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

BEFORE SHRI RAJESH KUMAR (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)

ITA Nos.4878, 4879, 4880, 4881 & 4883/MUM/2014
(Assessment Year: 2005-06 to 2008-09 & 2012-13)

Income Tax Officer (International Taxation) TDS-3 R. No. 137, 1st Floor, Scindia House, Ballard Pier, N.M. Road, Mumbai – 400 038	Vs.	M/s Braitrim India Pvt.Ltd. 23, Singhi House, Ambala Doshi Marg, Fountain, Mumbai – 400 023

PAN No. AABCB2779F

(Revenue)	**(Assessee)**

Assessee by	: Ms Vasanti Patel, A.R
Revenue by	: Shri S.S. Iyangar, Sr. D.R
Date of Hearing	: 14/07/2021
Date of pronouncement	: 19/07/2021

ORDER

PER BENCH:

The captioned appeals filed by the revenue are directed against the consolidated order passed by the CIT(A)-10, Mumbai, dated 30.01.2014 which in turn arises from the respective orders passed by the A.O u/s 163 of the Income Tax Act, 1961 (for short 'Act'), dated 31.11.2012 for A.Y 2005-06 to A.Y 2008-09 and A.Y 2012-13. As the same issue is involved in the aforementioned appeals, therefore, the same are being taken up and disposed off by way of a common

order. We shall take up the appeal for A.Y. 2005-06 as the lead matter. The revenue has assailed the impugned order passed by the CIT(A) on the following grounds before us:

> "1.(i) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that proceedings u/s. 201 are for treating the assesses in default for failure to comply with the provisions of section 195 which has nothing to do with the proceedings u/s. 163 against the same assesses being treated as agent of the non resident for assessment of income of that non-resident.
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> (ii) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in placing reliance on the case of Premier Tyres Ltd. (Supra) of Bombay High Court which is an older decision without relying on the recent decision of ITAT, Mumbai in ITA No. 6698/Mum/2002 in the case of Air India Ltd. (now known as National Aviation Co. Ltd.)
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> 2. The Appellant prays that the order of the Ld. CIT(A) on the above ground(s) be set aside and that of the Assessing officer be restored.
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> 3. The appellant craves leave to amend or after any ground or add a new ground which may be necessary."

2. Briefly stated, the assessee company viz. Braitrim India Pvt. Ltd. (BIPL) is an Indian subsidiary of Braitrim U.K. which is engaged in the business of supplying world class hangers to global retailers situated all over the world. Braitrim U.K has global arrangements with various retailers, whereby the latter had nominated Braitrim U.K and its group companies as their global source for hangers to be used by their garment suppliers situated all over the world. The assessee company has been nominated by its parent company to manufacture and sell hangers to the Indian garment suppliers of the retailers with whom Braitrim U.K. had entered into an arrangement. As observed by the ITO(IT) TDS-3, Mumbai, the assesee i.e BIPL would raise invoices on the Indian garment suppliers and would remit part of the sale receipts to Braitrim U.K. It was observed by the ITO(IT) TDS-3, Mumbai, that though the assessee had initially dubbed the remittances as 'administrative expenses' but thereafter had renamed the same as rebate/discount in the course of the proceedings before him. It was

further observed by the ITO(IT) TDS-3, Mumbai that the aforesaid administrative expenses/rebate and discount was claimed as an expense by the assessee company in its profit and loss account without deduction of any tax at source on the same. Accordingly, the ITO(IT) TDS-3, Mumbai, issued a 'Show cause' notice (for short 'SCN') u/s 201 of the Act, dated 24.11.2010 and called upon the assessee company to explain as to why it may not be treated as an assessee-in-default on account of its failure to deduct tax at source while making the payments to the foreign company, viz. Braitrim U.K. Rebutting the aforesaid observation, it was submitted by the assessee that Braitrim U.K was required to give a rebate/discount to the retailers based on the volume/units of sales that were achieved by Braitrim group. It was submitted by the assessee that subsequently the proportionate share of rebate/discount was recovered by Braitrim U.K from the respective group companies. In the backdrop of the aforesaid fact situation, it was submitted by the assessee that the amount remitted by it to Braitrim U.K. was nothing but reimbursement (without any mark up) of its proportionate share of expenses qua the rebates/discounts that were passed on to the retailers by Braitrim U.K. In support of its aforesaid claim the assessee also filed with the ITO(IT) TDS-3, Mumbai the copy of the 'Cost Reimbursement Agreement' that was executed between Braitrim U.K and the assessee, viz. BIPL. Accordingly, it was submitted by the assessee that as Braitrim U.K. had incurred expenses on its behalf, therefore, the remittances so made were only in the nature of reimbursement of expenses and did not include any profit/income element. Also, in support of its claim that there was no default on its part to deduct any amount of tax at source qua the amounts remitted to Braitrim U.K, it was submitted by the assessee that after necessary verifications the A.O while passing the draft assessment order in its case had not carried out any disallowance u/s 40(a)(i) of the Act. However, the ITO(IT) TDS-3, Mumbai did not find favor with the aforesaid claim of the assessee. Holding a view that the discount/rebate or administrative expenses was a misnomer, and the income

arising to Braitrim U.K that was generated through its Indian agent i.e BIPL was remitted abroad without deduction of tax at source, he treated the assessee as being in default u/s 201 of the Act.

3. Further, backed by his conviction that the assessee company, viz. BIPL had remitted the income generated through it in India to Braitrim U.K in the garb of discount/rebate or administrative expenses, the ITO(IT) TDS-3, Mumbai being of the view that the amount so remitted was taxable in India, thus, issued a 'SCN', dated 21.11.2011 to BIPL and called upon it to explain as to why it may not be treated as an 'agent' of Braitrim U.K u/s 163 of the Act, and consequently, as the latters 'representative assessee' in respect of the payments so made to Braitrim U.K. In reply, the assessee objected to its being treated as an 'agent' of Braitrim U.K. u/s 163 of the Act. However, the ITO(IT) TDS-3, Mumbai did not find favor with the contentions advanced by the assessee. Observing that BIPL had a business connection with Braitrim U.K and the latter was directly or indirectly in receipt of income from or through the assessee viz. BIPL, the ITO(IT) TDS-3, Mumbai, vide his order dated 31.11.2012 held the assessee as an 'agent' of Braitrim U.K office u/s 163 of the Act that had remitted the amounts to the said foreign company without deduction of tax at source.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). It was observed by the CIT(A) that as the provisions of Sec. 163 of the Act were alternative to the provisions u/s 201 of the Act, therefore, the same could not have been simultaneously resorted to. It was observed by him that in case where jurisdiction have been assumed u/s 201 of the Act, then, jurisdiction cannot vest u/s 163 of the Act. Elaborating on his said view, it was observed by the CIT(A) that there could not be simultaneous jeopardy for the payer under two different provisions of the Act, each of which supplements a machinery for collection of tax payable by a non-resident payee. It was, thus, observed by the CIT(A) that having assumed jurisdiction under one provision, it would not be open for the A.O

to proceed under another alternative provision of the Act. The CIT(A) in order to fortify his aforesaid observation relied on the judgment of the Hon'ble High Court of Bombay in the case of CIT vs. Premier Tyres Ltd. (1982) 134 ITR 17 (Bom). It was observed by the CIT(A) that the Hon'ble High Court while upholding the view taken by the Tribunal, had observed, that once the assessee-company becomes liable to pay income-tax as an 'agent' of a non-resident, it cannot be saddled with the further obligation to make a deduction of tax and be deemed to be in default under s. 201 of the IT Act, 1961. Also, reliance was placed on the judgment of the Hon'ble High Court of Calcutta in the case of Bunge & Company Limited Vs. ITO (1971) 71 ITR 92 (Cal), wherein it was held that the same assessee cannot be treated as an agent u/s 163 of the Act and at the same time held to be in default u/s 201 of the Act, for the reason, that the said statutory provisions were mutually exclusive and operated in different fields. In sum and substance, it was observed by the CIT(A) that the same person cannot be treated as an agent u/s 163 of the Act and proceeded against u/s 201 at the same time. It was observed by him that as he had upheld the order passed against the assessee u/s 201 of the Act which is an order of assessment and/or an order akin to an order of assessment, thus, having held so, there cannot be one more assessment in respect of the same very income pursuant to Sec. 163 of the Act. In the backdrop of his aforesaid observations, the CIT(A) was of the view that the order passed by the A.O u/s 163 was though not a valid order, however, the same would assume significance if the order passed u/s 201 failed to bring to tax the income under question. Accordingly, in the backdrop of his aforesaid deliberations the CIT(A) allowed the appeal of the assessee.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the outset submitted that the Tribunal in the case of the parent company, viz. Braitrim U.K. Ltd. vide its order passed in ITA No. 1750 to

1753/Mum/2015, dated 21.08.2019 for A.Y 2006-07 to A.Y 2008-09 and A.Y 2011-12, had held, that the remittances made by BIPL to Braitrim U.K Ltd. were towards reimbursement of expenses that were incurred on its behalf by Braitrim U.K. Ltd., and the same cannot be construed as income chargeable to tax in the hands of the assessee before them, viz. Braitrim U.K Ltd. It was submitted by the ld. A.R that the Tribunal while disposing off the aforesaid appeal of M/s Braitrim UK Limited had directed the A.O not to treat any part of the reimbursement of expenses received by the assessee before them viz. Braitrim U.K Ltd., as the latters income. In order to drive home her aforesaid claim, the ld. A.R had taken us through the relevant observations of the Tribunal in its aforesaid order. It was submitted by the ld. A.R that now when the remittances made by the assessee viz. BIPL to M/s Braitrim UK had been held as reimbursement of expenses without any mark up, the same, thus, not being in the nature of income chargeable to tax in the hands of the payee did not cast any obligation upon the assessee, viz. BIPL to deduct tax at source u/s 195 of the Act while remitting the amounts in question to Braitrim U.K. It was further submitted by the ld. A.R that following its aforesaid order, the Tribunal had thereafter vide its consolidated order passed in ITA Nos. 4742 to 4747/Mum/2014, dated 21.05.2021 for A.Ys 2005-06 to 2012-13 quashed the demands that were raised on the assessee by treating it as being in default u/s 201(1) r.w.s 195 of the Act. (copy of the order placed on record). It was submitted by the ld. A.R that the Tribunal had observed that now when the primary tax liability embedded in the payments made by BIPL to Braitrim U.K had been quashed, therefore, the very foundation of tax withholding demands u/s 195 ceases to hold good in law and the assessee, viz. BIPL could not be held as being in default u/s 201 of the Act. (copy of the order placed on record). Qua the issue as regards treating of the assessee as an ‘agent’ of M/s Braitrim U.K, the ld. A.R further relied on the order of the CIT(A).

6. Per contra, the ld. Departmental Representative (for short 'D.R') could not controvert the observations recorded by the Tribunal while disposing off the appeal in the case of M/s Braitrim U.K Ltd., i.e as the remittances by the assessee to Braitrim U.K Ltd. were towards reimbursement of its share of expenses (without any mark up), therefore, no obligation was cast upon the assessee to deduct tax at source within the meaning of Sec. 195 of the Act. However, it was submitted by the ld. D.R that the aforesaid adjudication by the Tribunal in the case of parent company of the assessee would have no bearing on treating of the assessee as its 'agent' within the meaning of Sec. 163 of the Act. In order to drive home his aforesaid contention the ld. D.R had drawn support from the order of the ITAT, Mumbai in the case of National Aviation Co. Ltd. (formerly known as Air India) Vs. Dy. CIT, TDS, Circle-1, Mumbai, ITA No. 6698/Mum/2002, dated 03.11.2010. (copy placed on record). Relying on the aforesaid order, it was submitted by the ld. D.R that as observed by the Tribunal the judgment of the Hon'ble High Court of Bombay in the case of Premier Tyres Ltd.(supra) was rendered in context of the pre-amended law, therefore, the same would not come to the rescue of the assessee. To sum up, it was the claim of the ld. D.R that as the chargeability of tax or otherwise is not a criteria for determining as to whether an assessee could be held to an 'agent' of a non-resident u/s 163 of the Act, therefore, the support drawn by ld. A.R from the fact that the appeal against the order passed u/s 201 had been decided in favor of the assessee cannot have any bearing on treating of the assessee as an 'agent' of the non-resident under Sec. 163 of the Act.

7. We have heard the ld. authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. Admittedly, it is a matter of fact borne from the record that the Tribunal while disposing off the appeals of M/s Braitrim UK Ltd. in ITA No. 1750 to 1753/Mum/2015 for A.Ys 2006-07 to 2008-09 and A.Y. 2011-12, vide its order

dated 21.08.2019, had concluded, that as the remittances made by the assessee, viz. BIPL to Braitrim U.K Ltd. were towards reimbursement of expenses that were incurred by the latter on behalf of the assessee, therefore, no obligation was cast upon the assessee to deduct tax at source under Sec. 195 of the Act. The observations of the Tribunal in its aforesaid order are culled out as under :

> *"13. We have carefully considered the rival submissions and perused the material on record. We find that the assessee is required to give a rebate/discount to the retailers based on the volume / units of sales to garment suppliers achieved by the Braitrim group. Subsequently, the proportionate share of rebate / discount is recovered by the assessee from its group companies, including BIPL, based on the relative sales of those group companies to the respective retailers. The assessee has, accordingly entered into a reimbursement agreement with BIPL, whereby BIPL has acknowledged its obligation to reimburse its proportionate share of the discount / rebate to the assessee based on sale volumes/units achieved by it. As per the Cost Reimbursement Agreement (CRA), such reimbursements are depicted as 'Administration charges' by BIPL in its books of account.*
>
> *14. We find it relevant to refer to the following clauses of the Cost Reimbursement Agreement (CRA) in order to appreciate the nature and characterization of the amount of reimbursements :-*
>
> > *i) that the title to the agreement is described as 'Cost Reimbursement Agreement';*
> > *ii) that the preamble to the agreement mentions the fact of payment of administration charges by the Assessee to the customer companies in respect of goods supplied by worldwide entities of Braitrim group including BIPL and the purpose of the agreement is to recover such charges by the assessee from BIPL;*
> > *iii) that Article 3 requires BIPL to compensate the assessee towards the proportionate administration charges in respect of goods supplied to the customer companies/suppliers;*
> > *iv) that Article 4 prescribes the method of computation of the proportionate share of the administration charges to be borne by BIPL determined as proportion of its sale to customer companies to the total worldwide sales of the Braitrim group; and,*
> > *v) that Article 5 stipulates that the payments made under the agreement represent reimbursement of administration charges borne by the assessee.*

15. Therefore, so far as the understanding of the parties to the CRA is concerned, the same has been understood to be in the nature of reimbursement of the rebate/discount passed on by the assessee to the retailers. Factually speaking, it has also been established that there is no mark-up retained by the assessee while recovering from BIPL the rebate/discount given to the retailers. It is also clear that BIPL has also made sales to other independent parties for which no discount/rebate or administrative charges are payable to the assesseecompany. The aforesaid undisputed features of the arrangement clearly bring out that the transaction in question cannot be construed to be 'royalty' as understood by the income-tax authorities. This becomes even more pertinent once the nature of such payments by BIPL to the assessee has been admitted as such in the assessment of BIPL for assessment year 2007-08

16. Pertinently, the assessee stated that the transaction for reimbursement of administrative charges by BIPL to the assessee was subject to transfer pricing proceedings during the assessment year 2007-08, wherein the TPO questioned the commercial expediency of the transaction of payment for administration charges and determined the arm's length price as 'Nil', which was effectuated accordingly by Assessing Officer in the draft assessment order.

17. Before the DRP, BIPL raised objections against the draft assessment order, which was based on the order of the Transfer Pricing Officer. The DRP held as under :-

> *"The DRP has carefully considered the order of the TPO, submissions of the taxpayer and objections of the taxpayer. The main issue here is that the assessee has paid to its AEs an amount of Rs.1,87,30,339 slating that these charges are paid as administration charges. However, as accepted by the taxpayer, these expenses are nothing but reimbursement of expenses incurred by the AE for the discounts to be passed on to the retailers by Braitrim UK. After considering the arguments of the assessee it can be inferred that Braitrim UK negotiates globally with various garment retailers to use the hangers manufactured by Braitrim group companies all over the world. As part of these arrangements/agreements BraitrimUK agreed to pass on the discount at the rate 1% of sale of hangers by Braitrim group of companies to the retailers. As rightly stated by the assessee because of this arrangement the taxpayer is getting business without much effort on advertisement and marketing as evidenced by no expenses on marketing or advertisement debited in the profit and loss account for the FY 2006-07. The Braitrim group companies supply the hangers to the garment manufacturers, which in turn supply to the ultimate retailers in the form of pre-hanged clothes. The assessee*

also supplied hangers to garment manufacturers within and outside India. Based on the sale of these hangers by the assessee Braitrim UK has to pay to the retailers at the rate of 1% on these sales made by the taxpayer to retailers through garment manufacturers. Before the DRP, the taxpayer also produced invoices raised by third party retailers against Braitrim UK to show that the said discount @ 1% on sale of hangers by the Indian entity was passed on to the retailers…..In view of the above discussion, we are satisfied that the discount given by the AE, Braitrim UK to the retailers is helping the tax payer to get the business without much marketing effort, for which the taxpayer is reimbursing the AE at the rate of 1% of sale of hangers in India, which was ultimately passed on to the retailers by the AE."

However, the DRP revised the arm's length price as computed by the TPO on account of the timing difference between the recognition of administration charges/ rebate in the books of account of BIPL, vis-à-vis the amount recognized by the assessee in its accounts; and, accordingly, the assessment was finalised. When BIPL filed appeal before the Tribunal, the Tribunal, while accepting the payments to be reimbursements, restored the issue to the file of the DRP for examination of the reconciliation of invoices raised by the assessee and the invoices recorded by BIPL. The TPO, in response to the remand report called for by the DRP, as directed by this Tribunal, had accepted the contentions of BIPL and found the same to be in order.

18. From the aforesaid, it follows that for the assessment year 2007- 08 there is a concurrent acceptance of the claim of BIPL that the payments are in the nature of reimbursement by all the authorities, viz. the TPO, the DRP and the Tribunal. Therefore, in the face of such concurrent acceptance of the nature of payment as being a mere reimbursement, it is untenable for the Revenue to contend in the captioned cases that the nature of the amount is otherwise. Therefore, what follows is that the expenses have been incurred by the assessee on behalf of BIPL and the same were merely reimbursed to the assessee. Ostensibly, the contractual responsibility of the rebates to be paid to retailers lies with the assessee. However, since the sales are made by BIPL, the commercial prudence postulates that BIPL bears the ultimate responsibility of such rebates in respect of India sales, and thus the payment of such reimbursements. Admittedly, the liability is definite and crystallised in the books of BIPL, and it merely represents normal discount. Thus, we are inclined to uphold the grievance of the assessee that the payments qualify as a pure reimbursement of expenses and accordingly, not taxable in India. The reimbursements received by the assessee are in respect of specific and actual expenses incurred by the assessee and do not involve any mark-up and the assessee has furnished sufficient evidence to

demonstrate the incurrence of expenses. There is thus no good reason to make any addition to income in respect of these reimbursements of expenses. The action of the Assessing Officer, as the learned counsel rightly contends, is on pure surmises and conjectures.

19. Here, we would also like to refer to the judgment in the case of AP Moller (supra). Facts of that case were that the assessee was a foreign company engaged in shipping business and was a tax resident of Denmark; that it had agents working for it, who booked cargo and acted as clearing agents for the assessee; and, that in order to help all its agents across the globe, the assessee had set up and maintained a global telecommunication facility called Maersk net system which was a vertically integrated communication system. The agents would pay for the system on pro rata basis. According to the assessee, it was merely a system of cost sharing and the payments received by the assessee from its agents in India were in the nature of reimbursement of expenses. The Assessing Officer, however, did not accept this contention and held that the amount paid by these three agents to the assessee were FTS rendered by the assessee and held them taxable in India under Article 13(4) of the Double Taxation Avoidance Agreement (DTAA) between India and Denmark and brought them to tax at 20% u/s 115A of the Act. The CIT(A) dismissed the assessee's appeal, but the Tribunal allowed its further appeal. The Hon'ble High Court dismissed the Department's appeal holding that the Tribunal had rightly observed that the Maersknet-communication-system was an automated software based communication system which did not require the assessee to render any technical services; that it was merely a cost sharing arrangement between the assessee and its agents to efficiently conduct its shipping business; and, that it was part of the shipping business and could not be captured under any other provisions except under the DTAA. The Hon'ble Supreme Court, dismissing the appeal held as under :-

> *"……. the facts that the assessee had its information technology system, that the assessee had appointed agents in various countries for booking of cargo and servicing customers in those countries, preparing documentation, etc., through these agents, that for the sake of convenience of all these agents, a centralised system was maintained to avoid unnecessary cost, that the system comprised booking and communication software, hardware and a data communications network and was, thus, an integral part of the international shipping business of the assessee and ran on a combination of mainframe and non-mainframe servers located in Denmark, that the expenditure incurred for running this business was shared by all the agents and that the systems enabled the agents to co-ordinate cargos and ports of call for its fleet were findings of fact. Once these were accepted, by no stretch of*

imagination, could the payments made by the agents be treated as fees for technical services. The payments were in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. Neither the Assessing Officer nor the Commissioner (Appeals) had stated that there was any profit element embedded in the payments received by the assessee from its agents in India. Once the character of the payment was in the nature of reimbursement of the expenses, it could not be income chargeable to tax. Moreover, freight income generated by the assessee in the assessment years in question was accepted as not chargeable to tax as it arose from the operation of ships in international waters in terms of article 9 of the DTAA. Once that was accepted and it was also found that the Maersk net system was an integral part of the shipping business which was allowed to be used by the agents of the assessee as well in order to enable them to discharge their role more effectively as agents, and the business could not be conducted without it, it could not be treated as any technical services provided to the agents."

20. Quite clearly, payments by way of reimbursement of expenses incurred on behalf of the payer cannot be construed as income chargeable to tax in the hands of the payee, a proposition which is approved by the Hon'ble Bombay High Court in the case of Siemens Aktiongesellschaft (supra). In view of the above discussion, we direct the Assessing Officer not to treat any part of reimbursement of expenses received by the assessee as income of the assessee. The assessee gets the relief accordingly on Ground no. 2 of the aforesaid appeal."

We find, that in the backdrop of the aforesaid observation of the Tribunal that the amounts received by M/s Braitrim U.K from BIPL were in the nature of reimbursement of expenses and did not involve any income element, the Tribunal had vide its consolidated order passed in ITA Nos. 4742 to 4747/Mum/2014 for A.Ys. 2005-06 to 2012-13, therein quashed the impugned demands that were raised against the assessee under Sec. 201(1) r.w.s 195 of the Act (Copy of the order placed on record). As stated by the ld. A.R, and rightly so, the tax withholding liability u/s 195 of the Act is a vicarious liability and its survival entirely depends upon the survival of the primary tax liability on the income element embedded in the payments received by the recipient. Admittedly, as the remittances made by the asessee before us, viz. BIPL to M/s

Braitrim UK Ltd. had been held to have been made towards reimbursement of expenses (without any mark-up), therefore, in the absence of any income element chargeable to tax in the hands of the payee, no obligation was cast upon the assessee to deduct any tax at source on the said amounts within the meaning of Sec. 195 of the Act. Accordingly, as the amounts remitted by the assessee company, viz. BIPL to Braitrim U.K have been held to be towards reimbursement of expenses (without any mark-up), therefore, in the absence of any 'Income' element therein involved the assessee, viz. BIPL could not be held to be a representative assessee within the meaning of Sec. 160(1)(i) qua the said remittances.

8. We shall now advert to the core issue qua which our indulgence has been sought by the revenue by preferring the present appeal, i.e the sustainability of the view taken by the CIT(A) that as he had upheld the order passed against the assessee u/s 201 of the Act, which is in the nature of an order of assessment and/or order akin to an order of assessment, therefore, having held so there cannot be an another assessment on the assessee in respect of the same income by treating it as an 'agent' under Sec. 163 of the Act. As is discernible from the order passed by the CIT(A), we find, that he had while concluding that as provisions of Sec. 163 are alternative to Sec. 201 of the Act and thus cannot be resorted to together, therein, relied on the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Premier Tyres Ltd. (1982) 134 ITR 17 and that of the Hon'ble High Court of Calcutta in the case of Bunge & Co. Ltd. Vs. ITO (1971) 79 ITR 93 (Cal). As such, the CIT(A) drawing support from the aforesaid judicial pronouncements, had observed, that there cannot be simultaneous jeopardy for the payer under two different provisions of the Act, each of which supplements a machinery for collection of tax payable by a non-resident assessee. It was observed by him that as he had upheld the order passed against the assessee u/s 201 of the Act which is an order of assessment and/or

an order akin to an order of assessment, thus, having held so, there cannot be one more assessment in respect of the same very income pursuant to Sec. 163 of the Act. As observed by the ITAT, Mumbai in the case of National Aviation Company of India Vs. Dy. CIT (2011) 137 TTJ 162 (Mum) both of the aforesaid judicial pronouncements, viz. (i). Premier Tyres Ltd. (supra); and (ii). Bunge & Co. Ltd. (supra), as had been relied upon by the CIT(A) for concluding as hereinabove were rendered in context of the pre-amended Sec.195 of the Act i.e prior to the amendment made available to Sec. 195 vide the Finance Act, 1987 w.e.f 01.04.1987. As observed by the Tribunal in the case of National Aviation Co. of India (supra), vide the aforesaid amendment the words "unless he is himself liable to any income-tax" in Sec. 195 stood omitted w.e.f 01st June, 1987. The Tribunal observed that as the liability of an assessee to deduct tax at source under s. 195 is different from the liability of an assessee to file a return of income as an agent of a foreign principal, therefore, the claim of the assessee that simultaneous proceedings cannot be taken, i.e holding the assessee as an assessee in default under Sec. 201; and at the same time passing an order under s. 163, holding the assessee as a representative assessee, did not merit acceptance. It was observed by the Tribunal as under :

> 38. We now take up the third proposition canvassed by the learned counsel for the assessee. The proposition is that simultaneous proceedings cannot be taken under s. 201 of the Act holding the assessee as an assessee in default and at the same time pass an order under s. 163, holding that the assessee is a representative assessee. The learned counsel mainly relied on the decision of the Hon'ble Calcutta High Court in the case of Bunge & Co. Ltd. (supra). We have perused this decision. The Calcutta High Court has held that the group of sections from s. 160 to s. 163 and the group of sections from ss. 195 to 201 of the Act are mutually exclusive and operate in different fields. It further held that the same person cannot be treated as an agent under s. 163 of the Act and prosecuted against under s. 201 at the same time. On p. 98 of the said judgment, it is clear that the counsel appearing on behalf of the Revenue did not contest this proposition and on the contrary had submitted that the IT authorities have not yet made up their minds as to whether the petitioner is to be treated as an agent under s. 163 of the Act or is to be proceeded with as "any person within the meaning of s. 195 thereof". Under those circumstances the notice issued was held to be without jurisdiction. The learned Judge in this case has made it clear that he is not pronouncing any opinion on the merits of the other contentions raised by the petitioners. In this decision, we have to

note the wordings of s. 195(1) as it then existed as brought out at p. 96. We extract the same for ready reference :

> "195(1) Any person responsible for paying to a non-resident, not being a company, or to a company which is neither an Indian company nor a company which has made the prescribed arrangements for the declaration and payment of dividends within India, any interest, not being 'interest on securities', or any other sum, not being dividends, chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself liable to pay any income-tax thereon at the rates in force :
>
> Provided that nothing in this sub-section shall apply to any payment made in the course of transaction in respect of which a person responsible for the payment is deemed under the proviso to sub-s. (1) of s. 163 not to be an agent of the payee."
>
> (Emphasis, italicized in print, ours)

We will deal with these wordings in the coming paras.

39. The next judgment relied upon by the learned counsel is the decision of the Hon'ble Bombay High Court in the case of CIT vs. Premier Tyres Ltd. (supra). In this judgment the Hon'ble Court held as follows :

> "A person who is himself liable to pay income-tax on a payment to be made to a non-resident as an agent of the said non-resident, under s. 161 of the IT Act, 1961, cannot be saddled with the further obligation to deduct IT under s. 195 of the IT Act, 1961 before making the payment to the non-resident and be deemed to be in default under s. 201 of the Act."

The Hon'ble Court followed the decision of the Hon'ble Calcutta High Court in the case of Bunge & Co. Ltd. (supra) and upheld the decision of the Tribunal.

40. Mr. Sonde has brought to our notice the amendments brought to s. 195 w.e.f. 1st June, 1987 by the Finance Act, 1987. In this amendment the words "unless he is himself liable to pay any income-tax" has been omitted in the section. The learned counsel argued that the Hon'ble Court in the case of Bunge & Co. Ltd. (supra) had not rested their decision on these wordings and hence the omission of the same w.e.f. 1st June, 1987 by Finance Act, 1987 does not effect binding nature of the decision. We are not persuaded by this argument. In the case of Bunge & Co. (supra), as already stated, this issue has not been contested at all. At p. 98 para 2 it was observed as follows :

> "The former group of sections from ss. 160 to 163 and the group of sections from ss. 195 to 201 of the Act, it is contended mutually exclusive and operate on different fields. Pointed reference made in this connection to the proviso to s. 195(1) of the Act prescribes that nothing in s. 195(1) shall apply to any payment in the course of transactions in respect of which a person responsible for the payment is deemed to be an agent of the payee under the proviso to sub-s. (1) of s. 163 of the Act. This, it is pointed out, puts the matter beyond the pale of controversy. It is clearly an expression of the legislative intention that these two

> groups of sections are entirely independent of each other and are mutually exclusive."

This proviso has since been omitted from the statute. All the arguments are based on provisions of law which have been amended. Such arguments based on old law cannot be entertained. In the absence of this proviso in the statute, in our opinion, these case laws have no application. The legal position has changed long back.

41. On the other hand the Special Bench of the Tribunal in the case of Mahindra & Mahindra (supra) had considered the issue, though in a different context, and concluded that non-initiation of proceedings under s. 163, treating the payee as an agent of a non-resident within the time provided under the Act for time-barring, would result in the order passed under s. 201 being barred by limitation. At p. 646 it concluded as follows :

> "(xiii) No order under s. 201(1) or (1A) can be passed where the Revenue has not taken any action against the payee and further the time-limit for taking action against the payee under s. 147 has also expired."

This shows that the Special Bench was of the opinion that both proceedings can take place simultaneously and that in fact not taking the same results in the order under s. 201 being bad in law.

42. In our humble opinion, the liability of an assessee to deduct tax at source under s. 195, is different from the liability of an assessee to file a return of income as an agent of a foreign principal. As rightly put by the learned Departmental Representative, the assessee can be treated as an agent of the non-resident principal and assessments framed in that capacity. The tax deducted under s. 195 would be given credit against the tax so assessed. Being treated as an agent of the non-resident, and assessed as such, means that the assessee is assessed in a representative capacity and not in its own capacity. In many cases the assessees are regularly deducting tax under s. 195 and are also filing returns of income as an agent of the non-resident and are claiming credit of the TDS. The assessee has a legal duty under both the sections. In view of the above discussion, this submission of the learned counsel of the assessee is dismissed."

We, thus, finding ourselves in agreement with the aforesaid view so taken by the Tribunal, respectfully follow the same. Accordingly, we do not find favor with the observation of the CIT(A) that as he had upheld the order passed against the assessee u/s 201 of the Act, therefore, having held so, there cannot be one more assessment in respect of the same income on the assessee pursuant to Sec. 163 of the Act. As observed by us hereinabove, the CIT(A) while concluding as hereinabove, had failed to appreciate that the judicial pronouncements relied upon by him, viz. judgment of the Hon'ble High Court of Bombay in the case of Premier Tyres Ltd. (supra); and that of the Hon'ble High Court of Calcutta in the

case of Bunge & Co. Ltd. (supra), were both rendered in the backdrop of the pre-amended Sec. 195 of the Act i.e prior to the amendment made available vide the Finance Act, 1987 w.e.f 01.06.1987. As observed by us hereinabove, pursuant to the amendment made available on the statute vide the Finance Act, 1987 w.e.f 01.06.1987 as the words "unless he is himself liable to any income-tax" in Sec. 195 stood omitted w.e.f 01st June, 1987, therefore, the innate exception carved out for a person who was himself liable to pay tax as an 'agent' of the non-resident person u/s 163 of the Act qua deduction of tax at source u/s 195 of the Act as per the pre-amended law i.e prior to 01.06.1987, had thereafter been dispensed with or in fact obliterated from the statute. We, thus, in terms of our aforesaid observations set-aside the view taken by the CIT(A) that as he had upheld the order passed against the assessee u/s 201 of the Act, therefore, having held so, there could not have been one more assessment in respect of the same income on the assessee pursuant to Sec. 163 of the Act.

9. We shall now deal with the issue as to whether the assessee company, viz. BIPL could principally be held to be the 'agent' of Braitrim U.K u/s 163 of the Act. As is discernible from the order passed by the ITO (IT) – TDS-3, Mumbai, the contentions advanced by the assessee that it was not an 'agent' of Braitrim U.K u/s 163 of the Act were rejected by him. It was observed by the ITO(IT)-TDS-3, Mumbai, that the assessee, viz. BIPL was to be held to be an 'agent' of Braitrim U.K u/s 163 of the Act for the reasons, viz. (i). that BIPL has a business connection with Braitrim U.K and its principal business is substantially controlled and managed over by Braitrim U.K ; (ii) that Braitrim U.K is directly or indirectly in receipt of income from or through BIPL; and (iii). that BIPL is the agent office managed on behalf of Braitrim U.K. Although, the assessee has assailed before the CIT(A) the aforesaid observations of the ITO(IT)-TDS-3, Mumbai, on the basis of which it was held to be an 'agent' of Braitrim U.K, however, we find that the CIT(A) by merely confining his adjudication to the aspect that the assessee

could not have been subjected to double jeopardy under the two provisions of the Act i.e Sec. 201 and Sec. 163 of the Act, had thus, not dealt with the specific contentions that were raised by the assessee before him, therein, assailing its being treated as an 'agent' of Braitrim U.K under Sec. 163 of the Act. Also no contentions qua the aforesaid issue on merits i.e treating of the assessee as an 'agent' u/s 163 of the Act were advanced by the authorized representatives for both the parties in the course of hearing before us. As we have set-aside the view taken by the CIT(A) that having upheld the order passed against the assessee u/s 201 of the Act, the assessee could not be held to be an 'agent' of Braitrim U.K under Sec. 163 of the Act, therefore, in all fairness we restore the matter to the file of the CIT(A) for adjudicating by way of a speaking order the assessee's claim on merits that it could not have been held to be an 'agent' of Braitrim U.K u/s 163 of the Act. Needless to say, the CIT(A) shall in the course of the set-aside proceedings afford a reasonable opportunity of being heard to the assessee, wherein the latter shall remain at a liberty to substantiate its aforesaid claim on the basis of fresh submissions/documents. The **Grounds of appeal Nos. 1(i) and (ii)** are allowed for statistical purposes in terms of our aforesaid observations.

10. As the facts and the issue involved in the remaining appeals of the revenue, viz. ITA Nos. 4879 to 4881 & 4883/Mum/2014 for A.Ys 2006-07 to 2008-09 & A.Y 2012-13 remains the same as were there before us in the revenue's appeal for A.Y 2005-06 in ITA No. 4878/Mum/2014, therefore, our order therein passed shall apply mutatis mutandis for the purpose of disposing off the aforementioned appeals. Accordingly, on the same terms the matters for the aforementioned years are also restored to the file of the CIT(A) for adjudicating on the basis of a speaking order the assessee's claim on merits that it could not be held to be an 'agent' of Braitrim U.K u/s 163 of the Act.

11. Accordingly, the appeals of the revenue, viz. ITA Nos. 4879 to 4881 & 4883/Mum/2014 for A.Ys 2006-07 to 2008-09 & A.Y 2012-13 are allowed for statistical purposes in terms of our aforesaid observations.

12. Resultantly, the appeals of the revenue viz. ITA Nos. 4878 to 4881 & 4883/Mum/2014 for A.Ys 2005-06 to 2008-09 & A.Y 2012-13 are allowed for statistical purposes in terms of our aforesaid observations.

Order pronounced in the open court on 19/07/2021.

Sd/-	Sd/-
(RAJESH KUMAR)	(RAVISH SOOD)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai;
Dated: 19.07.2021
PS: Rohit

Copy of the Order forwarded to :

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

BY ORDER,
//True Copy//

(Sr. Private Secretary)