

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "D": NEW DELHI  
(Through Video Conferencing)**

**BEFORE  
SHRI R.K. PANDA, ACCOUNTANT MEMBER  
AND  
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 4764/Del/2016  
Asstt. Year 2012-13

ACIT (International Taxation) Circle-2(2)(1), Room No. 411, 4 <sup>th</sup> Floor, E-2 Block, Dr. S.P. Mukherjee Civic Centre, Minto Road New Delhi – 110 002.	Vs.	M/s. Mitsui & Co. Ltd. Plot No. D-1, 4 <sup>th</sup> Floor, Salcon Ras Vilas, District Centre, Saket New Delhi – 110 017 PAN AAACM5469Q
(Appellant)		(Respondent)

CO No. 363/Del/2016  
Asstt. Year 2012-13

M/s. Mitsui & Co. Ltd. Plot No. D-1, 4 <sup>th</sup> Floor, Salcon Ras Vilas, District Centre, Saket New Delhi – 110 017 PAN AAACM5469Q	Vs.	ACIT (International Taxation) Circle-2(2)(1), Room No. 411, 4 <sup>th</sup> Floor, E-2 Block, Dr. S.P. Mukherjee Civic Centre, Minto Road New Delhi – 110 002.
(Appellant)		(Respondent)

Department by:	Shri Satpal Gulati, Sr. DR
Assessee by :	Shri Ved Jain, CA
Date of Hearing	08/10/2020
Date of pronouncement	20/10/2020

## **ORDER**

### **PER R.K. PANDA, AM**

This appeal filed by the Revenue is directed against the order dated 30<sup>th</sup> June, 2016 of the Ld. CIT(A)-43 New Delhi relating to assessment year 2012-13. The assessee has filed the Cross Objection against the appeal filed by the revenue. For the sake of convenience the same were heard together and are being disposed of by way of this common order.

2. Facts of the case, in brief, are that the assessee is a company incorporated in Japan and is one of biggest trading houses of the world. The assessee is involved in trading from needle to airplane engines. Assessee also undertakes several projects in connection with big industrial installations power projects. It filed its return of income on 29<sup>th</sup> September, 2012 declaring income of Rs.

19,54,96,219/- . AO during the course of assessment proceedings noted that the assessee has three project offices in India namely :-

TISCO

Purulia

Teesta Projects

3. He noted that assessee has entered into contract with West Bengal State Electricity Board, Calcutta (WBSEB) on 11.08.2000 in respect of Purulia Pumped Storage Project. These agreements are as under-

- a) Contract for Erection, Testing and Commissioning of Equipment and Materials in respect of Electro Mechanical Equipment (Lot 6. 1) of Purulia Pumped Storage Project.
- b) Contract for supply of equipment and materials in respect of Electro Mechanical Equipment (Lot 6.1) of Purulia Pumped Storage Project.

4. The assessee has also entered into contract with Tata Iron and Steel Company Limited on 31.03.1998 for the following:

- a) Design manufacture and supply of imported plant, machinery and equipment with auxiliaries
- b) Supply of imported designs and drawing, foreign technicians' services for supervision of detailed engineering in India,
- c) Design manufacture and supply of indigenous plant, machinery and equipment
- d) Supply of indigenous designs and drawings, erection, start-up, commissioning and demonstration of performance guarantee tests for skin pass mill (SPM) for cold rolling mill project, Jamshedpur. (TISCO Project)

In addition to the above, the assessee has also entered into contracts with National Hydroelectric Power Corporation Ltd. (NHPC) on 6.12.2001 for carrying out Electrical and mechanical Works of Teesta H.E. Project [3 X 1 70 MW (Stage-V) Sikkim, India. These agreements are as under :-

- a) First Contract - For CIF/CIP Supply of all offshore equipments and materials including Mandatory Spares for Lot-6 Electrical & Mechanical works of Teesta HE Project

(Stage- V).

