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[2021] 129 taxmann.com 35 (Mumbai - Trib.)[30-07-2021]

INTERNATIONAL TAXATION : Assessee company changed its domicile from British Virgin Islands to Mauritius; it would be entitled to treaty benefits of DTAA between India and Mauritius

INTERNATIONAL TAXATION : As long as an agent is paid an arm's length remuneration for services rendered, nothing survives for taxation in hands of dependent agency permanent establishment

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[2021] 129 taxmann.com 35 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'I'

Assistant Director of Income Tax (International Taxation), 1(1), Mumbai

v.

Asia Today Limited

PRAMOD KUMAR, VICE-PRESIDENT
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER
IT APPEAL NOS. 4628 AND 4629 (MUM.) OF 2006 & OTHS.
[ASSESSMENT YEARS 2000-01 & 2001-02]
JULY 30, 2021

Section 9 of the Income-tax Act, 1961, read with Article 5 of DTAA between India and Mauritius - Income - Deemed to accrue or arise in India (Resident - Company, control and management, place of) - Assessment Years 2000-01 & 2001-02 - Whether Corporate re-domiciliation, also referred to as 'Continuation', is process by which a company moves its 'domicile' (or place of incorporation) from one jurisdiction to another by changing country under whose laws it is registered or incorporated, whilst maintaining same legal identity - Held, yes - Whether a re-domiciliation of company by itself cannot lead to denial of treaty entitlements of jurisdiction in which company is re-domiciled, though, of course, fact of re-domiciliation of company could at best trigger detailed examination or re-domiciled company being actually fiscally domiciled in that jurisdiction - Held, yes - Whether where assessee company changed its domicile from British Virgin Islands to Mauritius, it would be entitled to treaty benefits of DTAA between India and Mauritius - Held, yes [Para 4][In favour of assessee]

Section 9 of the Income-tax Act, 1961, read with Article 5 of DTAA between India and Mauritius - Income - Deemed to accrue or arise in India (Permanent Establishment - Agency PE) - Assessment Years 2000-01 & 2001-02 - Whether as long as an agent is paid an arm's length remuneration for services rendered, nothing survives for taxation in hands of dependent agency permanent establishment - Held, yes - Whether viewed thus, existence of a dependent agency permanent establishment is wholly tax neutral unless it

is shown that agent has not been paid an arm's length remuneration - Held, yes [Para 9][In favour of assessee]

> As for the reasons and justifications for such re-domiciliation, it is pointed out that due to business, and even legal, position being rather dynamic and constantly evolving, these offshore entities sometimes faced with a situation where the rules and regulations then prevailing in the current "domicile" (place of incorporation) of the company no longer fit the company's purpose, or the prevailing rules and regulations of its current jurisdiction of domiciliation are in some way inhibiting future business or prospects. For these reasons, and a multitude of others, the possibility of transferring the domicile of a company by way of continuation from one place to another, may be the preferred option. To satisfy this demand legislation enacted expressly for this purpose has been the response of many jurisdictions. This means essentially that the company ceases to "live" in one jurisdiction, and is deregistered there, but *via* a transfer by way of the continuation process, is alive and well in another. Of course, to effect a re-domiciliation, both the existing jurisdiction (where the company is currently registered) and the target jurisdiction (where the company is to be 'continued') need to be on the list of countries where re-domiciliation is possible. Not all countries allow re-domiciliation, but many popular offshore centres do permit, and even facilitate, the re-domiciliation. Obviously, British Virgin Islands and Mauritius are such jurisdictions.

Vijaykumar G. Subramanian *for the Appellant.* **Niraj Sheth** and **Jay Bhansali** *for the Respondent.*

ORDER

Pramod Kumar, Vice-Presodemt - These three appeals filed by the Assessing Officer, and one cross-objections filed by the assessee, pertain to the same assessee involve some common issues arising out of the materially similar set of facts and were heard together. The assessee has moved petitions under rule 27 of the Income-tax (Appellate Tribunal) Rules 1962, in respect of assessment years 2002-03 and 2003-04. Therefore, as a matter of convenience, all these appeals and cross-objections are being taken up together for disposal by way of this common order.

2. During the hearing, learned Departmental Representative submitted that the assessee company was, as per the licence agreement dated 1st January 1995 (at pages ten onward of the paper-book) with El-Zee Television Pvt Ltd, was incorporated in the British Virgin Islands, but then, as per the tax residency certificate dated 6th July 1999 issued by the Government of Mauritius, this company was incorporated in Mauritius on 29th June 1998, and a copy of the said TRC was placed before us at page 7 of the paper-book. If it's a BVI company, as the agreement indicates, obviously the Indo Mauritian tax treaty benefits cannot be extended to the assessee. We were thus urged to hold that the treaty entitlements being granted, on the facts of this case, was inappropriate. Learned counsel for the assessee, on the other hand, submitted that the company, even though initially incorporated in the British Virgin Islands, was now registered in Mauritius. It was pointed out that the assessee company has duly been issued a tax residency certificate, which is not even called into question. Learned counsel for the assessee has also filed a written note justifying the treaty entitlements, and that the fact of re-domiciliation of the assessee company does not affect these treaty entitlements.

3. We find that the assessee company was actually registered, with name as Signpost International Limited, on 15th November 1991 in the British Virgin Islands as an 'international business company'. Subsequently, on 24th May 1992, name of the company was changed to 'Asia Today Limited'. This company appears to have been re-domiciled in Mauritius on 29th June 1998 when Registrar of Companies issued a 'certificate of incorporation by continuation' stating that "……Asia Today Limited in on and from 29th day of June 1998, incorporated by continuation as a private company limited by shares" and that "this certificate will be effective on the date of deregistration of the company in its place of incorporation". It is only upon issuance of this certificate that the company is discontinued in the British Virgin Islands, *vide* certificate

dated 30th June 1998 that states that "The Registrar of Companies of the British Virgin Islands hereby certifies that Asia Today Limited, an international business company incorporated under section 3 of the International Business Companies Act of the law of British Virgin Islands has discontinued its operations in the British Virgin Islands on 30th June 1998". As a net result of these actions, a company originally incorporated in the British Virgin Islands stands migrated to, and, to use the expression employed in the parlance of offshore entities business, "re-domiciled" in, Mauritius.

4. As we explore the meaning, and implications, of a company being re-domiciled in a different jurisdiction, we find assistance from the literature filed, by Shri Sheth, before us. Corporate re-domiciliation, also referred to as 'Continuation', is explained as the process by which a company moves its 'domicile' (or place of incorporation) from one jurisdiction to another by changing the country under whose laws it is registered or incorporated, whilst maintaining the same legal identity. As for the reasons and justifications for such re-domiciliation, it is pointed out that due to business, and even legal, position being rather dynamic and constantly evolving, these offshore entities sometimes faced with a situation where the rules and regulations then prevailing in the current "domicile" (place of incorporation) of the company no longer fit the company's purpose, or the prevailing rules and regulations of its current jurisdiction of domiciliation are in some way inhibiting future business or prospects. For these reasons, and a multitude of others, the possibility of transferring the domicile of a company by way of continuation from one place to another, may be the preferred option. To satisfy this demand legislation enacted expressly for this purpose has been the response of many jurisdictions. This means essentially that the company ceases to "live" in one jurisdiction, and is deregistered there, but via a transfer by way of the continuation process, is alive and well in another. Of course, to effect a re-domiciliation, both the existing jurisdiction (where the company is currently registered) and the target jurisdiction (where the company is to be 'continued') need to be on the list of countries where re-domiciliation is possible. Not all countries allow re-domiciliation, but many popular offshore centres do permit, and even facilitate, the re-domiciliation. Obviously, BVI and Mauritius are such jurisdictions. Clearly, therefore, re-domiciliation of corporate entities in the offshore world is a fact of life.

5. When we take into account of the smoothness and ease with which the assessee company was redomiciled in another sovereign jurisdiction, and the fact that tax residency certificate was issued even before the re-domiciliation process was complete, inasmuch as the ere-domiciliation was completed on 30th June 1998 with the discontinuance of registration by the Registrar of Companies in Mauritius but the tax residency certificate was issued on 29th June 1998 itself, the very concept of treaty entitlements, on account of situs of incorporation, seems to be much less conceptually justifiable- particularly so far as these taxpayer friendly offshore jurisdictions are concerned. Obviously, there was nothing more than the fact of registration of a company which has been taken as treaty entitlement. The attachment with the jurisdiction of incorporation in these cases appears to be as ephemeral as required by the exigencies of treaty shopping, and this concept of re-domiciliation of the companies also appears to be an antithesis of the very justification of the situs of incorporation of a company being linked with the treaty entitlements. All this is, however, purely academic so far as the present assessment years are concerned. It is almost after the end of two decades from the relevant financial period that the issue regarding treaty benefit entitlement is being raised for the first time, and that too without any specific ground of appeal in that respect. Such an inordinate lapse of time does extend finality to the findings about such foundational aspects. The Assessing Officer himself has granted the treaty benefits to the assessee before us all along, and it cannot be open to the Departmental Representative to wake up today to revisit this foundational aspect. In any case, given the ground realities of offshore world, re-naming, re-structuring and even re-domiciliation of offshore companies are facts of life. A re-domiciliation of the company by itself cannot lead to denial of treaty entitlements of the jurisdiction in which the company is re-domiciled, though, of course, the fact of re-domiciliation of the company could at best trigger detailed examination or the re-domiciled company being actually fiscally domiciled in that jurisdiction. As we hold so, we are alive to the fact that in the light of judgments of Hon'ble Courts above, one could possibly argue that once a tax

residency certificate was issued, it could not even be open to the tax authorities to make such investigations, but then it is not necessary to deal with these nuances of law. There is not even a suggestion, leave aside any material to suggest so, that the assessee company is not now fiscally domiciled in the Mauritius. There is nothing more than a doubt lurking in the mind of the learned Departmental Representative, but that cannot be reason enough to reject the treaty entitlement in question. We, therefore, reject this objection of the learned Departmental Representative.

6. Grievances raised by the appellant Assessing Officer, in the three appeals, are as follows:

1. On the facts and in the circumstances of the case and in law the ld. CIT(A) erred in holding that gross receipt mentioned in Circular No. 742 means the gross receipt on the basis of cash system.

2. On the facts in the circumstances of the case and in law, the ld. CIT(A) erred in holding that no income in respect of the Pay Channel Subscription Agreement accrues to the assessee.

3. On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in holding that the subscription revenue collected is only business income of the telecasting company and not royalty.

4. On the facts and in the circumstances- of the case and in law, the ld. CIT(A) erred in holding that no interest u/s. 234B and 234C is payable by a non-resident whose total income is subject to deduction of tax at source and directing the Assessing Officer to delete interest charged u/s. 234B and 234C of the I.T. Act, 1961.

5. On the facts and in the circumstances of the case and in law, the ld.CIT(A) erred in holding that provisions of Circular No. 742 were prejudicial to the interest of the assessee and therefore, not binding on it.

6. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in holding that the assessee does not have a PE in India and accordingly its business profits are not taxable in India."

(A.Ys 2000-01 & 2001-02)

*Assessment u/s. 143(3) r.w.s. 147

1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that Zee Telefilms Limited (ZTL) does not constitute a Permanent Establishment (PE) of the assessee in India.

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that, in the absence of a permanent establishment (PE), income of the assessee is not taxable as per article 7 of the DTAA.

(A.Y 2001-02)

**Original Assessment u/s. 143(3)

7. There are two departmental appeals for the assessment year 2001-02 - one against assessment under section 143(3), and second against reopened assessment under section 143(3) r.w.s. 147. As for the cross objections, as also the petition filed by the assessee under rule 27 of the Appellate Tribunal (Income Tax) Rules, 1962, it is, in effect, contended that without prejudice to the judgment of Hon'ble CIT(A), wherein it is held that the assessee has no PE in India and hence income is not taxable in India, even if it is held that the assessee has a PE in India, the income of the assessee is not taxable in India as it has paid remuneration/commission to agent in India on arm's length basis, as held by Hon'ble Supreme Court in the case of *DIT (International Taxation)* v. *Morgan Stanley & Co. Inc.* [2007] 292 ITR 416 (SC)] and by Hon'ble Bombay High Court in the case of *Set Satellite Pte Ltd.* v. *CIT* [(2009) 307 ITR 205 (Bom)].

8. Learned representatives fairly agree that the issues in appeal are squarely covered by a dated 29-1-2021

decision of the coordinate bench, in assessee's own case for the assessment years 2002-03, 2004-05, 2005-06 wherein the coordinate bench has, *inter alia*, observed as follows:

> 2. The common grounds of appeal raised in all the departmental appeals, *i.e.* the appeals filed by the Assessing Officer, are as under:
>
> 1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that Zee Telefilms Limited (ZTL) does not constitute a Permanent Establishment (PE) of the assessee in India.
>
> 2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that, in the absence of a permanent establishment (PE), income of the assessee is not taxable as per article 7 of the DTAA.
>
> 3. The common grounds of cross objections, in CO Nos 124 and 125/Mum/2008, are as follows:
>
> Without prejudice to our contentions as respondent of the appeal, even if it is assumed, without accepting, that the respondent is held to have permanent establishment (PE) through its agent, Zee Telefilms Limited, we contend that no income can be attributed to such PE as agent is remunerated on arm's length basis having regard to the functions and risks performed by the agent, and no income of the assessee is taxable in India.
>
> 4. In the remaining two cross objections, *i.e.* CO No 63 and 64/Mum/2008, the issue raised in the cross objection remained the same, but with the benefit of Hon'ble Bombay High Court's judgment in the case of *Set Satellite Pte Ltd* v. *CIT* [(2009) 307 ITR 205 (Bom)] in the meantime, wordings of the grievances have become a little more elaborate as follows:
>
> Without prejudice to the judgment of Hon'ble CIT(A), wherein it is held that the assessee has no PE in India and hence income is not taxable in India, even if it is held that the assessee has a PE in India, the income of the assessee is not taxable in India as it has paid remuneration/commission to agent in India on arm's length basis, as held by Hon'ble Supreme Court in the case of *Morgan Stanley* 292 ITR 416 (*i.e.DIT (International Taxation)* v. *Morgan Stanley & Co. Inc*. [2007] 292 ITR 416 (SC)]) and Hon'ble Bombay High Court in the case of *Sony Entertainment Television (Singapore) Limited* (173 Taxman 475) (*i.e.Set Satellite Pte Ltd* v. *CIT* [(2009) 307 ITR 205 (Bom)])
>
> 5. Learned counsel's contention is that the issue is covered, in favour of the assessee and in assessee's own cases, by a series of orders of the coordinate benches- such as order 12th January 2018 and two other orders- both 31st May 2018, copies of which are placed before us at pages 50 to 91 of the paper book filed before us. Learned Departmental Representative, however, does not share this perception. His stand is that "the adequacy of FAR analysis of risks undertaken by AEs (as discussed by the AO in the assessment order) is not adjudicated" in these decisions, and that "in other cases relied upon by the assessee, transfer pricing adjudication was made" and, therefore, "the decisions are not applicable as distinguishable on facts". Learned Departmental Representative has thus prayed that (*a*) the decision of the AO that permanent establishment of the assessee exists in India may be confirmed; and that (*b*) the matter may be remanded to the Assessing Officer or the Transfer Pricing Officer to examine whether the test with regard to adequacy of FAR analysis of risks undertaken by the AEs, as laid down by Hon'ble Supreme Court in the case of *Morgan Stanley* (*supra*) is satisfied. In view of this position, we deem it appropriate to briefly deal with the issue on merits.
>
> 6. To adjudicate on these appeals, at this stage, only a minimal facts need to be taken note of. The assessee before us is a foreign telecasting company incorporated in Mauritius and having a tax residency certificate of the Mauritius. It sells advertising time and collects subscription revenues through its Indian affiliates Zee Telefilms Limited and El Zee, but its claim was that since it does not have any permanent establishment in India, no part of its income was taxable in India. The Assessing

Officer did not accept the claim. He was of the view that its Indian agent constitute virtual projection of the foreign company, and, therefore, it has a permanent establishment in India, in the light of Hon'ble Andhra Pradesh High Court's judgment in the case of *CIT* v. *Vishakhapatnam Port Trust* (144 ITR 146). Referring to this judgment, and analysing the facts of the case of the assessee, in the assessment order for the assessment year 2002-03, for example, the Assessing Officer concluded as follows:

5.2.3 Now keeping the above in view point, one has to look into the factual aspects of the case, particularly the following:

- The assessee could not have earned any income from India but for its Indian agent, ZTL/EI Zee.
- The 'brand name' used by the assessee is same as that of its agent in India, that is, ZEE. Thus, for persons desirous of doing business with the assessee in India, there is no difference between ZTL/EI Zee and Asia Today Ltd. it is seen that in a number of TDS certificates issued to the assessee, the name 'Zee TV' or 'Zee ZTL/EI Zee Cinema' or 'Zee Telefilms' were used. There terms were therefore, used interchangeably.
- The income stream of the assessee is from selling of advertising time and these are 'sold' by ZTL/EI Zee. Almost all the advertisers are from India and the advertisements are solicited by the Indian company. The advertisers book the slots on the channel by coming into contact with employees of ZTL/EI Zee at their office. The other stream of revenue is 'subscription revenue' which is also collected by ZTL/EI Zee on behalf of the assessee.
- The payments are collected by ZTL/EI Zee and the same is remitted to Mauritius by it.
- The employees of ZTL/EI Zee are employees of Zee group as a whole and they perform functions as required by ATL also.
- In the case of other telecasting channels also it is held by the revenue authorities that their agent in India constitute a Permanent Establishment.

5.2.4. The above stated factual position clearly brings out that the assessee's case falls under Article 5(1) of the Indo-Mauritius treaty when the business of the assessee is carried out through a fixed placed in India and in effect, is a virtual projection of the assessee in India.

7. The Assessing Officer further observed that, without prejudice to the above analysis, the assessee has an agency permanent establishment in India, under article 5(4) of India Mauritius DTAA, inasmuch as its Indian agents are the dependent agents. As for the plea that in case the assessee is held to have a dependent agent permanent establishment, as was held by the Assessing Officer, no further profits can be attributed in the hands of the assessee as the agent has been paid arm's length remuneration services rendered, the Assessing Officer rejected the said plea, and observed as follows:

5.3.3 No Further Profits can be taxed in view of Article 7(2) of the Treaty:

The next submission of the assesses is that even if it is assumed that there is a PE in India, as per Article 7(2) of the Treaty, where an enterprise carries on business in India through a PE, the profits attributable to such PE shall be the profits that the PE would have made, if it were a distinct and separate enterprise dealing independently with the enterprise of which it is a PE. Thus, the profits attributable to the PE shall be the profits it would have made, if it were an independent enterprise. Since the assessee is making an arm's length payment to ZTL/EI Zee, ZTL/EI Zee would have made the same profits dealing with an independent enterprise. Since the said profits are already taxed in the

hands of ZTL/EI Zee, no further profits can be attributed to the activities performed by it. Further, the assessee has laid Emphasis on CBDT Circular No. 5 dated September 28, 2004 which states that profits attributable to a PE have to be computed having regard to the arm's length principle. For the detailed reasons given in following paragraphs, I do not find merit in the claim of the assessee that if payment to ZTL/EI Zee is made at arm's length, then it extinguishes the tax liability of the assessee in India.

8. It was in this backdrop that the taxability of the assessee, in respect of advertisement revenue and subscription revenues earned through its agents in India, was confirmed. However, when he carried the matter in appeal before the learned CIT(A), he held that the assessee does not have any permanent establishment in India. Therefore, the assessee cannot be taxed in respect of its income from Indian operations. The relevant facts for the other assessment year are, as learned representatives fairly agree, materially similar. The Assessing Officer is aggrieved and in appeal before us. The assessee's cross-objections, however, deal with an even more fundamental aspect. That aspect is that given the fact that the assessee has paid arm's length remuneration to its Indian agents, no further taxability can be attributed to its income earned through the agents in India.

9. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

10. We find that it's an admitted position that the assessee does not have any office or place of management of its own, and its presence in India is only through its agents. Undoubtedly, in terms of Hon'ble Andhra Pradesh High Court's path-breaking judgment in the case of *Vishakhapatnam Port Trust* (*supra*), " 'permanent establishment' postulate the existence of a substantial element of an enduring or permanent nature of a foreign enterprise in another country which can be attributed to a fixed place of business in that country" and "it should be of such a nature that it would amount to a virtual projection of the foreign enterprise of one country into the soil of another country" [Emphasis, by underlining, supplied by us, here as also elsewhere in this order]. What is equally important is in the fundamental analysis justifying the existence of permanent establishment under Article 5(1) and 5(2), as we have reproduced earlier, there is not even a whisper of a mention about any fixed place of business. All this analysis points out is that "The assessee could not have earned any income from India but for its Indian agent, ZTL/EI Zee" and that "The employees of ZTL/EI Zee are employees of Zee group as a whole and they perform functions as required by ATL also", but then the agent and the principal being from the same business group would not obliterate their separate legal existence. It is only elementary that there cannot be a permanent establishment under the basic rule, *i.e.,* 5(1), unless there is a fixed place of business. It is by now well settled in law that in order to constitute a fixed place permanent establishment under Article 5(1), there has to a fixed place of business from which business of the foreign enterprise is carried out, and such a place of business should be at the disposal of foreign enterprise .As observed by a coordinate bench of this Tribunal, relying upon the landmark Special Bench decision in the case of *Motorola Inc* v. *DCIT* [(2005) 95 ITD SB 269 (Del)] and in the case of *Airlines Rotables Ltd* v. *JDIT* [(1911) 44 SOT 368 (Mum)], "The physical test, *i.e.,* place of business test, requires that there should be a physical location at which the business is carried out. However, mere existence of a physical location is not enough. This location should also be at the disposal of the foreign enterprise and it must be used for the business of foreign enterprise as well. A place of business should be at the disposal of the foreign enterprise for the purpose of its own business activities. This place has to be owned, rented or otherwise at the disposal of the assessee, and a mere occasional factual use of place does not suffice". Even a case is not made out for satisfaction of this condition by the Assessing Officer, and, as such, there is no case for existence of a permanent establishment under Article 5(1). As for the permanent establishment under Article 5(2), even by definition, there cannot be a permanent establishment under Article 5(2) unless it is at least alleged to be covered by one of the specific clauses in article 5(2). As we discuss the case made out by the Assessing Officer, it is also important to note that the Assessing Officer concludes his relevant

analysis by adding that "In the case of other telecasting channels also it is held by the revenue authorities that their agent in India constitute a Permanent Establishment", but in none of these cases the permanent establishment is said to be under basic rule, *i.e.,* Article 5(1) and Article 5(2), and in all these cases, the permanent establishment is dependent agency permanent establishment, *i.e.,* under Article 5(4). Even the case of the Assessing Officer thus hinges on the applicability of Article 5(4). There can be permanent establishments through the presence of the agency, for example. There can be virtual projections even without a fixed place of business, such as in the case of a dependent agency permanent establishment, but such cases will be covered by article 5 (4) rather than article 5(1) and 5(2). The detailed analysis by the Assessing Officer, as extracted earlier in this order, also makes that position evident. At best, therefore, it is a case of dependent agency permanent establishment under Article 5(4), and learned Departmental Representative also accepts that. There is no conflict between 'virtual projection of a foreign enterprise' and the 'dependent agency permanent establishment', and it's in this light that we have to take note of the analysis of legal position. There can be simple situations in which a foreign enterprise operates through an agent, acting as a franchise, and such a franchise can virtually project business of the foreign enterprise on the soil of another country. Clearly, therefore, just because there is virtual projection of business, as the case is made out by the Assessing Officer, it is to be inferred that that there is a permanent establishment under the basic rule, *i.e.,* Article 5(1) an 5(2), and negate the existence of a dependent agency permanent establishment, as would at best emerge out of the facts marshalled out by the Assessing Officer. As we are examining this aspect of the matter, it may also be useful to refer to the following extracts, defining permanent establishment, from the India Mauritius Double Taxation Avoidance Agreement [(1984) 146 ITR (St.) 214]:-

ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include—

(*a*) a place of management ;

(*b*) a branch ;

(*c*) an office ;

(*d*) a factory ;

(*e*) a workshop ;

(*f*) a warehouse, in relation to a person providing storage facilities for others ;

(*g*) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources ;

(*h*) a firm, plantation or other place where agricultural, forestry, plantation or related activities are carried on ;

(*i*) a building site or construction or assembly project or supervisory activities in connection therewith, where such site, project or supervisory activity continues for a period of more than nine months.

(*j*) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or connected project) for a period

or periods aggregating more than 90 days within any 12 month period.

3. Notwithstanding the preceding provisions of this article, the term "permanent establishment" shall be deemed not to include :

(*a*) the use of facilities solely for the purpose of storage or display of merchandise belonging to the enterprise ;

(*b*) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display ;

(*c*) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise ;

(*d*) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or for collecting information for the enterprise ;

(*e*) the maintenance of a fixed place of business solely—

(*i*) for the purpose of advertising,

(*ii*) for the supply of information,

(*iii*) for scientific research, or

(*iv*) for similar activities,

which have a preparatory or auxiliary character for the enterprise.

4. Notwithstanding the provisions of paragraphs (1) and (2) of this article, a person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State [other than an agent of an independent status to whom the provisions of paragraph (5) apply] shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if:

(*i*) he has and habitually exercises in that first-mentioned State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or

(*ii*) he habitually maintains in that first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfils orders on behalf of the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted exclusively or almost exclusively on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.

6. The fact that a company, which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise) shall not, of itself, constitute either company a permanent establishment of the other.

11. The question thus arises as to what are the tax implications of the existence of a dependent agent

permanent establishment (DAPE) under Article 5(4). The DAPE is after all a type of permanent establishment, and the very concept of permanent establishment is a compromise between source rule and residence rule inasmuch as it provides justification to trigger source jurisdiction taxation over business activities of a foreign enterprise. Unless there is a PE in the source jurisdiction, there cannot be taxation of business profits of the foreign enterprise in the source jurisdiction, and when there is a PE in the source jurisdiction, only so much of profits of the foreign enterprise, as are attributable to a PE, can be taxed in the source jurisdiction- as is the unambiguous mandate of Article 7(1). It is in this context one has to examine the tax implications of DAPE, and that tax implication is that the profits attributable to the DAPE are brought to tax in the source jurisdiction. The next logical point, therefore, as to how to compute profits attributable to a DAPE, and it is this aspect of the matter which has been a subject matter of academic debates and controversies. There are two approaches to it *i.e.,*, to borrow the terminology employed by International Tax Law Reports (see 2007, Volume 9; Part 5; at pages 963-964), first- a "single taxpayer" or "zero-sum approach", and, second- "two taxpayers" or "non zero-sum approach". While Philip Banker, a well known international tax lawyer, has all along advocated zero-sum approach, late Klaus Vogel touched a different chord, in his column 'Tax Treaty Monitor' in the 'Bulletin for International Taxation (November 2007 at page 475) and given his approval for "two taxpayers approach". The latter is also in consonance with Authorised OECD Approach of the OECD. On materially similar facts of dependent agency permanent establishment for a similarly placed foreign telecasting company as in this case, in the case of *DDIT* v. *Set Satellite (Singapore) Pte Ltd* [(2007) 106 ITD 175 (Mum)], a coordinate bench, speaking through one of us, (*i.e.* the Vice President), had upheld the "two taxpayer approach", in computation of DAPE profits, and observed as follows:

> 11. The particular difficulty in the case of a dependent agent permanent establishment is that DAPE itself is hypothetical because there is no establishment -permanent or transient- of the GE in the PE state. The hypothetical PE, therefore, must be visualized on the basis of presence of the GE as projected through the PE, which in turn depends on functions performed, assets used and risks assumed by the GE in respect of the business carried on through the PE. The DAPE and DA has to be, therefore, be treated as two distinct taxable units. The former is a hypothetical establishment, taxability of which is on the basis of revenues of the activities of the GE attributable to the PE, in turn based on the FAR analysis of the DAPE, minus the payments attributable in respect of such activities. In simple words, whatever are the revenues generated on account of functional analysis of the DAPE are to be taken into account as hypothetical income of the said DAPE, and deduction is to be provided in respect of all the expenses incurred by the GE to earn such revenues, including, of course, the remuneration paid to the DA. The second taxable unit in this transaction is the DA itself, but this taxability is in respect of the remuneration of the DA. The provisions of the tax treaty are silent on this issue, and rightly so, because the taxability of the DA is quite distinct of the taxability of the enterprise of the contracting state which is in respect of PE of such an enterprise. At the cost of repetition, it is not the DA who constitutes PE of the GE, but it is by the virtue of a DA that the GE is deemed to have a PE, a DAPE though, in the other contracting state. We are of the considered view that in addition of the taxability of the DA in respect of remuneration earned by him, which is in accordance with the domestic law and which has nothing to do with the taxability of the foreign enterprise of which he is dependent agent, the foreign enterprise is also taxable in India, in terms of the provisions of Article 7 of the tax treaty, in respect of the profits attributable to the dependent agent permanent establishment. As we have elaborated earlier in this order, a dependent agent permanent establishment is distinct from the dependent agent. While computing the profits of this dependent agent permanent establishment, a deduction is to be allowed for the remuneration paid to the dependent agent as that is cost of operation of the dependent agent permanent establishment and as it has been incurred for generating the revenues attributable to such hypothetical permanent establishment. Let us take a very simple example to understand the mechanism of this approach. Let us assume that there is an electronic equipment distributor by the name of Sing Co. based in Singapore. He sources the electronic equipment from all over the globe and sells the same to its customers in India. Instead of

having a regular office in India, and instead of carrying out the marketing activity in India, he projects his business in India through an Indian Co. by the name of Ind. Co. There is no dispute that Ind. Co. is a dependent agent of the Sing Co. In consideration of the services rendered by Ind. Co., Sing Co. pays Ind. Co. commission @ 30 per cent on sales plus reimbursement of expenses. Sing Co., however, procures the electronic equipment from China, shipped directly to India and sells it in India after a mark up of 200 per cent. We further assume that the reasonable handling costs of Sing Co. for souring the merchandise is 60 per cent on cost. In a particular year, Sing Co. sells goods worth $ 3 million in India. Let us further assume that expenses incurred by Ind. Co., to earn the agency remuneration, is $ 8,99,000. The profits taxable in India, in such a case and based on the treaty provisions before us, should be as follows :

A. Commission earned by Ind. Co.			$9,00,000
Less : Deductible expenses of Ind. Co		$ 8,99,000	
Taxable in the hands of the Ind. Co.			$ 1,000
B. Profits attributable to Sing Co.'s DAPE in India			
Sales consideration			30,00,000
Less : Commission paid to Ind. Co.	9,00,000(-) :		
Cost of purchases	10,00,000(-)		
: Sing Co.'s handling charges		6,00,000(-)	
			25,00,000
Profit of the DAPE or, in other words, profits Attribute to India operations of the Sing Co.		$ 5,00,000	

As far as 'A' in the above example is concerned, it does not have anything to do with the income of the foreign company. This taxability is in the hands of the domestic dependent agent and is on net basis after taking into account the expenses incurred by the agent for earning of remuneration whether or not the same relates to the business of the foreign company or not. As regards 'B' above, it represents the earnings of the foreign company attributable to the dependent agent permanent establishment, on account of its having a dependent agent in source country. This income is taxable in the hands of the foreign company in the source country and the tax credit in respect of such taxability will be available to the foreign company in residence country. If, in this example, we are to assume that the income of the PE is only the remuneration earned by the agent on net basis, we will end up in a situation that while profits of Sing Co. attributable to India operations will be $ 5,00,000, the taxability of the profits will be confined to only $ 1,000. What is to be taxed under Article 7 is income of the foreign enterprise attributable to the permanent establishment in the host country. The income attributable to the permanent establishment in the host country is the income attributable to foreign company's operations in the host country, which, in turn, implies the income attributable to the activities carried on the foreign enterprise in the host country. That income, as shown in 'B' above is the income arrived at by taking into account revenues generated by the PE and deducting therefrom the expenditure incurred by the foreign enterprise to earn those revenues. However, it is open to the foreign enterprise to claim appropriate adjustment for the foreign enterprise's overheads and even a reasonable charge, on account of activities of the foreign enterprise carried on outside the host country, by treating the foreign enterprises as a fictionally separate entity.

12. Learned counsel, however, contends that since the profit attributable to the PE are the profits

which the PE "might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is permanent establishment", the taxable profits of the foreign enterprise cannot extend beyond the profit earned by the dependent commission agent. The line of reasoning adopted by the learned counsel is that PE is nothing but the dependent agent, and, the taxability of PE can only, therefore, be in respect of the earnings of the agent. Learned counsel has, with his inimitable oration, erudition and legal skills, woven a complex web of arguments to support this legal proposition. However, as it sometimes happens, the quality of arguments in support of a legal proposition is inversely proportional, proportional if it is, to the merits of the proposition sought to be advanced. This is one such occasion. Let us set out the reasons why we think so, and, in the process, deal with various arguments of the learned counsel one by one.

13. At the outset, we must reiterate that a dependent agent (DA) and a dependent agent permanent establishment (DAPE), in our humble understanding, are two distinct things. As we have stated earlier, it is as a result of existence of a dependent agent that the foreign enterprise is 'deemed to have' a permanent establishment in the country in which dependent agent is situated.

14. Under Article 7 of the treaty, the taxability is of the foreign company. What is taxable under Article 7 is profit earned by the foreign enterprise, as it Article 7(*i*) provides that "The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein". Agency remuneration paid by the foreign enterprise is not an income of the foreign enterprise but an expenditure of the foreign enterprise. The taxability of any profit under Article 7 has to be in the hands of the foreign company and not the host company of which dependent agent is resident. Therefore, in it is patently erroneous to suggest that by payment of tax liability by the dependent agent, tax liability of the foreign principal is discharged. So far as Article 7 is concerned, it deals with the taxability of the foreign company.

15. Under the scheme of the Act, the taxable unit is the foreign company, though the quantum of income taxable is such income as may be held to be attributable to the permanent establishment of the foreign company in India. The tax liability of the foreign company and not the Indian dependent agent. However, in case we are to uphold the stand of the learned counsel, we will end up in a situation that taxability of Indian company is to be allowed to extinguish tax liability of the foreign principal.

16. Learned counsel has relied upon the commentaries of various authors including Phillip Baker, Prof. Roy Rohtagi and Prof. David R. Davies. It is contended that according to these distinguished authors, payment of arms length remuneration by a foreign company to its agent extinguishes tax liability of the foreign principal. With respect, and for the reasons we have set out above, we are of the considered view that in the dependent agency permanent establishment situation, this proposition does not hold good. In any event, this approach proceeds on the assumption, which turns out to be fallacious assumption on the facts of the present case, that dependent agent and dependent agent permanent establishment are one and the same thing.

17. Learned counsel has then relied upon the order of this Tribunal in the case of *Dy. CIT* v. *Roxon OY* [2006] 103 TTJ (Mum.) 8911 which was authored by one of us. This decision, however, did not deal with the peculiarities of a dependent agent permanent establishment. This decision dealt with the taxability of the installation PE, and, the principles dealing with computation of profits of installation PE, in our considered view, do not have any bearing on the computation of profits of the dependent agency PE. We are, therefore, not persuaded by this reasoning either.

12**.** Late Prof Klaus Vogel, one of the most eminent international tax scholars of our times, favoured the path adopted by the coordinate bench. In perhaps his last column in Tax Treaty Monitor (Bulletin

for International Taxation, November 2007, page 475), published in November 2007- just a month before he passed away, referring to the above coordinate bench decision, he had this to say: "One can understand that many have problems imagining how profits should arise to a permanent establishment which, as the Tribunal itself repeatedly stated, does not exist in reality and is a non-entity "wholly hypothetical and fictional". Such sceptics should consider, how- ever, that the parent enterprise as a rule will aim to realize receipts from the contracts concluded by the dependent agent which, in addition to compensating the agent's fee, include a surplus profit, for otherwise the parent would lack any commercial reason for employing the agent. This surplus is not- or only secondarily- attributable to activities in the parent's residence country. Rather, it is a profit that the parent obtains through employing the agent in the country in which the profits arise. Fairness ("inter-nations equity") requires that the surplus profit be taxed in that state. If the drafters of a treaty or model treaty want to provide this, they must notionally attribute it to a contact in that state. This does not mean that they must attribute it to a person or an object in the real world. In the world of law, a legal concept, a figure of thought, will do. The agency permanent establishment is such a figure of thought which makes it technically possible to connect the surplus profit to the agent's state. Thus, it is not only possible, but it is the rule that a profit exceeding the agent's compensation will be submitted to the agent's state". Philip Baker, another eminent international tax expert whose work in referred to, with approval and respect, in many of the judicial precedents from Hon'ble Courts above, does not agree with this approach. In his editorial comments in the International Tax Law Reports, he favoured the other alternative approach to this issue, *i.e.,* single taxpayer approach. He observed that, "One view (to which editor of these law reports subscribes) is that if the dependent agent is being remunerated on a correct arm's length price for the function he performs, risks he assumes, and the assets he employs in his agency, there is no basis for attributing any further profits to the DAPE over and above the arm's length remuneration to the agent". There is thus a cleavage of opinion on the approach to the DAPE profit attribution. Be that as it may, when the matter travelled before Hon'ble High Court, however, these views of the coordinate bench did not find favour with Their Lordships. Rejecting the theory about separate profit attribution for the dependent agency permanent establishment *vis-à-vis* the dependent agent, Their Lordships have, in the judgment reported as *Set Satellite Pte Ltd* v. *CIT* [(2009) 307 ITR 205 (Bom)], observed as follows:

10. From a reading of Article 7(1) of the DTAA it is clear that the profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. The profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment. In para 2 while determining the profits attributable to the permanent establishment the expression used is "estimated on a reasonable basis". The DTAA does not refer to arm's length payment. The principles contained in the matter of income from international transaction on an arm's length price are contained in section 92 of the Income-tax Act. The principles have been clarified by the Finance Act, 2001 as also Finance Act, 2002. From the order of the CIT, which has been accepted it is clear that the Appellant herein has paid to its PE on arm's length principle. It recorded a finding of fact that the Appellant had paid service fees at the rate of 15 per cent of gross ad revenue to its agent, SET India, for procuring advertisements during the period April 1998 to October, 1998. The fact that 15 per cent service fee is an arm's length remuneration is supported by Circular No. 742 which recognizes that the Indian agents of foreign telecasting companies generally retain 15 per cent of the ad revenues as service charges. Effective November 1998, a revised arrangement was entered into between the parties whereby the aforesaid amount was reduced to 12.5 per cent of net ad revenue (*i.e.,* gross ad revenues less agency commission). Simultaneously, the Appellant also entered into an arrangement entitling SET India to enter into agreements, collect and retain all subscription revenues. Considering all these aspects and the fact that the agent has a good profitability record, it held that the Appellant has remunerated the agent on an arm's length basis.

This finding of the Tribunal has not been disputed by the Revenue. The entire contention of the Revenue is that the advertisement revenue pertaining to its own channel and AXN Channel are also taxable in India.

11. We may firstly point out that CIT has dealt with the issue as to why the advertisements received by the Appellant were not liable for being taxed in India based on the CBDT Circular No. 23, dated 23-7-1969 which clearly sets out that where a non-resident's sales to Indian customers are secured through the services of an agent in India, the assessment in India of the income arising out of the transaction will be limited to the amount of profit which is attributable to the agent's services, provided that (*i*) the non-resident principal's business activities in India are wholly channelled through his agent; (*ii*) the contracts to sell are made outside India; and (*iii*) the sales are made on a principal-to-principal basis. The CIT(A) had recorded a specific finding in favour of the Appellant in the affirmative on all three counts. It is in these circumstances that it was held that the advertisement revenue received by the Appellant may be from the customers in India is not liable for tax in India. That CBDT Circulars are binding needs no repetition. If authorities need be cited. We may now refer to the judgment of the Supreme Court in UCO Bank v. CIT [1999] 237 ITR 889. In that judgment the issue was whether Circular of 9-10-1984 was inconsistent or whether there was contradiction in the circular and Section 145 of the Income-tax Act. The Supreme Court observed that :—

"... In fact, the circular clarifies the way in which these amounts are to be treated under the accounting practice followed by the lender. The circular, therefore, cannot be treated as contrary to section 145 of the Income-tax Act or illegal in any form. It is meant for a uniform administration of law by all the income-tax authorities in a specific situation and, therefore, validly issued under section 119 of the Income-tax Act. As such, the circular would be binding on the department." (p. 901)

See also *CIT* v. *Hero Cycles (P.) Ltd.* [1997] 228 ITR 463 (SC). It would thus be clear that the Circular No. 23 would be binding on the Assessing Officer and had to be considered while assessing the tax liability of an assessee.

The Tribunal in its judgment has not considered the effect of the finding recorded by the CIT (Appeals) based on the Circular and which circular was relevant for the purpose of deciding the controversy in issue. This circular read with Article 7(1) of the DTAA would result in holding that the income from advertisement if neither directly nor indirectly attributable to that of the permanent establishment, would not be taxable in India. The Tribunal in fact in para 10 has recorded a finding that Article 7(2) provides that the arm's length price is the criterion for computation of these hypothetical profits. In our opinion the entire rational or reasoning given by the Tribunal has to be set aside. In matters of tax what has to be considered and more so in international transactions if there be a treaty, the provisions of the treaty and if the provisions of the treaty are more advantageous to an assessee, then the construction will have to be given which is advantageous to the assessee. At this stage we may note that on behalf of the assessee learned Counsel has produced an order passed by the Additional CIT (Transfer Pricing-II), Mumbai in the matter of determination of arm's length price with reference to all the transactions reported in Form No. 3CEB filed by the assessee. The assessee is SET India, the depending agent. The order records that the assessee is engaged in the business of providing audio-visual television content and also acts as an advertising agent of Set Satellite Singapore Pvt. Ltd. The assessee distributes these channels to the Indian cable operators and that the assessee has applied the TNM method to determine the arm's length price for its international transaction. It, however, clarified that the order is in respect of reference received for assessment year 2002-03 and not for subsequent assessment years.

12. We may now consider the judgment in *Morgan Stanley & Co. Inc's* case (*supra*). The Appeals dealt with the Double Tax Avoidance Agreement (DTAA) between India and United States. That treaty advocated application of the arm's length principle or provided a mechanism for avoiding double taxation on income. The issue involved, Morgan Stanley and Company (for short, "MSCo.")

and one of the group companies of Morgan Stanley, Morgan Stanley Advantages Services Pvt. Ltd. (for short "MSAS"). An agreement was entered into for providing certain support services to MSCo. MSCo. outsourced some of its activities to MSAS. MSAS was set up to support the main office functions in equity and fixed income research, account reconciliation and providing IT enabled services such as back office operations, data processing and support centre to MSCo. On 5-5-2005 MSCo. filed its advance ruling application . The basic question related to the transaction between the MSCo. and MSAS. The advance ruling was sought on two counts (*i*) whether the applicant was having PE in India under Article 5(1) of the DTAA on account of the services rendered by MSAS under the services agreement dated 14-4-2005 and if so (*ii*) the amount of income attributable to such PE. It was ruled that MSAS should be regarded as constituting a service PE under Article 5(2)(1). On the second question the AAR ruled that the transactional net margin method (TNMM) was the most appropriate method for the determination of the Arm's Length Price (ALP) in respect of the service agreement dated 14-4-2005 and it meets the test of arm's length as prescribed under section 92C of the 1961 Act and no further income was attributable in the hands of MSAS in India. The said ruling of AAR on the question of income attributable to the PE was the subject-matter of challenge by the Department. Insofar as the issue of PE is concerned the Supreme Court was pleased to hold that it agreed with the Ruling of the AAR that stewardship activities would fall under Article 5(2)(1). Dealing with the question of deputation, the Court held that on the facts that there is a service PE under Article 5(2)(1) and as such held that the Department was right in its contention that there exists a PE in India. Considering Article 7 of that treaty the Court observed that what is to be taxed under Article 7 is income of the MNE attributable to the PE in India and what is taxable under Article 7 is profits earned by the MNE. Under the Income-tax Act the taxable unit is the foreign company, though the quantum of income taxable is income attributable to the PE of the said foreign company in India. The Court observed that the important question which arises for determination is whether the AAR is right in its ruling when it says that once the transfer pricing analysis is undertaken there is no further need to attribute profits to a PE. The Court further noted that the computation of income arising from international transactions has to be done keeping in mind the principle of arm's length price. The Court further reiterated that the main point for determination is whether the AAR was right in ruling that as long as MSAS was remunerated for its services at arm's length, there should be no additional profits attributable to the applicant or to MSAS in India. After considering the various methods by which arm's length price can be determined the Court observed as under :—

"As regards determination of profits attributable to a PE in India (MSAS) is concerned on the basis of arm's length principle we have quoted Article 7(2) of the DTAA. According to the AAR where there is an international transaction under which a non-resident compensates a PE at arm's length price, no further profits would be attributable in India. In this connection, the AAR has relied upon Circular No. 23 of 1969 issued by the Central Board of Direct Taxes. This is the key question which arises for determination in these civil appeals."

After discussing the various issues the Court in its conclusion held as under :—

"As regards attribution of further profits to the PE of MSCo. where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE. The situation would be different if the transfer of pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the PE for those functions/risks that have not been considered. The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represent the value of the profit attributable to his service. In this connection, the Department has also to examine whether the PE has obtained services from the multinational enterprise at lower than the arm's length cost."

In our opinion considering the judgment, if the correct arm's length price is applied and paid then nothing further would be left to be taxed in the hands of the Foreign Enterprise.

13. Considering the above principle as may be discerned from the judgment in *DIT (International Taxation)* 292 ITR 416 (*supra*) it would be clear that—

(1) Considering the CBDT Circular No. 742 it would be fair and reasonable that the taxable income is computed at 10 per cent of the gross profits. In the instant case insofar as marketing services are concerned by the arm's length principle what has been paid is more than 10 per cent as can be seen from the order of CIT(A). This was not disputed by the revenue in its Appeal before the ITAT.

(2) The only contention advanced and which found favour with the Tribunal was that the advertisement revenue received by the assessee was also income liable to tax in India. The CIT(A) relied upon Circular No. 23 of 1969. That Circular read with Article 7(1) would result in holding that advertisement revenue received by the appellant are not taxable in India as long as the treaty and the Circular stands.

14. In the light of the above Appeal filed by the Appellant herein is allowed and the order of the ITAT is set aside. Merely because tax on income was paid for some assessment years would not stop the assessee from contending that its income is not liable to tax. The order of CIT is restored except to the extent that it has said that it cannot interfere because the Appellant had paid the tax. That part is set aside.

13. In the light of Hon'ble jurisdictional High Court's judgment in the case of *Set Satellite* (*supra*), so far as profit attribution of a DAPE is concerned, the legal position is that as long as an agent is paid an arm's length remuneration for the services rendered, nothing survives for taxation in the hands of the dependent agency permanent establishment. Viewed thus, the existence of a dependent agency permanent establishment is wholly tax neutral.

14. An interesting offshoot of this legal position is that, as on now, existence of dependent agency permanent establishment is of no tax consequence. Whether there is a DAPE or not, the taxation is only of the agent's remuneration which is taxed anyway *de hors* the existence of a DAPE. Such an approach may sound somewhat incongruous from an academic point of view inasmuch as what was considered to be a threshold limit for source taxation ceases to have any relevance for source taxation, and as, on a conceptual note, PE, whether a fixed base PE, DAPE or any other type of PE, provides for threshold limits to trigger taxation in the source state, but then if as a result of a DAPE, no additional profits, other than agent's remuneration in the source country - which is taxable in the source state anyway *de hors* the existence of PE, become taxable in the source state, the very approach to the DAPE profit attribution may seem incompatible with the underlying scheme of taxation of cross border business profits under the tax treaties, but that cannot come in the way of the binding force of judicial precedents from Hon'ble Courts above. The SLP against this decision is said to pending before Hon'ble Supreme Court but that does not, in any way, dilute binding nature of this binding judicial precedent. In all fairness to the learned Departmental Representative, however, we may take refer to observations in another coordinate bench decision in the case of *Delmas France* v. *ADIT* [(2012) 17 taxmann.com 91 (Mum)], to the effect, "Similarly, before accepting DAPE profit neutrality theory, we will still have to deal with learned Departmental Representative's plea that as per the law laid down by Hon'ble Supreme Court in the case of *DIT* v. *Morgan Stanley & Co Inc*. [2007] 162 Taxman 165 (SC), the arm's length remuneration paid to the PE must take into account 'all the risks of the foreign enterprise as assumed by the PE', but then in an agency PE situation, unlike a service PE situation which was the case before the Hon'ble Supreme Court, a DAPE assumes the entrepreneurship risk in respect of which agent can never be compensated because even as DAPE

inherently assumes the entrepreneurship risk, an agent cannot assume that entrepreneurship risk. To this extent, there may clearly be a subtle line of demarcation between the dependent agent and the dependent agency permanent establishment. The tax neutrality theory, on account of existence of DAPE, may not indeed be wholly unqualified- at least on a conceptual note". However, in the present case, successive coordinate benches in assessee's own case for different assessment years have upheld the contentions of the assessee and held that once an arm's length remuneration is paid to the agent, nothing further survives for taxation in the hands of the DAPE which, at best, can be brought to tax in the hands of the assessee. In any event, whatever be the academic justification for an alternative approach to the issue, the law laid down by Hon'ble Courts above is to be deeply respected and loyally followed. Respectfully following the law laid down by Hon'ble Courts above and consistent with the stand of the coordinate bench decisions, we uphold the plea of the assessee for the present years as well. We, therefore, hold that even if there is held to be a dependent agency permanent establishment on the facts of this case, as at best the case of the Assessing Officer is, it is wholly tax neutral inasmuch as the Indian agents have been paid arm's length remuneration, and nothing further can, therefore, be taxed in the hands of the assessee.

15. It has not been the case of the revenue authorities at any stage that the remuneration paid to the Indian agent is not an arm's length remuneration for the services rendered by the agents concerned. There is no material whatsoever before us to show, or even indicate, that the remuneration paid to the agents is not arm's length remuneration. Under these circumstances, we see no reasons to remit the matter to the file of the Assessing Officer, for fresh round of ALP ascertainment proceedings, as prayed by the learned Departmental Representative. The plea of the assessee, as raised in the cross objections, therefore, merits acceptance. Whether there is a DAPE or not, there are no additional profits to be brought to tax as a result of the existence of the DAPE, and, therefore, the question about existence of a DAPE on the facts of this case is wholly academic.

16. Once we hold, as we have held above, that in the light of the present legal position, existence of dependent agency permanent establishment in wholly tax neutral, unless it is shown that the agent has not been paid an arm's length remuneration, and when it is not the case of the Assessing Officer, as we have noted earlier, that the agents have not been paid an arm's length remuneration, the question regarding existence of dependent agency permanent establishment, *i.e.* under article 5(4), is a wholly academic question. We humbly bow to the law laid down by Hon'ble Courts above. The limited argument before us is that here is a case of dependent agency permanent establishment, and existence of a DAPE, in the light of these discussions, is wholly tax neutral- particularly in the light of the legal position regarding profit attribution to the DAPE. We need not, therefore, deal with the question about existence of a DAPE, as it is an academic exercise with no tax effect involved. The related grounds of appeal are thus infructuous.

17. In view of the above position, the issue raised in the departmental appeals is wholly academic and does not call for any adjudication at this stage.

18. Learned counsel for the assessee points out that he has raised an additional ground of cross objection in CO No. 64/Mum/2008, and he would like to keep that issue alive, even though, in the present situation, it may not have any impact on outcome of the appeal. This additional ground of cross objection is with respect to the question whether an assessment on a non-existent company, which has already merged in some other company, is valid.

19. Learned Departmental Representative, does not oppose this prayer.

20. The issue raised in the additional ground of cross objection being purely legal, it really needs to be admitted. We, therefore, admit the additional ground of cross objection but treat it, in the light of the above discussions, as not pressed.

21. In the result, all the four appeals are dismissed as infructuous and all the four cross objections are allowed

9. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench in assessee's own case.

10. Respectfully following the esteemed views of the coordinate bench, we dismiss the appeals filed by the revenue as infructuous and allow the cross objections, as indeed petitions under rule 27, in the terms indicated above.

11. In the result, the appeals are dismissed as infructuous and the cross objection filed by the assessee is allowed in the terms indicated above. Pronounced in the open court today on the 30th day of July, 2021.

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