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

BEFORE,
SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

I.T.A No.7211/Del/2017
(ASSESSMENT YEAR 2013-14)

Dy. CIT, Circle-3(1)(1), International Taxation, New Delhi.	Vs.	M/s Western Union Financial Services Inc., C/o KPMG Building No.10, 8th Floor, Tower-B, DLF Cyber City, Phase-II, Gurgaon-122 002 PAN–AAACW 1936E
(Appellant)		**(Respondent)**

Appellant By	**Sh. Tarandeep Singh, Adv.**
Respondent by	**Sh. Sohail Malik, Sr.DR**
Date of Hearing	**01.07.2021**
Date of Pronouncement	**20.09.2021**

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal has been preferred by the Department against order dated 22.09.2017 passed by the Learned Commissioner of Income Tax (Appeals)-43, New Delhi {CIT(A)} for Assessment Year 2013-14.

2.0 The brief facts of the case are that the assessee is a non-resident company registered in USA. It is engaged in the business of rendering money transfer services. The business of the assessee includes transfer of monies across international borders. For the purpose of carrying out its business in India, the assessee had entered into agreements appointing agents in India. There are four types of agents (i) Department of Posts (ii) commercial banks (iii) non-banking financial companies and (iv) tour operators.

2.1 The return of income for the year under consideration was filed declaring total income at Rs.1,34,90,540/-. During the course of assessment proceedings, the Assessing Officer reached a conclusion that the assessee company had a Permanent Establishment (PE) in India under Article 5 of India US-Double Taxation Avoidance Agreement (DTAA) in the form of fixed placed PE due to usage of software developed and owned by the assessee in India. The Assessing Officer also noted that there was existence of agency PE on account of agents working in India. Accordingly, the Assessing Officer held that commission income earned by the assessee from its operations in India was taxable in India. The

Assessing Officer went on to attribute 50% of the profits earned by the assessee on funds remitted to India.

2.2 Aggrieved, the assessee approached the Ld. First Appellate Authority, who was pleased to allow the appeal of the assessee by following the order passed by the Co-ordinate Bench of this Tribunal in assessee's own case for Assessment Years 2001-02 to 2009-10, wherein it was held that assessee did not have any Permanent Establishment in India in terms of Article 5 of India US-DTAA. The relevant finding of the Ld. CIT(A) are being reproduced herein under:-

> *"4.1 The appellant, a foreign company incorporated in USA is engaged in the business of rendering money transfer services from abroad. The appellant is a tax resident of USA. The appellant has appointed representatives in India who provide services of making payments to individual beneficiaries in India, being remittances made through the appellant from remitters abroad and destined in favour of individual beneficiaries residing in India. "Such representatives are entities such as the Indian Post Offices, banks, travel agents etc. The assessee has been claiming that it receives commission from various customers for the money transfer business in the foreign country which is the income of the assessee, and the assessee also pays commission to its agents in India for delivering money to various customers. The assessee claims to not have any PE or any specific business connection in India except the Indian agents through which money is delivered to various customers in India. The AO has treated the assessee as having a PE in India for its business activities, and as such commission earned by the assessee even in the foreign country has been held by the AO to be taxable in India.*

4.2 The assessing officers consistently over various years have been holding that the appellant has a fixed place PE as per article 5(1) of India USDTAA, and dependent agent PE as per article 5(4) of the India US DTAA. The AOs *have also been holding that the appellant has a business connection in India within the meaning of section 9(1) of the Income Tax Act, 1961, and therefore, the income arising or accruing on account of its business connection in India has been held liable to tax under the I.T.Act, 1961. The AOs have been applying global net profit rate of the appellant to determine the profit earned by the appellant on account of commission earned by it during the relevant financial year for the funds remitted to India. 50% of such profit is being attributed to Indian operations.*

4.3 My predecessor Id. CIT (Appeals) have been holding that there exists no PE in India and hence no income is taxable in India. In coming to this conclusion the order of Hon'ble ITAT Delhi in AY 2001-02 has been followed.

4.4 In the subject year A Y 2013-14, the order u/s 143(3) was passed on26.4.2016, wherein on the basis of 50% of profits attributable to India on a basis as explained in para 4.2 above, a sum of Rs. 5,09,61,837/- was held to be taxable in India. This order of AO is in challenge before me.

4.5 The Ld. AR submitted that identical facts are involved in the appellant's own case for A. Yr. 2001-02 to 2006-07 and A.Yr. 2008-09. The Hon'ble lTAT after analyzing facts in detail has held in its order for AY 2001-02dated 10/03/2006 in ITA No. 4889/Delhi/2004 (104 ITD 341] that –

(i) the appellant had a business connection in India within the meaning of section 9(1) of the Act.

(ii) the appellant had neither the fixed place PE nor the agency PE in India and in absence of any PE in India the profits, if any, attributable to India operations could not be assessed as business profits under Article 7 of the treaty.

4.6 Following the above referred order of the Ld. ITAT, my Ld. Predecessor in Appeal No. 122, 123/08-09, 345/06-07 and 121/07-08 for the year 2002-03 to A.Yr. 2005-06 has allowed the appeals in favor of the appellant vide his order dated 01/01/2010. Similarly, my Ld. Predecessor in Appeal No. 98/2010-11 for the A.Yr. 2006-07 and in appeal No. 153/10-11 for A.Yr. 2008-09 has decided in favour of the appellant vide his order dated 24/02/2012 and29/ 07/2011 respectively. Further, for

A.Yr. 2009-10, the issue has been decided in favour of the appellant by my Ld. Predecessor vide order datedl4/08/2012. Further, for A.Yr. 2011-12, the issue has been decided in favour of the appellant by my Ld. Predecessor vide order dated 15.05.2015 Appeal No.207/2014-15. Hon'ble ITAT has also decided in favor of the appellant for A. Yr.2002-03, 2003-04 & 2005-06 vide order dated 6.01.2012 and for AY 2004-05and 2009-10 vide order dated 10.12.2015.
It is seen that the issues stand squarely decided as under

4.7 It is seen that the issues stand squarely decided as under:

- *Ground No 1 and ground No 3 in favour of the assessee holding that no income is arising or accruing in India to the foreign company as there is no permanent establishment in India.*

- *Ground No 2 is against the assessee as it has been held by the lTAT, that the assessee has a business connection in India. Ground of appeal No. 4 & 5 are regarding attribution of profit of Indian PE. Once it is held that the appellant did not have PE in India, no business income can be brought to tax in India under Article 7 of the treaty. Hence, this ground of appeal has become infructuous and hence not adjudicated.*

- *Ground of appeal No. 6 is regarding charging of interest u/s234B. As a result of the findings on Ground No 1, 2 and 3 since the assessee is not held income tax on the income from business connection in India and the issue of interest would not arise, this ground also becomes infructous. ”*

2.3 Aggrieved, the Department has now approached this Tribunal challenging the order of the Ld. CIT(A) by raising the following grounds of appeal:

> *“1. Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred in holding that the income earned by the assessee from the business of money transfer services in respect of remittances made to individuals in India is not liable to tax in India.*

2. Whether on the facts and in the circumstances of the case, the ld. CIT (A) has erred in holding that the assessee does not have a Permanent Establishment ('PE') in India and, therefore, the profits attributable to operations in India are not liable to be taxed in India as business profits in terms of Article 7 of the India-USA DTAA.

2.1 Whether the Ld. CIT (A) has erred in holding that the software applications installed on the machines in the premises of the agents and dedicated to the business of the money-transfer, do not constitute assessee's Permanent Establishment in India.

2.2 Whether the Ld. CIT (A) has erred in holding that the representatives of the assessee in India do not constitute its Dependent Agent PE in India.

2.3 Whether the Ld. CIT (A) has erred in not attributing any profits against the business activities carried by it through it PE in India.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (Appeals) has erred in holding that the assessee is not liable to pay interest u/s 234B of the Act, completely overlooking the observations of the Hon'ble High Court in the case of M/s Mitsubishi [330 ITR 578, Del] that the role of the assessee/payee/deductee in short deduction or non-deduction of tax needs to be ascertained before claim regarding non-liability to interest u/s 234B of the Act is accepted."

3.0 The Ld. Sr. DR placed heavily reliance on the assessment order.

4.0 The Ld. Authorized Representative (AR) placed reliance on the orders of the Tribunal in assessee's own case for Assessment Year 2001-02 to 2010-11 and submitted that this issue stood covered against the Department and in favour of the assessee by

the aforesaid orders. Our attention was drawn to the copies of the orders placed in the Paper Book filed by the assessee in this regard.

5.0 We have carefully considered the facts of the case in light of the orders of the Co-ordinate Benches of this Tribunal for Assessment Years 2001-02 to 2010-11. In ITA No.4889/Del/2004, for Assessment Year 2001-02, the Co-ordinate Bench of this Tribunal had considered this issue at length and had reached the conclusion that though the assessee had a business connection in India, it had neither fixed placed PE nor agency PE in India and in absence of any PE in India the profits, if any, attributable to India operations could not be assessed as business profits under Article 7 of the India-US DTAA. It was also held that the agents engaged by the assessee were independent agents under Article-5(4) of the India US-DTAA and they did not have the necessary authority to conclude the contracts of the assessee and, on that premise, it was held that there is no agency PE of the assessee in India. Under similar circumstances, the Co-ordinate Bench of the Tribunal held that though the assessee had business connection, it did not have any fixed placed PE nor agency placed PE in India, and, in the

absence of any such PE in India, the profits, if any, attributable to India operations could not be assessed as business profits under Article-7 of the India US DTAA. The relevant paragraphs of the order of the ITAT are being reproduced herein under for a ready reference:-

> *"(c) Is the software "VOYAGER" the PE of the assessee?*
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> *26. The department has made out a case that the software, which affords access to the agents to the assessee's mainframe, computers in USA for the purpose of finding out the matching of the MTCN numbers, has been installed in the premises of the agents and hence taken together with the premises constitutes the PE. The premises of the agents are either owned or hired by them. There is no evidence to show that the assessee can as a matter of right enter and make use of the premises for the purpose of its business. The software is the property of the assessee and it has not parted with its copyright therein in favour of the agents. The agents have only been allowed the use of the software in order to gain access to the mainframe computers in the USA. Mere use of the software for the purpose from the premises of the agents cannot in our opinion lead to the decision that the premises-cum-software will be the PE of the assessee in India. Under article 5.2(j) and installation may amount to a PE provided it is used for the exploration of natural resources. Therefore, even if the software is to be considered as an installation, since it is not used for exploration or exploitation of natural resources it cannot per se be treated as a PE.*
>
> *…….*
> *Agency PE:*
>
> *28. The stand of the income-tax department is that the agents are not "independent agents" under article 5.5 of the treaty but are "dependent agents" under article 5.4(a) of the treaty.*

29. (A) Are the agents "independent agents"?

30. We shall first address the question whether the agents are "independent agents" under article 5.4. Three conditions are required to be satisfied in order that an agent may be said to be an independent agent: (1) he should be acting in the ordinary course of his business; (2) his activities should not be devoted wholly or almost wholly on behalf of the foreign enterprise for whom he is acting as agent and (3) the transactions between the foreign enterprise and the agent should be at arm's length.

31. The argument of the learned CIT (DR) was that the agents were not carrying on the activity in the ordinary course of their business. What is "business" has been explained in various decisions. In the leading case of Narain Swadeshi Weaving Mills v. CEPT [1954] 26 ITR 772 the Supreme Court explained that business connotes some real, substantive and systematic course of' activity or conduct with a set purpose. In Liquidators of Pursa Ltd. v. CIT [1954] 25 ITR 265 the Supreme Court held that underlying the expression "business" is the fundamental idea of continuous exercise of an activity. In Barendra Prasad Ray v. YTO [1981] 129 ITR 295 the Supreme Court again held that the word is of wide import and means an activity carried on continuously and systematically by a person by the application of his labour and skill with a view to earning income. Therefore any activity which is being systematically and continuously carried on with the object of earning profits is a business activity. That way, the activity engaged in by the agents of paying the monies to the beneficiaries or claimants in India, after satisfying them- selves about their identity and after accessing the MTCN number to verify the genuineness of the claim, amounts to carrying on of the business of money transfer. The agreement of agency is initially for a period of 5 years and to be renewed for successive periods of one year each. The agents could appoint sub-agents for carrying out the activity. They have to maintain records and measure up to the standards set by the assessee. They have received training from the assessee in the use of the software and in

the communication systems. All these are activities which are carried on systematically and continuously with a set purpose and hence amount to business.

32. But then Mr. Rajnish Kumar contended that this was not an activity in the "ordinary course of the business" of the agents, as their ordinary business is in local money transfer in the case of the Department of Posts and banks and not in trans-border money transfer and that in the case of nonbanking financial companies and tour operators appointed as agents money transfer business, whether locally or internationally, is not in their ordinary course of business. In the case of the Department of Posts, it is well-known that they accept money orders for transfer of funds within India. Engaging themselves in the same type of business with international ramifications is just an extension of their business. It cannot be said that it is not in the ordinary course of their business. The same is the case with commercial banks. Though strictly speaking it may not be part of their banking business, as the expression is defined in the Banking Regulation Act, 1949 and as contended by Mr. Rajnish Kumar, still it is nobody's case that it is not a lawful activity which they have embarked upon. In fact, they have obtained the approval for such activity from the RBI under section 3(c) of the FEMA. The approval granted by the RBI to Bank of Punjab Ltd. has been filed in the paper book. Though the approval is only for the purpose of FEMA, as rightly pointed out by the learned CIT(DR), the activity engaged in would still, in our opinion, amount to a business, though not banking business, because it has been carried on systematically and continuously with the objective of earning commission. Having regard to the variegated services provided by the banks these days, which cannot be ignored, all with a business motive, it seems to us too technical an objection to say that the activity carried on by the assessee's agents in India is not a business activity in the ordinary course of their business. Non-banking financial companies deal with money belonging to others and the activity of paying out monies on behalf of the Western Union Financial Services Inc., must be viewed as part of their business activity. In the case of tour operators, acting

as agents of an established firm engaged in the international money transfer business may be conducive to their business. A broad view of the matter has to be taken in these matters. We are therefore satisfied that the objection of the Department cannot be accepted.

33. The second question to be considered is whether the activities of the agent are wholly or almost wholly devoted to the assessee. So far as the Department of Posts and commercial banks are concerned, the objection of the Department cannot be countenanced at all. The Department of Posts, as noted earlier, functions under the aegis of the concerned Ministry of the Government of India. Its main activity is to serve the public in India in the matter of sending/receiving letters, parcels, packets etc. within or to/from outside India, money orders within India, maintaining small savings account in several forms such as savings certificates, time-deposit accounts, postal life insurance etc. They have a vast network throughout the country. They are a service organization for the benefit of the general public and it would be a misnomer to say that their activities are wholly or almost wholly devoted to the Western Union Financial Services Inc., of the USA. The income-tax authorities have not brought out any data, as they ought to have, to show that the activities undertaken by the Department of Posts on behalf of the assessee herein constitute such a large part of their activities that it can be said that the Department of Posts are dependent on the assessee for their revenues. The position is the same in the case of commercial banks, non-banking financial companies and tour operators appointed as the agents of the assessee. There is no evidence to show that the extent of their activities for the assessee, compared to all their activities, is so large that it can be said that they are dependent on the assessee for their earnings or revenues. The agents in the present case have not been shown to be economically dependent on the assessee. The income-tax authorities have stated that the agents have not acted in that capacity for any other entity engaged in the money transfer business and therefore their activities are wholly or almost wholly devoted to the assessee. We do not see how this conclusion follows. The agents, as we have seen earlier, have their own businesses or activities amounting to business. They are not carrying on the activity for the assessee, as agents, in exclusion of their other businesses or activities. In this situation, just because they are not acting as agents

for any other company carrying on money transfer business it cannot be said that their activities are wholly or almost wholly devoted to the assessee.

34. The learned CIT(DR) has drawn our attention to paragraphs 36 to 38.8 of the revised commentary on the OECD model and has relied on the same in support of his argument that the agents in the present case are not independent agents within the meaning of article 5.5 of the DTAA. The commentary discusses what in general are the tests to be applied to ascertain whether the agent is an independent agent or not. The extent of legal dependence or control, the undertaking of risks, the fact whether the agent is subject to the control of the principal for the manner in which the work is to be carried out etc. have been discussed. Much of the discussion loses relevance to the controversy before us where we have to apply article 5.5 which requires that the activities of the agent must be wholly or almost wholly devoted to the foreign enterprise. This is the test laid down in the article. Even on this aspect, paragraph 38.6 of the revised commentary has this to say:

> *"Another factor to be considered in determining independent status is the number of principals represented by the agent. Independent status is less likely if the activities of the agent are performed wholly or almost wholly on behalf of only one enterprise over the lifetime of the business or a long period of time. However, this fact is not by itself determinative. All the facts and circumstances must be taken into account to determine whether the agent's activities constitute an autonomous business conducted by him in which he bears risk and receives reward through the use of his entrepreneurial skills and knowledge. Where an agent acts for a number of principals in the ordinary course of his business and none of these is predominant in terms of the business carried on by the agent legal dependence may exist if the principals act in concert to control the acts of the agent in the course of his business on their behalf."*

What we thus understand from the language used in article 5.5 is that the agent's activities for the foreign enterprise must constitute a large chunk of all his activities taken together so that it can be said that he is economically dependent largely on the activity. Nothing has been brought on record to suggest this. Even if you take the risk factor, the "to send" specimen form which was filed before us in the course of the hearing while explaining the transaction makes it clear on the reverse that the assessee will be liable to refund the principal amount of a money transfer (at the applicable rate of exchange at the time the refund is made) upon the written request of the sender if payment to the recipient is not made within 30 days excluding Sundays and holidays and that the same will be the case of the fees charged. It goes on to say that the assessee or his agent will in no case be liable for damages for the delay, non-payment or underpayment of the money transfer. The agent is not therefore liable to any risk on this account.

35. We now proceed to consider the question whether the transactions between the agents and the assessee are under arm's length. The agreements filed before us show that the "base compensation" is 30 per cent in the case of the Department of Posts and 25 per cent in the case of others. It may be reduced under clause 6.2 of the agreement with the Department of Posts if the assessee were to assume responsibility for the advertising and promotion of the services or to establish a customer service centre to handle customer queries. The reduction shall not exceed 10 per cent of the gross revenues earned by the agent concerned from the money transfer business done by it in the relevant year. In the case of banks appointed as agents, the amount of reduction is left to the determination of the assessee. There is no material to show that the rates of compensation are higher in other cases so as to indicate that the agents were discriminated against. The higher rate of compensation in the case of the Department of Posts is probably because its reach is much wider compared to the commercial banks, NBFCs or tour operators. The terms of appointment of sub-agents are

uniform in all cases. Thus there seems to be no basis for the charge that the compensation paid is not adequate for the services rendered by the agents. There is no finding contrary to the claim made by the assessee that the rates of compensation are uniform throughout the world. In these circumstances, there is no merit in the claim that the transactions between the assessee and the agents are not under arm's length.

36. The result is that (1) the agents are acting in the ordinary course of their business; (2) their activities are not devoted wholly or almost wholly to the foreign enterprise and (3) the transactions are under arm's length. Therefore the agents are independent agents under article 5.5 of the treaty.

37. (B) Are the agents "dependent agents"?

38. It is now well-settled that merely because the agents are not "independent agents" it does not automatically follow that they are "dependent agents" under the DTAA and that the question has to further examined under article 5.4 of the DTAA. In other words, even if the agent is shown to be not an independent agent, it has to be further shown that he is a dependent agent within article 5.4 and that it must be shown that he has and habitually exercises an authority in India to conclude contracts in the name of the foreign enterprise. In TVM Ltd. v. CIT [1999] 237 TTR 230, a decision rendered by the AAR, it has been accepted that when an agent failed to come up to the standard of independence referred to in article 5.5, the issue regarding PE is not closed but has to be resolved in terms of article 5.4. It was further held that the presence of the words "unless his activities are limited to the purchase of goods or merchandise for the enterprise" in clauses (i) and (ii) may suggest a narrower interpretation restricting the article to agents involved in such activity and as saying that mere purchase or sporadic sale of goods through an agent will not be sufficient to merit such an agent being considered a PE, but that this is not the correct view as it would ignore the generality of the preceding words of the paragraph

merely because exceptions are carved out in the latter part of the aforesaid clauses only in respect of a particular category of agents (viz., those buying or selling goods). It was held that paragraph 4 of the article "is applicable in all cases where the enterprise in a Contracting State has an agent in the other who does not have an independent status. Such a person will be deemed to be a permanent establishment only if he has, and exercises, the authority to conclude contracts in the name of the enterprise. But even the existence of such authority will not make him a permanent establishment (i) if he is a mere agent for purchase of goods or merchandise; or (ii) being an agent for sale of goods or merchandise is allowed to habitually to maintain a stock of the goods of the enterprise and effect sales there from. The conclusion seems inevitable that even a non-independent agent can be deemed to be a permanent establishment only if he can act independently in the matter of concluding contracts on behalf of the principal, on his own, freely and without control from the latter..." (pages 241-42 of the report). It is therefore necessary to examine whether the agents in the present case have authority, or habitually exercise authority to conclude contracts for the assessee. Here also, the observations of the AAR in the above case are worth reproducing: At page 242-43 it was noted that paragraph 4 of the article uses two expressions: "has" and "habitually exercises" the authority to conclude contracts on behalf of the foreign enterprise. It was held that "While the expression "has" may have reference to the legal existence of such authority on the terms of the contract between the principal and agent, the expression "habitually exercises" has certainly reference to a systematic course of conduct on the part of the agent If, despite the specific provision of the soliciting agreement, it is found, as a matter of fact that TVI is habitually concluding contracts on behalf of TVM without any protest or dissent, perhaps it could be presumed either that the relevant provisions of the agency contract are a dead letter ignored by the parties or that the principal has agreed implicity to TVI exercising such powers notwithstanding the terms of the "contract". The AAR has further observed that this view is reinforced

by the Commentary on the OECD Model of Double Tax Conventions as well as the views of text book writers like Klaus Vogel and Baker.

39. In line with the above, we have to examine the facts of the case to find out first whether the agents have the authority to conclude contracts (on behalf of the assessee). There is no express authority given to them in the agreement and our attention was not drawn to any clause therein to that effect. All that the income-tax authorities have stated is that (a) that the agents carry out in India the commitment given by the assessee to the remitter of the money abroad and (b) that the agents have the power to appoint sub-agents to do their work. From these facts, taken singly or together, it cannot be inferred that the agents either have the authority to conclude the contracts or have habitually exercise the authority without any protest from the assessee. In paragraph 33 of the commentary referred to in the preceding paragraph, under the heading "Authority to conclude contracts", it has been stated: "the authority to conclude contracts must cover contracts relating to operations which constitute the business proper of the enterprise. It would be irrelevant, for instance, if the person had authority to engage employees for the enterprise to assist that person's activity...". This paragraph has been quoted approvingly by the AAR in TVM Ltd.'s case (supra) (page 244 of the report). Thus the fact that the agents (in the present case) have the authority to appoint sub-agents does not mean that they (agents) have the authority to conclude contracts. The terms of appointment of sub-agents given at page 22 of the paper book as attachment to the contract of agency with Karnataka Bank Ltd. lists the duties and responsibilities of the sub-agents regarding money transfer service requirements, advertising and promotion, exclusivity, locations and hours of operations, payment for the service, delivery standards, maintenance of records, security and confidentiality, accounting, use of software, indemnity, conditions of termination etc. Nowhere in the sub- agency agreement has any authority to conclude contracts has been given to them. In fact, when the agents themselves have no such authority under their agreement, they

cannot delegate the same to their sub-agents (delegatus non potestdelegare).

40. There is also no material to hold that the agents have "habitually" exercised the authority to conclude contracts. As already noted, the authority must be to conclude contracts in the conduct of the business proper of the foreign enterprise. The fact that the agents conclude in India the commitment of the assessee made abroad cannot be considered as an authority to conclude con- tracts. The contract is between the remitter abroad and the assessee. It is entered into outside India. The agents are not party thereto. The agents merely carry out the concluding step in the arrangement embodied in the contract. In other words, the assessee undertakes outside India to transfer the money to India. It is only the payment part of the undertaking that is executed by the agents in India. The contract is already concluded outside India. The agent has no say over the contract. He has to merely execute the payment part, after satisfying himself as to the genuineness of the transaction and the identity of the beneficiary in India. By executing the last leg of the contract which has already been concluded (outside India) he is not concluding the contract for the assessee, much less habitually. The appointment of sub-agents is merely to facilitate the work of the agent. That apart, what is considered to be a "duty" cannot be considered to be an "authority". By making payment to the beneficiary, the agent in India is only performing his duty under the agreement of agency, for which he is remunerated; he is not exercising any "authority", certainly not an authority to conclude contracts on behalf of the assessee. The words "duty" and "authority" are incompatible with each other. The dictionary meaning of the word "duty" is "assignment/burden/commitment that one is obliged to do by law or by calling of one's business". It connotes an obligation, which a person is bound to perform. Per contra, "authority" in law belongs to the province of power (Page 124 of K.J. Aiyar's Judicial Dictionary, 13th edition, Butterworths). According to Salmond (Jurisprudence, 10th ed., page 243), "the ability conferred upon a person by the law to alter, by his own will directed to that

end, the rights, duties, liabilities or other legal relations, either of himself or of other persons must be present ab extra to make a person an 'authority"'. Judged by these tests, the fact that the agents in India pay out the money to the beneficiaries or claimants, which they are bound to under the agreement with the assessee for which they are remunerated does not appear to us to be a case of exercise of any authority. Thus, the agents do not habitually exercise the authority to conclude the contracts on behalf of the assessee.

41. For the above reasons, we are of the view that there is no agency PE of the assessee in India. In the absence of any PE in India, it follows that the profits, if any, attributable to the Indian operations cannot be assessed as business profits under article 7 of the treaty."

5.1 The conclusions reached by this Tribunal for Assessment Year 2001-02 have thereafter been followed by the other Co-ordinate Benches of this Tribunal in Assessment Years 2002-03, 2003-04, 2004-05, 2005-06, 2007-08, 2008-09, 2009-10 and 2010- 11. Facts being similar for all the years involved in this matter, we find it difficult to reach a different conclusion and we are of the opinion that the consistent view taken by the Tribunal for all the earlier assessment orders cannot be disturbed without any comparable reason. We, therefore, hold that findings of the Ld. CIT(A) cannot be interfered with. The grounds raised by the Department are dismissed.

6.0 In the final result, the appeal of the Department stands dismissed.

Order pronounced on 20th September, 2021.

Sd/-	**Sd/-**
(N. K. BILLAIYA)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 20/09/2021
PK/Ps
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT DEHRADUN