- b) Second Contract - For Ex-works supply of all equipments and materials of Indian origin for Lot-6 Electrical & Mechanical works of Teesta HE Project (Stage-V).
- c) Third Contract - For providing all onshore services in respect of all equipments supplied under First & Second Contract and other services for Lot-6 Electrical & Mechanical works of Teesta HE Project (Stage-V). (Teesta Project)

4. On being questioned by the AO the assessee submitted that (a) no income has been earned from the execution of three projects namely Teesta, TISCO and Purulia projects. (b) Income from offshore supplies accrued outside India and no operation is carried out in India in respect of offshore supplies. (c) Capital gains income has been earned during the year on sale of shares of Buongiorno Digital Innovation Private Limited. Capital gains on such sale have been duly offered to tax at the rate of 20%.

5. The AO asked the assessee to explain why Mitsui India Pvt. Ltd (MIPL) should not be treated Dependant Agent Permanent Establishment (DAPE) in India and also why the assessment should not be completed as per the preceding assessment year since the facts remain the same. Rejecting the various explanations given by the assessee the AO held that MIPL is DAPE of Mitsui & Co. Japan. The AO noted from the details furnished by the assessee that the total supplies made by Mitsui Japan to Indian customers amount to Rs. 39,67,73,32,478/-. Applying the GP rate of 2.07% the AO determined the gross profit at Rs. 82,13,20,782/- and held that an amount of Rs. 41,06,60,391/- is the profit attributable to the PE being 50% of such gross trading profit.

6. The AO similarly noted that the assessee has paid commission of Rs. 84,06,07,736/- on total sale of Rs. 39,67,73,32,478/. It was explained by the assessee that the commission was paid to MIPL for support services rendered and the same has been charged at market price. However the AO

noted that such commission paid was allowed @0.8905556% in assessment year 2008-09, 2009-10, 2010-11 and 2011-12. He, therefore, restricted such commission to Rs. 35,33,48,865/- by applying the same rate. Accordingly the excess commission paid during the year of Rs. 48,72,58,871/- was disallowed by him.

6.1 AO also made addition to Rs. 22,31,645/- being the guarantee fee received from Bussan Auto Finance Pvt. Ltd and network maintenance service fee of Rs. 5,88,86,927/- received from MIPL due to certain mismatch of the Form 26AS. Accordingly the AO determined the taxable income of the assessee at Rs. 31,39,26,317/- as against the returned income of Rs. 19,54,96,219/-.

7. In appeal the Ld. CIT(A) upheld the view of the AO that MIPL has been constituted as a dependant agency permanent establishment of the assessee company in India. He however, held that 20% of the gross trading profit is to be attributable to the operations of the assessee in India. He also upheld the action of the AO in confirming the addition of Rs. 22,31,645/- made by

the AO on account of guarantee fee and Rs. 5,88,86,927/- made by the AO on account of network maintenance service fee. However the Ld. CIT(A) held that only 20% of the gross trading profit out of the operations in India as against 50% determined by the AO is attributable to the Indian operations. . He allowed deduction of commission to the permanent establishment of the assessee at Rs. 84,06,07,736/- as against Rs. 35,33,48,865/- determined by the AO.

8. Aggrieved with such order of the Ld. CIT(A) the revenue is in appeal before the Tribunal by raising the following grounds :-

1. *“On the facts and in the circumstances of the case, whether the Ld. CIT(A) erred holding that only 20% of the gross trading profit out of the operations in India, was attributable to the permanent Establishment of Mitsui & Co. Ltd. (“Assessee”) in India as against 50% as was determined by the Assessing Officer.*
2. *On the facts and in the circumstances of the case, whether the Ld. CIT(A) erred in allowing deduction of commission to the Permanent Establishment of the*

*assesee at Rs. 84,06,07,736/- as against Rs. 35,33,48,865/- which was determined by the Assessing Officer.*

*3. The appellant craves to add, amend, modify or alter any grounds of appeal at any time or before the hearing of the appeal.”*

9. Assessee has also filed the cross objection by raising the following grounds :-

- 1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad, both in the eyes of law as well as on facts.*
- 2. On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in upholding the view of the AO that Mitsui India Pvt. Ltd. has been constituted as a Dependent Agency Permanent Establishment of the assessee company in India.*
- 3. Without prejudice to the above and in the alternative, the learned CIT(A) has erred in not accepting the fact that the transaction*

*between the assessee and Mitsui India Pvt. Ltd. being at arm's length only, no further profit could be attributable to the assessee.*

4. *On the facts and circumstances of the case, the learned CIT(A) has erred in holding 20% of the gross trading profits to be attributable to the operations of assessee in India without there being any basis for the same.*

5. (i) *On the facts and circumstances of the case, the learned CIT(A) has erred in confirming the addition of Rs.22,31,645/- made by the AO on account of Guarantee fees.*

(ii) *That the addition has been confirmed despite the fact that the income appearing in Form 26AS is not taxable in the hands of the assessee.           i*

(iii) *Without prejudice to the above, the credit of the tax deducted at source on such income has not been given to the assessee.*

6. (i) *On the facts and circumstances of the case, the learned CIT(A) has erred in confirming the addition of Rs.5,88,86,927/- made by the AO on account of Network Maintenance Service Fees.*

*(ii) That the addition has been confirmed despite the fact that the said income appearing in Form 26AS is not taxable in the hands of the assessee.*

*(iii) Without prejudice to the above, the credit of the tax deducted at source on such income has not been given to the assessee.*

*7. That the respondent craves leave to add, amend or alter any of the grounds of appeal.”*

10. Ld. Counsel for the assessee did not press ground of appeal No. 4, 5 & 6 for which Ld. DR has no objection. Accordingly the above grounds are dismissed as not pressed. Ground No. 1 and 7 of the Cross Objection being general in nature are dismissed.

11. So far as ground of appeal No. 2 is concerned , i.e. the order of the Ld. CIT(A) in holding that M/s. Mitsui India Pvt. Ltd. has been constituted as a Dependent Agency Permanent Establishment of the assessee company in India, we find the issue stands squarely covered in favour of the assessee by the

Tribunal in assessee's own case for asstt. Year 2010-11. We find, the Tribunal vide ITA No. 4377/Del/2016 order dated 22<sup>nd</sup> September, 2020 for the assessment year 2010-11 has held that MIPL is not a Dependent Agency PE of the assessee. The relevant observation of the Tribunal from para 10 onwards reads as under :-

*“10. So far as ground of appeal No. 2 is concerned i.e. the order of the Ld. CIT(A) in holding that M/s. Mitsui India Pvt. Ltd. has been constituted as a Dependent Agency Permanent Establishment of the assessee company in India, we find the issue stands squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case for asstt. Year 2005-06 vide ITA No. 2335/Del/2011 order dated 14.09.2017 wherein it was held that MIPL is not a Dependent Agency PE of the assessee. The relevant observations of the Tribunal from para 4 onwards read as under :-*

*4. The Second ground is regarding finding of the learned CIT (Appeals) holding that no income is liable to be attributed in India even if MIPL is*

*considered to be Dependent Agent PE in India. On this issue the learned CIT-DR though stated that though in view of the TPO order under Section 92CA(3) holding the transactions between the assessee and the MIPL at arm's length, addition may not be sustainable, yet argued that MIPL be considered as/Dependent Agent PE in India in terms of Article 5(7) of DTAA between India and Japan. It was contended by the learned CIT-DR on the basis of the allegation levied by the Assessing Officer in the assessment order that MIPL habitually secures order for the assessee in India and MIPL is economically dependent on the assessee as major revenue of MIPL is from the assessee company. Accordingly, it has to be examined whether MIPL can be considered to be a Dependent Agent of the assessee company. In this regard it may be relevant to refer to Article 5(7) of DTAA between India and Japan, which reads as under :-*

*“7. Notwithstanding the provisions of paragraphs 1 and 2, where a person—other than an agent of an independent status to whom paragraph 8 applies—is acting 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 Contracting State, if:*

*(a) he has and habitually exercises in that Contracting State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 6 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph;*

*(b) he has no such authority, but habitually maintains in the first mentioned Contracting State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise; or (c) he habitually*

*secures orders in the first-mentioned Contracting State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control as that enterprise.*

*8. As enterprise, shall not be deemed to have a permanent establishment in a contracting State merely because it carries on business in that Contracting State through a broker, general commission agent or any other agent of an independent status provided that such persons are acting in the ordinary course of their business.*

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

*4.1 As per above clause (7) a person other than an independent agent is treated as PE if he fulfills any of the three conditions, (a), (b) or (c). It is not the case of the Assessing Officer that MIPL habitually exercised authority to conclude contracts. It is also not the case of the Assessing Officer that MIPL habitually maintains a stock of goods or merchandise. Thus, the condition of (a) and (b) are not fulfilled. The third condition in (c) is habitually securing orders for the assessee. In this regard we note that the Assessing Officer has made this allegation on the basis that commission has been paid by the assessee company to the MIPL. On this basis it has been assumed that MIPL is securing orders. This contention of the Assessing Officer does not appear to be correct. As per the agreement which has been quoted by the Assessing*

*Officer in the assessment order, MIPL is supposed to put best effort to collect information with regard to Instant Noodle project etc. to make the best effort to find the best candidate, to attend/take care of the visitor from Japan, to make the best effort to analyze the feasibility report. None of these clauses can be interpreted to mean that MIPL is securing orders. On the basis of this clause the Assessing Officer was wrong in assuming that MIPL is securing orders. The Assessing Officer has not brought any other material to substantiate his allegation that may demonstrate that MIPL has secured orders for the assessee. It is to be noted that this clause (c) uses the word 'habitually secures orders'.*

*Thus, there has to be procurement of orders habitually. As against this the assessee's contention has been that MIPL is only providing support services and it is not securing order on behalf of assessee company. It may be relevant to further mention that the expression 'has' shall mean a legal existence. Whereas 'habitually secures orders' shall mean a systematic conduct on the part of the agent. Thus it is not only a legal right to secure order but also it is to be found, as a matter of fact that agent has habitually secured order.*

*4.2 Further, in this case the TP study of MIPL was subject matter of examination by the TPO. The FAR (Function performed, Assets deployed and Risk assumed) analysis has been accepted by the TPO. These agreement on the basis of which Assessing Officer has levied the allegation were also before the TPO. Thus, there cannot be any allegation that MIPL has performed any function beyond what has been stated. Functional and economic analysis of the transactions entered into having been examined nothing further can be imputed. The services of MIPL to assessee company*

*were support services similar to the activities of a Liaison offices. This fact gets also supported from the finding recorded by the Assessing Officer himself in the assessment order on page 26 whereby it has been stated by the Assessing Officer that MIPL is functioning in the same manner as the LOs of the assessee are functioning in India. It has already been held that LOs do not constitutes PE in India. Thus, the functioning of MIPL though a subsidiary and a company incorporated in India but its activities vis-à-vis assessee company were akin to liaison office. It does not have authority to conclude contract, it was not maintaining any stocks of goods and merchandise nor it was securing order for the assessee company. In view of the above facts we reject the contention of the learned CITDR that MIPL habitually secures order for the assessee company. And accordingly, none of the condition prescribed in Article 5(7) are fulfilled.*

*4.3 The second contention of the learned DR was that MIPL is economically dependent on assessee company as major revenue of MIPL is from assessee company. We are of the view that this per se cannot be ground to hold that MIPL is a Dependent Agent.*

*For invoking this clause, first one of the three conditions needs to be fulfilled. As we have held hereinabove that MIPL does not get covered as PE under Article 5(7), it cannot be considered to be a Dependent Agent. The learned DR also made a reference to Conventions on Double Taxation by Klaus Vogel to support its contention that where a person works only for one principle such person is economically dependent on the principal, in "these circumstances the agent though not legally but will be bound to obey his principal's instructions and be regarded as being Dependent Agent. This contention of the learned CIT-DR again ignores the basic requirement i.e.*

*fulfilling one of the three conditions. It is also important to note that the DTAA provide for treating a person as Dependent Agent. The DTAA has to be strictly interpreted. The DTAA having prescribed the conditions, no further conditions can be read. What learned CIT-DR is canvassing will mean adding new condition in the DTAA. Further, it may be relevant to note that as per Para 9 of this Article 5 in DTAA, it has been specifically provided that if a company in the contracting state is controlled by a company in the other contracting state that itself shall not itself constitute either of company a permanent establishment of the other. Thus, the fact that MIPL is controlled by the assessee company shall not mean that MIPL is a PK of the assessee company.*

*4.4 Our view gets supported by the judgment of Hon'ble Delhi High Court in the case of Director of Income Tax And Others Versus M/s. E Funds IT Solution and Others 364 ITR 256 Delhi, where the Hon'ble court has held as under:-*

*" 31. Paragraphs 4 and 5 of Article 5 relate to creation of agency PE in the second contracting country. Agency replaces fixed place with personal connection. Arvid K. Skaar in his work "Permanent Establishment" has opined that primacy of "location test" of the basic rule is consistent with the conceptual structure of the PE clause itself. An agency will constitute a PE only when a PE cannot be found according to those conditions in the basic rule which are altered or replaced by the agency clause. OECD and UN Model Treaties recognize agency PE. The principle being, that a foreign enterprise may choose to perform business activities itself or through a third, person in the other States. An agent is a representative who acts on behalf of another with third persons. International taxation laws recognize and accept*

*two distinct types of agency PE, dependent and independent Every agent by very nature of principle of agency is to follow principal's instructions. But this principle is not squarely applicable to DTAA's, as third parties may not be strictly an agent under the domestic law. Further, the aforesaid dependency cannot be the distinguishing factor which determines whether the agency is dependent or an independent agency for the purpose of Article 5 paragraphs 4 and 5 respectively. A dependent agency is one which is bound to follow instructions and is personally dependent on the enterprise he represents. Such dependency must not be isolated or once in a while transaction but should be of comprehensive nature."*

*32. The "dependency test" as per Arvid A. Skaar requires examination and answer whether the business interest of the principal and the agency have merged. When there is evidence of merging of interest, then power to instruct the agent exceeds a certain level. In such cases the Principal regularly participates in the process of settling current business problems or exercises discretionary power in the said respects. OECD Commentary does not accept dependency based on financial support, supply of patents etc. as itself creating agency PE. Klaus Vogel on Double Taxation Conventions, Third Edition at page 345 in paragraph 170 states that interdependence must exist in both legal and. economic respects but the independence is the main criteria. The expression "independent agent" is used with the words "brokers and general commission 7 agents" in paragraph 5 of Article 5 will, therefore, normally not include agents who have power to conclude contracts. Paragraph 38.1 of the OECD Commentary has been quoted above (see paragraph 15). The commentary elucidates and gives illustrations and tests.*

33. *Earlier U.N. commentary had deviated in some respect from the OECD commentary and had observed that an agent who was wholly or almost wholly engaged by one principal shall be considered to be a dependent agent. This initial position stated in UN commentary has, however, not been accept in subsequent commentaries. The essential criteria being arms length relationship though engagement with one or a group might serve as an indicator of absence of independence of an agent.*

34. *Subsidiary by itself cannot be considered to be a dependent agent PE of the Principal, otherwise it would negate the overriding effect of paragraph 6 to Article 5, a provision which precedes and seeks to give recognition to separate legal entity principle associated with juristic incorporated enterprises. However, a subsidiary may become dependent or an independent PE agent provided the tests as specified in paragraphs 4 and 5 are satisfied. A dependent agent is deemed to be PE of the principal establishment under paragraph 4, if one of the three conditions specified in sub-clause (a) to (c) are satisfied. Under sub-clause (a), a dependent agent should have authority and should habitually exercise the said authority to conclude contracts on behalf of the foreign enterprise. What is meant by the term "authority to conclude contract" has been subject matter of controversy on whether participation in negotiations by the agent is sufficient or not. However, this is not relevant for the decision of the present appeals in view of the factual matrix of the present case. Subclause (b) refers to an agent who habitually maintains stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the Principal enterprise.*

8 *In such cases, the agent should also perform some additional activities in its country on behalf of the foreign enterprise which has contributed to the*

*sale of goods or merchandise. Sub-clause (c) applies when the agent habitually secures orders in the said country i.e. where he is located, almost wholly or wholly for the foreign enterprise.*

*35. Transactions between a foreign enterprise and an independent agent, do not result in establishment of a permanent establishment under paragraph 5 to Article 5 if the independent agent is acting in ordinary course of their business. The expression "ordinary course of their business" has reference to activity of the agent tested by reference to normal customs in the case in issue. It has reference to normal practice in the line of business in question. However as per paragraph b of Article 5, an agent is not considered to be an independent agent if his activities are wholly or mostly wholly on behalf of foreign, enterprise and the transactions between the two are not made under arm's length conditions. The twin conditions have to be satisfied to deny an agent character of an independent agent. In case the transactions between an agent and the foreign principal are under arm's length conditions the second stipulation in paragraph 5 of Article 5 would not be satisfied, even if the said agent is devoted wholly or almost wholly to the foreign enterprise.*

*36. In Morgan Stanley (supra) Supreme Court rejected the contention of the Revenue that dependent agency was created after recording that Indian subsidiary had no authority to enter into or conclude contracts on behalf of the foreign establishment / agency. The contracts were entered into in America and, were concluded there. Only implementation of those contracts to the extent of back office operations were carried out in India. This legal position is relevant in the present case.*

37. In *TVM Ltd. vs. Commissioner of Income Tax (1999)237 ITR 230*, Authority of Advance Ruling has interpreted the two expressions "has" and "habitually exercises" in the case of dependent agent. It has been observed that the expression "has" may have reference to the legal existence of such authority on terms of the contract between the Principal and the Agent, the expression "habitually exercises" has certainly reference to systematic course of conduct on the part of the agent. Reference to OECD Commentary and Klaus Vogel was made and it has been observed :-

" Para. 4 uses two expressions :-has and "habitually exercises an authority to conclude contracts on behalf of the enterprise in question. 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 implicitly to TVI exercising such powers notwithstanding the terms of the contract. If such a situation is found to exist, then perhaps it could be said that TVI constitutes a permanent establishment for TVM despite the clauses of the contract relied upon."

38. Judgment of the Delhi High Court in the case of *Rolls Royce PLC versus Director of Income Tax (International Taxation) (2011) 339 ITR*

*(Del) is a good authority for the proposition that subsidiary can constitute and become a PE of the controlling company. The said decision proceeds on its own peculiar facts and we do not find that any legal principle and the elucidation in the present-decision is contrary to the legal ratio propounded in the case of Rolls Royce(supra). "*

*4.5 In view of the above, we hold that MIPL is not a Dependent Agent PE of the assessee.*

*11. We find following the above decision the Tribunal in assessee's own case for asstt. Year 2006-07 to 2008-09 in a batch of appeals vide consolidated order dated 7.1.2020 has held that MIPL is not a Dependent Agent PE of the assessee. Accordingly the appeal of the assessee was allowed and the grounds raised by the revenue were dismissed. The relevant observation of the Tribunal at para 53 reads as under :-*

*"53. After hearing both the sides, we find the ground of appeal No.1 by the assessee relates to the order of the CIT(A) holding the assessee a Dependent Agent Permanent Establishment. After hearing both the sides, we find the above-ground raised by the*

*assessee is identical to ground of appeal No.4 raised by the revenue in ITA No.2801/Del/2011. We have already decided the issue and following the decision of the Tribunal in assessee's own case for A.Y. 2005-06 have dismissed the ground raised by the Revenue."*

*11.1 Since the lower authorities following the orders of the preceding years have held that M/s. Mitsui & Co. Ltd. has been constituted as Dependent Agent PE of the assessee company in India , therefore, following the consistent decisions of the Tribunal in assessee's own case in the preceding assessment years and in absence of any contrary material brought to our notice against the decision of the Tribunal we hold that MIPL is not a Dependent Agency Permanent Establishment of the assessee. Ground No. 2 of the assessee's appeal accordingly is allowed. "*

12. Since the lower authorities following the orders of the preceding years have held that M/s. Mitsui & Co. Ltd. has been constituted as Dependent Agent PE of the assessee company in

India , therefore, following the consistent decisions of the Tribunal in assessee's own case in the preceding assessment years and in absence of any contrary material brought to our notice against the decision of the Tribunal we hold that MIPL is not a Dependent Agency Permanent Establishment of the assessee.

Ground No. 2 of the assessee's cross objection is accordingly allowed.

13. So far as ground of appeal No. 3 and 4 of the Cross Objection are concerned, the same relate to attribution of profits to DAPE. We find identical issue had come up before the Tribunal in assessee's own case for the assessment year 2010-11. We find the Tribunal vide ITA No. 4377/Del/ 2016 order dated 22<sup>nd</sup> September, 2020 has decided the issue in favour of the assessee by holding as under :-

*“12. So far as ground of appeal No. 3 and 4 are concerned these relate to attribution of profits to DAPE. We find this issue also stands squarely covered in favour of the assessee*

*by the decision of the Tribunal in assessee's own case for asstt. Year 2005-06 vide ITA No. 2335 /Del/ 2011 order dated 14<sup>th</sup> September, 2017 wherein the Tribunal held as under :-*

*"This issue is squarely covered by the assessee's own case for the AY 2005-06 by the order of Hon'ble ITAT Delhi dated 14.09.2017 bearing ITA No. 2335/Del/2011. Copy of ITAT order is enclosed at PB Pg. 31-58. The relevant findings of the court are as under (PB Pg. 48)*

*The ground 2 raised in Revenue appeal is regarding attribution of the income if MIPL is taken as Dependent Agent PE. Though, this ground becomes academic in nature in view of our finding holding that MIPL is not Dependent Agent PE of the assessee company but since this issue forms part of the ground No. 2 in Revenue's appeal the same is being decided on merit as well.*

*5.1 The Assessing Officer has made the addition holding that MIPL is a Dependent Agent PE and has computed 50 per cent of the profit in respect of the turnover in India. The learned CIT (Appeals) has deleted the addition holding that Transfer Pricing Officer has specifically stated in his order that Transfer Pricing documentation which contains the functional and economic analysis of comparable and of the assessee, has been examined. The learned CIT-DR was fair enough to point out that the Assessing Officer made the addition since at the time of passing of the assessment order he was not having benefit of the order passed under Section 92CA(3) by the TPO in the case of MIPL and the learned CIT (Appeals) has deleted the addition after*

*taking into consideration the order passed by the TPO which was available to him by that time.*

*5.2 It is a fact on record that the TPO has carried out functional and economic analysis of the activities performed by MIPL towards the assessee company. No adverse inference has been drawn in respect of the same. All these facts were before the TPO. This issue is also covered by the judgment of the Supreme Court in the case of DIT International Taxation Vs. Morgan Stanley and Co. 292 ITR416 (SC), where the court has approved the ruling delivered by the authority for advance holding that once a Transfer Pricing analysis is undertaken, there is no further need to attribute profit to a PE.”*

*13. We find following the above decision of the Tribunal in assessee’s own case for asstt. Year 2005-06 the Tribunal in assessee’s own case for asstt. Years 2006-07 to 2008-09 vide order dated 7.1.2020 has held that the assessee is not a Dependent Agent Permanent Establishment and no income is attributable.*

*14. The relevant para of the order of the Tribunal reads as under :-*

*“54. In ground of appeal No.2 and 3, the assessee has challenged the order of the CIT(A) in upholding the action of the AO regarding attribution of profit @ 20% of the gross trading profit determined by the CIT(A).*

*55. After hearing both the sides, we find this issue stands decided in favour of the assessee by the decision of the Tribunal in assessee's own case for A.Y. 2005- 06 where it has been held that the assessee is not a Dependent Agent Permanent Establishment and no income is attributable. Respectfully following the decision of the Tribunal in assessee's own case for the preceding assessment year, grounds of appeal No.2 and 3 raised by the assessee are allowed.*

Thus, in view of the above, issue is squarely covered by the assessee;s own case and no income is attributable.”

*15. Respectfully following the consistent decisions of the Tribunal in assessee's own case for the preceding assessment years and in absence of any contrary material brought to our notice we hold that no further profit could be attributed since assessee is not a Dependent Agency Permanent Establishment. Grounds of appeal No. 3 and 4 of the assessee are accordingly allowed.”*

14. Respectfully following the decision of the Tribunal in assessee's own case for the assessment year 2010-11, we hold that no profit could be attributable since assessee is not a DAPE. The grounds are accordingly allowed.

15. So far as ground of appeal No. 1 by the revenue is concerned, we have already held that MIPL is not a DAPE. Therefore, we are of the opinion that no attribution of income should be made to MIPL. Ground No. 1 raised by the revenue is therefore dismissed.

15. So far as ground of appeal No. 2 by the revenue is concerned i.e. the order of the Ld. CIT(A) in restricting the commission, we find Mitsui India Pvt. Ltd. has been paid a commission of Rs. 84,06,07,736/- @ 2.1180695 on the total sale. We find the AO restricted this commission to Rs. 35,33,48,865/- by applying the profit rate of 0.8905556% as applied by him in the preceding assessment year. We find the Ld. CIT(A) deleted the addition made by the AO observing that TPO has accepted the payment of Rs. 84,06,07,736/- being at arm's length. We do not find any infirmity in the order of the Ld. CIT(A) on this issue. First of all this issue becomes academic in nature in view of our finding that MIPL is not dependent agency PE and therefore no income is attributable to the assessee and therefore when there is no income there is no question on any disallowance. Further

such commission claimed by the assessee has been accepted in earlier years by the Ld. CIT(A) and the revenue had not preferred any appeal although they had filed appeal against the order on other issues decided by the Ld. CIT(A) in favour of the assessee. Therefore we find merit in the arguments advanced by the Ld. Counsel for the assessee that once the department has accepted the view taken by the Ld. CIT(A) in the preceding years the said view cannot be disputed in the current year in view of the principles of rule of consistency. In this view of the matter ground raised by the revenue is dismissed.

16. In the result the appeal filed by the revenue is dismissed and the cross objection filed by the assessee is allowed.

**Order pronounced on 20<sup>th</sup> October, 2020.**

**sd/-**

**sd/-**

**(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

**(R.K. PANDA)  
ACCOUNTANT MEMBER**

Dated: 20/10/2020

***Veena***

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi