

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

**BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No.1472/Del/2012  
Assessment Year: 2001-02

M/s. Parpool Ltd., C/o- MGB Metro Group Buying HK Ltd. - India Liaison Office, 40, Okhla Industrial Estate, Phase-III, New Delhi	<b>Vs.</b>	ADIT, International Taxation, Circle -1(2), New Delhi
<b>PAN :AAECM3289J</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

**And**

ITA Nos.4911/Del/2010 & 1473/Del/2012  
Assessment Years: 2007-08 & 2008-09

M/s. MGB Metro Group Buying HK Ltd., India Liaison Officer, 40, Okhla Industrial Estate, Phase-III, New Delhi	<b>Vs.</b>	DIT, Circle-3(1), International Taxation, Drum Shape Building, New Delhi
<b>PAN :AAECM3289J</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	S/sh. Ashwani Taneja & Shantanu Jain, Adv.
Department by	Sh. Surender Pal, Sr.DR (Intl. Taxation)

Date of hearing	16.04.2018
Date of pronouncement	31.05.2018

**ORDER****PER O.P. KANT, A.M.:**

Out of the aforesaid captioned three appeals, two appeals, i.e., ITA Nos. 1472/Del/2012 and 1473/Del/2012 are directed against combined order dated 01/02/2011 of the Ld. Commissioner of Income-tax (Appeals), New Delhi [in short 'the Ld. CIT(A)'] for assessment years 2001-02 and 2008-09 respectively. The third appeal, i.e., ITA No. 4911/Del/2010 is directed against order dated 30/09/2010 passed by the Deputy Commissioner of Income-tax, Circle-3(1), International Taxation, New Delhi (in short 'the Assessing Officer') for assessment year 2007-08 in pursuance to the direction dated 23/09/2010 of the Ld. Dispute Resolution Panel (DRP). The assessee in all the three appeals remained the same, although it has undergone change in name many times. Since the facts and circumstances and issue-in-dispute in all these appeals are identical, same were heard together and disposed of by way of this consolidated order for convenience.

**2.** The grounds of appeal raised in ITA No. 1472/Del/2012 and 1473/Del/2012 are identical except change of amounts or rate of profit attribution. The grounds raised in ITA No. 1472/Del/2014 for assessment year 2001-02 are reproduced as under:

- 1. On the facts and in the circumstances of the case and in law, the Ld Commissioner of Income Tax (Appeals) - XXIX, New Delhi ("CIT(A)") has erred in confirming the assessment order holding that the appellant has a 'business connection' in India under section 9(1 )(i) of the Act in respect of activities of*

*its Liaison Office (“LO”) in connection with purchase of goods in India for export, without appreciating that:*

- (i) The activities of the LO in India are in accordance with the permission granted by RBI and no income accrues or arises or is deemed to accrue or arise to the appellant from or through activities of its LO in India, under section 5 or section 9 of the Act;*
- (ii) LO is engaged in only incidental and auxiliary activities (such as collecting and supply of India market product information, flow of information from suppliers etc) for the head office;*
- (iii) LO of the appellant only facilitates the negotiation between the suppliers/ vendors in India and head office or Metro group sales entities distribution companies in certain cases and is not itself concluding the purchase contracts, as finalization of samples and pricing is done by the head office/ buyer.*

*2.1 Without prejudice to the above on the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in confirming the assessment order holding that the purchase exemption as per Explanation 1(b) to section 9(1X0) of the Act, which expressly provides that no income shall be deemed to accrue or arise in India through purchase operations in India for export, is not allowable in the appellants case.*

*2.2 On the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in confirming the allegations of the Ld AO in the assessment order that purchase exemption is not allowable to the appellant since substantial activities are conducted in India and ignoring various judicial precedents holding that activities similar to the activities carried out by LO form part of ‘purchase operations’ and hence exemption under section 9( 1 Xi) of the Act cannot be denied to the appellant.*

3. *Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in confirming the action of the Ld AO in the assessment order estimating income at Rs.54,87,120/- being 25% of profit, due to alleged business connection in India and needs to be reduced considering the activities of LO in India and the activities of Head Office*
  4. *On facts and in the circumstances of the case and in law, the Ld AO has erred in levying and the Ld CIT(A) has erred in not adjudicating and deleting levy of interest under section 234B of the Act which is covered in favour of the appellant by the judgment of the Hon'ble jurisdictional Delhi High Court in the case of DIT Vs Jacobs Civil Incorporated, Mitsubishi Corporation and Ors 330 ITR 578 (Del) and DIT Vs Ericsson AB, Ericsson Radio System AB, Metapath Software International Ltd 246 CTR 422 (Del).*
  - 5 *The appellant prays for leave to add, alter, rescind from or withdraw any of the above grounds of appeal at or before the time of hearing of the appeal.*
- 3.** The grounds raised in ITA No. 4911/Del/2010 are also being more or less similar; we are not reproducing the same.
- 4.** The briefly stated facts of the case as culled out from the order of the lower authorities as well as submission of the Ld. counsel of the assessee before us are that the assessee M/s MGB Metro Group Buying HK Ltd. (in short 'MGB HK'), is a foreign company, incorporated in Hong Kong and is a wholly-owned subsidiary of Metro AG, Germany (in short 'Metro AG'). It is claimed by the assessee that it was engaged in the business of procuring various goods and materials from various countries including India and selling the same to Metro Group Distribution Companies, who further sale those goods to retail customer

through its sales outlets across the world. The Metro Group Distribution Companies, *inter alia*, deals in shoes, jackets, T-shirts, pants, shorts, jogging suits, belts, wallets, home furnishing etc goods.

**4.1** The 'MGB HK', which was earlier named as 'Gemex Trading Ltd', Hong Kong, established a Liaison Office (LO) in India in November, 1990. As a result of global restructuring, the name of the assessee company was changed to Parpool Ltd., which closed its operation in India w.e.f. 06/05/2002. A new Liaison Office of Gemex Trading Ltd., Switzerland (wholly-owned subsidiary of Metro AG) came into existence w.e.f. 22/11/1999, which started its operation in India from 1/10/2000. Due to global restructuring of Gemex Trading Ltd. to MGB HK, the Indian LO of Gemex trading Ltd, Switzerland was closed w.e.f. 30/06/2004. The 'MGB HK' i.e. the Head Office (HO), was granted permission by the Reserve Bank of India (RBI) to open the Liaison Officer (LO) vide letter dated 27/02/2004 and the LO started its operation in India w.e.f. 01/07/2004. Though the name of the assessee undergone change many times, but the Indian operations during this period remained more or less same.

**4.2** A survey under section 133A of the Income-tax Act, 1961( in short the 'Act') was carried out on 18/01/2007 at the business premises of MGB HK, Liaison Office (in short the 'MGB India') located at Okhla Industrial Estate, New Delhi. During the survey proceedings, various documents were collected and statements of various employees were recorded. According to the survey team, the MGB HK/Gemex Trading Ltd./Parpool Ltd. earned income

from agency business and the substantial activity relating to this core business of agency, were being performed in India by their Indian office.

**4.3** The assessee did not file return of income for assessment year 2001-02, and thus after recording reasons to believe that income escaped assessment, the Assessing Officer issued notice under section 148 of the Act for filing of return of income and assessment was completed on 28/12/2007 under section 143(3) read with section 147 of the Act. The Assessing Officer held that Gemex Trading Ltd, Hong Kong/Parpool Ltd, Hong Kong/MGB HK had a business connection in India in the form of activities of the Indian office and its employees and income accruing or arising, whether directly or indirectly, through or from this business connection in India, is taxable in India. The findings of the Assessing Officer are summarized as under:

- (i) *The Indian LO is rendering services to the buyers (Metro Group Distribution Companies) and acting as the procurement agent of such buyers in India.*
- (ii) *The claim of the assessee that its operation in India are confined to purchase for export from India and, hence is exempt under 9(1)(i) read with explanation 1(b) of the Act is not maintainable due to the reason that:*
  - (a) *that HO is providing the services relating to buying agency commission agreement and is not purchasing the goods on its own account.*

- (b) The HO is being compensated by the buyers for services rendered in the form of commission.*
  - (c) The LO is rendering services to the Metro group distortion companies/ultimate buyers and not to the HO.*
- (iii) The permission granted by the RBI with respect to the operations carried out by the India LO has been violated by the MGB HK on following two accounts:*
- (a) the Indian LO is not only functioning for procurement from India but also from Nepal and Sri Lanka*
  - (b) Indian LO is working for the ultimate buyers, i.e., Metro group distribution companies and not for Hong Kong head office.*

**4.4** The claim of the assessee that its activities are exempted under clause (b) of Explanation-1 to section 9(1)(i) of the Act, was rejected and profit of Rs.54,87,122/- was attributed to the Indian office and same was assessed as income of the assessee in India.

**4.5** The assessee challenged the finding of the Ld. Assessing Officer before the Ld. CIT(A), who dismissed the appeal of the assessee. The assessee is in appeal before the Tribunal against the said order.

**4.6** For assessment years 2007-08 and 2008-09, the assessee filed return of income on 25/09/2008 and 29/09/2008 respectively declaring Nil income in both the assessment years. In assessment year 2007-08, the Assessing Officer issued draft assessment order on 14/12/2009 proposing to tax the activity of

Indian office, following finding of the Assessing Officer in assessment year 2005-06. The findings of the Assessing Officer are reproduced as under:

“6. On the basis of facts found during survey, enquiries conducted and after considering all the objections of the assessee, jurisprudence on the issue, the provisions of the Act and also the tax treaty between Indian and Switzerland, it was held for the AY 2005-06 that Gemex Trading Ltd, Hong Kong, Parpool Ltd. Hong Kong and MGB Metro Group Buying HK Ltd. has a business connection in India in the form of activities of the Indian office and its employees and all Income accruing or arising, whether directly or indirectly, through or from this business connection in India, is taxable in India. For the various reasons given in the assessment order for the AY 2005-06, the claim of the assessee that its activities is exempted under clause (b) of Explanation 1 of section 9(l)(i) of the Act was rejected, and assessee's income was computed as 15.29% markup on the total expenses incurred by the liaison office as per its audited accounts and direct LO expenses incurred by the Hong Kong HO. The working was based on Rule 10B(l)(e) of the IT Rules, 1962 by considering the transactional net margin method, as the most appropriate method.

6.1 As mentioned above, the facts of the case are exactly similar to that of A.Y. 2005-06. Therefore, for the detailed reasons mentioned in that order, the business profits of the assessee company are computed on the basis of 15.29% mark up on cost incurred by the LO as per its audited accounts as well direct expenses incurred by Hong Kong as follows:

(IN EUROS)

Calendar year	Year ended December, 2006	Year ended December, 2007
Liaison office (-LQ') expense as per audited LO accounts (converted into Euros) [A]	631,188	682,858
Direct LO expenses incurred by Hong Kong [B]	84,641	179,047
<b>Total LO expenses (C) = (A) + (B)</b>	715,859	861,905
Mark-up on (C) @ 15.29%	109,455	131,785
Mark-up [pro-rated based on April to March] = 9/12(109,144) + 3/12(131,785)	115,037	

Profit attributable to operations In India	115,037
Amount equivalent in INR @ exchange rate of 1 Euro = INR 57.42	6,605,450

*6.2 The Indian office of MGB Metro Group Buying HK Ltd., Hong Kong had regularly provided the services in connection with procurement by the Metro distribution companies. The Indian office is being shown as a liaison office. As discussed in the assessment order for the AY 2005-06 in detail, the assessee company had a business connection in India, and substantial income was earned on account of the activities of the activities of the Indian office. However, the assessee company did not declare the income accrued in India for taxation and filed a nil return of income in India for AY 2007-08. The information collected during the survey and during the assessment proceedings and after providing proper opportunities to the assessee, It has been held that income of assessee is taxable In India. On the basis of the finding in this order along with the order for AY 2005-06, I am satisfied that the assessee has concealed the particulars of its income, accordingly, penalty proceedings under section 271(1)(c) of the Act are being initiated separately.”*

**4.7** The assessee filed objection against the same before the Ld. DRP. The assessee claimed that the LO undertook solely liaison activities i.e. to act as a communication channel between head office and supplier parties in India and not to carry out any commercial or industrial activity. According to the Ld. AR , the activities of the LO were only incidental and auxiliary in nature and the HO played substantial role in respect of procurement sourcing from India. The Ld. DRP rejected contention of the assessee and confirmed the draft assessment order and observed as under:

*“iii. We have carefully considered the facts of the case and the objection of the assessee to the AO’s action. We are of the considered opinion that the objections of the assessee are to be rejected. The LO has as many as 40 people working for it this is a large work force for a mere LO. It is undertaking collecting and*

*supply of Indian market and product information which is not a mere communication or ancillary activity but a substantial commercial activity. It is conducting laboratory test and pre-shipment inspection which is against not mere communication auxiliary activity. It is a substantial commercial activity. The LO is involved in the activity of identifying the supplies and the product selection. It also undertakes quality checks. These two activities are also substantial commercial activities. The manager of the HO has confirmed in his statement that the LO ranges for supply between the buyers (the other group companies of the metro group for which the assessee is acting as a procurement/commission agent) and the suppliers in India and the L.O has a well established network of suppliers, that at times on request of the buyer the LO contacts the suppliers and at a times themselves contact the LO if they have marketable product. All this establishes a strong and definite business connection of the assessee in India i.e. MGB-HK in India and the AO's action is to be approved.*

*There are two ways of looking at the activities of the LO.*

- (a) Firstly, it is acting as a business connection for the MGB-HK and as such, the income of the MGB-HK which accrues because of the business connection is taxable in India as provided by sub clause (a) of Explanation 1 of section 9(l)(i) of the Income Tax Act. In that situation, a substantial portion of the commission income (gross commission - reasonable expenditure for earning this commission) at 7.2% of the FOB value of the goods retained by M/s MGB-HK on the goods procured for the other group companies from India is required to be taxed in India. As far as attribution of this income to Indian business connection is concerned 50% of the commission income will be a reasonable attribution.*
- (b) Alternatively, the other view is that the Indian LO is acting as a branch office of M/s MGB-HK and conducting the business activities of rendering services as a procurement agent for the other group companies of the larger metro group. In this view of the matter, foe assessee's income will be calculated on the basis of mark up of 15.29% on the total expenditure of this branch inclusive of the direct expenses incurred by the HO for this branch. This ncome as computed by the AO comes to Rs 66,05,450/-.*
- (c) As the information necessary for computing the income as per para (a) above is not available, the action of the AO in computing the income as per para (b) is to be approved."*

**4.8** The Assessing Officer passed final assessment order in pursuance to the direction of the Ld. DRP attributing 15.29% markup on the total expenses incurred by the LO as per audited accounts of the LO. The working of the addition of Rs. 66,05,450/- was made based on Rule 10B(1)(e) of the Income-tax Rules, 1962 by considering the transactional net margin method as the most appropriate method. Aggrieved, the assessee is in appeal before the Tribunal against the said order.

**5.** In assessment year 2008-09, addition of Rs.78,85,522/- has been proposed by the Assessing officer in draft assessment order on identical base, which was taken in AY 2007-08. Against the draft assessment order, the assessee did not file objections before the Ld. DRP within the stipulated period, and thus the Assessing Officer passed the final order on 14/01/2011 and against which, the assessee preferred appeal before the Ld. CIT(A), who upheld the order of the Assessing Officer in the combined order dated 01/12/2004 for assessment year 2001-02 and 2008-09. Aggrieved, the assessee is in appeal before the Tribunal.

**6.** We first take up the appeal of the assessee in ITA No. 1472/Del/2014 for assessment year 2001-02. The ground Nos. 1 & 2 qua the claim of the assessee that operations of the assessee in India being confined to purchase of goods in India for purpose of export, no income shall be deemed to accrue or arise in India as per Explanation 1(b) to section 9(1)(i) of the Act.

**6.1** Before us, the Ld. counsel of the assessee filed paper book in two volumes containing pages 1 to 602. The Ld. counsel also filed a legal compendium containing pages 1 to 224.

**6.1.1** The Ld. counsel referred to historical background related to exemption granted in section 9 of the Act for operations confined to purchase of goods in India as under:

- (i) *That prior to the amendment made to section 9 (vide the Finance Act, 1964) in case of non-resident, no income was regarded as deemed to accrue or arise in India through or from operations which were confined to purchase of goods in India for the purpose of export. However, the said section included a specific proviso, wherein such exemption was not allowed in case of the non-resident, who had an office or agent in India.*
- (ii) *That vide, the Finance Act, 1964, the said proviso was deleted. Pursuant to this amendment, a non-resident having Office or agent in India was also made available to claim exemption from operations confined to purchase of goods in India for exports under explanation 1(b) to section 9(1)(i) of the Act.*
- (iii) *The Central Board of Direct Taxes (CBDT) issued circular No. 23 dated 23/07/1969 clarifying the effect of the above amendment.*
- (iv) *The CBDT vide circular No. 7 of 2007 dated 22/10/2009 withdrawn the circular No. 23 with immediate effect.*

**6.1.2** The Ld. Counsel submitted that withdrawing the Circular No. 23 of 1969 is operative only w.e.f. 22/10/2009 and, therefore, it has no bearing on assessment years prior to said date. The Ld.

counsel submitted that in view of the above, even in case of an agency, whose presence is more tangible than the LO, no income is taxable where the activities are confined only to purchase of goods for export.

**6.1.3** The Ld. counsel referred to pages 541 -546 of the paper book and submitted details of the activities carried out by the Hong Kong head office. Similarly he submitted detailed of the activities carried out by the LO in India. He also referred to various pages of the paper book to highlight the sample trail of entire transaction involving purchase from India and export to Metro Group Companies.

**6.1.4** The Ld. counsel referred to page 286 -287 of the paper book and submitted that the LO was established with the prior permission of the RBI to gather information about supplier in India and act as a communication channel and coordinate the purchases from India for export. The Ld. counsel submitted that the RBI has not made any allegation at any point of time on the assessee that the LO has exceeded its limits imposed at the time of granting the approval to the assessee. The Ld. counsel also referred to auditors certificates, placed on in the paper book as under:

*AY 2001-02 –PB- 362 to 363*

*AY 2007-08- PB- PB 115 , 154*

*AY 2008-09 – PB- 194, 198*

**6.1.5** The Ld. counsel referred to the statement of various employees recorded during the course of survey and submitted that the Ld. Assessing Officer has wrongly interpreted the same.

The Ld. counsel also referred to the information gathered under section 133(6) of the Act, from various suppliers.

**6.1.6** In support of his contention benefit of Explanation -1(b) of the section 9(1)(i) is available for procurement of goods by the HO for the affiliate companies, the Ld. counsel relied on the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Nike Inc. (2013) 24 taxmann.com 170 and other decisions in which, the decision of Nike Inc. (supra) has been followed. He also submitted a chart of comparison of the facts of the instant case with the facts of Nike Inc. (supra).

**6.1.8** Further, in respect of the observation of the Assessing Officer that the LO was engaged in carrying operations in Sri Lanka and Nepal the learned counsel submitted that those operations were insignificant as compared to the operations carried out in India. He submitted details of such purchases in calendar year 2000 and 2001 as under:

<b>Sr. No.</b>	<b>Purchases made from</b>	<b>Calendar year, 2000</b>	<b>Calendar Year 2001</b>	<b>Total</b>	<b>%</b>
1.	India	4,41,32,000	4,95,30,000	9,36,62,000	96.00%
2.	Sri Lanka	29,37,000	7,43,000	36,80,000	3.70%
3.	Nepal	1,50,000	1,41,000	2,91,000	0.30%

**6.1.9** The Ld. counsel, relying on the decision of the Tribunal in the case of Nike Inc. (2010) 125 ITD 35, submitted that no income accrues or arise in India or deemed to accrue arise in case the purchase operations are primarily with respect to Indian business.

**6.2** On the contrary, the Ld. DR relying on the order of the lower authorities submitted that in the instant case the MGB, HK (i.e.

HO) has not procured the goods and it has only assisted the buyers in procuring the goods, which is a job in the nature of buying agency. Further, he submitted that the expenses of the LO is being reimbursed by M/s MGB Metro group buying limited Hong Kong, which is an agent of various Metro group distribution companies. The MGB HK is being remunerated at the fixed percentage of commission for the services rendered to the Metro group distribution companies. According to him, the LO has performed those services of buying agency. He submitted that under the Explanation 1(b) of section 9(1)(i), any non-resident, who purchases goods for the purpose of export ,may claim benefit of exemption from tax but LO of an agent, who is carrying out activity of buying agency, cannot take shelter of Explanation -1(b) to section 9(1)(i) of the Act because the Indian LO is not liaison office of the buyers who are purchasing goods and it is LO of a buying agency. According to him, the LO is having source of income in India and falls under the main section 9(1)(i) of the Act. The ld. DR submitted that Indian LO carried out the activities, which included collecting samples from the Indian manufacturers, sending them to buyers for selection, confirming the purchase orders, supervising the entire manufacturing process carried out by the Indian manufacture including lab test of raw material, finished products, quality control, inspection of goods, arranging transport logistic for the buyers and manufacturers. According to him, all these activities have been carried out on behalf of the HO and for very same services, the HO is being remunerated by the buyers i.e. Metro group

distribution companies at a fixed rate of commission, whereas no profit has been attributed to the Indian LO for agency activities carried out from India. The Ld. DR submitted that this commission is deducted by the HO from the FOB value of the export invoice raised by the manufacturer. The Ld DR also submitted that statement of the employees during the survey established that they habitually exercised an authority to conclude contract on behalf of the nonresidents and the activities are not limited to purchase of goods, therefore the assessee also falls under the business connection as per Explanation -2 to section 9(1)(i) of the Act. Alternatively, the learned DR submitted that the entire activity of buying agency which includes collecting samples from the Indian supplier and supervising the process of purchase, quality control, transport of goods etc, is having source of income in India therefore the income from said buying agency activities is deemed to accrue or arise in India being having source of income in India.

**6.3** We have heard the rival submission and perused the relevant material on record including the paper book of the assessee and orders of the lower authorities. In the instant case, there was no Double Tax Avoidance Agreement (DTAA) between the Hongkong and the India during relevant period and no other DTAA has been cited by the assessee, hence, we are not referring to any articles of the DTAA and only question of dispute before us revolves around section 9(1)(i) of the Act along with Explanation-1(b) and Explanation -2 below it, therefore, we feel it relevant to reproduce the relevant part of section 9 as under:

**“Section 9(1)(i)** *The following incomes shall be deemed to accrue or arise in India :—*  
*all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.*

*Explanation -1* .....

- (a) .....
- (b) *in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export;*
- (c) .....
- (d) .....
- (e) .....

*Explanation 2.—For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,—*

- (a) *has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or*
- (b) *has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or*
- (c) *habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:*

**6.3.1** Thus, for falling any income under the main section 9(1)(i) following shall be deemed to accrue arise in India:

- (i) income accrue or arising through or from any business connection in India
- (ii) through or from any property in India
- (iii) through or from any asset or source of income in India

**6.3.2** However, the Explanation 1(b) has excluded the non-resident from the deeming income through or from operations which are confined to purchase of goods in India for the purpose

of export. In other words, when a non-resident purchase goods in India for the purpose of export, then no income would accrue arise to him in respect of the operations confined to purchase of goods.

**6.3.3** Further, the scope of “business connection” has been extended by Explanation- 2 where an authority to conclude contracts on behalf of the assessee has been habitually exercised in India. But said extension of business connection is not applicable where the activities are limited to the purchase of goods or merchandise for the non-resident.

**6.3.4** In the facts of the instant case, the contention of the Revenue is that Explanation-(1)(b) to section 9(1)(i) does not apply and

- the income is deemed to accrue arise either through or from any business connection in India or through or from any source of income in India.

**6.3.5** The assessee is claiming that it falls under Explanation 1(b) and, according to which, no income accrue or arise to the non-resident from operations, which are confined to purchase of goods in India for the purpose of export.

**6.3.6** To decide the controversy in hand, first we have to decide whether the assessee falls under the Explanation-1(b) to the section 9(1)(i) of the Act. If it fulfills the requirement of the said explanation, then there is no requirement to examine even the existence of business connection in view of Explanation-2 below the section 9(1)(i) of the Act and the assessee would be entitled for no deemed income from operations of purchases. But if it does

not fulfill the requirement of Explanatory-1(b), then for holding responsible for deemed income, existence of business connection or source of income in India need to be established.

**6.3.7** For adjudicating the above issue in dispute, we need to appreciate the relevant facts of the case. The Metro AG, Germany group is engaged in retail sales of various lifestyle goods like garments, accessories, shoes, wallet, belt etc through its retail outlets in various countries, for which it has created distribution companies as well as retail companies. For buying of those goods from Asia Pacific region including India, the group constituted a buying agency company in Hong Kong, namely MGB Metro Group Buying HK Ltd (MGB HK) and entered into an agreement with Metro AG, Germany (which is titled as “buying commission agency agreement”) for facilitating procurement of products worldwide for Metro group companies. As a consideration towards the services provided, the Hong Kong office receives commission from Metro group distribution companies. The company MGB HK started a Liaison Office (LO) in India. Thus, in this case the HO is MGB, HK. Before us, the Ld. counsel summarized the activity of the HO as under:

*“2.7.2 Hong Kong head office undertakes the function of procurement of diverse varieties of goods and products from various countries including India, which typically involves coordinating the design, procurement and flow of goods from suppliers to the distribution companies which are the ultimate buyers. This process inter alia includes strategic decision making, product management, procurement, quality assurance, logistics, finance, IT solutions, other supply chain management issues like*

*demand and supply forecasting/ Tanning and supply chain security etc.”*

**6.3.8** Further , he referred to page 541-546 of the paper book volume 2 (for AY 2001-02 ) wherein various activities undertaken by the HO are captured . The said activities of the HO listed by the Ld. counsel in written synopsis are reproduced as under:

*“2.7.3. Various activities undertaken by HO in respect of purchases are as under [detailed functional analysis of activities earned by HO is captured in AY 2001-02 Volume 2 Page 541 - 546]:*

- *Carry-out market research in relevant product area and ensure marketing transparency;*
- *Interacting with customers and distribution companies;*
- *Supply and demand planning including supply chain security;*
- *Decisions in relation to locations;*
- *Co-ordination with customer relationship management to identify customer articulated needs;*
- *Product design co-ordination so that new and existing products can be optimally integrated into the supply chain;*
- *Evaluation of supplier, negotiation on terms and conditions including finalization of price;*
- *Order placement, sample & accessories handling, order processing, processing and checking of export documents;*
- *Assurance of meeting legal requirements of national legislation product standards and quality control procedure to ensure that the internationally acknowledged high quality standards of Metro Group be enforced with all domestic and foreign suppliers;*
- *Negotiation of freight rates and entire transport logistics, shipment follow- ups/ centralized shipment control and taking shipment insurance cover;*

- *Opening letter of credit on supplier, managing foreign exchange risk, payments to supplier, invoicing to customers and document handling;*
- *Establishes and maintains supply chain portal which is used to generate electronic purchase orders;*
- *Development and maintenance of Internet Platform Global NetXcahnge, facilitating electronic data transfer / information sharing with suppliers, and portal maintenance; and*
- *Developing international standards for occupational training in retail sector and offering on-line tailored training courses and programs.”*

**6.3.9** Regarding the activities undertaken by the LO, the ld. counsel submitted as under:

*“2.8. Activities undertaken by LO in India*

*The activities undertaken by the LO are limited to:*

- *Collecting and supply of India market/product information;*
- *Flow of information from suppliers to Hong Kong head office in relation to product and price and assisting Hong Kong head office in taking decisions;*
- *Order follow-ups and submission of order lead time and notification of any delivery problems; and*
- *Laboratory tests and pre-shipment inspection (on sample basis)*
- *All other functions (including maintenance of portal for order placement, opening of Letter of Credit etc.) are performed by HO. [detailed functional analysis of activities carried by HO is captured in AY 2001-02 Volume 2 page 541-546.]”*

**6.3.10** The Ld. counsel also referred to various pages of the paper book to explain the sample trail of entire transaction

involving purchase from India and export to Metro group distribution companies. The relevant chart produced in the synopsis is extracted as under:

<i>Sr. No.</i>	<i>Sample Documents in support of activities undertaken by HO</i>	<i>AY 2001-02 PB</i>	<i>AY 2007-08 PB</i>	<i>AY 2008-09 PB</i>	<i>Survey Documents PB</i>
1	<i>Invoice raised by Indian supplier on HO for exports from India on FOB basis.</i>	568	<i>Page no. 260-262</i>	<i>Page no. 376-377</i>	<i>Page no. 180-244, 269-276</i>
2	<i>Invoice raised by HO on buyer</i>	<i>Page no. 561</i>	<i>Page no. 243-245</i>	<i>Page no. 358-360</i>	<i>Page no. 298-299</i>
3	<i>Copy of Letter of Credit opened by HO in favor of Indian supplier on purchase of goods.</i>	<i>Page no. 569-580</i>	<i>Page no. 263-274</i>	<i>Page no. 378-389</i>	
4	<i>Claim / rejection of defective goods by HO</i>	<i>Page no. 581-583</i>	<i>Page no. 275-277</i>	<i>Page no. 390-392</i>	-

**6.3.11** In view of the above detailed functions of the HO at Hongkong and LO at India, the Ld. Counsel emphasized that HO, which is non-resident and acting as a buyer for purchase of goods from India through the Indian LO, the activities of the LO falls under explanation 1(b) to the section 9(1)(i) of the Act.

**6.4** The Ld. DR, referred to various invoices raised by the suppliers, available in paper book, wherein goods have been sent directly to the Metro group companies and thus according to him in-substance, the non-resident buyers were the Metro group companies and not the HO, who acts only as a buying agency and therefore the explanation 1(b) is not applicable in the instant case and the assessee cannot be exempted from deemed income accrued from the buying agency activity. The Ld. DR in support of the contentions relied on the documents collected and statement

recorded during the course of survey at the premises of the Indian LO. The relevant part of the statement of Mr. Steen Billman (Office Manager), LO having role in identification & selection of products and product development has been reproduced by the Assessing Officer in the assessment order for AY 2001-02, which is extracted as under:

*“Q. 5 (of the state) How the requirement of the buyer is known to you and now it is communicated to the customers?”*

*Ans. It can be generated through various channel from buyers side or from by us a by input from the suppliers. The buyer can come personally to us or he can communicate with us through Email or telephonically. He can communicate us directly or through our Hong Kong officer.*

*Q. 6 (of the statement) How the products are selected? Please explain the procedure for selection of products? Also elaborate the role of Hong Kong office in the selection of Products Vis-a-0Vis yours.*

*Ans... The products are selected by the buyer after we give presentation to them either through E-mail with exhibit materials or through their personal direct meetings with the suppliers organized and assisted by us. We organize the meetings of the buyers and suppliers and assist them in holding the negotiations in most of cases i.e. 70 to 80% of the cases. In the rest of the cases, the buyers approaches our Hong Kong office and Hong Kong office coordinate with us communication the requirement to us. We convey the same to the Indian suppliers in other words we at on their behalf to coordinate with the Indian suppliers.*

*The role of Hong Kong office in the selection of the product is that of co-ordinate and specialist/knowledge centre. In Hong Kong we have product managers who are specialist in different areas. They function as adviser regarding the*

*products since they have data base of various products from different countries with them.*

*Q.12 (of the statement) What is the role of Indian office in product development, products identification, whether any data basis maintained?*

*Ans. Overall we have a limited role in product development. This role is played mainly by the suppliers according to the market requirements take fashion patters. Regarding the product identification, we as India office have data base of suppliers groups of a particular products. This data base, we keep on updating according to their performance.*

*At our Hong Kong office we do have knowledge centre constituted by the specialized product manager, who advise the buyers regarding the products and its feasibility in terms of price and design. But as far as the India is concerned we have the data base of Indian suppliers of particulars products.”*

**6.5** The Assessing Officer has also mentioned pages 36 to 39 of Annexure -‘I’ and pages 1 to 66 of Annexure-‘F’ of records impounded during the course of survey to substantiate that the buyers visited India and all arrangements of their meeting with suppliers/vendors and arrangement for their stay and travelling was made by the Indian LO. He referred to statement of Mr. Steen Bilman regarding role played by the Indian office in price negotiation, reproduced by the Assessing Officer in para 3.2 of the assessment order. The relevant part of the statement is extracted as under:

*"Q.7 What is the role of Hong Kong office and Indian office in the price negotiation?*

*Ans. There are different way in which Indian office plays the role, these are enumerated as under:*

- (i) In some cases the buyer gives us full authority to negotiate the price with the suppliers either with or without price band. The price arrived at is acceptable to the buyer as he has given the full authority to us. This situation happens in 10% of cases*
- (ii) In most of the cases i.e. 80% and above we arrange and assist the meeting between the buyer and supplier, a representative from Indian office is present during such meeting. He helps in the arriving at the negotiable price.*

*As for as the role of Hong Kong office is concerned in price negotiation, it has price negotiation role between the suppliers of different countries and a coordinate role.”*

**6.6** The Ld. DR also referred to statement of Ms. Tanu Neb (senior merchandiser) reproduced by the Assessing Officer in para 3.2 of the assessment order. The relevant part is extracted as under:

*"Q1. Please state in details the roles played by you or LO while the buyer negotiates a deal with the supplier.*

*Ans. We assist the buyer in negotiation of prices as we are well aware of the prevalent prices. We take care that the buyer gets a reasonable price and is not subjected to very high prices by the supplier. In the sense, we assist in negotiation of prices.*

**6.6.1** The Ld. DR also relied on the statement of Mr. Steen Billman regarding role played by Indian office in quality control of the products and Sh. Rahul Kashyap ( quality control manager) reproduced by the Assessing Officer in assessment order. By

referring to the statements, the Ld. DR emphasized that the Indian LO was working for the ultimate buyers or purchaser of the product and not the MGB HK ( or the HO), who remained as a supervising authority for part of the functions but mainly remained a paper intermediary only. The Ld. DR also drawn attention towards the part of the assessment order, where the Assessing Officer has referred to page 26 and 27 of Annexure -I, impounded during the course of survey. He referred to the finding of the Assessing Officer based on these impounded papers that in the copy of inspection reports, defect description, test by independent laboratories etc the customer or the buyer mentioned was Metro DE/ REAL DE GERMANY and not the MGB HK.

**6.6.2** The Ld. DR further submitted that in view of the statement and the documents found, it was clear that the Indian LO played important role at various stages of product procurement from suppliers of Indian and other neighbouring countries suppliers, and that HO only acted as advisory. He submitted that Indian LO was manned by way of trained and specialized staff for this purpose, which not only assisted in procurement of goods to the ultimate buyer but also tracked shipment for that buyer.

**6.7** In rejoinder, the Ld. counsel of the assessee submitted that statement of various employees recorded during the course of survey proceeding have been interpreted wrongly by the Assessing Officer. He referred to statement of Mr. Steen Bilman, office manager recorded during the course of survey proceedings and submitted that he clarified that the LO was engaged in only

incident activities for the head office, which cannot result in any taxable income earned by the assessee in India. Regarding the conclusion of the Assessing Officer on the statement of Ms Tanu Neb that India Liaison Office habitually exercising authority to conclude contracts and consequently the activities of the LO resulted in Constitution of business connection in India, the Id. counsel submitted that above conclusion was not factually correct and not sustainable in law. The Ld. counsel submitted that the Explanation-2 to section 9(1)(i) has excluded the activities of purchase of goods and merchandise and therefore there is express exemption in respect of activities of purchase of goods and even if it is assumed that the LO concludes the purchase contract with the supplies in India, even then that itself cannot be held to be business connection within the meaning of section 9(1)(i) of the Act.

**6.8** The Ld. counsel also referred to various pages of the paper book which contained response of some of the Indian suppliers taken under section 133(6) of the Act , to support his contention that the LO does not have any authority to conclude contracts for Hong Kong head office or any other third party. The relevant submission of the Ld. counsel is reproduced as under:

- **“Supplier – Hemlines (AY 2001-02 – PB -501)**

*“2. Our company representative personally visit to MGB Metro Group at their abroad offices, stores buyers visit our office, we send samples to them and their executives over their identity/ select and negotiate.*

*3. Price is negotiated by our company executives with foreign buyers through discussion, e-mails etc....*

*5. Quantity/ Purchase price is intimated by foreign buyer. No spot orders are given by Gemex Trading Ltd/ MGB Metro Group India office.*

*Purchase orders are electronically generated and transmitted to us and hence not signed."*

- **Supplier — Virola (AY 2001-02 - PB - 502)**

*"(ii) The metro group identify/selects our products for purchase through their visit to our factory, photographs and samples sent to them, exhibition at Germany and Italy, where the buyers of different countries and their representatives visits us. "*

*"(Hi) The prices of the products are negotiated by the management representatives and buyers. The representatives/buyers visit us or meet us in the various fairs where we participate."*

- **Supplier - N M Exports (AY 2001-02 - PB - 494)**

*"(iii) Price negotiations are done normally by the partner of the firm with the concerned purchasing officer of the importer/buyers."*

*"(v) Again the concerned purchasing officer intimates the quantity & the unit price after negotiation. Purchase orders are normally downloaded from the portal. "*

- **Supplier - Royal Embroidery (AY 2001-02 - PB - 500)**

*"The samples are duplicated by us and sent to the metro local office and forwarded by them to the buyer. The buyer makes a final selection and after any charges that the buyer may want we give a final price."*

- **Supplier - Asian Handicrafts (AY 2001-02 - PB — 497-498)**

*"(ii) The process of identification / selection is —first we send the product images to Ms. Suchita Singh and she forwarded the same to buyer. Based on the buyer's feedback, if required, we make necessary changes and send samples once the buyer received the sample, the order is placed with us for the mutually agreed price.*

*(iii) We quote the prices on the samples, and if the buyer asks for changes, we revise the price based on such changes. The price is mutually agreed between the buyer and the seller.*

*(v) The correspondence regarding the quantity, unit purchase price and order is done through MGB Metro office in New Delhi (thru Ms Suchita Singh). The final order confirmation is received later.*

*The computer ized purchase order is received either via email or a hard copy on the company's letterhead. The same is issued by the exporter*

department of the buyer. However there are no physical signatures by the employees of India liaison office or by the buyer or the consignee.

(vi) The buying agreement/ terms and conditions of business was discussed and the letter of credit was issued by the buyer as per agreed terms."

## 6.9 According to the Ld. Counsel the responses of the Indian suppliers manifested as under:

- *“Negotiation happens between foreign buyers/ head office and vendors (and not by LO). Further, finalization of samples and pricing is done by head office/ buyer;*
- *In fact, the final order confirmation is received later since the confirmation comes from the head office. Further, it is the export department in head office which issues the purchase order. Further Letter of Credit is opened by the head office. This also shows the role of the head office in the entire supply chain. Relevant documents to establish the same were submitted during the assessment proceedings - refer paragraph 3.2 below.*
- *The purchase orders ("POs") are generated on the supply chain portal. The portal is developed, maintained and operated by head office at Hong Kong. The supplier orders are approved/ decided by HO and then loaded on the portal for accessing by the suppliers and for view of the LO personnel. The personnel of LO can access the portal only for viewing the reports/ orders (so that they can follow-up on orders and maintain communication link between suppliers and head office) but have no authority to load / approve / edit any order or report. Mere viewing the orders on portal, does not mean that the personnel of LO sign the PO. It is the automated web- based portal which generates the PO approved by the HO at Hong Kong;*
- *AO has made a grave allegation that copy of Agreement for Discount between the Appellant and Hemlines Exports is signed by the LO in India [AY 2001-02 - PB - 199]. This is clearly not borne out from the copy of agreement as no signature of any LO person is appearing therein. In fact, the covering letter under which the terms of agreement are provided by LO to the supplier expressly provide that the agreement is received from head office for signature of the supplier. This shows that LO is only an information channel between head office and suppliers in India as after such signatures of the supplier, LO forwards the same to head office. Copy of this agreement and cover letter while is there on the records however, is not part of Paper Books filed. The same is available with us and can be produced if required.*
- *Discounts are determined in the meetings between the vendors and head office/ buyer personnel. LO again has no role in approving the discounts;*
- *It is only the correspondence i.e. exchange of information that is undertaken through the LO for convenience. It is pertinent to note that the order is done 'through' the LO and not 'by' the LO.*

*Therefore, from the above statements of vendors and employees of the Appellant, in fact, it is clearly evident that the Indian liaison office only assists (without anything more) in negotiating the prices, on behalf of the Hong Kong head office. The fact that the*

*representative of HK/buyer is present at the meeting itself shows that the LO does not have authority to enter into / conclude the purchase contracts and is merely to function as a support office.”*

**6.10** In view of the above, the Ld. counsel submitted that the operations of the LO in India are confined to purchase of goods in India for export and hence no part of its income is taxable in India as the provisions of section 9(1)(i) of the Act.

**6.11** From the arguments and counter arguments of the parties, we are of the opinion that the MGB HK acted as a buying agency for the Metro group distribution companies in purchasing goods from India. This is evident from the various documents impounded and the statement recorded during the course of survey. Merely routing of sales invoices by the supplier through the MGB, HK or routing the letter of credit by the buyers through the MGB HK, cannot in-substance make the MGB HK as buyer, when it is very well-known to the supplier as who is the buyer. The supplier and the Indian LO interact directly or indirectly to the MGB distribution companies who are the ultimate buyers , for the purpose of identification or selection of products, sales and samples, quality instruction, packaging instruction, packaging material instruction, transport and logistics instruction etc. Further, the MGB HK receives commission out of the invoices raised by the supplier i.e. which means that the buying agency commission has been deducted out of the amount of the supplier. This fact is evident from the finding of the Assessing Officer as under:

*“For these services, MGR Metro Group Buying HK Ltd. receives a buying commission of the invoiced gross*

*FOB/FCA, value of the goods for the performance set out in Clause 1.2. Such commission for India as seen from invoices and statements of the authorized signatory is 7.2% of the FOB value.*

*This is evidenced by a sample copy of invoice appearing on Page No.30 of Annexure 'H'. This is a invoice by N.M. Exports and the consignee is Metro Russia. The invoice value is USD 11844, it mentions the discount @7.2% and the net amount is shown as USD 10991.24. This means that the invoice value of the goods is USD 11844, which will be received by the MGB Metro Group Buying HK Ltd. from Metro Russia, but MGB Metro Group Buying HK Ltd. will be paying USD 10991.24 to N.M. Exports, retaining the part of sale consideration as commission, which is 7.2%.”*

**6.12** The learned counsel, before us submitted that the assessee was established with prior permission of the RBI and to gather information from suppliers in India and act as a communication channel and coordinate the purchases and from India for exports. However, in our opinion, on perusal of the various documents found during the course of survey and the statement recorded gives the picture otherwise. It is not the case that the LO has merely passed on the information received from the supplier to the HO, but the LO has carried out all the work of a buying agency, like assisting the buyer in selection of samples, insuring dispatch of samples by the supplier, checking the quality, carrying out lab test of the materials as well as the products, arrange transport logistics etc functions, which are much more than the communication channel. The team of persons employed at the LO includes designers, merchandisers, quality controllers etc and they have played a role more than that of a

communication channel. Thus, in our opinion, LO of the assessee has exceeded the permission granted by the RBI, as far as the activities carried out by it are concerned.

**6.13** Before us, the learned counsel has relied on the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Nike Inc.(supra). The relevant finding of the Hon'ble High Court is reproduced as under:

*“17. In the background of this legal position when we examine the facts of this case, the assessee is not carrying any business in India. They have established a liaison office. The object of establishing the said office is to identify the manufacturers, give them the technical know-how and see that they manufacture goods according to their specification which would be sold to their affiliates. The person who purchases the goods pays the money to the manufacturer, in the said income, the assessee has no right. The said income cannot be said to be a income arising or accruing in the Tax Territories vis-a-vis the assessee. In fact, the evidence on record shows that Nike, USA bears the entire expenses of the liaison office. The buyer who is a non-resident may in turn pay some consideration to the assessee outside India, the contract between the assessee and the buyer if at all is entered outside India. Therefore, even if any income arises or accrues to the assessee, it is outside India. Therefore, explanation (1) to sub-section (2) of [Section 5](#) expressly states income accruing or arising outside India shall not be deemed to be received in India within the meaning of the Section. However, under [Section 9](#), all income accruing or arising whether directly or indirectly through or from any "business connection" shall be deemed to be accrued or arises in India. Now by Explanation (2) "business connection" has been explained which includes any business activities carried out by a person who acting on behalf of the non-resident as an habitual exercise in India. An authority to conclude Contracts on behalf of non-resident unless his activities are limited to the purchase of the goods or merchandise for the non-resident. If the said definition is read with Clause (b) of Explanation 1 to Sub-Section (1) of [Section 9](#) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him whether directly or indirectly through or from any "business connection", which are confined for the purpose of export. In the first place, the assessee is not purchasing any goods. The assessee is enabling the manufacturers to purchase goods of a particular specification which is required by a foreign buyer to whom the manufacturer sells. As the orders are placed by the assessee*

*with the manufacturer and the goods are manufactured according to their specification which is the requirement of the buyer and even if it is held, though the goods are supplied to the buyer, it is deemed to be supplied to the assessee, the whole object of this transaction is to purchase goods for the purpose of export. Once the entire operations are confined to the purchase of goods in India for the purpose of export, the income derived therefrom shall not be deemed to accrue or arise in India and it shall not be deemed to be an income under [Section 9](#) of the Act. If we keep the object with which the proviso to clause (b) of Explanation 1 to Sub-section (1)(i) of [Section 9](#) of the Act was deleted, the object is to encourage exports thereby the Country can earn foreign exchange. The activities of the assessee in assisting the Indian manufacturer to manufacture the goods according to their specification is to see that the said goods manufactured has an international market, therefore, it could be exported. In the process, the assessee is not earning any income in India. If at all he is earning income outside India under a contract which is entered outside India, no part of their income could be taxed in India either under [Section 5](#) or [Section 9](#) of the Act. In that view of the matter, the order passed by the Tribunal does not suffer from any infirmities, which calls for interference. Therefore, the substantial question of law framed in this case is answered in favour of the assessee and against the Revenue.”*

**6.14** Further, the learned counsel cited decision of the Tribunal in the case of Nike Inc Vs ACIT (2010) 125 ITD 35 (Banglore) and submitted that Tribunal in para 39 and 43 of the Nike Inc ruling has upheld the benefit under provisions of Explanation 1(b) of section 9(1)(i) of the act, even if the LO supervises the operations for purchase of goods as an agent of affiliates. The learned counsel submitted that Nike Inc. also carried business in Pakistan and Sri Lanka through the Indian LO, however, the Tribunal held that no income accrued arise or deemed to accrued arise in case of purchase operations, which are primarily with respect to India business. The relevant part of the decision is reproduced as under:

*“37. The assessee has opened a liaison office solely for the purpose of helping its affiliates located at different parts of the world to buy the goods, etc., for trading operations. The assessee is the purchasing agent of the various affiliates who are actual buyers. The assessee as the purchasing agent places the orders, specifying the quantity, price, the affiliate with address on whom the bill is to be raised and the destination to which the goods should be sent. There are three ways of purchase: (1) Purchase of goods and receipt of goods at the same time at one place where the office of the assessee is located. (2) Purchase information sent by the assessee but goods dispatched to the various places as directed by it which may be where its sale outlets are located. (3) The assessee as an agent of buyers indicates to the manufacturer the rate at which the goods will be supplied, the names of the buyers and the address of the buyers where the goods have to be sent under intimation to it and that the person so indicated will be the purchaser on whom the bill should be raised and such person shall make the payment also.*

*38. Now, situations (2) and (3) are more or less similar. In situation (2), goods are dispatched to different sales outlets and in situation (3) instead of sales outlets, it is the affiliates. The affiliates have purchased the goods with the help of its agent, the assessee. The purchase by the agent for its principal is always an activity of purchase by the principal only. The emphasis is on the purchase of goods in India for the purpose of export by the non-resident. Therefore, purchase by principal directly or through an agent results in purchase only and, hence, in our view, both situations would equally be covered by this provision.*

*39. The assessee derives its agency income by helping its affiliates to procure goods for the purpose of sale. The assessee as an agent of these affiliates is paid for service charges or commission by those affiliates. The assessee has not in any way communicated with the manufacturers other than ensuring that they may manufacture in accordance with the samples, etc., provided and approved by it and the liaison office only ensures and supervises the manufacturing operations as an agent of affiliates. The assessee is not in any way representing the local manufacturer and is not an agent of the local manufacturer. The activity of the liaison office, therefore, being well within the limits prescribed by the RBI and its activity being strictly for purchasing for its affiliates out of India, Explanation 1(b) is squarely attracted in the case of the assessee.”*

**6.15** On perusal of the above, we find that in the case of Nike Inc., the main company i.e. Nike Inc., USA reimbursed the

expenses of the Indian LO and therefore the main company was acting as HO as well as it was buying goods for head office , for its retail shops and for the affiliates companies. As far as goods purchased by the Nike Inc. USA and its retail shops are concerned, it is the buyer and therefore, the Indian LO of the said entity has been correctly treated as excluded from deemed income in view of Explanation -1(b) of the section 9(1)(i) of the Act. But in the instant case, the Hongkong based HO is only a buying agency, assisting in purchasing of goods by the companies of Metro AG Group. The Metro group distribution companies are affiliates of the Metro AG, Germany. Whether those distribution companies are affiliates of the MBG, HK has not been demonstrated before us. The learned counsel has submitted before us a chart comparing the facts of the assessee vis-à-vis the Nike Inc, which is reproduced as under:

<b><i>In the case of Nike Inc.</i></b>	<b><i>In the case of the Appellant</i></b>
<i>It had an arrangement with its group companies for sourcing of the products</i>	<i>Facts same as Nike - Hong Kong head office has an arrangement with its group companies for sourcing of the products</i>
<i>Had a LO in India for carrying out the procurement activities</i>	<i>Facts same as Nike - MGB Metro Buying HK Limited had a LO in India for carrying out the procurement activities</i>
<i>The entire expenses of LO in India was borne by Nike Inc from USA through regular banking channels to India</i>	<i>Facts same as Nike - The entire expenses of India LO is borne by Hong Kong head office through regular banking channels to India</i>
<i>LO had no powers for signing/commitment except which were required for normal functioning as LO</i>	<i>Facts same as Nike - India LO had no powers for signing/commitment except which were required for normal functioning as LO</i>

<p><i>The LO gives it opinion of reasonability of price/issues etc., the US office decides the price, quality, quantity to whom to be shipped/billed</i></p>	<p><i>Facts same as Nike - India LO gives it opinion of reasonability of price/issues etc., the Hong Kong head office decides the price, quality, quantity to whom to be shipped/billed based on the discussions with the group companies.</i></p>
<p><i>Nike Inc. acts as a sourcing agent for the affiliates of Nike. Nike LO sources goods for the affiliates from India as goods were purchased by the affiliates directly from the vendor in India. As such, Nike Inc. doesn't purchase by itself and makes the sales to its subsidiaries, but, arranges for the purchase by Nike affiliates from India</i></p>	<p><i>In the present case however, Hong Kong Head Office is invoiced for the goods and re-invoices the goods to the buyer. Therefore, in the present case, the facts satisfy the condition "for the purpose of export" more precisely than the facts of the Nike case.</i></p>
<p><i>Nike LO undertakes the following activities:</i></p> <ul style="list-style-type: none"> <li><i>• Liasoning between the manufacturers and the assessee;</i></li> <li><i>• Giving opinion on reasonability of prices;</i></li> <li><i>• Close watch on the progress and quality at the manufacturing workshop;</i></li> <li><i>• Tracking delivery dates; and</i></li> <li><i>• Shipment tracking.</i></li> </ul>	<p><i>Facts similar to case of Nike</i></p>

**6.16** In our view, no such factual analysis has been carried out by the lower authorities in their orders and the Ld. DR also could not confirm the above factual comparison. Prima-facie, we have found certain dissimilarities in the facts of the case of the assessee vis-à-vis case of Nike Inc. (supra), but for arriving at the conclusion on finding of facts, it is important to assertion the facts incorrect prospective. Further, in the interest of natural justice, the assessee also needs to be given opportunity to explain the dissimilarities, if any. In view of the above, we feel it

appropriate to restore the matter to the file of the Ld. Assessing Officer for verifying comparison of the facts of the case of the assessee vis-à-vis the facts of Nike Inc. (supra) and decide the issue, whether the purchases by the Metro Group Distribution Companies falls under explanation (1)(b) of section 9(1)(i) of the Act, in accordance with law. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard.

**7.** The other issues of business connection in view of Explanation 2 of section 9 (1) or source of income in India would arise subsequent to the decision on the issue of Explanation -1(b) of the section 9(1)(i), therefore, at present, we are not adjudicating on arguments in respect of those issues. The ground No. 1 to 2.2 of the appeal are accordingly allowed for statistical purposes.

**8.** The ground No. 3 of attributing profit to the LO, is consequential to the decision on ground 1.1 to 2.2 of the appeal. Since those grounds have already been restored to the file of the Ld. AO, accordingly, we are not adjudicating the ground No. 3 at present.

**9.** The ground No. 4 related to levy of interest in section 234B of the Act, also being consequential in nature, we are not required to adjudicate upon at present.

**10.** The ground No. 5, being general in nature, we are not required to adjudicate upon specifically.

**11.** In the result, appeal of the assessee in ITA No. 1472/12/2012 for assessment year 2001-02 is allowed for statistical purposes.

**12.** As similar grounds have been raised in remaining 2 appeals i.e. ITA Nos. 4911/Del/2010 & 1473/Del/2012 for assessment year 2007-08 and 2008-09 respectively, those grounds are also adjudicated mutatis mutandis and those appeals are also allowed for statistical purposes.

**13.** In the result, all the three appeals of the assessee are allowed for statistical purposes.

The decision is pronounced in the open court on 31<sup>st</sup> May, 2018.

Sd/-  
**(BHAVNESH SAINI)**  
**JUDICIAL MEMBER**

Sd/-  
**(O.P. KANT)**  
**ACCOUNTANT MEMBER**

Dated: 31<sup>st</sup> May, 2018.

RK/-(D.T.D.)

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi