Holding India Pvt. Ltd. as per the guidelines of the assessee, for which, DHR Holding India Pvt. Ltd. is compensated with arm's length remuneration, comprising of cost plus markup. In response to further query, the assessee submitted that it does not maintain any India specific books of account. Hence, segmental profit and loss account of sales made to Indian customers during the relevant financial year is not readily available with the assessee. However, the assessee submitted an unaudited sales statement, as per which, the total sales made to Indian customers worked to USD 23.607 Million.

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6. After examining the details furnished, the Assessing Officer noticed that the assessee had entered into three separate contracts with DHR Holding India Pvt. Ltd., namely, Sales Commission Agreement, Distribution Agreement and Marketing Support Services Agreement. On perusing these agreements, the Assessing Officer wanted to ascertain the legal relationship between the assessee and DHR Holding India Pvt. Ltd. Since, as alleged by the Assessing Officer, the assessee did not furnish the required details, he issued summons to two employees of M/s. Arbro Pharmaceuticals Pvt. Ltd., a regular customer of the assessee. In pursuance to the summons issued under section 131 of the Act, the concerned employees of M/s. Arbro Pharmaceuticals Pvt. Ltd. appeared before the Assessing Officer and statements were recorded from them. From the statement recorded, the Assessing Officer found that DHR Holding India Pvt. Ltd., for all practical purposes, acts as an Indian representative of the assessee company and also maintains inventory of spare parts in their premises. He further observed, DHR Holding India Pvt. Ltd. is maintaining a warehouse in its premises for the equipments of the assessee and the premises is used as a sales AY: 2017-18 (AB Sciex Pte Ltd., Singapore) outlet for soliciting or receiving orders. Thus, he concluded that the assessee has a fixed place PE in India.

7. Further, the Assessing Officer observed, DHR Holding India Pvt. Ltd. habitually exercises a predominant role in India for concluding contracts on behalf of the assessee and also habitually maintains in India stock of goods or merchandise from which it is regularly supplying goods merchandise on behalf of the assessee. He also observed that DHR Holding India Pvt. Ltd. acts solely on behalf of the assessee while providing services to assessee's customers in India. Therefore, DHR Holding India Pvt. Ltd. can be considered as a dependant agent PE of the assessee. On the aforesaid premises, the Assessing Officer issued a show-cause notice to the assessee to explain as to why the receipts on account of AMC should not be taxed in India as it has a PE in India. Though, the assessee objected to the proposed action of the Assessing Officer, however, rejecting the submissions of the assessee, the Assessing Officer held that since premises of DHR Holding India Pvt. Ltd. is used by the assessee as a warehouse to stock goods and being used as a sales outlet, it has to be considered as a fixed place PE. Further, he held, since DHR Holding India Pvt. Ltd. works

exclusively for the assessee and AY: 2017-18 (AB Sciex Pte Ltd., Singapore) habitually concludes contracts and undertakes liasoning woks with Indian customers for sale of equipments, it has to be considered as dependant agent PE under Article 5(8) and 5(9) of India - Singapore Tax Treaty. Accordingly, he held that income attributable to the PE has to be taxed in India.

8. Having held so, he proceeded to attribute profit to the PE by extrapolating the net figure of 9.5% on global sales to the earning from India, and computed an amount of Rs.15,39,67,046/- as profit from India. Further, he observed, as per Sales Commission Agreement, DHR Holding India Pvt. Ltd. is paid commission at 9%. Whereas, as per Distribution Agreement, DHR Holding India Pvt. Ltd. gets initial resale or distribution discount of 46%. The Assessing Officer observed, when DHR Holding India Pvt. Ltd. is performing the same function under both the agreements, there is no justification for such huge difference in commission. He observed, for performing certain functions/services DHR Holding India Pvt. Ltd. has not been remunerated at all. Therefore, there is need to attribute profit to the PE in India for the employment of assets, risks and functions performed by DHR Holding India Pvt. Ltd. Accordingly, he held that 37% of the profit earned by the assessee in India is attributable to the PE. Thus, he worked out AY: 2017-18 (AB Sciex Pte Ltd., Singapore) the profit attributable to PE in India at Rs.5,69,67,807/- and taxed it at the rate of 40% with surcharge and education cess thereon.

9. Being aggrieved with the aforesaid decision of the Assessing Officer, the assessee raised objection before learned DRP. However, learned DRP did not find merit in the objections raised by the assessee. Accordingly, he upheld the additions made by the Assessing Officer.

10. Sh. Ajay Vohra, learned Senior Counsel appearing for the assessee submitted, the assessee being a manufacturer and seller of scientific equipments effects direct sales to customers in India. He submitted, the sales were made from outside India. In this context, he drew our attention to the sample invoices indicating sales made from Singapore to the customers in India. He submitted, since the scientific equipments require regular maintenance, repairing etc., the assessee enters into AMC with the customers. However, since the assessee is located outside and its employees do not travel to India, the assessee has sub- contracted the repair and maintenance related activities to DHR Holding India Pvt. Ltd. He submitted, the assessee has entered into three agreements with DHR Holding India Pvt. Ltd.; first is AY: 2017-18 (AB Sciex Pte Ltd., Singapore) Sales Commission Agreement for direct sales; second is Distribution Agreement; and third is Marketing Support Agreement. Drawing our attention to the relevant clauses of the three agreements, learned counsel for the assessee submitted, there is nothing in the agreements to suggest that DHR Holding India Pvt. Ltd. has allowed the assessee to use its premises as warehouse or as a sales outlet for soliciting orders. He submitted, under the Distribution Agreement, DHR Holding India Pvt. Ltd. has been appointed as a non-exclusive distributor. He submitted, it purchases goods from assessee for resale in India. He submitted, the transaction under the Distribution Agreement, is on principal to principal basis and DHR Holding India Pvt. Ltd. is treated like any other customer, except for the fact that discount on the price is given. Insofar as Marketing Support Agreement is concerned, learned counsel for the assessee submitted, DHR Holding India Pvt. Ltd. is remunerated at cost plus arm's length margin.

11. Drawing our attention to the scope of services provided by DHR Holding India Ltd., learned counsel submitted, there is no material to show that the assessee is using the premises of DHR Holding India Pvt. Ltd. in any manner to constitute a fixed place AY: 2017-18 (AB Sciex Pte Ltd., Singapore) PE. He submitted, when the assessee has sold goods to Indian customers from outside India and none of its employees have visited in India for any work, there cannot be any fixed place PE of the assessee in India. He submitted, DHR Holding India Pvt. Ltd. cannot also be treated as dependant agent PE as it has no authority to conclude any contract on behalf of the assessee. He submitted, the finding of the Assessing Officer that DHR Holding India Pvt. Ltd. habitually concludes contracts on behalf of the assessee has no basis at all. He submitted, no material has been brought on record by the Assessing Officer to demonstrate that the core activities of the assessee are being carried out in India. He submitted, the burden is entirely on the Assessing Officer to show that an agency relationship exists between the assessee and DHR Holding India Pvt. Ltd. He submitted, DHR Holding India Pvt. Ltd. is not dependant on assessee and has its own independent business. He submitted, even assuming that DHR Holding India Pvt. Ltd. is an agent of the assessee but it has to be proved on record that such agent has authority to conclude contract on behalf of the assessee. He submitted, the alleged warehouse as mentioned by the Assessing Officer is not belonging AY: 2017-18 (AB Sciex Pte Ltd., Singapore) to the assessee but belongs to DHR Holding India Pvt. Ltd. for its own inventory.

12. Without prejudice, he submitted, the conclusion of the Assessing Officer is based entirely on the statement recorded from two employees of a customer of assessee, viz., M/s. Arbro Pharmaceuticals Pvt. Ltd. He submitted, those employees are not employees of the assessee or DHR Holding India Pvt. Ltd. Therefore, their statements, if at all adverse to the assessee, would not have any relevance. He submitted, in any case of the matter, the statements recorded from the concerned employees were neither confronted to the assessee nor any opportunity of cross examining them was offered to the assessee. Thus, he submitted, the Assessing Officer has not properly understood the legal relationship between the parties. He submitted, since the assessee did not have either fixed place PE or dependant agent PE in India, no part of its income is taxable in India. Therefore, attribution of profit to the PE in such scenario will not arise. In support of his contention, learned counsel relied upon the following decisions:

(i) ADIT Vs. M/s. E Funds IT Solution Inc. (Civil Appeal No.6082 of 2015) AY: 2017-18 (AB Sciex Pte Ltd., Singapore)

(ii) DCIT Vs. Lubrizol Corporation, USA (2017) 83 taxmann.com 13 (Mum. - Trib.)

13. Strongly relying upon the observations of Assessing Officer and learned DRP, learned Departmental Representative submitted, the terms of agreements between assessee and DHR Holding India Pvt. Ltd., coupled with the statement recorded from two of the employees of a customer of the assessee in India clearly demonstrate that DHR India is carrying out functions of an agent of the assessee for sale of scientific equipments and spare parts manufactured by the assessee. Drawing our attention to the statement recorded under section 131 of the Act, he submitted, the Indian customers are negotiating with DHR India not only for purchases but post sales services. Further, drawing our attention to the observations of the Assessing Officer, he submitted, the

assessee did not furnish documentary evidences to demonstrate that Indian customers placed orders directly on assessee. As regards the claim of the assessee that its employees never visited India, learned Departmental Representative submitted, since DHR Holding India Pvt. Ltd. provides all kinds of services, there is no need for the employees of assessee to visit India. Thus, he submitted, the Assessing Officer has rightly held that assessee AY: 2017-18 (AB Sciex Pte Ltd., Singapore) has PE in India, both, under Article 5(8) and 5(9) of India - Singapore DTAA.

14. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. Undisputedly, the Assessing Officer has treated DHR Holding India Pvt. Ltd., an associated enterprise of the assessee based in India, as the fixed place PE, agency PE and dependant agent PE under Article 5(1), 5(8) and 5(9) of India - Singapore DTAA. The basic facts based on which the Assessing Officer has come to such a conclusion are certain clauses in the agreements between the assessee and the DHR Holding India Pvt. Ltd. and mainly the statement recorded from two employees of one of assessee's Indian customers M/s Arbro Pharmaceuticals Pvt. Ltd. As discussed earlier and accepted by the Assessing Officer, the assessee is a manufacturer and seller of scientific equipments, spare parts and peripherals and sales them globally, including in India. The assessee has asserted from the stage of assessment proceeding itself that these sales made to Indian customers are effected directly from Singapore and no part of such sale was carried out in India. It has been submitted, in respect of such direct sales, the assessee had entered into AMC AY: 2017-18 (AB Sciex Pte Ltd., Singapore) with the Indian customers and all AMC and warranty related services are sub-contracted to DHR Holding India Pvt. Ltd.

15. The aforesaid claim of the assessee carries some strength in view of the sample copy of invoices placed in paper-book. On perusal of such invoices, it becomes very much clear that sales to Indian customers have been directly made by the assessee from Singapore. It is also evident, in respect of such sales the assessee has also entered into AMC with Indian customers. It is the contention of learned counsel for the assessee that all AMC and warranty related work has been sub-contracted to DHR Holding India Pvt. Ltd. As stated by the Assessing Officer, the assessee had entered into three separate agreements with DHR Holding India Ltd. The first agreement between the assessee and DHR Holding India Pvt. Ltd. is Sales Commission Agreement. On a perusal of this agreement placed at page 13 of the paper-book, it is noticed that the assessee has appointed DHR Holding India Pvt. Ltd. on non-exclusive basis for providing services related to sales, installation, warranty for the products and spare parts sold directly by the assessee to customers in India. Clause 1.1 of the agreement says that the assessee may solicit or, upon an order being placed by a customer, take orders requiring delivery of AY: 2017-18 (AB Sciex Pte Ltd., Singapore) products, whereas, the assessee designates DHR India Pvt. Ltd. as an authorized warranty-related service provider. Clause 1.2 stipulates the scope of services as per Exhibit - A to the agreement. The scope of services under Exhibit - A are as under:

"EXHIBIT A SCOPE OF SERVICES • Interaction and liaising in relation to orders from customers on behalf of AB Singapore.

• Other incidental activities like tracking delivery schedules, etc. for the customers based on directions provided by the overseas entities.

- Installation of products supplied by overseas entity to customers in India.
- Services in relation to warranty claims from customers, etc."

16. Clause 1.3 of the Agreement provides that DHR Holding India Pvt. Ltd. in a commercially reasonable manner, provide all customers necessary assistance and services during the warranty period, to the extent required under the terms of the relevant product warranty, irrespective of the fact, whether the product was purchased directly from the assessee or DHR Holding India Pvt. Ltd. This clause also provides that for performing installation and warranty related services, DHR Holding India Pvt. Ltd. shall be remunerated in the terms provided under Exhibit- B. Exhibit- B stipulates commission for sales related activities at 6% and commission towards installation and first year warranty of AY: 2017-18 (AB Sciex Pte Ltd., Singapore) instruments at 3%. Clause 2 of the agreement provides that DHR India shall intimate the order from customer to the assessee and the assessee shall make all efforts to ship the products by the delivery date requested by DHR India and shall indemnify and hold DHR India harmless for any damages incurred by DHR India as a result delays in shipment that are caused by the assessee. Clause 2.2 says, the assessee shall arrange for and bear the cost of carriage/freight and insurance of the product and clearing the goods for export. Clause 3.1 says, after delivery of the products, DHR India or its designee shall inspect the product and notify the assessee of any damage, tampering, shortage or other discrepancy between the products and shipping documents. Clause 4.1 says, the assessee reserves the right to sell or lease directly any product for post warranty services contract for ultimate use within the territory, regardless of whether the customer placing such order is located within or outside of the territory. Clause 5.1 provides, in respect of any direct sales by the assessee within the territory, the assessee shall pay DHR India a commission applied against the net sales price of the product towards remuneration for the assistance rendered and to be rendered, and the business goodwill developed by DHR India and such commission shall be AY: 2017-18 (AB Sciex Pte Ltd., Singapore) payable by the assessee to DHR India upon the issuance of the invoices for the products shipped to the customers. Clause 11 of the Treaty say, DHR India shall report all warranty claims made in respect of all products to the assessee. In case of providing any spares under warranty/maintenance, DHR India will provide for the same out of its own stock and DHR India shall have the right to get a replacement product/part free of cost from the assessee or cross charge the cost of the product/part to the assessee.

17. Thus, the Sales Commission Agreement not only defines the scope of services of DHR India but also makes it clear that DHR India will have to provide the services stipulated under the agreement, regardless, whether the product was purchased from assessee or from DHR India. The scope of services under Exhibit - A to the agreement indicates that the DHR India is required to do liasoning in relation to orders from customers on behalf of the assessee. It also has to do other incidental activities like, tracking of delivery schedule for the customers. It also has to do the installation of products and provide warranty services. Thus, the scope of services do not envisage or grant any authority to DHR India to conclude any contract of sale on behalf of the assessee.

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18. The next agreement which needs to be seen is Distribution Agreement. On perusal of a copy of the agreement placed at page 24 of the paper-book, it is to be seen that under the agreement, the assessee has appointed DHR India as its non-exclusive distributor for distribution of related products and its spare parts to customers within the territory. Clause 1.1 of the agreement provides that the Products shall include all such products and its spare parts which the assessee may decide to distribute under the agreement and which is to be purchased by DHR India either from the assessee or from third party for resale. This Article further makes it clear that notwithstanding the agreement of appointment of DHR India, the assessee reserves the right to solicit, or upon the request of a customer, take orders requiring delivery of products either within or outside of the territory. Clause 1.2 makes it clear that DHR India shall make all reasonable efforts to distribute or sell all products on its own account. Clause 1.3 provides that the assessee shall supply DHR India with all technical data and other product information customarily made available to facilitate sales of the products. Clause 1.5 provides, DHR India shall maintain an inventory of products sufficient to meet, in its business judgment, the forecast AY: 2017-18 (AB Sciex Pte Ltd., Singapore) sales for each product within the territory. Clause 2.2 provides that assessee shall arrange for and bear the cost of carriage/freight and insurance of the product, and clearing the goods for export. However, title to any product, possession and the risk of loss shall pass from assessee to DHR India once the product is delivered to the carrier contracted by the assessee to deliver the product. Clause 2.3 says, DHR India shall be the importer of record in respect of products purchased by and imported into the territory by DHR India. Further, DHR India shall be responsible for all actions necessary to obtain clearance to import all products into the territory. Clause 2.5 confers right to DHR India to cancel or reschedule any of its purchase orders for the products. However, such cancellation or rescheduling has to be in terms with the agreement. Clause 2.6 provides that during the term of this agreement, DHR India shall be entitled to purchase products from the assessee, subject to, resale or distribution discount. Clause 3 of the agreement provides for prices of products and terms for distribution activities as well as discounts to be provided thereon.

19. Thus, a reading of the Distribution Agreement as a whole, makes it clear that the purchase of products by the DHR from AY: 2017-18 (AB Sciex Pte Ltd., Singapore) assessee for the purpose of resale in India is on principal to principal basis and no agency relationship is there between the parties. This fact is further clarified from Clause 11.1 which provides that DHR India shall at all times act only as an independent contractor, and never as a legal representative of the assessee. It further provides that nothing in this agreement shall be construed to give either party the power to direct or control the daily activities of the other party, or to allow DHR India to negotiate or conclude contracts on behalf of the assessee, or to constitute the parties as principal and agent, employer and employee, franchisor and franchisee, partners, joint venture partners, co-owners, or otherwise as participants in a joint undertaking. It also makes it clear that DHR India has no right or authority to assume or create any obligation of any kind, express or implied, on behalf of the assessee to any customer or to any other person and/or to waive any right, interest, or claim that the assessee may have against any customer, or other person. Clause 11.2 makes it clear that DHR India shall indemnify the assessee against any claim made by any party resulting from DHR India's acts, omissions, or misrepresentations, regardless of the form of action. Thus, Distribution Agreement does not leave any scope to AY: 2017-18 (AB Sciex Pte Ltd., Singapore) say that DHR India as a distributor of products, manufactured and sold by the assessee, is acting as an agent.

20. The last agreement which needs to be examined is Marketing Support Services Agreement. As per the terms of this agreement DHR India is required to provide assessee and other group companies the following marketing support services:

- Identifying market opportunities for AB Singapore • Identifying potential customers and marketing of the products for AB Singapore • Providing demonstration of the products of the overseas entities to prospective customers • Conducting seminars and exhibitions for providing information (pertaining to products of overseas entities) to customers • Pass on all enquiries to overseas entities for comments and quotations;
- Receipt of clarifications and follow-up with the potential customers • Provide information and product training to the customers • Advertising, publicity and public relation activities through third parties;
- Market surveys and studies to standardize and improve the performance of the products of overseas entities; • In conjunction with tire personnel of overseas entities, prepare an annual marketing plan for the territory;
- Any other incidental marketing activities. • Interaction with the customers for providing any clarifications from time to time • Receipt of complaints from customers in relation to issues faced on the products sold"" directly by the overseas entities • Ensure timely payment by the customer against deliveries made by overseas entities from time to time • On overseas's entities request, act as a transmission channel to receive and transmit copies of any documents: • Any other incidental activities in relation to servicing that may be required by the customers;

21. For providing such services, the assessee is to be remunerated at cost plus markup at arm's length basis. Clause 4 AY: 2017-18 (AB Sciex Pte Ltd., Singapore) of this agreement defines the status of DHR India as an independent contractor which does not have and cannot represent itself as having any authority to enter into any obligation on behalf of the assessee or to bind the assessee contractually in any way. It also stipulates, DHR India has no authority to negotiate or conclude or procure any contract or order on behalf of the assessee or any of its group companies or otherwise bind the assessee or any other group companies in any way in this regard. It also provides that DHR India shall conduct or deal with any potential or existing customers in a manner that may lead to the belief that DHR India has the authority to conclude the terms of the contract or to bind the assessee in any manner. It also provides that DHR India may take up/provide such services to any other parties if such arrangement does not prejudice the assessee or its group associates in any manner. Thus, even the Marketing Support Agreement makes it clear that DHR India does not have any authority or power to conclude contracts or enter into any negotiations with the customers on behalf of the assessee.

22. Thus, the three sets of agreements read together or even on standalone basis do not in any manner give impression that DHR AY: 2017-18 (AB Sciex Pte Ltd., Singapore) India is habitually concluding contract on behalf of the assessee so as to make it a PE under Article 5(8). There is

nothing on record, even, to suggest that DHR India is acting as an agent wholly and exclusively for the assessee and not in regular course of its business to make it a PE under Article 5(9) of the Treaty. As it appears, the sole basis on which the Assessing Officer has treated DHR India as a fixed place PE and dependant agent PE is the statement recorded from two of the employees of an Indian customer of the assessee. However, it is the assertion of the assessee from the very beginning that the statements recorded of these persons were neither confronted, nor any opportunity of cross examination was granted. This assertion has not been controverted by the departmental authorities. Therefore, in our view, the Assessing Officer could not have utilized such adverse material to the detriment of the assessee without giving any opportunity to the assessee to cross examine. In any case of the matter, the persons whose statements have been utilized by the Assessing Officer are neither employees of the assessee nor DHR India. They have only stated certain facts without being aware of the legal relationship and real nature of the transaction between the assessee and DHR India.

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23. Therefore, in our view, basis such statement, it will not be safe to conclude that the assessee either has a fixed place PE or dependant agent PE. Further, the allegation of the Assessing Officer that the assessee utilizes the premises of DHR India as a warehouse to stock its goods and sales outlet is not borne out from the materials on record. The facts on record clearly reveal that the assessee's employees have never visited India. Direct sales to Indian customers were made from Singapore through shipment. The sales effected by DHR India are on its own independent status. Therefore, the products purchased by DHR India under the Distribution Agreement and kept in its inventory cannot be considered to be the products belonging to the assessee, as, they are sales transaction on principal to principal basis for resale by DHR India to Indian customers. Further, clause 11.1 and 11.2 of Sales Commission Agreement makes it clear that any replacement of products/spares under warranty/maintenance has to be provided by DHR India out of its own inventory and DHR India will have the right to either get a replacement from assessee or cross charge the cost to the assessee. Therefore, the terms of the agreements make it clear that assessee does not have a warehouse or sales outlet in India AY: 2017-18 (AB Sciex Pte Ltd., Singapore) to constitute a fixed place PE in India under Article 5(1) of the Treaty. Thus, in our view, the conclusion drawn by the Assessing Officer that the assessee has fixed place PE or dependant agent PE is not borne out from any cogent material/evidence brought on record.

24. Unfortunately, learned DRP has not properly appreciated the facts and simply adopted the version of the Assessing Officer. There is nothing on record to suggest that the assessee is utilizing the premises of DHR Holding India Pvt. Ltd. either as warehouse for storage of its products or as a sales outlet for soliciting/procuring orders from Indian customers. Further, there is no cogent material on record to demonstrate that DHR Holding India Pvt. Ltd. habitually exercises authority to conclude contracts on behalf of the assessee or maintains stock of goods or merchandise from which it regularly deliver goods to Indian customers on behalf of the assessee or it habitually secures orders in India wholly and exclusively for the assessee. Thus, none of the ingredients of Article 5(8) are satisfied. The terms of the agreement as well as the conduct of parties do not make out a case for the Revenue that the premises of DHR India would constitute either a fixed place PE or agency PE.

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25. Further, the revenue authorities have not brought any material on record to demonstrate that the activities of DHR India are wholly devoted on behalf of the assessee and as such it does not have any independent status and was not acting in the ordinary course of its business. We have noted, from the stage of assessment proceeding itself, the assessee has consistently urged that DHR India is having its own independent status and business and its activities are not wholly devoted to the assessee. However, the departmental authorities have rejected the claim of the assessee without bringing any contrary material on record to demonstrate that the activities of DHR India are wholly and exclusively devoted to the assessee. That being the factual position, it cannot be said that DHR India constitutes dependant agent PE of the assessee. Thus, in our view, conditions of Article 5(9) of India - Singapore DTAA are not fulfilled.

26. At this stage, it is necessary to observe, in case of E Funds IT Solution Inc. (supra), the Hon'ble Supreme Court has held, the burden of proving the fact that a foreign entity has a PE in India is on the Revenue. In the said decision, the Hon'ble Supreme Court has further elucidated that for constituting a fixed place PE, there must exist a fixed place of business in India which is at AY: 2017-18 (AB Sciex Pte Ltd., Singapore) the disposal of the non-resident entity through which it carries on its own business. In the facts of the present case, it is not disputed that there is no direct presence of the assessee in India. It is an admitted factual position that none of the employees of the assessee company ever visited India in connection with assessee's business. Whatever sales of products have been effected to Indian customers is directly from Singapore. Thus, applying the ratio laid down by the Hon'ble Supreme Court, as aforesaid, it has to be held that there cannot be any fixed place PE of the assessee in India. This is so because the revenue authorities have failed to discharge their initial burden of proving such fact.

27. As regards DHR India constituting the dependant agent PE, we have already deliberated on the issue and have held that no material has been brought by the departmental authorities to demonstrate that the Indian entity habitually exercises its authority to conclude contract etc. in terms of Article 5(8) or its activities are wholly devoted on behalf of the assessee. Thus, there cannot be any PE under Article 5(8) and 5(9) of the Indian - Singapore Tax Treaty. Thus, applying the legal principle to the facts emerging on record, we hold that the assessee does not have AY: 2017-18 (AB Sciex Pte Ltd., Singapore) any PE in India. Therefore, in absence of PE, the business profits of the assessee cannot be taxed in India. Accordingly, the additions made by way of attribution of profit to the PE in India deserve to be deleted. Accordingly, we do so.

28. For the sake of completeness, we must observe, in course of hearing, learned counsel for the assessee had taken an alternative contention to the effect that, even assuming that assessee has a PE in India, no further attribution of profit can be made to the PE as the transaction between the assessee and DHR India was accepted to be at arm's length, both, in case of assessee and DHR India. For such proposition, he relied upon the following decisions:

1. DIT vs. Morgan Stanley & Co. [2007] 162 Taxman 165 (SC)

2. Honda Motor Co. Ltd., Japan Vs. ADIT (Civil Appeal No. 2833 of 2018, dated 14.03.2018)

3. Ricardo UK Ltd. Vs. DCIT (ITA No.4909/Del.2018 and Ors., dated 17.02.2021)

29. In reply, learned Departmental Representative submitted, no reference was made to the TPO for determining the ALP of the transaction between assessee and DHR India.

30. Having considered rival submissions, in principle, we agree with learned counsel for the assessee that in a particular case, where the transaction between the Indian entity and its overseas AY: 2017-18 (AB Sciex Pte Ltd., Singapore) AE are found to be at arm's length, no further attribution of profit can be made to the AE. Since, we have already held that the assessee does not have a PE in India, we leave the issue at that.

31. In view of our aforesaid decision, the other aspect relating to attribution of profit to PE having become academic does not require adjudication. Thus, in sum and substance, ground no. 1, 2, 3 and 4 are allowed and rest of the grounds, having rendered academic, are not required to be adjudicated insofar as the present appeal is concerned. However, the issues raised in these grounds are left upon for adjudication, if need arises in future.

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

Order pronounced in the open court on 29th April, 2022 Sd/- Sd/-

(G.S. PANNU)
PRESIDENT

(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 29th April, 2022.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi