

**IN THE INCOME TAX APPELLATE TRIBUNAL  
[ DELHI BENCH : "D" NEW DELHI ]****BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER  
AND  
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER****I.T.A. No. 360/Del/2017 (A.Y. 2013-14)****AND****I.T.A. No. 7615/Del/2018 (A.Y. 2015-16)****(THROUGH VIDEO CONFERENCING)**

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| ITOCHU Corporation,<br>5-1, Kita-Aoyama,<br>2-Chome, Minato-Ku<br>Tokyo 107-8077, JAPAN.<br><b>PAN: AABCI5567L</b><br><b>(APPELLANT)</b> | Vs. | ACIT,<br>(International Taxation)<br>Circle 2(1)(1),<br>New Delhi.<br><b>(RESPONDENT)</b> |
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| <b>Assessee by :</b>  | <b>Shri Ajay Vohra, Sr. Adv &amp;<br/>Shri Rishabh Malhotra, AR;</b> |
| <b>Department by:</b> | <b>Shri Satpal Gulati [CIT]-DR</b>                                   |

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| <b>Date of Hearing</b>       | <b>24.09.2021</b> |
| <b>Date of Pronouncement</b> | <b>24.11.2021</b> |

**ORDER****PER SUCHITRA KAMBLE, JM :**

These two appeals are filed by the assessee for assessment years 2013-14 and 2015-16.

2. The grounds of appeal are as under:-

**I.T.A. No. 360/Del/2017 (A.Y. 2013-14) :**

“ 1. On the facts, in the circumstances of the case and in law, the Ld. AO/ Hon'ble Dispute Resolution Panel ('DRP') has erred in alleging that Itochu India Private Limited ('Itochu India'), appellant's subsidiary in India and other agents constitute a dependent agent Permanent Establishment ('PE') of the appellant in India in terms of Article 5 of the India-Japan Double Taxation Avoidance Agreement ('DTAA') and thereby assessing the income attributable to the alleged

PE amounting to INR 2,64,93,05,483, without appreciating the fact that none of the following pre-requisite conditions to constitute a dependent agent PE were fulfilled by Itochu India and so Itochu India was not a dependent agent PE:

- Itochu India does not habitually exercise the authority to conclude the contracts in India for and on behalf of the appellant; or
- Itochu India does not habitually maintains stock of goods in India for delivery to customers for and on behalf of the appellant; or
- Itochu India does not secure orders in India for and on behalf of the appellant.

2. In alleging that the appellant had a dependent agent PE in India, the Ld. AO/ Hon'ble DRP failed to appreciate that:

2.1 The appellant has provided all the documentary evidences including party wise sale details, copy of contracts/ bill of lading/ invoices/ purchase orders and copy of agency agreement entered between the appellant and Itochu India as and when was requested by the Ld. AO, to substantiate the fact that the appellant made sales in India without any involvement of Itochu India or with a limited role of Itochu India where it is acting as a communication channel. Also, the appellant had filed additional documentary evidences before the Hon'ble DRP as additional evidences;

2.2 Itochu India has not secured orders in India and is not involved in negotiating terms and conditions and finalization of the prices of the contract with the Indian customers;

2.3 The agency agreement between Itochu India and the appellant includes different activities for export vis-a-vis import of goods and the negotiation activities undertaken by Itochu India pertains to purchase of goods by the appellant from Indian customers and not to sale of goods;

2.4 Itochu India is not being compensated on all costs incurred and Itochu India bears all the cost arising from the performance of its duties;

2.5 The facts of the case of Huawei Technologies Co Ltd, China vs. ADIT (ITA Nos. 5253/Del/20ii, 5254/Del/2on, 5255/del/20ii & 5256/Del/20ii dated 21 March 2016) are different from the facts of the appellant's case and therefore the reliance placed by the Ld. AO/ Hon'ble DRP is not justified;

2.6 The Transfer Pricing Report of Itochu India specifically mentions that the role of Itochu India is limited to act as a communication channel between the associated enterprises and the customers and therefore the reliance placed by the Ld. AO/ Hon'ble DRP is not justified

and therefore were not justified in concluding that the appellant constituted a dependent agent PE in India.

3. The Ld. AO/Hon'ble DRP also erred on the facts, in the circumstances of

the case and in law in holding that Itochu India is legally and economically dependent on the appellant and ignored to appreciate the fact that Itochu India is an independent entity, primarily engaged in trading activities with major source of income being revenue from such trading activities only.

3.1 The Hon'ble DRP has erred in holding that since 100% shares of Itochu India are held by the appellant, Itochu India is financially dependent on the appellant;

4. The Ld. AO/ Hon'ble DRP has erred on the facts, in the circumstances of the case and in law in alleging that sales made by the appellant are taxable in India without appreciating the fact that approximately 83% of the total sales have been directly made by the appellant to its Indian customers without any involvement of Itochu India and with regard to the balance 17% sales, the Ld. AO/ Hon'ble DRP has failed to appreciate the fact that the role of Itochu India is limited to acting as a communication channel between the customers and the appellant for which it is remunerated at arm's length price.

5. Without prejudice to the above ground, the Ld. AO/ Hon'ble DRP has erred on the facts, in circumstances of the case and in law in determining the profits attributable to the alleged PE with respect to direct sales made by the appellant to its Indian customers by applying the Force of Attraction Rule without appreciating the fact that there is no such provision in the Indian - Japan DTAA.

6. Without prejudice to the above ground, the Ld. AO/ Hon'ble DRP have erred on the facts, in the circumstances of the case and in law in attributing 50% of the total sales made by the appellant and assuming a profit margin of 10% to the alleged PE, thereby assessing the income attributable to the alleged PE amounting to INR 2,64,93,05,483 which is not only arbitrary but is highly unreasonable and excessive.

6.1 The Ld. AO/ Hon'ble DRP has erred in attributing 50% of total sales value to the alleged PE without any justification and reasonable basis.

6.2 The Ld. AO/ Hon'ble DRP has erred on the facts, in the circumstances of the case and in law in applying Rule 10 of Income Tax rules, 1962 while determining the profit margin for PE being 10% without appreciating the fact and choosing to ignore that the actual global profit margin of the appellant of 0.002% was submitted before the Hon'ble DRP.

6.3 The Ld. AO while attributing the income to the alleged PE has exceeded his jurisdictional powers and authority as he is specifically restricted from determining the arm's length price as per CBDT instruction No. 3/2016 dated 10 March, 2016 read with section 92CA of the Act;

6.4 The Ld. AO/ Hon'ble DRP has made reference to the order passed by the Ld. Transfer Officer at various places without appreciating the fact that no such order was passed by the Ld. Transfer Pricing Officer in the case of the appellant

for the captioned year;

7. Without prejudice to the above grounds, the Ld. AO has ignored to appreciate the fact that where the international transactions between Itochu India and the appellant have been found to be at arm's length price, as reported in Form 3CEB read with transfer pricing report of Itochu India for the captioned year, even if it is presumed for argument sake only that Itochu India constituted PE of the appellant in India, no further profits could be attributed and brought to tax in terms of Article 7 of the India-Japan DTAA.

The above grounds are without prejudice to each other.

The Appellant craves leave to alter, amend or withdraw all or any of the grounds herein or add any further grounds as may be considered necessary either before or during the hearing. "

**I.T.A. No. 7615/Del/2018 (A.Y. 2015-16) :**

" 1. On the facts, in the circumstances of the case and in law, the Ld. AO/ Ld. Dispute Resolution Panel ('DRP') has erred in alleging that Itochu India Private Limited ('Itochu India'), appellant's subsidiary in India and other agents constitute a dependent agent Permanent Establishment ('PE') of the appellant in India in terms of Article 5 of the India-Japan Double Taxation Avoidance Agreement ('DTAA') and thereby assessing the income attributable to the alleged PE amounting to Rs. 1,06,48.29.913 , without appreciating the fact that none of the following prerequisite conditions to constitute a dependent agent PE were fulfilled by Itochu India and so Itochu India was not a dependent agent PE:

- Itochu India does not habitually exercise the authority' to conclude the contracts in India for and on behalf of the appellant; and
- Itochu India does not habitually maintains stock of goods in India for delivery to customers for and on behalf of the appellant; and
- Itochu India does not secure orders in India for and on behalf of the appellant; and
- Itochu India is not legally or economically dependent on the appellant.

2. On the facts and in the circumstances of the case and in law, the addition of Rs. 99.51.65.483 made in the final assessment order is bad in law and needs to be deleted/ quashed as it is a mere replica of the assessment order passed for AY 2013-14 and based on account of incorrect appreciation of facts.

2.1 That the Ld. AO / Ld. DRP has erred in holding that the assessee has not produced evidence to substantiate its position that it does not have a PE in

India and has failed to appreciate that the company has provided all the documentary evidences including party wise sale details, copy of contracts / bill of lading / invoices / purchase orders and copy of agency agreement to substantiate the fact that the appellant made sales in India without any involvement of Itochu India or with a limited role of Itochu India where it is only acting as a communication channel;

2.2 That the Ld. AO/ Ld. DRP has erred in holding that the assessee has failed to provide any information or agreements in relation to nature of relationship and dealings with these agents in India and has failed to appreciate various evidences including financial statements of Itochu India and email correspondences filed by the appellant to substantiate that the role of Itochu India was limited to being a communication channel and that Itochu India is not legally or economically dependent on the appellant.

2.3 That the Ld. AO/ Ld. DRP has erred in holding that Itochu India secures orders in India on behalf of the appellant and has failed to appreciate that:

- the services in relation to the purchase of goods are different from sale of goods;
- the purchase and sale functions performed by Itochu India are separately mentioned in the agency agreement;
- no negotiation activity was undertaken by Itochu India for sale purposes; and
- Itochu India had no authority whatsoever to conclude contracts on behalf of the appellant.

2.4 That the Ld. DRP has erred in making a reference to the directions issued in appellant's own case for AY 2013-14 wherein the Ld. DRP had made reference to the order passed by the Transfer Pricing Officer at various places and failed to appreciate that no order was passed by the Transfer Pricing Officer in the case of the appellant either for AY 2013-14 or for the subject year.

3. That the Ld. AO / Ld. DRP has erred in holding that the appellant had a dependent agent PE in India;

3.1 That the Ld. AO/ Ld. DRP has failed to appreciate that the Indian subsidiary has not' secured any orders for appellant in India and is not involved in negotiating terms and conditions or the finalization of the prices of contract with Indian customers.

3.2 That the Ld. AO/ Ld. DRP has failed to appreciate that the Transfer Pricing Report of Itochu India specifically mentions that the role of Itochu India is limited to act as a communication channel between the associated enterprises and the customers and therefore the reliance placed by the Ld. AO / Ld. DRP is not justified.

3.3 The Ld. AO/ Ld. DRP also erred on the facts, in the circumstances of the case and in law in holding that Itochu India is legally and economically dependent on the appellant and ignored to appreciate the fact that Itochu India is an independent entity, primarily engaged in trading activities with major source of income being revenue from such trading activities only.

4. That on the facts and circumstances of the case and in law, the Ld. DRP has grossly erred in placing reliance on a third party public website to hold that the appellant has its own office in Mumbai.

4.1 That the Ld.AO has failed to provide any evidence regarding existence of the office of the appellant in India, pursuant to the directions of the Ld. DRP to further examine the presence of the office in India.

5. Without prejudice to the above grounds, the Ld. AO/ Ld. DRP has erred on facts and circumstances of the case and in law in attributing 50% of the total sales made by the appellant and assuming a profit margin of 10% to the alleged PE, thereby assessing the income attributable to the alleged PE amounting to Rs.99,51,65,483, which is not only arbitrary but highly unreasonable and excessive.

5.1 That the Ld. AO/ Ld. DRP has erred in attributing 50% of the total sales value in India to the alleged PE without any justification and reasonable basis and without controverting to the various judicial precedents which have accepted a lower rate of income attribution.

5.2 That the Ld. AO/ Ld. DRP has failed to appreciate that as per the audited nonconsolidated accounts for the subject year, the global profit margin earned by the appellant is 0.18%, which ought to have been considered by the Ld. AO/ Ld. DRP while determining the profit margin.

5.3 The Ld. AO/ Ld. DRP has erred in considering the profit margin as 10% of the sales as per the provisions of Rule 10 of the Income-tax Rules, 1962 read with section 44BB of the Act without appreciating that the provisions of Section 44BB of the Act are not applicable in the present case since the appellant is a trading company and is not involved in the business of extraction/ production/ prospecting of mineral oils or supplying machinery on hire or any related services thereof in India.

5.4 That the Ld. AO while attributing the income to the alleged PE has exceeded his jurisdictional powers and authority as the Ld. AO is specifically restricted from determining the arm's length price as per CBDT instruction No 3/2016 dated 10 March, 2016 read with section 92CA of the Act.

6. Without prejudice to the above ground, the Ld. AO/ Ld. DRP has erred on the facts, in circumstances of the case and in law in relying on the directions of the Ld. DRP for AY 2013-14 in appellant's own case while determining the profits attributable to the alleged PE with respect to direct

sales made by the appellant to its Indian customers by applying the 'Force of Attraction' rule without appreciating the fact that there is no such provision in the Indian-Japan DTAA.

7. Without prejudice to the above grounds, the Ld. AO has failed to appreciate the fact that where the international transactions between Itochu India and the appellant have been found to be at arm's length price in the preceding year(s) and in the absence of any reference to the transfer pricing officer for the subject year, even if it is presumed for argument sake only that Itochu India constituted PE of the appellant in India, no further profits could be attributed and brought to tax in terms of Article 7 of the India-Japan DTAA.

8. Without prejudice to the above, on the facts and circumstances of the case and in law, the Ld. AO/ Ld. DRP has erred in alleging that the sales made by the appellant are taxable in India without appreciating that 60% of the total sales are directly made by the appellant to its Indian customers without any involvement of Itochu India and with regard to the balance 40% of sales, the Ld. AO/ Ld. DRP has failed to appreciate the fact that the role of Itochu India is limited to acting as a communication channel between the customers and the appellant for which it is remunerated at arm's length price and therefore, the said addition is bad in law and ought to be quashed / deleted.

9. That on the facts and circumstances of the case and in law, the Ld. Assessing Officer has erred in initiating the penalty proceedings under Section 271(i)(c) of the Act.

The above grounds are without prejudice to each other.

The Appellant craves leave to alter, amend or withdraw all or any of the grounds herein or add any further grounds as may be considered necessary either before or during the hearing. "

3. First we take up the appeal of the assessee [ITA. No. 360 (Del) 2017] for assessment year 2013-14. Brief facts of the case are as under:

Itochu Corporation is an entity incorporated under the laws of Japan in 1858. Itochu Japan is engaged in distinct business provisions globally. Itochu is involved in domestic trading, import / export and overseas trading of various products such as oil, textile, machinery, metals, minerals, energy, chemicals, food, information and communication technology, realty, general products, insurance registration services, construction and finance as well as business

investment in Japan and overseas. The assessee filed its return of income on 21.11.2013 declaring income of Rs.1,80,78,892/-. The case of the assessee was selected for scrutiny vide notice dated 4.09.2014 issued under Section 143(2) of the Income Tax Act, 1961 (the Act). During the assessment proceedings the assessee submitted that in respect of year under consideration assessee earned fee amounting to Rs.1,80,78,892/- for rendering certain services and offered the same for taxation as fee for technical services. The Assessing Officer vide letter dated 27.01.2016 asked the assessee to produce details of all types of sales made in India during the subject year and further asked as to how the income earned from same are not taxable in India. Further the Assessing Officer also asked the assessee to explain as to why it shall not be considered to have a PE in India within the meaning of Article 5 of India – Japan Double Taxation Avoidance Agreement [‘DTAA’] particularly. The assessing Officer made addition to the extent of INR 266,73,84,575 thereby attributing 60% of entire sale (including direct sales). The Assessing Officer also proceeded to take a profit margin of 10%. The DRP upheld the attribution made by the Assessing Officer vide direction dated 1.12.2016 and pursuant to the direction of the DRP, the Assessing Officer passed the final assessment order dated 8.12.2016.

4. Being aggrieved by the assessment order the assessee filed the present appeal.

5.1 The ld. AR submitted that during the year under consideration assessee received service fee amounting to Rs.1,80,78,892/- from Itochu India and other third parties and the same was offered to tax as fee for technical service under Article 12 to India-Japan DTAA on gross basis at 10%. The taxes due were duly discharged by way of taxes withheld by Itochu India. The ld. AR further submitted that the assessee had received cost to cost reimbursement from Itochu India with regard to certain expenses incurred by the assessee company on behalf of Itochu India. The ld. AR further submitted that the assessee also

earned Revenue from sales to customers in India. The details of these sales amounting to JPY 9123,17,01,639 were provided to the Assessing Officer. The Id. AR submitted that the assessee also supplied certain equipment / product being in the nature of chemical products, textile products / yarns, crude oil, mechanical equipment, drink concentrate etc. to various Indian customers, either directly or with the support of India / other Indian third party's agents. The Id. AR further submitted that most of the sales made by the assessee were a result of direct interaction with the Indian customers and did not involve any agent. The Id. AR submitted that PE India provided certain support services to the assessee in relation to purchase and sale of goods from / to India. This primarily involves acting as a communication support between the assessee and its customers / suppliers and collecting information from India, considering the language / cultural barriers. The Id. AR referred to Clause 3.1 of the Agreement entered between the assessee and Itochu India. In respect of sales of goods to Indian customers and the captioned of the clauses obligation of agent with capital goods activities performed to Itochu India, which were limited to :

- (a) Promoting and protecting the interest of the assessee;
- (b) Submitting reports on the credit standing and financial background of the buyers and sellers of goods without any legal liability being attached on the part of Itochu India;
- (c) Submitting reports on all sales and purchases, market conditions and other information useful and necessary for promotion of export and import of the goods.

5.2 The Id. AR further pointed out Clause 2 relating to power of agent thereby the trade agreement all contracts orders proposal and offer for sale of the goods shall be subject to financial and formal approval and acceptance by the assessee and Itochu India will have no power, right or authority to approve or accept the same on behalf of the assessee. The services to be rendered by Itochu India in relation to the purchase of goods from Indian suppliers were

different and distinctly mentioned in the said agreement. This fact was clearly high-lighted to the Assessing Officer during the course of assessment proceedings. The scope of activities to be performed by Itochu India specifically for the purchase activities includes :

- (a) To look for prospective suppliers;
- (b) To negotiate on behalf of the assessee the terms and conditions of the purchase transactions;
- (c) To inspect the goods on behalf of the assessee;
- (d) To negotiate with suppliers on behalf of the assessee for amicable settlement of claims or complaints.

5.3 The ld. AR submitted that the assessee had entered into one agreement with Itochu India for providing various services in relation to sales of goods to India as well as purchase of goods from Indian suppliers. The services in relation to the purchase of goods from Indian suppliers were different and distinctly mentioned in the said agreement and were different from those relating to sale of goods. It is, therefore, clear that Itochu India had no authority whatsoever to conclude contract on behalf of the assessee with regard to sale of goods available to it in relation to purchase of goods. The ld. AR further submitted that Itochu India carried on business independently and had substantial revenue of its own from trading activities (60%) and, therefore, was not dependent upon the assessee for its survival.

5.4 The ld. AR submitted that the Assessing Officer passed the final assessment order without proper appreciation of facts and circumstances of the case and under absolute misconception of law. The Assessing Officer observed the activities undertaken by the Itochu India in relation to its obligation for purchase transactions and held that Itochu India secures orders in India for Itochu Japan. Thus, the Assessing Officer further held that Itochu

India was a dependent agent PE of the assessee. The Assessing Officer further apprised that Itochu India negotiates and finalizes the prices with the Indian customers. The ld. AR submitted that these factual aspects are incorrect and these negotiations of prices with Indian customers as stated by the Assessing Officer was a service that Itochu India was required to do, but related to the activities of purchases from Itochu Japan and did not related to the activities of sale at all. Thus, the observations of the Assessing Officer are incorrect appreciation of facts and are not emanating from any agreement or other evidences submitted before the Assessing Officer / DRP during the course of assessment proceedings.

5.4.1 As per the Memorandum of Agency Agreement entered into between Itochu Japan and Itochu India there are separate observations set out for Itochu India in relation to purchases and transactions respectively. However, the Assessing Officer incorrectly relied upon the obligations of Itochu India in relation to purchase transaction and applied it on the same to conclude that the assessee as a PE in India and, therefore, the consequent attribution was made by the Assessing Officer. The Assessing Officer primarily held that direct sales (constituting 83% of total sales) and indirect sales (constituting 17% of the sales) made by the assessee to its Indian customers has to be attributed to the dependent agent PE of the assessee by applying the Force of Attraction rule and thereby held that the same has to be taxable in India. The ld. AR submitted that Force of Attraction rule has not been provided for in the India Japan DTAA and accordingly the same cannot be applied to the present assessee's case. The ld. AR further contended that the Assessing Officer's finding that 50% of sales value has to be attributed to the assessee treating the Indian entity as PE in India is incorrect and assumed a profit margin of 10% by applying Rule 10 of the Income Tax Rules, 1962 is also not proper. The ld. AR further submitted that the attribution is highly excessive and nothing can be attributed to Itochu India let alone 50% of the sale as attributed by the Assessing Officer. Further while making the attribution the Assessing Officer

completely disregarded the fact that the correct net profit rate (Operating profit rate) and Itochu Japan is 0.001% and not 10% as contemplated by the Assessing Officer. For this submission the ld. AR pointed out that the same is evident from Global Accounts attached as Annexure I to the written submissions.

5.4.2 The ld. AR submitted that the Assessing Officer relied on the Transfer Pricing Officer [TPO] at various places without appreciating the fact that no TPO order was passed in the case of Itochu Japan. The ld. AR submitted that the Assessing Officer was incorrect in observing that Itochu India is both legal and economically dependent of Itochu Japan and almost 50% of income derived from Itochu India is earned from Itochu Japan. The ld. AR submitted that the audited financial statements of Itochu India for assessment year 2013-14 were submitted during the course of assessment proceedings which clearly demonstrate that Itochu India is primarily engaged in trading and commissioning activities and 77% of its total revenue is independent of Itochu Japan. Accordingly Itochu India business is not dependent on Itochu Japan. The ld. AR submitted that the Assessing Officer wrongly observed that since 100% shares of Itochu India are held by the assessee, Itochu India is financially dependent on the assessee. The ld. AR submitted that the Assessing Officer completely mis-conceptualized the law laid down in the decision of the Hon'ble Delhi High Court in the case of E-Funds IT Solutions (42 taxmann.com50) wherein it is held that a subsidiary does not automatically mean that the foreign company has a PE in India. Further as per the provisions of Article 5(9) of the India Japan DTAA, a foreign enterprise controlling an Indian enterprise shall not automatically constitute a PE of foreign enterprise in India. The ld. AR further submitted that the Assessing Officer relied upon the TP report of Itochu India for assessment year 2013-14 in relation to its role / activity undertaken for the overseas enterprise while concluding Itochu India as the PE of Itochu Japan in India. However, the TP report specifically mentioned that Itochu India role is limited to acting as the

communication channel between the overseas associated enterprise and the Indian customers.

5.5. The Ld. AR further submitted that the direct sales made by the assessee to Indian Customers cannot be brought to tax in India. The income arising from the supply of certain equipment/products like chemical products, textile products/yarns, crude oil, mechanical equipment, drink concentrate etc. to various Indian customers is not taxable in India. Revenue received from offshore supplies made by the assessee to various Indian customers were not liable to Income tax in India. The Assessing Officer in the assessment order has held at para 9 that the assessee has executed sales in India via various agents and Itochu India has deliberately failed to provide any information or agreements in relation to nature of relationship and dealing with such agents in India. The Ld. AR submitted that Itochu Japan had submitted details of all sales made to Indian customers. About 83% of the total sales value are direct sales without any involvement of Itochu India or third party agents. Agreements/invoices/bill of lading/purchase orders were submitted for sample cases as identified by the Assessing Officer himself. The Ld. AR further submitted that the Assessing Officer as well as the DRP has not only failed to appreciate but chose to ignore the relevant material in the form of contracts, bill of lading, emails and invoices submitted to them which clearly demonstrates that Itochu India was not involved at all in 83% of the sales made to Indian customers. The Assessing Officer without any foundation and only on assumptions and surmises, attributed the income to Itochu Japan's alleged PE in India.

5.6. The Ld. AR submitted that all contracts were submitted before the lower authorities for pointing about the direct sales and explaining therein that there was no involvement of Itochu India. Therefore, the alleged exposure of PE as held by the Assessing Officer is not justified. For this the Ld. AR illustrated certain examples. Direct Sales- Example 1: The reference is made to a contract

between the assessee (as seller) and Reliance Industries Limited (as buyer), dated 12.09.2016. The contract was entered for the purchase of barrels of crude oil by Reliance Industries Limited from the assessee. The delivery was scheduled in three cargo lots, FOB from Al shaheen terminal, Qatar i.e. outside India and to be received at the port of Reliance terminal-Sikka port i.e. in India. Payment was required to be effected via telegraphic wire transfer in US dollars to assessee's nominated bank account outside India. Accordingly, the purchase of oil was made by the assessee from Qatar i.e. outside India and was directly received by Reliance Industries Limited in India. The payment was directly made by Reliance Industries Limited through telegraphic wire transfer directly to the assessee. There was no involvement of Itochu India in effecting such sales in India.

5.6.1 Direct Sales – Example 2: A reference has been made to the contract entered between the assessee and Essar Oil Limited for purchase of oil. The delivery was scheduled in one cargo lot, FOB from Mina Saud and was to be received at the port of Essar SPM, in India. Itochu India has no involvement in effecting such sales in India. Payment was required to be effected via telegraphic wire transfer in US dollars to assessee's nominated bank account outside India. Accordingly, the oil was directly received by Essar Oil Limited in India. The payment was directly made by Essar Oil Limited through telegraphic wire transfer directly to the assessee. There was no involvement of Itochu India in effecting such sales in India.

5.6.2 Direct Sales - Example 3: A reference was made which provides for the contract entered between the assessee and Vedanta Aluminum Limited for purchase of Sandy Calcined Metallurgical Grade Alumina. The delivery is scheduled from the port outside India. The title to and risk shall pass to Vedanta Aluminum Limited at the moment such material has been put on board at the loading port i.e. outside India. Accordingly, the purchase of Sandy Calcined Metallurgical Garde Alumina was made by the assessee from

Australia i.e. outside India and was directly received by Vedanta Aluminum Limited i.e. in India. There was no involvement of Itochu India in effecting such sales in India.

5.7 Without prejudice to the above, the Ld. AR further submitted that the assessee has filed evidence of similar nature in relation to the majority of its sales. The details of the direct sales made by the assessee in India, wherein Itochu India played no role of any kind whatsoever is as follows:

| S.No. | Name of the party                 | Amount (in Japanese Yen) |
|-------|-----------------------------------|--------------------------|
| 1     | Essar Oil Limited                 | 1871,18,10,468           |
| 2     | Reliance Industries Limited       | 5020,11,94,382           |
| 3     | JCB India Limited                 | 54,61,14,610             |
| 4     | Jeans Knit Private Limited        | 28,28,469                |
| 5     | Wipro GE Healthcare Pvt. Ltd.     | 103,56,522               |
| 6     | AGS Transact Technologies Limited | 79,63,182                |
| 7     | BPL Limited                       | 42,72,723                |
| 8     | ITC Limited                       | 47,706                   |
| 9     | Itochu India Private Limited      | 21,49,790                |
| 10    | NCR Corporation India Pvt. Ltd.   | 4,43,04,698              |
| 11    | SHV Energy Pvt. Ltd.              | 20,54,63,377             |
| 12    | Universal Medical Instruments     | 357,400                  |
| 13    | Vedanta Aluminum Limited          | 34,28,15,484             |
| 14    | Posco Maharashtra                 | 543,26,14,305            |
|       |                                   | 7551,27,05,441           |

5.8 On the basis of various documents, material and evidence submitted, the Ld. AR submitted that the sales are made directly by Itochu Japan to Reliance, Essar and various other parties. Itochu India has no involvement in effecting

such sales in India. There is no role of Itochu India in such transactions since it is a direct sale which does not require any agent involvement in India. The Ld. AR relied upon the following decisions in relation to non-taxability of offshore supplies in India:

- a) Ishikawajima-Harima Heavy Industries Ltd. (288 ITR 408) SC
- b) Hyundai Heavy Industries Co. Ltd. (291 ITR 482) SC
- c) Linde AG, Linde Engineering Division (44 Taxmann 244) Del. HC (appeal withdrawn by the Revenue Department in the Supreme Court)
- d) Hyosung Corporation (AAR) (314 ITR 343)
- f) LG Cable (Delhi ITAT) (ITA No. 5280/Del/2011)

Thus, the Ld. AR submitted that no portion of direct sales can be brought to tax in India either on account of alleged PE nor on account of the concept of Force of Attraction Rule (as the same is not present in the DTAA).

5.9 The Ld AR further submits that sales made by the assessee to Indian Customers with support of Itochu India and other parties cannot be brought to tax in India. The Assessing Officer also alleged Itochu India and other third party agent as a dependent agent PE of the assessee in India. In this regard, the Ld. AR submitted that Itochu India provides certain support services to the assessee in relation to its purchase and sale of goods from/to India, which primarily involves acting as a communication support between the assessee and its customers/suppliers and collecting information from India, considering the language/cultural barriers. In support of the same, agreement entered between Itochu India and the assessee was also submitted to the Assessing Officer. With regard to the sales of goods to Indian customers, Clause 3(1) "Obligation of Agent" of the said agreement captured the activities performed by Itochu India which were limited to the following:

- \* Promoting and protecting the interest of the assessee
- \* Submitting reports on the credit standing and financial background of the buyers and seller of goods, without any legal liability being attached on the

part of Itochu India

\* Submitting reports on all sales and purchases, market conditions and other information useful and necessary for promotion of export and import of the goods.

Further, in accordance with Clause 2 'Power of the Agent' of the said agreement, all contracts, orders, proposal and offer for sale or purchase of the goods shall be subject to final and formal approval and acceptance by the assessee and Itochu India will have no power, right or authority to approve or accept the same on behalf of the assessee.

5.10 The Ld. AR further submitted that the assessee had entered into one consolidated agreement with Itochu India for providing various services in relation to sales of goods to Indian as well as purchase of goods from Indian suppliers. The services to be rendered by Itochu India in relation to the purchase of goods from Indian suppliers were different and distinctly mentioned in the said agreement. This fact was clearly highlighted to the Assessing Officer during the course of assessment proceedings. The scope of activities to be performed by Itochu India for the assessee specifically for the purchase activities includes:

- a) To look for prospective suppliers
- b) To negotiate on behalf of the assessee the terms and conditions of the purchase transactions
- c) To inspect the goods on behalf of the assessee
- d) To negotiate with suppliers on behalf of the assessee for amicable settlement of claims or complaints

The Ld. AR submitted that the Assessing Officer has relied on the negotiation activities undertaken by Itochu India in relation to the purchase transactions mentioned in the agreement and applied the same to sales without appreciating the fact that the activities undertaken by an Indian company for and on behalf of the foreign company in relation to the purchases made by the foreign company from India is not considered while determining

the PE of the foreign company in India.

5.11 The Ld. AR further submitted that some of the activities mentioned in the assessment order do not emanate from the agreement and are based on surmises and conjectures with no material/evidence to support the same, in particular the following activities mentioned in para 11.1 of the final assessment order:

- a) Promoting sales of products and services of the assessee within India
- b) Submission of proposals to customers on behalf of assessee and providing suggestions/opinion regarding required amendments.

Thus, it is evident that Itochu India and other third parties in relation to indirect sales are only acting as a communication channel between the assessee and Indian customers along with the provision of various other support services. The Ld. AR pointed out that the Assessing Officer alleged that the negotiation activities performed by Itochu India are in relation to purchase functions and not sale functions and therefore reliance on such clauses of 'Memorandum of agency agreement' by the Assessing Officer to build a PE exposure is unjustified. Further, the Assessing Officer alleged that Itochu India is legally and economically dependent on the assessee and hence concluded that Itochu India is dependent agent PE of the assessee.

5.12 The Ld. AR submitted that Itochu India is carrying out its business activities without any detailed control or supervision of the assessee. Itochu India has the authority to take decisions in relations to its day to day business operations and providing the services under the aforesaid agreement on its own and is not subject to any detailed instructions/directions from the assessee in this regard. Itochu India is an independent entity having the requisite skills, resources, employees and expertise to perform the services and bears all costs in relation to the services being provided (which is also evident from Clause 3(d) of the aforesaid agreement). Accordingly, Itochu India cannot be said to be legally dependent on the assessee in any manner whatsoever so as to

constitute a dependent agent PE. Additionally, the Ld. AR submitted that Itochu India is primarily engaged in trading activities and major source of revenue for Itochu India (66% of the total revenue) is independent of Itochu Corporation. Also, majorly of such traded good are purchased by Itochu India from third parties and not only from the assessee. The Ld. AR made reference to Note 18 – Revenue from operation to the Financial Statements of Itochu India for the year ending 31.03.2013, details of which are as under:

| S.No. | Particulars                                       | Amount (in INR)      | Percentage  |
|-------|---|----------------------|-------------|
| 1     | Sale of traded goods                              | 725,905,697          | 66.67%      |
| 2     | Commission and service income from Itochu Japan   | 260,874,849          | 23.92%      |
| 3     | Commission and service income from other entities | 102,604,648          | 9.41%       |
|       | <b>Total</b>                                      | <b>1,089,385,194</b> | <b>100%</b> |

The Ld. AR further submitted that Itochu India provides such support services to various other entities as well from which it earns commission/service income. The Ld. AR submitted that audited financial statements for the year ending 31.03.2013 of Itochu India which clearly demonstrate the economic independence of Itochu India as it has an independent revenue / income stream and it also provides similar services to other entities as well (thereby earning service income from entities other than the assessee). Therefore, the Ld. AR submitted that Itochu India cannot be construed as constituting a dependent PE of the assessee in India under any circumstances. The Ld. AR pointed out to Article 5(7) of the India-Japan DTAA and further submitted that Itochu India neither has the authority to conclude contracts, nor does it maintain a stock of goods from which it deliver goods on behalf of the enterprise nor does it secure orders for the assessee. Hence, Itochu India does not satisfy any condition mentioned under Article 5(2) to create a dependent agent PE exposure.

5.12.1 The Ld. AR submitted that Itochu India was appointed as an agent in India by the assessee to provide the service like assistance in the gathering of relevant market information etc. to the assessee. Therefore, Itochu India cannot qualify as an agent of the assessee under Article 5(7)(a) because it does not have any negotiating capacity nor does it secure any sales order for the assessee. The assessee placed reliance on the decision of the Hon'ble Delhi High Court in case of National Petroleum Construction Company vs. DCIT (ITA No. 143/2013 order dated 29.01.2016) wherein the Hon'ble High Court rejected the adverse observations of the lower authorities as the facts and other material available on record nowhere suggest that the conditions of Article 5(5) of the India-UAE DTAA i.e. 'dependence tests' stood satisfied. The High Court noted that the agent rendered services to other third parties and earned substantial revenues from such third parties. The Hon'ble High Court also found that the conditions of Article 5(4) of the India-UAE DTAA were not satisfied as there was no material or evidence available on record which could suggest that the agent participated in any negotiation or had any authority to conclude contract or even secured the contract for the NPCC. Accordingly, the Hon'ble High Court held that the agent cannot be held to be a dependent agent Permanent Establishment as per Article 5(4) and 5(5) of the Treaty. The Ld. AR also relied upon the orders of the Mumbai Tribunal in case of Varian India Pvt. Ltd. (33 Taxmann.com 249) and B4U International Holdings Ltd. (23 Taxmann.com 372). Thus, the Ld. AR prayed that the allegations of the Assessing Officer that the assessee has a dependent agent PE in India shall be rejected and the matter may be decided in favour of the assessee.

5.13. Without prejudice to the above, the Ld. AR submitted that the attribution made by the Assessing Officer is incorrect and without any basis. The assessee does not constitute a PE in India. The Assessing Officer has computed the profits attributable to the alleged PE which is wholly fallacious, unreasonable, excessive and absolutely against the principle of profit attribution. The

Assessing Officer has attributed 50% of the total sales value and assumed a profit margin of 10% on such attributable revenue. The Assessing Officer has not given any basis behind such assumption. The Ld. AR further pointed out that 83% of the total sales value of the assessee does not have any involvement of the alleged PE i.e. Itochu India and has been directly affected by the assessee in India. Further, the balance 17% of the Indirect Sales can also not be attributed considering the assessee has no PE in India. Further, also the conditions mentioned under Article 5(7) of the India-Japan DTAA are not satisfied in the matter under consideration. Thus, the Ld. AR submitted that the attribution of 50% made by the Assessing Officer is without any basis and has to be deleted.

5.14 The Ld. AR further submitted that even if it is assumed for argument sake that the assessee has PE in India even then the Assessing Officer has not taken the correct profit rate. The correct net profit rate (Operating profit rate) of the assessee from trading operations is 0.002% and not 10% as alleged by the Assessing Officer. The action of the Assessing Officer in computing the profits attributable to the alleged PE is bad in law as he had exceeded his jurisdiction and hence, null and void. The Ld. AR relied upon the CBDT Instruction No. 3/2016 dated 10.03.2016 wherein it has been expressly clarified that though the Assessing Officer has the power under Section 92C of the Act to determine the arm's length price of international transactions, determination of such arm's length price should be carried out by the Assessing Officer where reference is not made to the TPO. The Ld. AR further submitted that Itochu India has already been paid a service fee/commission by the assessee for the services provided by it which has been tested and found to be meeting the arm's length criteria. The Ld. AR pointed out the Transfer Pricing Documentation maintained by Itochu India as well as the transfer pricing certificate obtained by Itochu India in Form 3CEB for the period under consideration, wherein the payment received by Itochu India for the services provided to the assessee have been found to be at arm's length. Accordingly,

once it is established that the alleged PE has been compensated at an arm's length price, no further profit can be attributed to such PE in accordance with the provisions of the DTAA. The Ld. AR pointed out that for the previous year, the transaction of receipt of service fee by Itochu India from the assessee was also examined by the Transfer Pricing Officer and was found to be meeting the arm's length criteria. Thus, it is clear that Itochu India has been compensated at an arm's length price by the assessee for the service provided and therefore, no further profit can be attributed to the alleged PE in accordance with the provisions of the DTAA. This principle has been upheld by the AAR in the case of Morgan Stanley and Co which was affirmed by the Hon'ble Supreme Court and thus it becomes the law of the land. In addition to the above, the Ld. AR submitted that without accepting the existence of alleged PE of the assessee in India, the Assessing Officer grossly erred in attributing 50% of the sales value to the alleged PE in India, which is not only arbitrary but is highly excessive, unreasonable and not supported by any evidence.

5.15 The ld. AR relied on the following decisions :-

1. Bhopal Sugar Industries Ltd. Vs. STO AIR (1977) 3 SCC 147;
2. Varian India Private Limited 33 Taxmann.com 249);
3. Mitsui & Co. Ltd. Vs. ACIT (ITA. No. 4764/Del/2016);
4. National Petroleum Construction Company (2016) 66 taxmann.com 16;
5. Nike Inc. (ITA. 976 of 2008);
6. E-Funds IT Solution Inc.399 ITR 34 (SC);
7. Samsung Heavy Industries Co. Ltd. (Civil Appeal No. 12183 of 2016);
8. GE Energy Parts Inc. Vs. CIT (International Taxation) (2019) 411 ITR 243 (Del.);
9. Daikin Industries Ltd. Vs. ACIT (International Taxation)
- 10 Ishikawajima-Harima Heavy Industries Ltd. 288 ITR 408 (SC);
- 11 Hyundai Heavy Industries Co. Ltd. 291 ITR 482 (SC);
- 12 Ericsson A.B. 343 ITR 470 (Del);

- 13 LG Cable 237 CTR 438 (Del);
- 14 LS Cable Vs. DIT (2011) 197 Taxman 100 (Del.);
- 15 DIT Vs. Nokia Networks (2012) 253 CTR 417 (Del);
- 16 DIT Vs. Morgan Stanley 292 ITR 416 (SC);
- 17 DIT Vs. Honda Motors Co. Ltd. 265 Taxman 542 (SC);
- 18 ESS Advertising (Mauritius) S.N.C. et Compagnie (ITA. Nos. 3760 & 4542/Del/2016);
- 19 Anglo French Textile Company Ltd. Vs. CIT 23 ITR 101 (SC);
- 20 Hukum Chand Mills Ltd. Vs. CIT 103 ITR 548 (SC);
- 21 CIT Vs. Ahmedbhai Umarbhai & Co. 18 ITR 472 (SC);
- 22 The Anglo–French Textile Co. Ltd. Vs. CIT 25 ITR 27 (SC);
- 23 Annamalais Timber Trust and Co. Vs. CIT 41 ITR 781 (Mad.)
- 24 CIT Vs. Bertrams Scotts Ltd. 31 Taxman 444 (Cal.);
- 25 Samsung Heavy Industries Co. Ltd. Vs. DIT (ITA. 01 of 2012);
- 26 Radhasoami Satsang Vs. CIT (1992) 193 ITR 321 (SC);
- 27 CIT Vs. Excel Industries Ltd. 358 ITR 295 (SC);
- 28 CIT Vs. Neo Poly Pack (P.) Ltd. (2000) 245 ITR 492;
- 29 CIT Vs. Arthur Anderson and Co. (2009) 318 ITR 229.

6. The Ld. DR submitted that the issue involved in the present case is that whether revenue earned on account of sale to Indian Customers is attributable to India for taxation or not? AO in this case attributed 50% of the sale revenue towards activities executed by Itochu India Pvt. Ltd. as permanent establishment and assumed profit rate of 10%. The Ld. DR further submitted that Itochu Japan, a leading *sogoshosha* (trading company) is engaged in domestic trading, import/export, and overseas trading of various products such as oil, textile, machinery, metals, minerals, energy, chemicals, food, general products, realty and finance. The trading is done either directly or with the support of Itochu India/ other third party independent agents. It is claimed that the revenue derived by Itochu Japan from direct sales to Indian customers

is approximately 82.7%. The remaining revenue is earned through sales that are completed with the help of Itochu India. The exact amount is as under:

| <b>Particulars</b>                 | <b>Amount (in Japanese Yen)</b> |
|------------------------------------|---------------------------------|
| Direct Sales                       | 7551,27,05,441                  |
| Sales with support of Itochu India | 1571,89,96,198                  |
| <b>Total Sales</b>                 | <b>9123,17,01,639</b>           |

As regards, the Ld. AR's contentions that there was no role of Itochu India in respect of 83% of sales, the Ld. DR refuted the same. The Ld. DR submitted that 17% of sales Indian entity acts as a communication channel between Indian customer and the assessee. The Ld. DR submitted that activities performed by Indian entity as per agreement includes as under: -

- Credit standing/financial background of buyers/sellers of goods\_ [this activity can be even before entering into transaction or after the transaction (tracking till closure of payment).
- Resolve unsatisfactory account solutions.
- Report on all sales and purchase how it can submit if it not involved right from beginning in respect of all such instances of sales.
- Inspection of Goods (when authorized)
- The appellant claimed that Indian entity was compensated for aforesaid activities at arm's length in respect of 17% of total sales.

The Ld. DR submitted that as regards direct sales, the appellant submitted that in case of direct sales, there was no involvement of Itochu India. The assessee mentioned certain examples where contracts were submitted at the lower authorities as well as before the Tribunal. The details of the direct sales made by the appellant in India, wherein Itochu India claimed to have played no role of any kind whatsoever, is as follows:

| <b>S.No.</b> | <b>Name of the party</b> | <b>Amount (in Japanese Yen)</b> |
|--------------|--------------------------|---------------------------------|
|--------------|--------------------------|---------------------------------|

|              |                                       | <b>Yen)</b>           |
|--------------|---------------------------------------|-----------------------|
| 1.           | Essar Oil Limited                     | 1871,18,10,468        |
| 2.           | Reliance Industries Limited           | 5020,11,94,382        |
| 3.           | JCB India Limited                     | 54,61,14,610          |
| 4.           | Jeans Knit Private Limited            | 28,28,469             |
| 5.           | Wipro GE Healthcare Pvt Ltd           | 103,56,522            |
| 6.           | AGS transact technologies Limited     | 79,63,182             |
| 7.           | BPL Limited                           | 42,72,723             |
| 8.           | ITC Limited                           | 47,706                |
| 9.           | Itochu India Private Limited          | 21,49,790             |
| 10.          | NCR Corporation India Private Limited | 4,43,04,698           |
| 11.          | SHV Energy Private Limited            | 20,54,63,377          |
| 12.          | Universal Medical Instruments         | 357,400               |
| 13.          | Vedanta Aluminum Limited              | 34,28,15,484          |
| 14.          | Posco Maharashtra                     | 543,26,14,305         |
| <b>Total</b> |                                       | <b>7551,27,05,441</b> |

6.1 The Ld. DR pointed out that the email communication submitted by the assessee on the subject matter of sales does not include instances of direct sales. The discussion in respect of email communication submitted by the appellant has been made as under:-

- It may be relevant to refer to Page 1374 wherein it is highlighted by ESACO that India market is very sensitive and difficult to keep long term business. Therefore, ESACO preferred to engage with Indian market through Itochu. With reference to this opportunity, Itochu Japan (Mr.Muro) has written back to Itochu India resource (reference email at page 1373 -oct31-2012-6:53AM) to check with its Indian customers. It reads as under;

“Please check with your customers”

- Thereafter, Itochu India offers terms to Indian clients regarding Price, Quantity and L/C terms. Page 1373 shows that Itochu India reported that currently Chinese prices are at a particular level. This type of information shared by Itochu India itself evidences that it had discussed

about the price of the product where the customer would have pointed out about the availability of material from Chinese Market at different level.

- Emails at Page 1373 shows that Itochu Japan is negotiating with back end supplier i.e. the party from where it is procuring the goods to be supplied to India and there is no email to showcase the process of negotiation with Indian clients (to whom sale has been made) by Itochu Japan.
- Email at Page 1372 confirms the fact of finalization of deal (Sandhya for FCL) with Indian entity only. Another email at page 1372 shows that Itochu India is emphasizing on maintaining business relation with Indian Client (Cheminova). Further, email at page 1371 shows the act of authorization to negotiate L/C terms with clients. Email at page 1404 shows that contract with Indian Client has been extended for one year based on negotiation by Indian entity. Email at page 1406 shows that Itochu Japan is asking Indian Entity to get Sutures next order.
- Email at page 1434 shows that Itochu India is providing inputs on regulations in India and advising Itochu Japan to put labels with particular set of details. This shows that Itochu India is mitigating risk on account of compliance issues. Email at page 1431 & 1432 shows that the Itochu India is required to interact with Indian Clients for understanding their requirements and expectations about their procurement –email is in respect of engagement by Indian entity (Itochu India) with WellKnown (indian customer) in respect of supply offer from Mitsui Chemicals. Page 1441 email shows direct order to Itochu India. It is a case of order procured through Itochu India.

6.2. The following observations are also critical to highlight that the order procurement was finalized by Itochu India in respect of the sales made by the assessee to India.

- No evidence towards visit of experts to negotiate the deal with Indian entities in respect of sale of products.
- Indian market is very competitive one and efforts are required to be made for effective sales. The competition does require closer interface with the customers to procure orders. This effort has been completely made by Itochu India because the Indian customers are basically customers of Itochu India.
- The appellant nowhere demonstrated any instance of negotiation of deal with Indian Clients on its own. There is no evidence to showcase direct involvement in making sales to customers in India.
- It is also not a case where the entire sale is to very limited customers. Thus, reaching out to large scale customers in India and finalizing the

deal is not possible without presence in India. Thus, Itochu India is playing the role of order procurement on behalf of Itochu Japan.

- Entire activity starting from indentifying customers, approaching them, negotiation & finalization of products & prices is done by Indian entity.

6.3. In the backdrop of the above facts, it transpires that the Itochu India does represent Itochu Japan before Indian Customers for functions such as negotiation, inspection etc. with Indian clients as far as purchase of goods is concerned for sales function. The assessee has accepted this position and accordingly, offered income in this regard. However, for sale revenue, the appellant has disputed the role of negotiation etc. by the Indian AE with customers in India. One may question as to why the appellant needs services of Itochu India only for purchase and not for sales? It is relevant to highlight that close interaction is must for any buyer with the seller to keep a check on parameters like timely delivery, best price, credit period, recovery and quality of the goods. In such a situation, Indian buyer would also ensure close interaction to ensure checks on the aforesaid parameters and thus, Itochu India is bound to play similar role while purchasing as well as selling the goods to Indian Parties.

6.4. The Ld. DR submitted that DRP in its order at page 39 of the order brought out the functions performed , assets used and risk taken by the Itochu India as a permanent establishment vis-à-vis the assessee outside India. It is noteworthy that the function of Indian AE of identification of potential customers and continuous engagement with such customers goes into development of market intangible in the form of a) customer lists b) order backlog c) customer contracts and related customer relationships d) non-contractual customer relationships. No compensation has been made to Indian AE for all such functions to develop market intangible asset. Section 92 B of I.T.Act provides that market intangible includes client list. Indian AE has performed this function of maintaining and up keeping the client list in the capacity of PE entity.

6.5. It may be relevant to take note of India Japan DTAA where Clause 1 of [Article 7](#) of the said agreement reads as under :

*"1. The profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in that other Contracting State but only so much of them as is **directly or indirectly attributable** to that permanent establishment."*

6.6. Further, the Treaty contains the Japanese notes, clause 6 whereof reads as under :

*"6. With reference to paragraph 1 of [article 7](#) of the Convention, it is understood that by using the term "directly or indirectly attributable to the permanent establishment", profits arising from transactions in which the permanent establishment has been involved shall be regarded as attributable to the permanent establishment to the extent appropriate to the part played by the permanent establishment in those transactions. It is also understood that profits shall be regarded as attributable to the permanent establishment to the above-mentioned extent, even when the contract or order relating to the sale or provision of goods or services in question is made or placed directly with the overseas head office of the enterprise rather than with the permanent establishment."*

6.7. It transpires from the aforesaid clarification embedded in the treaty itself that by using the term "directly or indirectly attributable to the permanent establishment", profits arising from transactions in which the permanent establishment has been involved shall be regarded as attributable to the permanent establishment to the extent appropriate to the part played by the permanent establishment in those transactions. It is also understood that profits shall be regarded as attributable to the permanent establishment to the above-mentioned extent, even when the contract or order relating to the sale or provision of goods or services in question is made or placed directly with the overseas head office of the enterprise rather than with the permanent establishment.

6.8. The assessee also argued that the action of the AO in computing the profits attributable to the alleged PE is bad in law as he had exceeded his jurisdiction and hence, null and void. In this regard, the assessee placed reliance on CBDT Instruction No 3/2016 dated 10 March 2016 wherein it has been expressly clarified that though the assessing officer has the power under Section 92C of the Act to determine the arm's length price of international transactions, determination of such arm's length price should not be carried out at all by the assessing officer where reference is not made to the transfer pricing officer.

6.9. This argument of the assessee has no force because it is not a case of determination of arm's length price of activities as reported in TP study report. It is a case where the AO has made out a case of Dependent Agent Permanent Establishment where FAR (Function, Asset and Risk) which has not been compensated as per TP Report. Thus, to compensate for such FAR, the AO has resorted to Rule 10 of Income tax rules for attribution of income.

6.10 The DR has also filed the following submissions which are reproduced as it is:

*“Contentions before AO/DRP*

*Two types of Sales i.e. Direct Sales & Sales using service provider i.e. Itochu India Pvt. Ltd.(IIPL). In case of Sales using Itochu India Pvt. Ltd., it is claimed before the Assessing Officer that the role of Itochu India Pvt. Ltd. is limited only to ‘Communication Support with the customer’, ‘Collection of information in India’, ‘Communication support for shipment schedule’ and ‘delivery date support’. Before DRP, it was claimed that in addition to the above, the role of Itochu India Pvt. Ltd. also include ‘Logistic support’ and ‘following up for delivery management’. It was claimed before AO that “the assessee directly sells products to customers in India and in some cases, its subsidiary in India (Itochu India Pvt. Ltd.) provides communication support with the customer. Role of the Subsidiary is restricted to acting as a communication channel.”*

*Role of Itochu India Pvt. Ltd.*

*As per documents: Letter dated 24.02.2016 which is not part of the paper book “such sales are made either directly by the assessee or through independent third party agents.”(AO p. 3)*

*“During the course of proceeding, the AR of the assessee .... Has admitted that the assessee has executed sale in India via various agents and Indian subsidiary company.....” (AO [para 9, page 7)*

*Agency Agreement*

*Cl. 1*

*(a) The principal hereby appoints the Agent (IIPL) as ‘selling and purchasing agent’ .....*

*(b) The principal reserves the rights to quote prices ..... deal directly with the buyers & sellers .... ‘if circumstances make it necessary or advisable to do so’ – meaning thereby that the agent is not precluded from such activities altogether.*

*Cl. 3(1)*

*(b) resolve unsatisfactory account situations – Authority to bind the principal*

*(e) settlement of all claims and complaints by the customer –Authority to bind the principal*

*(e) Inspection of Goods – Power to approve and reject – Authority to bind the principal*

*(2)*

*(a) Solicitation – Looking for suppliers in respect of assessee*

*(c) Negotiate for purchase transactions – Art. 5 do not distinguish between the negotiation and power to conclude contracts in respect of purchase or sale*

transactions. The purpose behind such conditions is proving business activities within the source state. The nature of transactions i.e. sale or purchase may have implications for attributing profit to the PE but not for proving the existence of PE.

(d) *Inspection of Goods*

(d) *Storage of Goods*

(f) *Negotiate with suppliers*

Cl. 4

(c) *“Overage : In case the principal finalizes the business at a price higher than the base price ... then the principal shall credit the difference between the final price and base price to the Agent’s account”. – If the contention of the assessee is to be accepted, then the principal should have no such obligation to pay since the Agent has no role in the price fixation.*

C. *TP study in case of Itochu India Pvt. Ltd. (No such TP study in case of assessee)*

\* *Itochu India Pvt. Ltd. coordinates with local buyers and suppliers (AO p. 39)*

\* *Collection of market information (AO p. 40)*

\* *Purchase goods from AEs and resale the same on ‘as is’ condition. Goods are imported by Itochu India Pvt. Ltd. primarily against confirmed orders or prior arrangement. (AO p. 40)*

\* *In such cases “despite the fact that Itochu India Pvt. Ltd. takes title to the goods for an interim period, its involvement with respect to the identified transactions continues to be in the capacity of service provider/facilitator. Further, ..... Even when title to the goods is with Itochu India Pvt. Ltd., the risks of unsold inventory is never borne by it ..... The overall arrangement between*

*Itochu India Pvt. Ltd. and the AEs or Itochu India Pvt. Ltd. and its customer is such that the overall risk in relation to inventory (in the hands of Itochu India Pvt. Ltd.) is minimal”. (AO P. 43)*

\* *“In respect of goods imported from AEs, Itochu India Pvt. Ltd. may (at times) be required to hold inventory with itself, in case customers require goods at regular interval.” (AO p. 44)*

\* *“Itochu India Pvt. Ltd. also identifies new distributors, provides incentives and discount to dealers based on quantities sold ..... The AEs are not involved in the sales and marketing effort for product sales in India.” (AO p.44)*

D. *Analysis of the Annual Accounts of Itochu India Pvt. Ltd. (p. 278-306 of PB-1)*

\* *Part of Rent paid by Itochu India Pvt. Ltd. is reimbursed by assessee (p. 238 & 301 of PB-1) supporting thereby the observation that it stores goods of the principal.*

\* *Incurs Legal and professional charges for the assessee too (p. 301 of PB-1)*

\* *Itochu India Pvt. Ltd. incurred a Loss (p. 285 of PB-1). “Itochu India Pvt. Ltd. takes title to the goods for an interim period, its involvement with respect to the identified transactions continues to be in the capacity of service provider/facilitator. Further, ..... Even when title to the goods is with Itochu India Pvt. Ltd., the risks of unsold inventory is never borne by it ..... The overall arrangement between Itochu India Pvt. Ltd. and the AEs or Itochu India Pvt. Ltd. and its customer is such that the overall risk in relation to inventory (in the hands of Itochu India Pvt. Ltd.) is minimal.” (AO p. 43) Thus, incurring loss from such a business model is inexplicable and is only possible when Itochu India Pvt. Ltd. undertakes risks on behalf of its principal in activities other than trading.*

E. *DRP findings:*

\* *Itochu India Pvt. Ltd. is financially dependent on the assessee.*

- \* *Itochu India Pvt. Ltd. secures orders in India for the assessee.*
- \* *Itochu India Pvt. Ltd. negotiates and finalizes the prices with the customers of assessee in India;*
- \* *Prices decided by Itochu India Pvt. Ltd. have binding effect on the assessee.*

*F. Analysis of Business Model on the basis of Communications:-*

*I. Pages 1370 to 1374 of PB-3 communications between Muro Saturo of Itochu Japan & Karthikeyan Yuvaral of Itochu India Pvt. Ltd. relating to sales of the products of Esaco to certain Indian customers. Other employees of Itochu India Pvt. Ltd. Ishizuka Shinaya and Hiro Morishige were also part of the communications. Here Itochu India Pvt. Ltd. informs the assessee about the fact that it has “offered the price quoted price of Esaco to other clients and are awaiting their reply”. In other words Itochu India Pvt. Ltd. is soliciting clients for the assessee. Not only that it is also suggesting the price by informing the Chinese prices (3550) for similar products. Assessee informs Itochu India Pvt. Ltd. that Esaco can lower their offer price from 3650 to 3600. On 9<sup>th</sup> Nov’12 Itochu India Pvt. Ltd. informs the assessee that it has successfully solicited 2 customers. M/s Sandhya Dyes & Chemicals and Cheminova. It may be noted that the communication from Sandhya (also see p. 1499 & 1503 of PB-3 for invoice & purchase orders for Sandhya) was send to Itochu India Pvt. Ltd. and not to the assessee. Cheminova is a new client solicited by Itochu India Pvt. Ltd. who wants LC of 180 days. In response to Itochu India Pvt. Ltd. communications, assessee writes that the LC condition is not acceptable and requests Itochu India Pvt. Ltd. to negotiate with Cheminova. Itochu India Pvt. Ltd. tried to negotiate but failed. “Tried, they are not accepting; we have to loose.” This clearly proves that Itochu India Pvt. Ltd. negotiates on behalf of assessee not only for purchases but for sales also. IN response to this email from Itochu India Pvt. Ltd., Mr. Muro from Itochu, Japan writes to Esaco (Thuan) that the mail received from “our Indian Office” (this describes the actual perception of Itochu Indian Private Ltd. in the*

*eyes of ITOCHU, Japan i.e. its their Indian Office). Esaco requests assessee to ask Itochu India Pvt. Ltd. to solicit other customers and accordingly the assessee wrote such a mail to Itochu India Pvt. Ltd. on 21/11/2012 (p. 1370 of PB-3)*

*II. P1420 – 1421 of PB-3 represents another set of communications between Indian customer “Wellknown” and Itochu India Pvt. Ltd. It may be noted that in all its communications, the customer (Ashish) only addresses its issues to Itochu India Pvt. Ltd. (Viddesh). This goes on to prove that the assessee’s contention that it directly interacts with Indian customers is factually incorrect. The Indian customers only communicate with Itochu India Pvt. Ltd. and not the assessee.*

*III. P1430 – 1432 of PB-3 provides yet another detailed account of the role and responsibility of Itochu India Pvt. Ltd. In these communications, Mr. Chang of ITOCHU, Japan discusses the desirable contract conditions with an Indian customer – Wellknown with reference to sourcing materials from SMPC. Mr. Chang discusses various hypothetical situations and requests Itochu India Pvt. Ltd. to meet Wellknown understanding their intentions and give a feed back. While doing so Itochu India Pvt. Ltd. has been offered various bargaining / negotiating powers like – “we can make flooring price 80/mt first”, “we can cut contract quantity and sale on spot market”etc.*

*In his mail dt. 19/9/12 Mr. Chang gives the liberty to Itochu India Pvt. Ltd. to discuss with Wellknown and fix the flooring price between 100-110/MT although the supplier (Mitsui Chemical) is asking for +120/MT. It also authorizes Itochu India Pvt. Ltd. to offer more incentive and accordingly requests Itochu India Pvt. Ltd. to have a face to face meeting with Wellknown and negotiate. He also concedes that it won’t be an easy negotiation as what they are facing for the last 2 years. This communication not only reconfirms that Itochu India Pvt. Ltd. negotiates price on behalf of the assessee but it also confirms that it has been doing the same since past 2 years.*

*IV. P. 1567-1571 of PB-3 contains details of communication between Itochu India Pvt. Ltd. and assessee relating to sale of goods to Creative Trendz Pvt. Ltd.*

*The communication reveals that Itochu India Pvt. Ltd. coordinates with the assessee for the issuance of Proforma Invoice, and with the customer for the finalization of settlement conditions, advance payments of LC A/S etc. Itochu India Pvt. Ltd. gets LC from the customer and forwards to the assessee and pursues the payment and sends the details of TT remittances.*

*V. P. 1440-1441 of PB-3 are the details of communications between the assessee, Itochu India Pvt. Ltd. and Accelerated Freeze Drying Ltd. for the supply of 1500 kgs of refined oil mixture. As can be seen, the customer approaches Itochu India Pvt. Ltd. for the supply and Itochu India Pvt. Ltd. forwards the customer request to the assessee. In the absence of any direct communication between the assessee and the customer, the price and terms of sale must have been finalized by the Itochu India Pvt. Ltd.*

*VI P. 1433-1435 of PB-3 is another example of Itochu India Pvt. Ltd. soliciting orders for the assessee. In fact, while doing so, Itochu India Pvt. Ltd. is prepared to take additional risks and “manage at our side” if the assessee is not able to fulfill certain conditions.*

*In view of the above, the contention of the assessee that Itochu India Pvt. Ltd. is merely a channel of communication should be disregarded.*

#### *Other Submissions*

- 1. In this regard, it may be relevant to refer to the judgment of the Hon’ble Supreme Court of Italy in Philip Morris wherein it is held that “the participation of representatives or employees of a resident company in a phase of the conclusion of a contract between a foreign company and another resident entity may fall within the concept of authority to conclude contracts in the name of the foreign company, even in the absence of a formal power of representation”.*

2. *The expression ‘an authority to conclude contracts’ has not been defined in the DTAA. Para 5 of Article 5 of OECD Model Convention whose language is similar to para 4 of Article 5 of the DTAA.*
3. *It is pertinent to mention here that India clarified its position in 2008 on para 33 of the OECD commentary by making it clear that it does not agree with both these sentences from para 33 of the OECD commentary as in its view the mere fact that a person has attended or participated in negotiations in a State between an enterprise and a client, can, in certain circumstances, be sufficient, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise; and that a person who is authorized to negotiate the essential elements of contract, and not necessary all the elements, can be said to exercise the authority to conclude contracts. ‘Skaar’ a well known author, proposes to apply a business activity test in such situations: where the intermediary also performs activities like locating customers, explaining the conditions of the contract and finally concluding the contract on behalf of the foreign enterprise, it appears obvious that the main parts of the business were conducted by the intermediary and the constitution of an Agency PE is justified.*
4. *On similar facts, this Tribunal has upheld the existence of DAPE in the case of Daikin Industries Ltd. in ITA No. 1623/Del/2015.”*

7. In rejoinder, the Ld. AR submitted that the Ld. DR in his submission dated 20 October 2020, has placed reliance on the Delhi ITAT ruling in case of **Daikin Industries Ltd. (ITA No.1623/Del/2015)**. In this regard, the Ld. DR under **Para 7** submits as under:

On the same set of facts, the Delhi bench held the Indian AE of Daikin Industries Ltd. (ITA No.1623/Del/2015) as the DAPE and attributed sales made to India for taxation. The relevant extracts of the decision are reproduced as under;-

“13. The foregoing discussion unambiguously proves, without any shadow of doubt that, in fact, DAIPL was negotiating and finalizing the contracts of sale claimed to have been made by the assessee from Japan. Albeit no authority apparently vested in DAIPL to finalize the contracts of direct sales in India, but the activities of negotiating and finalizing the contracts etc., constituting substance of any sale transaction, were indeed performed by DAIPL. Failure of the assessee to adduce any evidence showing its direct interface from Japan with customers in India and further the e-mails abundantly showing DAIPL negotiating and finalizing the prices, payment terms, delivery schedule and other contractual terms with the customers in India, leave no scope for doubt that such sales were, in fact, negotiated and finalized by DAIPL. The mere fact that the assessee was formally signing the contracts of sale does not, in any manner, alter the position.

7.2 In this regard, the Ld. AR submitted that the facts of the present case are different from the facts of the aforesaid case of Daikin for the following reason:

| <b>In the case of Daikin Industries Ltd (DIL)</b>  | <b>In the case of the Appellant.</b>  |
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| There was no single evidence substantiating the direct sales made by DIL to its Indian customers. DIL only submitted the emails for sales made with the help of its Indian subsidiary. | The Appellant has submitted the relevant emails substantiating both the direct sales and the sales wherein Itochu India acted as a communication channel only. From the perusal of the emails substantiating direct sales, it may be seen that there is no role of Itochu India in the direct sales. Further, in the sales (other than direct sales), the role of Itochu India is limited |

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|  | to act as a communication chanel.   |
| Sales were made by DIL to the individual customers.  | Only institutional sales were undertaken and there were no retail sales made by the Appellant. As such, there was no requirement to advertise or have any employee presence in India.   |
| Sales were made by DIL to the individual customers.  | Itochu India has incurred business promotion expenses which are not substantial when compared with the other expenses and the revenue generated by Itochu India from the sale activities. Here, your Honours would appreciate that in case of institutional sales, the requirement to spend hefty sums on selling and distribution expenses does not arise. |
| <b>In the case of Daikin Industries Ltd (DIL)</b>  | <b>In the case of the Appellant.</b>  |
| Transfer pricing study of the Indian subsidiary did not consider all the functions undertaken by it. | In the present case, the Ld. AO has not brought on record any fact to substantiate that the transfer pricing study of Itochu India did not adequately consider all the functions performed by it. Further, the  |

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|  | <p>Ld. TPO has not drawn any adverse inference post conclusion of the transfer pricing assessment proceedings in Itochu India's case for the subject year.</p> <p>Further, the FAR analysis presented by the Hon'ble DRP in its directions is flawed and without any basis as the risks have been apportioned on an ad-hoc basis.</p> |
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7.3. It is for the aforesaid reasons that the decision rendered in the case of Daikin should not be applied in the present case as the facts of the present appeal are different from the aforesaid case.

7.4. Further, the Ld. DR under para 9 of his submission dated 20 October placed reliance on the Hon'ble Delhi High Court in the case of GE Energy Parts (2019) 101 taxmann.com 142 (Delhi) and submits as under:

Furthermore, it is pertinent to add that pre-sales activities such as procuring orders, identifying buyers, negotiating with buyers, agreeing to the price, and requesting them to place an order with the foreign headquarters are not auxiliary in nature. The decision of Hon'ble Delhi High Court in the case of GE Energy Parets (2019) 101 taxmann.com 142 (Delhi) does fortify this position which in turn also relied upon the decision of Karnataka High Court in the case of Jebon Corporation (2012 Taxmann 7 (Kar);

7.5. In this regard, the Ld. AR submits that the facts of the present case are different from the facts of the aforesaid case of GE Energy for the following reason:

| <b>In the case of GE Energy</b>   | <b>In the case of the Appellant.</b>   |
|---|--|
| GE Energy had setup a Liaison Office (LO) in India, after RBI approval, for undertaking liaisoning activities.  | The Appellant only has a wholly owned subsidiary, Itochu India, which is a financially and legally independent entity which operates on a principal to principal basis with the Appellant.   |
| <b>In the case of GE Energy</b>   | <b>In the case of the Appellant.</b>   |
| Expatriates were deputed in India for undertaking marketing activities/ sales function of overall GE group and were involved and participated in negotiation of prices. Such negotiations of price took place in India. | In the case of the Appellant, there is no negotiation of contracts which takes place in India.   |
| There was important role of GE India employees in negotiation process.  | The Appellant has submitted the relevant emails substantiating both the direct sales and the sales wherein Itochu India acted as a communication channel only. From the perusal of the emails substantiating direct sales, it may be seen that there is no role of Itochu India in the direct sales. Further, in the |

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|  | sales (other than direct sales), the role of Itochu India is limited to act as a communication channel, no participation in negotiation. |
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7.6. It is for the aforesaid reasons that the decision rendered in the case of GE Energy should not be applied in the present case.”

8. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the broad issues in the present appeals to be decided as to whether the Itochu India Pvt. Ltd is a subsidiary of Assessee Company in India and whether the same constitute a dependent agent PE and, therefore, the Assessee Corporation has a permanent establishment in India in terms of Article 5 of the India Japan Double Taxation Avoidance Agreements. The more precise issue is that whether the sales directly made by the Assessee Corporation constitutes as sales in India and are attributable to tax in India. As per the details relating to Itochu India Pvt. Ltd. filed by the assessee during the course of assessment proceedings before the AO and TPO, it reveals that the Itochu India Pvt. Ltd. is an Associated Enterprises AE of the Assessee Company i.e. Itochu Corporation, Japan. Whether, it is a subsidiary company the criteria to decide the same has never been defined under the Income Tax Act, but the Ld. DR submitted that the Itochu India is a subsidiary Company of the Assessee. From the perusal of the Assessee Company i.e. Itochu Japan, it is seen that it's a leading Sogoshochu (Trading Company) and is engaged in domestic trading, import/export and overseas trading of various products such as oil, textile, machinery, metals, machines, energy, chemicals, food, general products and royalty and finances. While going through the submissions of the Ld. DR, it is noticed the Revenue doubted that the trading of the assessee Company i.e. Itochu Japan is done

either directly or with the support of Itochu India/other third party independent agency. Thus, the doubt of the Revenue that there is no direct trading, but the trading is done through the dependent agent PE or not is not emerging either from the Assessment order or from the evidences put up by the assessee before us. From the perusal of records, it is seen that the assessee company has given primarily the direct sales done in India and the sales which are made through Indian entity i.e. Itochu India Pvt. Ltd. The Revenue proceeded on the basis that since the direct sales by the assessee company are much more than the sales done through Indian entity it should be done through Indian entity as well, but to establish the same, the revenue has to look into whether the Indian entity acted as permanent establishment/dependent agent PE on behalf of the assessee company or not. The Ld. DR made submissions that Itochu India Pvt. Ltd. coordinate with local buyers and suppliers, collect market information, purchase goods from AEs as well as goods are imported by Itochu India Pvt. Ltd. primarily against confirmed orders or prior arrangements. All these evidences put up by the Revenue before us indicate that these are related to the sales which were made to Indian entity. The Assessing Officer has observed in para 9 of the assessment order that during the assessment proceedings, the AR of the assessee admitted that the assessee has executed sale in India via various agents and Indian subsidiary company. The Assessing Officer has further observed that in respect of goods imported from AEs, Itochu India Pvt. Ltd. at times required to hold inventory with itself, in case customers require goods at regular interval. Further Itochu India Pvt. Ltd. also identifies new distributors, provides incentives and discount to dealers based on quantities sold. The AEs are not involved in sales and marketing effort for product sales in India. These facts are either not emerging properly from the assessment order or coming out from the submissions of the Ld. AR for the assessee. Therefore, in our opinion, this needs thorough verification at the level of the Assessing Officer. Besides this, the assessee Company has not given a detailed transfer pricing documentation relating to its own Indian transactions as well as international

transactions but solely dependent on the Transfer Pricing documentation of Indian entity. This act of the Assessee Company shows that for the taxation purpose in India they have not prepared any separate documentation. Whether this is allowable or not is a separate issue but merely going through the assumption that since there was too many transactions, therefore, it has to be done through Indian entity in our opinion cannot be a valid reason for the assessee not to give full details to substantiate assessee's contentions. Simply quoting various judgments and relying upon the various precedents of other cases cannot absolve the assessee from its onus. When there is a doubt, the doubt has to be cleared by filing requisite details till the doubts are cleared and the satisfaction has to be within the four corners of law and cannot be based on assumptions and presumptions. The assessee in the instant case has not given the proper details at the time of assessment proceedings. In fact, from pages 1370 to 1374 of PB-3 filed before us, it emerges that the communications between Muro Saturo of Itochu Japan & Karthikeyan Yuvaral of Itochu India Pvt. Ltd. suggests that the same is related to sales of the products of Esaco to certain Indian customers. Other employees of Itochu India Pvt. Ltd. Ishizuka Shinaya and Hiro Morishige were also part of the communications. Here Itochu India Pvt. Ltd. informs the assessee about the fact that it has offered the quoted price of Esaco to other clients and are awaiting their reply. Thus, Itochu India whether to be construed as constituting a dependent PE of the assessee in India or not, needs verification. As envisaged in Article 5(7) of the India-Japan DTAA, Itochu India whether has the authority to conclude contracts, or it maintains a stock of goods from which it deliver goods on behalf of the enterprise or does it secure orders for the assessee, has to be verified by the Assessing Officer first. Itochu India was appointed as an agent in India by the assessee to provide the service like assistance in the gathering of relevant market information etc. to the assessee. Therefore, Itochu India whether qualifies as an agent of the assessee under Article 5(7)(a) or has any negotiating capacity or secures any sales order for the assessee, has to be looked into. The assessee placed reliance on the decision of

the Hon'ble Delhi High Court in case of National Petroleum Construction Company (supra) wherein the Hon'ble High Court rejected the adverse observations of the lower authorities as the facts and other material available on record nowhere suggest that the conditions of Article 5(5) of the India-UAE DTAA i.e. 'dependence tests' stood satisfied. The assessee while relying upon the various decisions submitted that the assessee is entitled to avail the benefits of Article 12 of India Japan DTAA and rightly offered to tax on fees for Technical Services at gross basis of 10%, but the same is not corroborated with the substantial evidences. Now coming to the decision of Daikin Industries Ltd. (supra) which is heavily relied upon by the Revenue, it is seen that the relevant emails submitted by the assessee during the assessment proceedings, do not substantiate both the direct sales and the sales wherein Itochu India acted as a communication channel only. The Ld. DR pointed out from the emails submitted by the assessee that these do not substantiate direct sales and that there is no role of Itochu India in the direct sales. Further, in the sales (other than direct sales), the role of Itochu India is whether limited to act as a communication channel or not is also not clear from the records. Thus facts are similar to that of Daikin Industries wherein the assessee therein failed to substantiate the direct sales made by Daikin Industries Limited to its Indian customers. But in present case there are certain documents which are produced before us need verification at the level of the Assessing Officer. Thus, the issue of whether Indian entity is dependent PE of the assessee company or not needs verification at the level of the Assessing Officer as per the documents produced before us. We are, therefore, remanding back the issue to the file of the TPO/Assessing Officer to adjudicate the same afresh. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Therefore, Ground Nos. 1, 2, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 3, 3.1 and 4 are partly allowed for statistical purposes. As regards, Ground No. 5, 6, 6.1, 6.2, 6.3, 6.4 and 7, the same are without prejudice grounds. Since the main grounds are partly allowed for statistical purpose, these grounds becomes academic. Thus, ITA No. 360/Del/2017 for A.Y. 2013-14 is partly allowed for

statistical purposes.

9. As regards to ITA No. 7615/Del/2018 for A.Y. 2015-16, Ground Nos. 1, 2, 2.1, 2.2, 2.3, 2.4, 3, 3.1, 3.2, 3.3, 4, 4.1 are identical to that of A.Y. 2013-14 and the same are partly allowed for statistical purpose. As regards Ground Nos. 5, 5.1, 5.2, 5.3, 5.4, 6, 7, and 8, the same are without prejudice grounds, since the main grounds are partly allowed for statistical purpose, these grounds becomes infructuous, hence partly allowed for statistical purposes. As regards Ground No. 9, the same is consequential, hence not adjudicated upon herein. Thus, ITA No. 7615/Del/2018 for A.Y. 2015-16 is partly allowed for statistical purposes.

10. In result, both the appeals of the assessee are partly allowed for statistical purposes.

**Order pronounced in the Open Court on this 24<sup>th</sup> Day of November, 2021**

**Sd/-**  
**( R. K. PANDA )**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**( SUCHITRA KAMBLE )**  
**JUDICIAL MEMBER**

Dated : 24/11/2021.

\*MEHTA\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

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|---|------------|
| Date of dictation   | 24.11.2021 |
| Date on which the typed draft is placed before the dictating Member                   | 24.11.2021 |
| Date on which the typed draft is placed before the Other Member                       | 24.11.2021 |
| Date on which the approved draft comes to the Sr. PS/PS                               | 24.11.2021 |
| Date on which the fair order is placed before the Dictating Member for pronouncement  | 24.11.2021 |
| Date on which the fair order comes back to the Sr. PS/PS                              | 24.11.2021 |
| Date on which the final order is uploaded on the website of ITAT                      | 24.11.2021 |
| Date on which the file goes to the Bench Clerk  | 24.11.2021 |
| Date on which the file goes to the Head Clerk   |            |
| The date on which the file goes to the Assistant Registrar for signature on the order |            |
| Date of dispatch of the Order   |            |