IN THE INCOME TAX APPELLATE TRIBUNAL "I", BENCH MUMBAI

BEFORE SHRI MAHAVIR SINGH, JM
&
SHRI G. MANJUNATHA, AM

ITA No.183/Mum/2018
(**Assessment Year :2013-14**)

DCIT(IT)-2(1)(2), Room No.1612, 16th Floor, Air India Building, Nariman Point Mumbai – 400021	Vs.	M/s. Daimler AG C/o. SRBC & Associates LLP, Chartered Accountants, 14th Floor, The Ruby, 29, Senapati Bapat Marg, Dadar(W), Mumbai - 400028
PAN/GIR No. AABCD2354C		
Appellant)	..	**Respondent**)

Revenue by	Shri Pankaj Kumar
Assessee by	Shri M.P. Lohia & Shri Hemen Chandariya
Date of Hearing	**28/03/2019**
Date of Pronouncement	**28 /03 /2019**

आदेश / O R D E R

PER G. MANJUNATHA (A.M):

This appeal filed by the revenue is directed against order of CIT(A)-56, Mumbai dated 13/10/2017 and it pertains to A.Y.2013-14.

2. Revenue has raised following grounds of appeal.

1. "Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in holding that the assessee does not have any business connection in India regarding the business of sale of spare parts, CBU cars and raw materials to MBIPL as well as sale of CBU cars directly to the customers in India"
2. "Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in holding that the assessee does not have a PE in India within the meaning of Article 5(2)(a),(b},(c)or(g)of the DTAA."
3. "Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in holding that in view of independent principal to principal basis business between the assessee and M/s Mercedes-Benz India Pvt. Ltd. (MBIPL), regarding the sale of raw materials and spare parts, the MBIPL

cannot be treated as agent of the assessee under Article 5(5) and 5(6) of the DTAA.."

3. The brief facts of the case are that the assessee is incorporated in and a tax resident of Germany. Based on the provisions of the India-Germany Double Taxation Avoidance Agreement (the Treaty), assessee has filed its return of income on 30/11/2013 declaring total income of Rs.107,21,33,636/- which was offered to tax as royalties and fees for technical services @10% under Article 12 of the India Germany Tax Treaty. Apart from the above income, the assessee did not have any income chargeable to tax under the provisions of Section 5 r.w.s. 9 of the Income Tax Act, 1961. Further, the assessee does not have a permanent establishment in India as per Article 5 of the Treaty. Accordingly, income from sale of raw materials, Completely Built up Cars (CBU) to MBIPL and sale of CBU cars directly to customers in India was not offered to tax in the return of income filed for the year. The AO has completed the assessment u/s.143(3) r.w.s. 144C(3) of the Act, and determined total income of Rs.109,00,86,003/- by *interalia* making additions towards profit as attributable to sale of spare parts, CBU cars to MBIPL and also through MBIPL and sale of CBU cars directly to customers in India on the ground that the assessee is having a permanent establishment in India and the income attributable to sales made in India in respect of above items is liable to tax in India under Article 5(2)(c), 5(2)(b) and 5(2)(a) of the Treaty.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A).

4.1. Before the CIT(A), the assessee submitted that since it does not have any permanent establishment in India, any income from sale of spare parts and CBU cars is not liable to tax in India under the provisions of Section 5 r.w.s.9 of the Income Tax Act, 1961. The assessee further contended that issue is squarely covered in favour of the assessee by the decision of ITAT in assessee's own case for earlier assessment years. The CIT(A) after considering relevant facts and also by following the orders of the ITAT for earlier years deleted the additions made by the AO.

5. Aggrieved by the CIT(A) order, the revenue is in appeal before us.

6. The ld. AR for the assessee, at the time of hearing submitted that the issue involved in the present appeal is squarely covered in favour of the assessee by the decision of ITAT, Mumbai 'I' bench in assessee's own case for the A.Y.2012-13 in ITA No.6888/Mum/2017 wherein the ITAT by following its earlier order upheld the findings of ld. CIT(A) and dismissed appeal filed by the revenue.

7. The ld. DR fairly accepted that the issue is covered in favour of the assessee by the decision of ITAT for earlier years.

8. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. We find that the Co-ordinate Bench of Mumbai 'I' Bench in assessee's own case for the A.Y.2012-13 in ITA No.6888/Mum/2017 had occasioned to consider

identical issue in the light of provisions of Section 5 r.w.s. 9 and also India Germany Treaty. We further noticed that the Co-ordinate Bench by following its earlier order in assessee's own case for earlier period held that income attributable for sale of spare parts, CBU cars and CBU cars directly to customers in India is not liable to tax in India, because the assessee does not having a permanent establishment in India. The relevant observations of the Tribunal are as under:-

> *"4. We have considered rival submissions and perused material on record. At the outset, the learned Authorised Representative submitted before us that identical issue has been decided in favour of the assessee through series of decisions by the Tribunal beginning from assessment year 1997-98 to 2011-12. In this context, he drew our attention to the latest order of the Tribunal passed for assessment year 2011-12, in ITA no.5704/Mum./2016, dated 31st May 2018. The learned Departmental Representative has not controverted the aforesaid submissions of the learned Authorised Representative. As could be seen from the materials placed before us, this is a recurring dispute between the assessee and the Department right from the assessment year 1997-98. In a series of decisions, the Tribunal has accepted assessee's claim that the income / profit received by the assessee on sale of raw materials and CBU cars in India is not taxable in India. In the latest order passed by the Tribunal for assessment year 2011-12 (supra), the Tribunal while dealing with the issue has held as under:-*
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> *"11. We find that the aforesaid issues on the basis of which the order of the CIT(A) for A.Y 2011-12 had been assailed by the revenue before us, had consistently been decided in favour of the assessee from A.Y 2001-02 to A.Y 2010-11. In the latest order, the Tribunal vide its order dated 03.11.2016 for AY 2010- 11, had decided the aforementioned issues in favour of the assessee by following the view earlier taken by the coordinate benches of the Tribunal in the assesses own case for A.Ys 2008- 09 and 2009-10, by observing as under:*
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> *"5. We find that on both the issues the Tribunal has decided the matter in favour of the assessee right from assessment year 2001-02 to 2009-10. In the latest order, the Tribunal vide order dated 28th September, 2016 for the assessment year 2008-09 and also for assessment year 2009-10 have decided this issue in the following manner:-*

Ground No.1

5. At the very outset id. AR appearing on behalf of assessee submitted that this issue has already been decided in favour of assessee in assessee's own case by Hon'ble ITAT in ITA Nos. 9211/M/2004, 6718/M/2006, 8520/M/2004, 6574/M/2006 for Assessment Years 2001-02 and 2002-03. Before we decide the merits of the case it is necessary to evaluate the orders passed by Hon'ble ITAT for Assessment Years 2001-02 and 2002-03 as pointed out by Id. AR and the operative para is reproduced below for the sake of convenience:

"The ld. Counsel for the assessee Shri Rajan Vora clarified that the assessee is a tax resident of Germany and the provisions of the Treaty shall apply to it to the extent the treaty is more beneficial to it. Therefore, the business income earned by the assessee form sale outside India of raw materials/CKD units to DCIL would be liable to tax in India only if the assessee has a permanent establishment in India.

"The ld. Counsel pointed out the at the issue of taxing the profits of the assessee on the basis that DCIL constitutes a business connection of the assessee was not discussed during the course of assessment proceedings violating the principle of natural justice for not giving an opportunity to the assessee to make his submissions and therefore the assessment order needs to be quashed. Without prejudice to the above, the ld. Counsel for the assessee respectfully submitted that DCIL does not constitute business connection in India and no income accrues arid arise assessee in India for sale of raw materials/ CKD units to DCIL.

"Section 9 of the Act provides, inter alia, that income accruing or arising, directly or indirectly through or form any business connection in India, shall be deemed to be income accruing or arising in India and, hence, where the person entitled to such income is a non-resident, if will be included in his total income.

Further, non-resident, it will be included in his total income. Further, Explanation (a) to Section 9(1)(i) of the Act provides that in case of a business of which all the operations are not carried out in India, the income deemed to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India-

9. The ld. Counsel for the assessee reiterated the arguments before the ld. CIT (A). He further relied on the following case laws: CIT Vs. Gulf Oil (Great Britain) Ltd. 108 ITR 874 (Bom) (Refer pg 56,62 of Paper Book-I) Mahabir Commercial Co Ltd vs. Commissioner of Income-tax (86 ITR 417) (SC); (Refer Pg 64, 80 of Paper Book)

Commissioner of Income-tax Vs Mewar Textile Mills Ltd (91 ITR 542) (SC); (Refer pg 81, 83 of Paper Book I)

Additional Commissioner of income-tax v Skoda Export, Praha (172 ITR 358) (AP) (Refer pg 84, 88 of Paper Book I).

10. The Id. Counsel further submitted as follows:

The assessee further submits that provisions of Circular No. 23/1969 dated 23 July 1969 ('Circular23') issued by the Central Board of Direct Taxes ('CBDT') would be applicable to the case of the assessee (refer Pg 551 to 553 of the paper book Volume II), Circular 23 has clarified the applicability of provisions of section 9 relating to business connection, to certain specific situations. There are various judicial precedents which have held that circulars issued by the CBDT are binding on. the Revenue authorities and assessee's should be given the benefit of favorable provisions of circulars-For eg the decision of the Hon'ble Bombay High Court in case of SET Satellite (Singapore) Pte Ltd v Dy. DIT. IT (2008) 307 FIR 205, (Refer Pg 678,679 & 699 of Paper Book Volume II).

11. After hearing, both the sides, we find force in assessee's arguments. The assessee merely sells the raw materials/CKD units to DCIL. It is DCIL which carries out further activity of assembling the same and selling the finished cars. There are no further activities carried out by the Appellant in India in this connection. This transaction ends with the appellant selling materials/ CKD. No income from such sales accrues or arises to the assessee in India. In other words no part of such profits accrues from or can be attributed to any activities of the assessee or his agent in India. The Apex Court in the case of CIT vs. Hyundai Industries Ltd (292 ITR 482) has held that in the case of an agreement with a South Korean Company for fabrication and installation of oil exploration platform, the PE attributable to installation and commissioning came into existence only after the supply of the equipment. Therefore profits from supply of the platform did not accrue in India. Similarly in the case of Ishikawajima Harima Heavy ltd. Ltd. v DIT (288 ITR 408), the Apex court held that profit will not accrue in India in respect of offshore supply of equipment. The subsequent amendment to sect 9(1)(i) will not affect the decision on profit arising from sale of equipment offshore. Mere sale of raw materials/components will not equipment result in business connection and even if it does as per he terms and conditions of the contract between the assessee and /DCIL no income accrues to the assessee on the basis of any activities carried out on behalf of the assessee in India. Therefore in our opinion DCIL does not constitute the assessee's business connection in India and thus, the assessee's income from sale of raw material/CKD units to DCIL would not be liable to tax in India under the provisions of the Act. We therefore concur with the decision of the

CIT(A) on this issue and dismiss the ground no. 1.(i) of the Revenue's appeal."

5.1 First Appellate Authority in the present case has also decided this issue in favour of assessee, the operative para of CIT (A) is mentioned below:

"10. I took note to the facts of the case and the submissions made by the appellants AR on record. in case of sale of CBU cars directly to the customers, the facts in AV 2008-09 are same as the facts in AY 2002-03 to AY 05-06 and AY 2007-08 and in order in Appeal No. CIT (A)-10/DDIT(IT)- 1(2)IT-58/09-10 (Old No.IT-295/07-08) dt 14-05-2010 for AY 1997-98 and in order in Appeal No.CIT (A)-10 I/DDIT(IT)-2(2) IT-57 /09-10 (Old No. IT- 294/07 -08) dt. 20-05-2010 for AY 2000-01 wherein he had also considered the Hon'ble ITAT, Mumbai order for AY 2001-02 and AY 2002-03 dated 31.03.2010 in the Appellants own case which is in favor of the Appellant. The appellant's AR has made the similar set of submissions as it was submitted in the appellate proceedings for A Y 1997 -98 arid AY 2000-01. The appellant's AR has made similar set of submissions as it was submitted that by him in the appellate proceedings for A.Ys.2007-08 and 2000-01, which has already been adjudicated as referred above. Thus, I find that the issue involved in these grounds of appeal has been decided in favour of the appellant by my predecessor CIT(A) in A,Ys 1997-98 and 2000-01 keeping reliance on decision of the jurisdictional ITAT, Mumbai's decision in A.Ys. 2001-02 and 2002-03. This, following the rule of consistency, I consider it proper and appropriate to be in agreement with my predecessor GIT(A)s decision and accordingly hold that the appellant does not have a business connection in India as the MBIPL does not constitute a business connection of the appellant in India u/s.9 of the Act and, therefore, its income in respect of sale of CBU cars directly to the customers in India is not taxable in India.

11. Even in case of sale of CBU cars/ raw materials and spare parts to MBIPL, I have examined the facts of the case and the submissions made by the AR. The facts in A Y 2008-09 are same as the facts in the case of the Appellant for A Y 2002-03 to A Y 2005-06 and A.Y. 2007-08, wherein the Hon'ble Tribunal has held that the Appellant does not have a business connection India. I agree with the contentions of the Appellant and I also find that the judicial precedents cited by the AR also support the Appellants case. As held by the jurisdictional Hon'ble ITAT, Mumbai that the Appellant merely sells the CBU cars raw materials/ spare parts from outside India and thereafter, the said CBU cars/ raw materials spare parts become the property of MBJPL. This transaction ends with the Appellant selling the CBU cars/ raw materials/ spare parts to MBIPL from outside India. The Appellant does not carry any manufacturing activity in respect of the CBU cars/ raw materials // spare parts sold by the Appellant to

MBIPL nor does it play any role in the subsequent sale CBU curs/ raw materials/ spare parts by MBIPL. MBJPL sells the CBU cars through its own network of dealers. The profit earned by MBIPL from sale of CBU cars purchased from the Appellant is taxed in the hands of MBIPL.

12. In view of the same, respectfully following the findings of the Hon'ble Tribunal in the case of the Appellants own case for AY 2002-03, 1 hold that with regard to sale of CBU cars/ raw Material/ spare parts by the Appellant to MBIPL, the Appellant does not have a business connection in India and that MBIPL does not constitute a business connection of the Appellant in India under Section 9 of the Act and therefore, its income in respect of sale of CBU cars to MI3IPL is not taxable in India.‖

6. On the other hand, Id. DR relied upon the orders passed by the A.O.

7. We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. After co-joint reading of all the orders passed by Hon'ble ITAT as well as CIT(A) in assessee's own case, we are of the considered view that the Id. C'ITA) while dealing with the said issue has relied upon the orders of Hon'ble ITAT in assessee's own case for AY 2001-02 and therefore CIT(A) has rightly held that with regard to the sale of CBU cars/materials/ spare parts by the assessee to MBIPL, assessee does not have a business connection in India and that MBIPL does not constitute the business action of the assessee in India u/s 9 of the Act and therefore the income in respect of sale of CBU cars to MBIPL is not taxable in India, while following the judicial consistency and following the orders of Hon'ble ITAT in assessee's own case, we dismissed this ground of appeal raised by revenue.

Ground No. 2:-

8. At the very outset Id. AR appearing on behalf of assessee submitted that this issue has already been decided in favour of assessee in assessee's own case by Hon'ble ITAT in ITA Nos.9211/Mum/2004, 6718/Mum/2006, 8520/Mum/2004, 6574/ Mum/2006 for Assessment Years 2001-02 and 2002-03. Before we decide the merits of the case it is necessary to evaluate the orders passed by Hon'ble ITAT for Assessment Years 2001-02 and 2002-03 as pointed out by ld. AR and the operative para is reproduced below for the sake of convenience:

"The next issue is that the assessee has challenged the contention of the A0 that the assessee has a PE in India under Article 52)(a),(b),(c) and(g) of the Treaty.

13. The Assessing Officer's arguments in this respect are us under: DCIL derives its entire business on account of the appellant and during the subject year, out of its total income of Rs.17,36,10,000/-, Rs.2,47,05,0000/- was by way of commis- sion income received from the assessee.

The engine is the most vital component of the automobile and DCIL is not in a position to carry out its contracts on its own in the absence of supply of equipment and technology by the assessee.

The Managing Director (MD) and Executive Director (ED) of DCIL are expatriate employees deputed by the appellant to DCIL arid through these employees, the appellant effectively controls all the employees of DCIL. Further, DCIL executes the business generated by the appellant and its day-to-day affairs are being controlled by the appellant.

Further, the AO has stated that DCIL is a sales outlet or warehouse of the appellant.

The assessee's key arguments are as under:

The commentary to Article 5 of the OECD MC states that the mere existence of a subsidiary does not of itself constitute the subsidiary company PE of the parent. Even the fact that the trade or business of the subsidiary is managed by the parent company does not constitute the subsidiary company a PE of the parent company.

The conditions as stated in the definition of PE in Article 5(1) of the Treaty must first be satisfied in order for a place to constitute a PE under Article 5(2) of the treaty i.e. the enterprise must carry out business operations in the other contracting state and such business of the enterprise must be carried on through such fixed base. As regards sale of parts/ CKD and CBU sales, no operations in respect of the manufacture and sale of the parts is carried out by the appellant in India. Thus, the key condition for constitution of PE i.e. carrying on of business in India is not satisfied and accordingly the appellant does not have a PE in India.

The appellant does not have a right to use DCIL premises and the premises are not at the disposal of the appellant. Accordingly, DCIL does not constitute a PE of the appellant in India.

For a fixed place of business to constitute a place of management of a foreign enterprise, significant decisions in relation to the business of the foreign enterprise need to be taken at that fixed place of business. The appellant is a company incorporated in Germany and is managed by its Board of Directors who manage the appellant's business from Germany and not through a fixed place of business in India. The appellant does not

carry out any business operations in India and thus, no decisions leave alone significant decisions in respect of the business of the appellants are taken by DCIL. Accordingly, DJL does not constitute a place of management of the appellant in India.

As regards the MD and ED, the appellant has submitted that the MD and ED have signed separate agreements with DGJL which specifically state that the management papers exercisable by the MD and ED shall be subject to the supervision and control of the Board of Directors of DCIL. Further the appellant has sought to rely on the rulings in the case of Carborandum co. Vs. CIT (108 ITR 335) and Tekniskil ('Sendirian) Berhad (222 ITR 551) to argue that the deputation of the MD and ED do not constitute a PE for the appellant in India.

Sales outlet/ warehouse of the appellant- The goods stored in the warehouses of DCIL. and sold at the sales outlets of DIL are those which belong to DCIL. As regards sale of parts/ CKD such sales are made by the appellant to DCIL on a principal-in principal basis and on sale, such parts/ CKD become the property of DOL. As far as CBU sales are concerned, DCIT does not maintain a stock of such cars and does not display them in its sales outlets. Accordingly, DCIL does not constitute a sale outlet warehouse of the appellant.

The AO has erroneously compared the gross commission income of DCIL of Rs. 2,47,05,000 with its net profits of Rs. 17,36,10,000/- to indicate that such commission forms a large proportion of DCIL's income. However, when compared to proportion of DCIL's gross revenues of Rs.2,53,42,66,000/- it is clear that the commission earned forms less than 1 percent of the total gross revenue earned by DCIL during the year.

14. The Id. CIT(A) held as under:

"I have carefully considered the submissions of the appellant as well as the observations of the AO. For the appellant to constitute a PE as per Article 5(1) and 5(2) for the Treaty. it would have to be proved that he appellant carries out some business operations in India and further it would have to be proved that the appellant has at its disposal certain fixed place of business in India, and that is business operations is carried out through such fixed place. As regards the parts/CKDs it is evident that the appellant sells the parts/CKDs to DCIL outside India and no activity in relation to such sales is carried out by the appellant in India. DCIL uses the parts/ CKDs in its own business of assembly and sale of cars. The profits from the business assembly and sale of cars are reported in the financials and offered to tax in the return of income of DCIL. The appellant does not carry our any operation in India in respect of the sale of parts/ CKDs to DCIL and accordingly, cannot qualify to / have a PE in

this respect under Article 5(1)and 5(2) of the Treaty.‖ Aggrieved, Revenue preferred an appeal before us. In our opinion mere existence of subsidiary does not by itself constitute the subsidiary company a PE of the parent the main condition for constitution of PE is carrying on of business in India, and a regards sale of parts/ CKD no operations in respect of the manufacture and sale of parts is carried out by the assessee in India. Further the assessee does not have a right to use of DCILs premises. Further DCIL does not constitute a place of management of the assessee in India as the management of the assessee's business is by the Board of Directors at Germany. The MD and ED actually become on deputation as employees of DCIL and work under the directions and control of the Board of DCIL.

As regards sale of parts/CKD such sale are made by the assessee to DCKIL on principal to principals' basis and on sale such parts/ CKD become the property of DCIL. Hence DCIL does not constitute sales outlet/ warehouse of the assessee. Hence we are of the opinion that the assessee does not carry out any operations in India in respect of sale of parts/ CKD to DCIL and therefore cannot qualify to have a PE in this respect under Article 5(1) and 5(2) of the treaty. Therefore we confirm the order of the Ld. CIT(A) and dismiss ground No.(i) and ('ii) raised by the Revenue.

In the result, the revenue's appeal is dismissed.

ITA No. 6718/Mum/2006 A. Y. 2002-03 Revenue's appeal As the facts of the case are identical in Revenue's appeal in ITA No.9211/M/04 for the reasons sated in appeal for A. Y. 2001-02 (supra), we hold DCIL does not constitute the Assessee's business connection in India and thus, the assessee's income from sale of raw material/ CKD units to DCJL would not be liable to tax in India under the provisions of the Act. Further, we hold that the assessee does not carry out any operations in India in respect of sale of parts/ CKD to DCIL and therefore cannot qualify to have a PE in this respect under Article 5(1) and 5(2) of the treaty. Therefore we confirm the order of the Id. CIT(A) and dismiss the revenue's appeal."

First Appellate Authority in the present case has also decided this issue in favour of assessee, the operative para of CIT(A) is mentioned below:

"21. 1 have considered the facts of the appellant's case as well as took note to the appellants detailed submissions. Having taken note of the same, it is evident that the issue involved in these grounds of appeal pertaining to A. Y.2009-1 0, the facts are similar to the appellant's case, which has already been decided by my predecessor CIT(A) in A.Ys. 1995-96, 1997-98,2000-01, 2001-02 to 2005-06 and 2007-08. 1 find that my predecessor CIT(A) has decided the issue, which has been raised by the appellant in

these grounds of appeal in favour of the appellant vide order in appeal Nos. CIT (A)-10/DDIT(IT)-1(2)/IT- 58/09-1 0 (Old No.IT-295107-08) dt. 14-05-2010 for AY 1997 - 98-and No. CIT (A)-10 /DDIT(IT)-1(2) IT 57/09-10 (Old No.1T- 294 /07-08) dt. 20-05-2010 for AY 2000-01 and CIT(A)-10 DDIT (IT) - 1(2) /IT-58/09-10 (old No. IT 295/07-08) dt. 14-05-2010 for AY 2005-06. I also find that while deciding the issue in favour of the appellant my predecessor CIT(A) has taken note of jurisdictional ITATs decision in the appellant's own case for A. Ys.2001-02 and 2002-03. The appellant's AR has made the similar set of submissions before me also as it was made in A.Ys.1997-98 and 2000-01. Having the facts available on record and the decision of my predecessor CIT(A) and the appellant's submission, I consider it proper and appropriate to follow the rule of consistency and accordingly hold that the appellant does not have a PE in India within the meaning of Article 5(1) and5(2) of the India-Germany tax treaty. Hence, MBIPL does not constitute a RE of the appellant in India under Article 5(2)a), 5(2(b), 5(2)(c) and 5(2)(g) of the said treaty. Thus, the appellant's these grounds of appeal are allowed accordingly.‖ After co-joint reading of both afore mentioned orders we found that this issue has already been decided by Hon'ble ITAT in favour of assessee. Therefore, while following judicial consistency and following the orders of Hon'ble ITAT in assessee's own case, we dismiss this ground of appeal raised by revenue.

Ground No. 3:-

At the very outset ld. AR appearing on behalf of assessee submitted that this issue has already been decided in favour of assessee in assessee's own case by Hon'ble ITAT in ITA Nos. 9211/Mum/2004, 6718/Mu m/200 6, 8520/Mu m/2 00 4, 6574/Mu m/2 006 f or Assessment Years 2001-02 and 2002-03. Before we decide the merits of the case it is necessary to evaluate the orders passed by Hon'ble ITAT for Assessment Years 2001-02 and 2002-03 as pointed out by Id. AR and the operative para is reproduced below for the sake of convenience:

—The CITA) has held that though the CBU cars are sold directly by the assessee to Indian customers, activities are carried out in India by DCIL acting on behalf of the assessee in concluding the sale vis-ã-vis the Indian customers. Even though the agreement entered into by the assessee with DCIL is categorized as General Agency Agreement, DCIL is a projection and is a one point contact for the customer to buy a car.

The assessee submits the facts covering the direct sale to customers listed above. DCIL merely acts as a communication channel for the assessee in such sales. No inference can be made that DOLL assists the assessee in the sale of OBU cars in material manner which can be considered as DCIL acting as an agent in concluding the sale of cars. DCIL cannot be

considered to be controlled by the appellant in these transactions if DCIL to be considered as a depending agent. Further DCIL does not bear any risk in the transaction but merely acts as conduit of communication for which they are compensated. Hence, no part of the profits occurring to the assessee can be attributed to the activities of DCIL in India.

The Id. DR submits that DCIL is a dependent agent of the assessee in as much as the entirety of the transactions of the assessee in India is though DCIL and DCIL undertakes an active part in concluding a deal for and on behalf of the assessee. We heard both the parties. The issue to be decided is whether DCIL is acting as art dependent on and controlled by the assessee and if so, can DCIL be considered as a permanent establishment (agency is whether any profit be attributed to the activities of such a PE in India. Article 7 of the Double Taxation Agreement reads as under:

"7(1) the profits of art of a contracting state shall be taxable only in that state unless the enterprise carries a business in the other contracting state through a permanent establishment situated therein. If the enterprise caries on business as aforesaid, the profits of the enterprise may be taxed in the other state but only so much of them as is attributable to that permanent establishment.

(2) Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment stated therein. There shall in each Contracting Sale be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3) In the determination of the profits of a permanent establishment, thee shall be allowed as deductions, expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere and according to the domestic law of the Contracting State in which the permanent establishment is situated.‖

28. In the instant case DCIL is being considered as dependent agent and so constitutes an agency PE of the assessee in India. The relevant article under the DTAA between in India and Germany is Article 5(5) in which the agency PE is defined as under;

5(5) Notwithstanding the provisions of paragraphs 1 and 2 where a person other than An agent of an independent status to whom paragraphs 6

applies is acing in a contracting state on behalf of an enterprise of the other contracting state that enterprise shall be deemed to have a permanent establishment in the first mentioned state, if this person.

Has and habitually exercises in that State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise. Has no such authority, but habitually maintains in the first mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise; or Habitually secures orders in the first mentioned state wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling controlled by, or subject to these same common control, as that enterprise.‖

29. First it has to be established that DCIL is a permanent establishment as contemplated in the DTAA between India and West Germany and if so, the profits attributable to the activities of such permanent establishment in the transactions under consideration will have to be determined which will be taxable in India. While arriving at the profits of the PE, the expenses incurred in earning the profits would also be deducted therefrom in arriving at the taxable profits of PE.

30. Now the activity of DCIL are twofold.(1) manufacture of cars using CKD packs and other components. (2) Act as communication exchange in respect of direct sale of CBUs by the assessee directly the clients in India. Even though the commission received by DCIL for helping the sale of CBUs, it is obvious that their main 2ctivity is that of manufacture of cars.

Acting as communication conduct is not their main business. Further the dept has not established that DCIL actively canvasses orders for CBUs of Assessee or is actively engaged in negotiating and concluding contracts if and when clients approach DCIL or their agents evidencing interest to buy CBUs from the appellant DCIL passes on communication both sides. Negotiations of price, specifications etc were concluded by the appellant. The sale to the customer was on principle to principle basis. The risk of diminishing in value or damages to the cars is to the account of customer's right from the port of shipment at the manufacturing end. The cars were cleared through customs in India for and on behalf of the ultimate customers. Thus, DCJL had no role to play from the sale or in any activity in promoting the sale to the assessee directly to the customers in India. They are only collection of information and activities of preparatory or auxiliary in nature. The prices offered to the clients are as per the list price notified by the assessee. DCIL has no authority to conclude any deal. Thus the mere acting as post office between the assessee and the client will not render DCIL as a dependent agent. DCIL cannot be considered s habitually procuring orders for the assessee in fact, DCIL themselves are

manufacturing and selling the cars and procurement of orders for direct shipment of cars by the assessee would in fact be contrary to and against the interest of the DCIL in its manufacturing activity. DIL by passing on communication from assessee to the client and vice versa, are merely rendering a very insignificant auxiliary/preparatory service in the sale of CBUs by the assessee to Indian clients. Therefore DCIL does not constitute a dependent agent of the assessee. The prices offered to the Indian clients are as per list price notified and so whether DCIL is involved or not the price charged to the customer would be the same. No profits can be attributed to the services of DCIL in India. In fact by engaging the services of DCJL, the profit of the assessee is reduced to the extent of the commission paid to DCIL.‖ First Appellate Authority in the present case has also decided this issues in favour of assessee, the operative para of CIT(A) is mentioned below:

"I have considered the appellant's submission as well as the facts - available on record. Having considered same, I find that similar issue had been decided by my predecessor CIT(A) in the appellant's own case in similar set of facts for A.Ys. in AY 2008- 09 are same as the facts in AY 1997-98, 2000-01, 2001-02, 2002-03 to 2005-06 and 2007-08. I find that my predecessor CIT(A) while deciding the appellant's this ground of appeal vide his order No. CIT (A)- 10/DDIT(IT)- 1(2)/IT-58/ 09-10 (Old No. IT-295/ 0 7-08) dt 14-05-2010 for A Y 1997-98 and No. CIT (A)- I0/DDIT'(IT)-1 (2)/IT-57/ 09-70 (Old No.IT-294/07-08) dt 20- 05-2010 for AY 2000-01, he relied upon the decision of the jurisdictional ITAT in the appellant's own case for A. Ys. 2001- 02 and 2002-03, which was decided by the / Hon'ble ITAT in favour of the appellant. In the course of appellate proceedings, the appellant's AR has made similar set of submissions and arguments as it was made in A. Ys. 1997- 98 and 2000-01 arid other preceding A.Ys. referred as above. The appellant's AR has also made the submission before me that the appellant company has made the payment of commission for the services rendered by MBIPL in assisting the appellant in communicating with end customers to whom the appellant has supplied the CBU cars. The' appellant's AR also submitted in his oral arguments that such commission paid was accepted by the transfer pricing officer of the department amid was not altered / challenged by the TPO. Therefore, based on the similar submission, he claimed that the appellant has made the payment t to the MBIPL commission at arm's length price for services so rendered by MBIPL.

29. I have examined the above documents and it can be seen from these documents that MBIPL does not have the authority to conclude contracts in respect of sale of CBU cars by the Appellant to the Indian customers directly and MBIPL merely assists the Appellant in communicating customer requests like price, desired configuration of cars, etc. to the Appellant and communicating the Appellant's reply to customers. These

activities cannot, in my view, be termed as MBIPL acting on behalf of the Appellant.

30. It is seen that the AO has not brought any material on record to prove at MBIPL is acting on behalf of the Appellant or is securing orders for the Appellant or in any way seeking to project itself as the agent of the Appellant in India. MBIPL IS merely acting in its ordinary course of business and hence, cannot be held as an agent of the Appellant in India.

31. With respect to the sale of CBU cars by the Appellant to MBIPL, it is observed that, the sales of CBU cars are made at arm's length on principal to Principal basis. The CBU cars, once purchased by MBIPL from the Appellant become property of MBIPL. The selling prices and the terms of sale of these CJ3U cars are determined by MBIPL itself. The sale of the said cars is recorded in the books of MBIPL and MBIPL pay tax on the said profits. In selling those cars, MBIPL does not conduct itself in a manner that it is acting on behalf of the Appellant. The Appellant also does not have any control or say in the sale of those cars.

33. In view of the above, I am of the considered view that in case of sale of CBU cars by the Appellant to MBIPL and also directly to customers in India, MBIPL is not acting on behalf of the Appellant in India and hence, the fundamental condition of constituting a PE as mentioned in Article 5(5) of the Treaty is not satisfied.‖ After co-joint reading it was rightly held that MBIPL constitutes an Agency PE within the meaning of Article 5(5)(a), 5(5)(b) 5(5)c) of the India-Germany.

Tax Treaty. Therefore, concurring with the above findings and also maintaining judicial consistency and following the orders of Hon'ble ITAT in assesses own case, we dismiss this ground of appeal raised by revenue.

Ground No.4:

At the very outset ld. AR appearing on behalf of assessee submitted that this issue has already been decided in favour of assessee in assessee's own case by Hon'ble ITAT in. ITA Nos. 9211/Mum/2004, 6718/Mum/2006, 8520/Mum/2004, 6574/ Mum/2006 f or Assessment Years 2001-02 and 2002-03. Before we decide the merits of the case it is necessary to evaluate the orders passed by Hon'ble ITAT for Assessment Years 2001-02 and 2002-03 as pointed out by ld. AR and the operative para is reproduced below for the sake of convenience:

31. The following decisions cited by the assessee can be extracted for this purpose.

—the decisions of the Hon'ble Supreme court in case of DIT vs. Morgon Stanley & Co Inc 292 ITR 416 (refer page 555,556 &

565) of Paper Book Volume III, wherein the Hon'ble apex court has observed that since the assessee did riot conclude any contracts on behalf of morgan Stanley & Co. Inc. (MSCo), it did not have an agency PE in India. Similar view has also been taken by the Special Bench o Delhi Tribunal in case of Motorola Inc & Others v DCIT (2005) 95 ITD 269 (refer page nos. 580,589&59) of Paper Book volume II and the Authority for Advance Rulings in case of TVM Ltd v CIT (1999) 237 ITR 230 (Refer page 600 &61

8) of paper book volume II).

The Hon'ble Delhi Tribunal has in the case of Western Union Financial Services Inc (104 ITD 34) (Refer page no. 522 & 547 of paper book volume II), observed that here is no evidence to show that the extent of their activities of the assessee, compared to all these activities, is so large that it can be said that they are dependent on the assessee for t h e i r earnings or revenues. Accordingly, the agents are not economically dependent upon the assessee, further there is no authority with the agents to conclude contracts. The agents are merely performing their duties and not exercising any authority based on the above, the Hon'ble Tribunal concluded that there is no agency PE in India.

In case of Kno Werx Education (India) P Ltd (301 ITR 207) (Refer pg 619 & 632) of paper book volume II), the authority for Advance Rulings has observed that since the applicant doe riot conclude any contract on behalf of the foreign company, doe not maintain stock of goods/ merchandise belonging to the foreign company and also carries on a variety of activities besides promoting examinations of the foreign company, the appellant enjoys an independent status.

Accordingly, the applicant cannot be deemed to be a PE of the foreign company in India.

Similarly, in case of Specialty Magazines (p) Ltd (274 ITR 310) (Refer pg 633 & 644 of paper book Volume II), the AAR ruled that since 22%-25% of the income of the applicant is derived from other clients, it cannot be said that its activities are carried out wholly or almost wholly of the foreign company. Thus the applicant, being artgent is not covered by the definition of PE in article 5 of the DTAA.‖

32. From the above it can be sent hat merely acting for a non resident principal would not by itself render an agent to be considered as PE for the purpose of allocating profits taxable in the hands of the principal.

There should be some definite activity of the PE to which profits can be attributed. Unless it is so established, merely calling a person as agent acting on behalf of foreign nonresident would not by itself render him to be considered as an agency PE and protanto part of the profits of the nonresident is liable to be taxed in India. We find that the revenue has not established that DCIL had carried out any activity to which any profit can be attributed. DCIL was merely carrying out the work of a post office transferring communication from one to another. Therefore, we are not convinced that the department had established that the activity of DCIL even if it is to be considered as PE has resulted in any profits to the assessee and in view of the specific provisions of the Article 7 of the Double Taxation Avoidance Agreement between Indian and Germany, the part of the profit of the non-resident assessee can be attributed to the activity with DCIL and hence is not taxable in India.

33. as we have held that no profit accruing to the assessee on sale of CBU cars directly to Indian customers can be attributed to the activities of DCIL, we are not deciding upon the correctness or otherwise of the percentage of profits, estimated by the CIT(A), as attributable to the activities of PE in India. Hence ground no.3 raised by the assessee is not decided as being infructuous.

34. in the result, the appeal of the assessee is allowed.

35. the only issue in the assessee's appeal is against the decision of the CIT(A) holding that 255 of the sale price of CBUs sold by the assessee directly to the Indian customers constitutes net profit of the assessee form sale of CBUs and 30% of the same accrues and is taxable in India.

36. As the facts of the case are identical with the assessee's appeal in ITA No. 8520/Mum/04 for AY 2001-02 for the reasons stated in the appeal for AY 2001-02 9supra) we hold that no part of the parties accruing to the assessee from sale of CBUs directly to the Indian clients is attributable to the activities of any PE of the assessee in India and hence no part of the profit rising to the assessee form sale of CBUs is taxable in India.‖ First Appellate Authority in the present case has also decided this issue in favour of assessee, the operative para of CIT(A) is mentioned below:

34. Ground No.9 relates to the issue of attribution of profit to the activities of the Appellant in India. I have already held in the above paragraphs that business connection/FE in India. As the facts in this issue are similar to the facts m the case of the Appellant for AY 1997-98 and AY 2000-01, as held in my predecessor's order number CJT(A)- 10 /DDIT('IT,)- 1(2)/ IT-58/ 09-10 (Old No.1T-295 /07 -08) dt 14-05-2010 for-AY 1997-98 and in order in Appeal No. CIT (A)-10 /DDIT(IT)-1(2)/IT-57/09- 10 (Old No. IT 294/07-08) dt 20-05-2010 for AY 2000-01, I hold that no part of the profits

accruing to the Appellant from the sale of CBU cars and raw materials to MBIPL and directly to the customers can be attributed to the activities of MBIPL in India. In view of the same, in my considered view, the issue of percentage of profit as decided by the A. 0 as attributable to the activities of the PE in India does not have any relevant as it has been held by him in the foregoing paras that the MBIPL cannot be held as PE of the appellant in India and accordingly, the appellant's this ground of appeal becomes infructuous in view of the afore stated facts and decision. Accordingly, the same is not adjudicated. However, for statistical purposes, the same is treated being dismissed being infructuous.‖ After co-joint reading of the above orders, we have observed that it was rightly held that MBIPL cannot be held as FE of the assessee in India. Therefore, concurring with the above findings and also maintaining judicial consistency and following the orders of Hon'ble ITAT in assessee's own case, we dismiss this ground of appeal raised by revenue.

Ground No.5:-

At the very outset Id. AR appearing on behalf of assessee submitted that this issue has already been decided in favour of assessee in assessee's own case by Hon'ble ITAT in ITA Nos. 9211/Mum/2004, 6718 /Mum/2006, 8520/Mum/2004, 6574 /Mum/2006 f or Assessment Years 2001-02 and 2002-03. Before we decide the merits of the case it is necessary to evaluate the orders passed by Hon'ble ITAT for Assessment Years 2001-02 and 2002-03 as pointed out by Id. AR and the operative para is reproduced below for the sake of convenience:

"18. Ground No.4 raised by the revenue reads as follows:

"4. On the facts and circumstances of the case and in law whether the ld. CIT(A) was correct in holding that when duty is cast on the payer to pay tax at source, no interest viz. 234B can be imposed on the payee assessee ignoring the fact that it is the liability of the payee to pay advance tax on the amount which had not been deducted at source under section 195 of the Income Tax Act, 1961.‖

19. It is not in dispute before us that identical issue was considered by the A.Y: 1997 -98 in ITA No.3727/M/09 and this Tribunal held as follows:

We have heard the parties. The Ld Counsel for the assessee submitted that now the issue stands covered in favour of the assessee by the decision of the Hon'ble High Court of Bombay in the case of DIT (IT) v/s. NGC Network Asia LLC, 222 TR 86 (Bom). In this case, it is not disputed that the assessee is a non- resident and payments made to the assessee company are subjected to TDS u/ sec. 195(1)of the Act. This fact has not been controverted by the Revenue. In this case, merely because there is a

failure on the part of the person who made payments to the assessee to deduct tax at source to which the provisions of Section 195(1) are attracted, to the extent of the Income/payments which are in mischief of TDS provision no liability to pay advance tax is put of the recipient. Once the Income is subjected to TDS provision, then that is outside the provisions of the advance tax as per the mandate of Section 209 of the Act and this view has been fortified by the decision of the Hon'ble High court of Bombay in the case of NGC Network Asia LLC (supra). We do not find any reason to interfere with the order of the CIT (A) as the principles laid down In the case of NGC Network Asia LLC (supra) squarely applicable to the facts of the case, We accordingly confirm the order of the CIT(A).‖ Respectfully following the aforesaid decision of the Tribunal we uphold the order of the CIT(A).‖ First Appellate Authority in the present case has also decided this issue in favour of assessee, the operative para of CIT(A) is mentioned below:

36. I have considered the appellant AR's arguments and have perused the decisions quoted above. Relying on the above mentioned judgments and also Hon'ble Tribunals decision in Appellant's own case for AY 1997- 98 (ITA No: 371 7jMumj2009) it is held that the levy of interest u1s.234B was not justified. Keeping reliance on the decision of the jurisdictional ITAT in the appellant's own case for A.Y.1997 -98, it is held that charging of interest u/s.234B in the appellant's case is not held correct. However, the A.O is directed to verify that the same set of facts prevail in the appellant's appeal for this A. Y. as it was in A. Y. 1997 -98 while giving appeal effect to this order.‖ After co-joint reading of the above orders, we have observed that it was rightly held that for charging interest u/s 234B in assessee's own case was not held correct. Therefore, concurring with the above findings and also maintaining judicial consistency and following the orders of Hon'ble ITAT in assessee's own case, we dismiss this ground of appeal raised by revenue.

12. We have deliberated on the aforesaid observations of the Tribunal on the issues under consideration in the assesses own case for A.Y 2010-11, and finding ourselves as being in agreement with the view therein taken, respectfully follow the same. We thus, are of the considered view that as the issues raised by the revenue before us are squarely covered by the aforesaid order of the Tribunal, hence find no merit in the grounds raised by the revenue and accordingly dismiss the same.‖ Daimler AG

5. As rightly pointed out by the learned Authorised Representative, the grounds raised in assessment year 2011-12 and the impugned assessment year are identical. Even no material difference in facts in the impugned assessment year has been brought to our notice by the learned Departmental Representative. Therefore, following the consistent view of

the Tribunal on the disputed issue, as referred to above, we uphold the decision of the learned Commissioner (Appeals).

Grounds raised are dismissed."

10. In view of this matter and consistent with view taken by the Co-ordinate Bench in assessee's own case for earlier years, we are of the considered view that there is no error in the findings recorded by ld. CIT(A) in deleting additions made by the AO towards profit attributable to sale of spare parts and CBU cars in India. Hence, we are inclined to uphold the findings of CIT(A) and dismiss the appeal filed by the revenue.

11. In the result, appeal filed by the revenue is dismissed.

Order pronounced in the open court on this 28/03 /2019

(MAHAVIR SINGH)
JUDICIAL MEMBER

(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 28/03/2019
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai