IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G' NEW DELHI

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

ITA No.4532/Del/2015
Assessment Year: 2011-12

Deputy Director of Income Tax, 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-122002
Appellant		Respondent

Assessee by : Shri S.S. Rana, C.I.T. DR
Department by: Shri Tarandeep Singh, CA

Date of hearing : 31.07.2018
Date of pronouncement : 28.09.2018

O R D E R

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER :

This appeal is preferred by the department against the order dated 15.05.2015 passed by the ld. CIT(A)-43, New Delhi for assessment year 2011-12.

2.0 Briefly, the relevant facts are that the assessee is a non-resident company registered in USA. It is engaged in the business of rendering money transfer services since 1890. The business of the assessee includes transfer of monies across international

borders. For the purpose of carrying out its business in India, the assessee has entered into agreements appointing agents in India. There are four types of agents - the Department of Posts, commercial banks, non-banking financial companies and tour operators.

2.1 During the course of assessment proceedings for the year under consideration, the Assessing Officer (AO) found that the assessee has a business connection in India u/s 9 of the Income Tax Act, 1961 (hereinafter called "the Act") and that the assessee also had a Permanent Establishment (PE) in India under Article 5 of the Indo-US Taxation Avoidance Agreement. The AO observed that, although, in the past the assessee had three liaison offices in India, however such offices have been closed w.e.f. 31st July 2005. The AO, however, held that assessee has an agency PE and a Software PE in India by observing as under:

> *"The application of aforesaid commentary in the assessee case clinches the issue of PE as the agents who are appointed in India, have been provided with a software to access the connectivity and the application software installed in standalone machines having in built dial up modems at various branches & sub agent locations. These systems are not on the agents/bank's network and are driven by a user ID and password and are validated by a terminal ID which*

automatically connects to the international host server of Western Union for marking of transactions as well as storage of data. Apart from this, Western Union has provided software known as Voyager 2.16 that generates a complete summary of transactions of Western Union handled by the agents/Bank.

The stand alone machines where Western Union financial Services Inc. application are installed and dedicated to the business of Money transfer can be construed as facilities used for the carrying on the business of the enterprise as stated in the commentary even if the premises, facilities are not owned or rented by the assessee company but belong to the representative of the assessee is India does not make any difference as stated in the above commentary. In all the representatives' premises in India having a dedicated machine as stated above, a board containing Western Union Logo itself establishes the identity of the company and the fact that the business of the assessee company is carried out through that premises. When one visit the premises of any of the agents he will find a distinct identity of presence of the assessee company, he will find virtual projection of the assessee company. This establishes the existence of permanent establishment of the assessee according to the commentary stated above. This aspect of fact was not examined by Hon'ble Tribunal in the assessee own case for 2001-02, therefore, reliance placed by the assessee on its order for A.Y.2001-02 is found misplaced.

....

Generally the appointment of the agents is for a period of 5 years in the beginning and can be extended any number of times for periods of one year at a time. The agents are remunerated at 30% in the case of Department of posts and 25% in the case of others, of the money handed over by the agent in India. The percentage may be reduced if the assessee assumes responsibility for advertising and promotion of the services in India or establishes a customer service center to handle telephonic queries. One other feature of the agreement is that the money is to be first paid out by the agent in India and therefore he will be reimbursed the same together with the commission due to him. One more noticeable feature of the agreement is that the agent has been given the power to appoint sub-agents / representatives. However, it is the responsibility of the agents to pay the sub-agents. The assessee can ask the agent to terminate the services of a sub-agent if it is found that the sub-agent is acting in manner prejudicial to the interests of the assessee. There are the usual clauses providing for security and confidentiality and reserving the intellectual property rights of both the parties in the trade name, trademarks, copyrights etc. belonging to them. There is a clause which enjoins the agent to maintain records of all the transactions of money transfer routed through him.

D.3 Now we examine that whether the agents appointed are of independent status. The OECD commentary elaborates that:

….. ……

Now take an example of one of the agent M/s Wall Street Finance Ltd. as per the annual report of the Wall Street Finances Ltd. For the previous year relevant to assessment year 2004-05, out of total income of 2296.86 lakhs, the commission received from the assessee company amount of '950.30 lakhs, it showed that 42% of revenue of the agent of the assessee accounted from the commission received from the assessee company. This showed the economic dependence of one of the agent of the assessee, the same situation will be applicable for other NBFC and tour operators agents appointed in India. Therefore, it can be stated that most of the agents are economically dependent on the assessee company. Further, the agents appointed in India do not have necessary and requisite resources and knowledge to handle the money transfer business independently. They require constant support and active assistance from the employee of the assessee company to carry out trans border money transfer business. Since they do not have necessary expertise and technology of its own to carry out the money transfer business therefore it cannot be said that they are acting in the normal course of their business.

Another important test of independent agent is to whether they are responsible to his principle for the result of his work and not subject to significant control with respect to the manner in which that work is carried out. In the instant ase the agents appointed in India are subject to significant control from the assessee company in respect of manner in which money transfer business is carried out. First it is fully

dependent on the technology provided by the assessee and the use of the software and the manner in which it should be used for all these works it is dependent on its principal. Further how the advertisement is to be done, awareness to be created, call center to be opened is all subject to control from the assessee company. Therefore the agents appointed in India have failed the test of being an independent agent as provided in article 5(5) of DTAA.

From above, it is clear that they are not agent of independent status then whether they qualify as dependent agent PE as per the article 5(4) of DTAA which is extracted below:-

….. …..

D.4 The assessee has dependent agent permanent establishment in India due to the following facts:-

D.4.1 The agents are working wholly and exclusively for the assessee company in respect of transborder money transfer business. At para 5 of the agreement between the assessee and Weizmann Ltd., which is available on last year's records, it is mentioned" the representative agrees that it will not during the term of agreement and for six months after the termination of this agreement act as an agent for or represent or operate as principal, another public money transfer service or engage directly or indirectly in any money transfer business other than as representative for Wun. This shows that the Weizmann Ltd. as working wholly and exclusively for the assessee. Similar is the case with other agents as well as therefore Weizmann Ltd. and other agents are dependent agents of the assessee.

D.4.2 The agents are working on behalf of the assessee and are rendering services on behalf of the assessee. They are interacting with the recipients of the money in India as in the name of Western Union and entering into subcontracts on behalf of the assessee. In fact the commitment given by Western Union to the sender is carried out in India by its agents. All the activities of the agents in the course of the business are binding on the assessee. Therefore, the important test of dependent agency plea that the agent must have the authority or give this impression that it has the authority to bind the principle of which it is an agent is fully satisfied in the case of the assessee. When the recipient of the money approaches any agent, he in fact goes to Western Union to collect the money.

....

The agents or representatives appointed in India by the assessee conclude the contract on behalf of the assessee by delivering money to the beneficiary in India. The agents deliver the money to the beneficiary on production of valid identity card and money transfer code. The decision of the agents to deliver the money is binding on the assessee company. Therefore, the contract of money transfer which was initiated by ana gent of the assessee outside India was finally concluded by the agent of the assessee in India. The decisions of the agemts were binding to the assessee. The agents or representatives were also given authority to appoint subagents or sub-representatives. This fulfils the tst of dependent agent PE as stated in the above commentary.

Therefore, the assessee company had a dependent PE in India.

The authority to conclude should be seen in respect of business perspective of the assessee. The assessee company is not engaged in the selling of merchandise / goods so that contract can be concluded with customers literally. The assessee is engaged in money transfer service and it is basically services industry, so the type of contract which are required to be entered in for this business should be relevant and whether these contract were concluded by the agents in India should be determinative test to decide as to whether they have authority to conclude the contract or not. In this industry the transfer of money to beneficiary is the main objective of the business and for these activities it receives commission. The agents in India do aggressive marketing and educate the sender / beneficiary to enter into contract for money transfer which will be concluded by them. They also have call centre to guide people. Therefore, they literally enter into contract which require for this business.

They also have power to appoint subagents in India, so that market and reach of the assessee increases. These are the contract which requires for money transfer and agents have authority to conclude them. Theefore the Hon'ble Tribunal has not correctly appreciated the fact of the case in A.Y.2001-02, and it is clear that they have authority to conclude the contract. It is well settled principle that the substance of activities should determine the issue of PE not the forms which it shown to appears. In Money transfer business they

are totally dependent on their principal and they have no resource to do this business independently.

Further, the department has not accepted the findings of the Hon'ble ITAT in case of assessee for AY 2001-02 on the issue of permanent establishment. The matter is now pending before the Hon'ble Delhi High Court. In view of the same, the order of Hon'ble ITAT, on which reliance has been placed by the assessee, has not been followed."

2.1 Being aggrieved, the assessee filed an appeal before the Ld CIT (A) and the Ld. CIT (A) followed the order of the Tribunal for the AY 2001-02 in assessee's own case and allowed the appeal of the assessee.

2.2 Now the Revenue is in appeal before us and has raised 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."

4. The Ld. DR heavily placed reliance on the assessment order passed by the AO.

5. The Ld. AR placed reliance on the decision of this Tribunal in assessee's own case in ITA No.4889/Del/2004, ITA No.1572-74/Del/2010 & Co. No.163-165/Del/2010, ITA No.5551 &

5552/Del/2010 and in ITA Nos 5649/Del/2010 & 4956/Del/2011 for AYs 2001-02, AY 2002-03, 2003-04 & 2005-06, AY 2004-05 & 2009-10 and 2007-08 & 2008-09 respectively. He further submitted that there is no change in the facts of the case and even the allegations levied by the AO are same.

6. This was not disputed by Ld DR. In crux both the parties admit before us that the facts of the case for AY 2011-12 are similar to the facts involved for the earlier years.

7. We have carefully considered these facts in the light of the orders of the Co-ordinate Benches of this Tribunal for the assessment years 2001-02, 2002-03, 2003-04, 2005-06 & 2004-05, 2009-10. In ITA No.4889/Del/2004 for the AY 2001-02, the Tribunal considered the issues at length and reached the conclusions that though the assessee has a business connection in India, it had neither fixed nor the agencies PE in India, as such in the absence of any PE in India, the profits, if any, attributable to Indian operations could not be assessed as business profits under Article 7 of the Treaty. It was also held that the agents engaged by the assessee in this matter are independent agents under Article 5(5) of the Treaty and they do not habitually exercise the authority to conclude the contracts on

behalf of the assessee, and, on that premise it was held that there is no agency PE of the assessee in India. The sum and substance of the order of the Co-ordinate Bench of the Tribunal is that though the assessee had business connection, it did not have any fixed place PE or agency place PE in India, and, in the absence of any PE in India, the profits, if any, attributable to India's operation could not be assessed as business profits under Article 7 of the Treaty. We extract the relevant portion of Tribunal order for AY 2001-02 as under:

> *"(c) Is the software "VOYAGER" the PE of the assessee?*
>
> *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. ITO [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 initi- ally 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 non-banking 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 ITR 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 pay- ment 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."

7.1 The conclusions reached by this Tribunal for the AY 2001-02 has thereafter also been followed by the other co-ordinate benches of Tribunal in Assessment Years 2002-03, 2003-04, 2004-05, 2005-06, 2007-08, 2008-09 and 2009-10. 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 years

cannot not be disturbed without any compelling reason. We, therefore, hold that findings of the Ld. CIT (A) cannot be interfered with. Grounds 1, 2, 2.1 and 2.2 are, accordingly, dismissed.

7.2 Since we have held that there is no PE in India, issue of attribution raised by the department in Ground No. 2.3 need not be adjudicated upon. This ground is therefore dismissed as *in fructuous*.

7.3 Similarly, Ground No. 3 which challenges the non-levy of interest u/s 234B also is dismissed as having become *infructous*.

8. In the final result, the appeal filed by revenue is dismissed.

Order pronounced in the open court on 28th September, 2018.

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

Dated: 28th SEPTEMBER, 2018

Copy forwarded to: -

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

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By Order

ASSTT. REGISTRAR