

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER
VIRTUAL HEARING

ITA No.33 & 34/Ind/2020
Assessment Years: 2010-11 & 2011-12

Birla Corporation Ltd.

Satna

PANNo.AABCB2075J

: Appellant

V/s

ITO (IT & TP),

Bhopal

: Respondent

Appellant by	Shri S.K. Tulsiyan, AR
Respondent by	Shri Amit Soni, Sr. DR
Date of Hearing	14.12.2021
Date of Pronouncement	31 .01.2022

ORDER

PER MANISH BORAD, A.M.:

The above captioned appeals filed at the instance of the assessee are directed against the order of Ld. Commissioner of Income Tax(Appeal) (in short 'Ld. CIT(A)']-13, Ahmedabad dated 31.10.2019 which is arising out of the order u/s 143(3) of the

Income Tax Act 1961(In short the 'Act') dated 18.11.2011 by ITO(IT & TP), Bhopal.

The common grounds of appeal have been raised so we reproduce below grounds for A.Y. 2010-11:

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the order of the Assessing Officer even-though the Assessing Officer has not followed the findings and directions contained in the order of the Hon'ble ITAT and was illegal and without jurisdiction.*

2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in determining the permanent establishment of the foreign suppliers as per the general Double Taxation Avoidance Agreements ignoring the specific finding given by the Hon'ble ITAT Jabalpur in the case of the appellant specifying treaty-wise relevant definition of 'permanent establishment' to be considered in the case of the appellant.*

3. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the order of the Assessing Officer by ignoring the submissions and documentary evidences placed by the appellant to establish that no liability to deduct tax arose for the following reasons:*

(i) A few foreign suppliers had not provided any installation or supervisory services and contracts were purely in nature of supply of machinery;

(ii) In some cases where supervision charges were paid a separate invoice was raised on which the tax was deducted by the appellant and

(iii) In some cases though the contract contained separate charges to be paid for supervision services, the installation of machinery was carried out inhouse and no supervision services were availed by the appellant.

(iv) In some cases the installation was carried out through third party flocal contractor and due tax has been deducted under domestic tax provision.

(v) In none of the cases the foreign suppliers have exceeded the time threshold limit to constitute a 'Permanent Establishment' as specified in the respective Double Taxation Avoidance Agreement.

4. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the order of the Assessing Officer wherein the Assessing Officer had wrongly held that the foreign suppliers had a permanent establishment in India.*

(i) In doing so, the Ld. CIT(A) ignored the fact that the Assessing Officer did not give any factual finding that installation or supervisory services were provided by the alleged permanent establishment of the foreign suppliers.

(ii) In doing so, the Ld. CIT(A) ignored the fact that there was no permanent establishment of the foreign suppliers in India as per the relevant provisions of the Double Taxation Avoidance Agreement.

(iii) In doing so, the Ld. CIT(A) ignored the fact that the appellant had deducted TDS on installation and supervisory services wherever applicable for the machinery purchased from the foreign suppliers.

(iv) In doing so, the Ld. CIT(A) ignored the fact that there was no finding in the order of the Assessing Officer that any income was earned by the foreign

supplier's permanent establishment for carrying out the installation or supervisory services being carried out in India.

5. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the order of the Assessing Officer even though the Assessing Officer has failed to establish that the foreign suppliers had any business connection in India so that income may be charged to tax in India as per section 5(2)(b) r.w.s. 9(1)(i) of the Act.

6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not directing the Ld. AO to allow credit for payment of tax aggregating to Rs. 1,45,00,000/- deposited to the credit of Central Government from time to time.

7. The Appellant craves to add, alter or delete all or modify any or all the above grounds of appeal.

2. From perusal of the grounds we find that following two issues needs to be adjudicated:-

A. Whether Ld. Assessing Officer erred in referring to provision of income Tax Act even though the ITAT held that the question of chargeability under section 5 and section 9 is academic, thus making the assessment bad in law

B. Since matter was set aside by ITAT for examination of agency PE only whether Ld. Assessing Officer failed to bring anything on record to establish that such a dependent agency PE existed in light of articles 5 & 6 of Double Taxation Avoidance Agreement (in short DTAAs).

3. Brief facts of the case as culled out from the records are that the assessee is a limited company engaged in the manufacturing and trading of cement. Assessee is responsible for deducting tax at source under chapter XVII of the Income Tax Act, 1961. Assessee during the course of business entered into transaction for purchase of equipment and other material to be used in the manufacturing process. The transactions under consideration for

non-deduction of TDS were conducted with 8 non-resident entities. A summary of the total payment made to foreign parties on which TDS deduction is under contention is as follows:

Vendor-wise List of Payments Under Consideration:				Payment (Rs.)	
S. No.	Particulars	Country	DTAA Reference	A.Y. 10-11	A.Y. 11-12
1	Polysius AG	Germany	Article 5(1) and 5(5)(a)	1,48,01,845	11,50,11,953
2	RHI AG	Austria	Article 5(5)(a)	1,61,12,160	1,63,33,227
3	PARR Intrument Co.	USA	Article 5(4)(a)	8,05,273	2,07,32,088
4	Shanyong Heavy Machinery Co. Ltd.	China	Article 5(4)	14,57,982	1,24,80,714
5	Tangsang Senpu Mine Equipment Co. Ltd.	China	Article 5(4)	-	1,88,42,739
6	Rexnord NV	Belgium	Article 5(4)(a)	-	13,18,493
7	Thermo Fisher Scientific Ecublens SARL	Switzerland	Article 5(5)(i)	-	56,67,600
8	MMD Asia Pacific Ltd.	UK	Article 5(4)	-	1,66,37,051
				3,31,77,260	20,70,23,865

i. Further, the purpose of payments is as follows:

For A.Y. 2010-11:

<u>S. No.</u>	<u>Name of Party</u>	<u>Purpose of Payment</u>
1	Polysius AG	Purchase of Equipment for Polycom Model No. 30/13-9 marked as POLBEC
2	RHI AG	Purchase of Basic Brick (Ankral R2CB and S2CB)
3	PARR Instrument Co.	Purchase of Digital Isoperibol Calorimeter
4	Shanyand Heavy Machinery Co. Ltd.	Purchase of vertical roller mill for coal grinding work

For A.Y. 2011-12:

<u>S. No.</u>	<u>Name of Party</u>	<u>Purpose of Payment</u>
1	TangsangSenpu Mine Equipment Co. Ltd.	Purchase of coal preparation (coal washery) plant
2	Polysius AG	Purchase of equipment for Polycom Model No. 303-19 marked as POLBEC
3	Rexnord NV	Purchase of Bucket Elevator
4	Thermo Fisher Scientific Ecublens SARL	Purchase of X-Ray Analytical Model ADVANTX INTELLPOWER
5	MMD Asia Pacific Ltd.	Purchase of complete coal crusher

6	Shanyang Heavy Machinery Co. Ltd.	Vertical Roller Mill for Coal Grinding Work
7	RHI AG	Purchase of Basic Brick (Ankral R2CD and S2CB)
8	RHI AG	Purchase of Basic Brick (Ankral R2CB and S2CB)

4. In the first round the proceedings u/s 201(1)/(1A) of the Act were carried out vide order dated 27.03.2012. Ld. ACIT-TDS Jabalpur raised a demand including interest at Rs. 1,90,54,630/- and Rs.10,84,08,460/- for A.Y. 2010-11 and 2011-12 respectively. treating the assessee in default for not deducting tax at source on the payment made to various non-resident being during the year under consideration for purchase, installation and supervision charges. Aggrieved assessee challenged the finding of Ld. Assessing Officer before the ld. CIT(A) who also confirmed the addition made by the ld. Assessing Officer holding the assessee to be in default for not deducting tax u/s 195 of the Act.

5. Aggrieved by the order of Ld. CIT(A), assessee preferred an appeal before ITAT, Jabalpur and vide order dated 24.12.2014 in ITANo.252/Jab/2013, this Tribunal firstly held that the question whether remittance were taxable under the provision of income tax Act 1961 of particularly u/s 5(2)(b) of the Act were of only academic in nature as the provisions of Double Taxation Avoidance Agreement (DTAA) are more beneficial to the appellant and hence the provisions of the Income Tax Act 1961 could not be pressed into play in the appellant case. Secondly this Tribunal set aside the limited issue to the Ld. Assessing Officer to ascertain

whether any of the foreign suppliers had a Permanent Establishment as defined in the respective DTAA's. To give effect to the order of the Tribunal dated 24.12.2014 proceedings were initiated by Ld. ITO (IT & TP) Bhopal. Ld. Assessing Officer while concluding the proceedings relied in the provisions of section 5(2)(b) r.w.s. 9(1) of the Act holding that the non-resident entities had a business connection in India and created a demand for default of non-deduction of TDS@ 41.2% along with levying interest thereby creating demand of Rs. 48,07,726/- for A.Y. 2010-11 and demand of Rs. 2,89,95,315/- for A.Y. 2011-12. Again the assessee preferred an appeal before the ld. CIT(A) but did not find any favour as the finding of Ld. Assessing Officer were confirmed by the ld. CIT(A).

6. Now assessee is in appeal before this Tribunal raising various grounds but the same are limited to two issues mainly contending that firstly ld. Assessing Officer exceeded his jurisdiction by ignoring the finding of the Tribunal by applying the provision of section 5(2)(b) r.w.r.t. 9(1) of the Act in place of DTAA provisions and secondly the Ld. Assessing Officer erred in holding that the non-resident were having a Permanent Establishment in India without bringing any thing on record to establish that dependent Abench PE existed in light of the Article 5 & 6 of DTAA.

7. Ld. Counsel for the assessee vehemently argued supporting the detailed written submission filed before us and Ld. CIT(A) and also referred to following documents enclosed in the paper book:-

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8. Per contra Ld. DR vehemently argued supporting the order of both the lower authorities and prayed for confirming the order.

9. We have heard rival contentions and perused the records placed before us. We notice that the assessee had made following payments to foreign parties in order to purchase equipment plant and machinery crushers and in some case for installation, supervision charges totalling to Rs.3,31,77,260/- &

Rs.20,70,23,865/- for A.Ys. 2010-11 & 2011-12 respectively.

Vendor-wise List of Payments Under Consideration:				Payment (Rs.)	
S. No.	Particulars	Country	DTAA Reference	A.Y. 10-11	A.Y. 11-12
1	Polysius AG	Germany	Article 5(1) and 5(5)(a)	1,48,01,845	11,50,11,953
2	RHI AG	Austria	Article 5(5)(a)	1,61,12,160	1,63,33,227
3	PARR Instrument Co.	USA	Article 5(4)(a)	8,05,273	2,07,32,088
4	Shanyong Heavy Machinery Co. Ltd.	China	Article 5(4)	14,57,982	1,24,80,714
5	Tangsang Senpu Mine Equipment Co. Ltd.	China	Article 5(4)	-	1,88,42,739
6	Rexnord NV	Belgium	Article 5(4)(a)	-	13,18,493
7	Thermo Fisher Scientific Ecublens SARL	Switzerland	Article 5(5)(i)	-	56,67,600
8	MMD Asia Pacific Ltd.	UK	Article 5(4)	-	1,66,37,051
				3,31,77,260	20,70,23,865

The purpose of payments is as follows:

For A.Y. 2010-11:

<u>S. No.</u>	<u>Name of Party</u>	<u>Purpose of Payment</u>
1	Polysius AG	Purchase of Equipment for Polycom Model No. 30/13-9 marked as POLBEC
2	RHI AG	Purchase of Basic Brick (Ankral R2CB and S2CB)
3	PARR Instrument Co.	Purchase of Digital Isoperibol Calorimeter
4	Shanyand Heavy Machinery Co. Ltd.	Purchase of vertical roller mill for coal grinding work

For A.Y. 2011-12:

<u>S. No.</u>	<u>Name of Party</u>	<u>Purpose of Payment</u>
1	TangsangSenpu Mine Equipment Co. Ltd.	Purchase of coal preparation (coal washery) plant
2	Polysius AG	Purchase of equipment for Polycom Model No. 303-19 marked as POLBEC
3	Rexnord NV	Purchase of Bucket Elevator
4	Thermo Fisher Scientific Ecublens SARL	Purchase of X-Ray Analytical Model ADVANT'X INTELLPOWER
5	MMD Asia Pacific Ltd.	Purchase of complete coal crusher
6	Shanyang Heavy Machinery Co. Ltd.	Vertical Roller Mill for Coal Grinding Work
7	RHI AG	Purchase of Basic Brick (Ankral R2CD and S2CB)

8	RHI AG	Purchase of Basic Brick (Ankral R2CB and S2CB)
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10. Ld. Assessing Officer in the second round of the proceedings again held the assessee in default and levied tax @ 41.2% for non-deduction of tax u/s 195 of the Act and charging interest thereon.

First issue raised by the assessee is that the ld. Assessing Officer exceeded his jurisdiction and ignored the finding of this Tribunal.

11. We notice that in the first round the CIT(A) confirmed the AO's order and held the appellant to be "assessee-in-default" for not deducting taxes u/s 195 before remitting the gross payments to foreign suppliers. Aggrieved by the CIT(A)'s order, the appellant preferred second appeal before this TAT, Jabalpur. The appeal of the appellant was decided by this ITAT, Jabalpur in ITA No. 252/JAB/13 dated 24.12.14. In the appellate order the relevant findings of the Tribunal were at Pages 47 to 51 of the order. The ITAT held that the impugned order dated 12.09.13 was bad in law and therefore set aside with certain findings and the tribunal has held that: Although the contracts between the appellant and foreign parties were composite but the appellant had brought sufficient evidence on record which showed that the remittances during the relevant previous years were made only towards supply of plant and machinery".

12. Further it was held by This Tribunal that "wherever any supervisory or installation services were envisaged to be rendered by the foreign parties, separate payments were made by the appellant on which tax was deducted u/s 195 of the Act. The ITAT

thus held that the contracts with suppliers were in substance and in essence “supply contracts” for purchase of goods and therefore the remittances made to foreign suppliers were not chargeable to tax in India.” In Its order ITAT also observed that Supervisory Charges Paid to Suppliers on which TDS was deducted u/s 195 were as follows:

S. No.	1. Entity (Country)	Amount of Supervision Charges (Rs.)	3. Whether TDS Deducted	Period of Rendering Services
1	Polysius AG (Germany)	Euro 141,022.38	Yes	113 days
2	Shenyang Heavy Machinery Co. Ltd. (China)	USD 106,000	Yes	106 days
3	PARR Instruments Company (USA)	No installation/supervisory services availed from the vendor and therefore no service element on which TDS ought to be deducted.		
4	Rexnord NV (Belgium)	No installation/supervisory services availed from the vendor and therefore no service element on which TDS ought to be deducted.		
5	RHI AG (Austria)	No installation/supervisory services availed from the vendor and therefore no service element on which TDS ought to be deducted.		
6	TangsangSenpu Mine Equipment Company (China)	No installation/supervisory services availed from the vendor and therefore no service element on which TDS ought to be deducted.		
7	MMD Asia Pacific (UK)	No installation/supervisory services availed from the vendor and therefore no service element on which TDS ought to be deducted.		
8	Thermo Fisher Scientific Ecublens SARL (Switzerland)	No installation/supervisory services availed from the vendor and therefore no service element on which TDS ought to be deducted.		

i. The ITAT further observed that although the appellant had deducted tax on the payments made to some of foreign suppliers from whom supervisory services were availed under Article 12 of the respective DTAA's in the subsequent financial years; but even such installation, assembly, and supervisory services, if any, rendered by foreign suppliers were not chargeable to tax in India since such services did not fall within the purview of Article 12 of the respective DTAA's. In support of this proposition, the ITAT referred to the definition of 'permanent establishment' outlined in Article 2 of the respective DTAA's wherein it was stated that unless the installation or assembly project or supervisory activities in connection with supply of any plant or project does not cross the specified threshold time limit, the non-resident enterprise cannot be treated to have a permanent establishment in India. The ITAT quashed the original order passed u/s 201(1)/(1A) dated 27.03.2012 and deleted the tax demand raised pursuant thereto and set aside the order on the limited issue to the file of the AO for verifying whether any of the foreign suppliers had a Permanent Establishment in India under the respective DTAA's.

ii. While concluding his submissions, learned Departmental Representative had filed a letter dated 25th September 2014 praying that as the DTAA aspects were not taken up at the stage of the Assessing Officer or the CIT(A), and as such the revenue authorities had no occasion to examine that aspect of the matter at all, the matter should at best be restored to the file of the AO for fresh examination in the right perspective. The ITAT saw merits in learned Departmental Representative's plea to the extent that the

facts stated by the assessee with regard to the PE of foreign vendors not being in existence may need to be verified, and particularly as the assessee did not make proper submissions, duly supported by the facts on this aspect of the matter, at the assessment or the appellate stage. The ITAT held that in case the Assessing Officer can bring any material on record which can demonstrate that the vendors had a PE in India, and the income embedded in the impugned payments was indeed liable to be taxed in India, to that extent and in accordance with the provisions of law, the Assessing Officer will be at liberty to raise the fresh demand under section 201 r.w.s. 195.

iii. In view of the above findings and directions issued by the Hon'ble ITAT, Jabalpur; it is observed that the ITAT had set aside the limited issue of ascertaining whether any of the foreign suppliers had a Permanent Establishment within the meaning of that expression defined in the respective DTAA's. The ITAT had specifically stated that the question whether the remittances were taxable under the provisions of the Income-tax Act, 1961 or particularly under Section 5(2)(b) were of only academic nature as the provisions of DTAA's were more beneficial to the appellant and hence the provisions of the Income-tax Act, 1961 could not be pressed into play in the appellant's case. Thus the limited enquiry was to be made by the AO that whether any of the foreign suppliers had rendered installation, assembly or supervisory services and/or carried out such project in India in connection with the supply of plant and machineries and whether the period of rendition of such services exceeded the prescribed threshold limit under the respective DTAA's so that a PE was constituted in India. If any of

the foreign suppliers were found to have an installation/assembly or supervisory PE in India, only then the AO was given the liberty to ascertain income attributable to such activities rendered by the suppliers in India through such PE and raise tax demand thereon.

iv. Subsequent to passing of the said appellate order, assessment proceedings were reconducted by the ITO (IT & TP), Bhopal. The AO held that the foreign vendors have a dependent agency permanent establishment in India and thus all payments made by the appellant are subject to TDS under section 195.

13. We notice that to give effect to the order of this Tribunal dated 24.12.2014 proceedings were initiated by ITO (IT&TP), Bhopal in the case of the appellant. As per para 58 of the ITAT's order, it was held by the ITAT that the scope of Section 5(2)(b) of the Act is academic since India does not have the right to tax income in respect of rendition of installation, commissioning, or assembly services, embedded in the invoice value of the related equipment, plant or machinery. The payments made to non-resident entities have no tax implications at all under the tax treaties. However, as the revenue authorities had not examined the aspects of DTAA, the matter was set aside to the file of assessing officer, it was directed that the facts as stated by the appellant with regards to 'Permanent Establishment' of foreign vendors not being in existence needs to be verified by the AO.

14. We find that the ld. AO has not followed the directions of this ITAT with regards to the issue of taxability of non-resident as per section 5(2)(b) of the Act which has already been held to be

irrelevant. The Assessing Officer has in fact relied on the provisions of section 5(2)(b) read with section 9(1)(i) of the Act and passed an order u/s 201(1) r.w.s. 201(1A) of the Act holding that the non-resident entities had a 'business connection' in India. This can be evidenced by the case law quoted by the ld. Assessing officer in his assessment order. The relevant extract from the assessment order is as follows:

"The landmark judgement of the Bombay High Court in the case of Abdullabhai Abdul Kadar Vs. CIT (1952) 22 ITR 241:

"If a non-resident has a commission agent in India, who enters into transactions on its behalf, the non-resident would be regarded as having a business connection in India"

15. We notice that when the ITAT has clearly given findings and set aside the matter for evaluation of DTAA provisions in the case and has further stated that the scope of Section 5(2)(b) and Section 9(1)(i) is academic since DTAA provisions will supersede the Income Tax Act, the ld. Assessing officer has still gone ahead and examined the question of business connection and quoted judicial precedents to support this contention which in our view is beyond the scope which was delineated by this Tribunal when the assessment order was set aside. Thus Ld. AO exceeded his jurisdiction.

16. The Assessing Officer has further examined issue relating to Double Taxation Avoidance Agreements pertaining to the eight non-resident entities. While passing the order u/s 201(1) and 201(1A) r.w.s. 195 of the Act, Avoidance Agreements with reference to definition of permanent establishment have been referred by the Assessing Officer:

S.	Particulars	Country	Article of DTAA on
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No.			PE Referred by AO
1	Polysius AG	Germany	Article 5(1) and 5(5)(a)
2	RHI AG	Austria	Article 5(5)(a)
3	PARR Intrument Co.	USA	Article 5(4)(a)
4	Shanyong Heavy Machinery Co. Ltd.	China	Article 5(4)
5	TangsangSenpu Mine Equipment Co. Ltd.	China	Article 5(4)
6	Rexnord NV	Belgium	Article 5(4)(a)
7	Thermo Fisher Scientific Ecublens SARL	Switzerland	Article 5(5)(i)
8	MMD Asia Pacific Ltd.	UK	Article 5(4)

17. We observe that instead of following the findings of the order of this Tribunal in the case of the appellant pertaining to ‘permanent establishment’, the Assessing Officer has referred to completely different definition of ‘permanent establishment’ which is not acceptable. This Tribunal has referred to the definition of ‘permanent establishment’ wherein it has been stated that unless the installation or assembly project or supervisory activities in connection with supply of any plant or project does not cross the specified threshold time limit, the non-resident enterprise cannot be treated to have of ‘permanent establishment’ in India.

18. The scope of enquiry and assessment of remittances made to foreign parties abroad was limited to the question whether any of the foreign suppliers had rendered installation, assembly or supervisory services and/or carried out such project in India in connection with the supply of plant and machineries and whether the period of rendition of such services exceeded the prescribed threshold limit in the respective DTAAs so as to constitute an installation/assembly/supervisory PE in India. It is noticed that

the Ld. AO never considered this limited issue which was set aside by the ITAT. The AO also chose to remain silent on the relevant facts and materials placed on record which showed that no installation, assembly, or supervisory services were tendered by foreign suppliers in India. In fact, it is not even the AO's case while holding that foreign suppliers had PE in India that such PE was pursuant to any installation, assembly or supervisor services rendered by any of the foreign suppliers. Instead, the AO harped on the fact that each supplier had appointed agent in India and made unsubstantiated and hypothetical allegations that terms for sale and/or contract for supplies were concluded in India through the agents in India and therefore a portion of the remittances made to such foreign suppliers were taxable in India.

19. In the case of *Saroj K Poddar (ITA 2406/Kol/2019)*, the Kolkata Bench of this ITAT held as follows:

“It is elementary that any legal proposition is required to be tested after establishing the foundational facts of a case. As discussed earlier, the Revenue can only support the order of the AO before us. The Revenue can strengthen their case on the issue raised in the assessment order but the Revenue cannot be permitted to make out an altogether new case before us de hors the findings of the AO in his assessment report. As held earlier, this Tribunal does not have the power to deal with an issue raised by the Revenue, which was never the case of the AO in the assessment order or in the remand-report as discussed (supra)....

...Useful reference in this regard may be made to the decision of a Division Bench of the Bombay High Court in the case of CIT Vs. Kanga & Co. [IT Appeal No. 2277 of 2013 dated 1 2016] wherein the Court observed that, it was unable to understand how an additional question of law could arise from the impugned order of the Income Tax Appellate Tribunal, when no foundation had been laid for the same before the authorities or the said Tribunal. Bench further observed that there are questions of fact which out to be raised before the authorities and in the absence thereof, the additional question of law sought to be raised by the Revenue could not be considered.”

20. In support of the above, the appellant made the following submissions on the scope and ambit of an assessment when the matter has been 'set aside' by this ITAT:

1. As per settled law, the order of the Tribunal u/s 254(1) of the Act must be read and understood in the proper context and in the light of all that is stated in the order itself.

2. It is also settled law that in a 'set aside' proceedings the authorities below are bound to decide as per the direction contained in the order and it is not open for the authorities to conduct fresh enquiry. The authorities below are precluded from entertaining a new plea. The authority is confined to the subject-matter on remand by the Tribunal, no other question could be considered or to enlarge the scope of the proceedings in contradiction to the findings given by the Tribunal.

3. Attention in this regard, is craved to the following decisions:

- The Decision of the Hon'ble Calcutta High Court in *Katihar Jute Mills (P.) Ltd. vs. Commissioner of Income-tax*, [1979] 120 ITR 861 (CAL.) wherein the Hon'ble jurisdictional High Court has held as follows:

"In the case before us, if the entire assessment order had been set aside, the contention of Mr. J.C. Paul would have been unassailable but unfortunately the fact is not so. There was no dispute with regard to the assessability of the sale proceeds of the loom hours at any stage of the proceedings. The AAC also did not consider that question at all, inasmuch as, that was not one of the points before him in appeal. The order of the AAC setting aside the assessment was only partial and to the extent as to the question of treatment of a loss in speculative transaction, as clearly indicated in the order itself. The order of the AAC, if read as a whole, in its proper context would clearly show that it was neither the intent nor the purpose nor the import of the order that the whole assessment was set aside and everything is kept at large so as to allow the ITO to make a fresh assessment on all the aspects of the matter and give a free hand to the assessee to make all claims and all arguments in that assessment. In that view of the matter, we are unable to accept the contentions of Mr. J.C. Paul. The hands of the ITO and in appeal against his order, of the AAC were tied.

We, therefore, answer the question in the affirmative and in favour of the revenue."

- The decision of the Hon'ble Bombay High Court in the case of *CIT vs. Indo-Aden Salt Works Co.* reported at (1959) 36 ITR 0429 (Bom.) wherein the Hon'ble High Court has held as under:

"13. It is also clear that the only question which the Tribunal was asked to consider and which the Tribunal had jurisdiction to consider was whether the AAC was right in deciding the appeal on the sole legal contention that there was no right in the assessee to claim relief in respect of supertax. The Tribunal having reached the conclusion that the AAC had

taken a technical and narrow view of the matter would have proceeded to go into the merits of the claim for relief in respect of supertax. It was at that stage that counsel for the assessee stated that he wanted to lead certain evidence in respect of the claim for the assessee-firm for relief from super-tax. That this was what happened before the Tribunal is expressly stated in the order of the Tribunal and it is only in this background and in this context that the words relating to vacating the order of AAC and restoring of the appeal must be read. It is true that read by itself the last sentence of the order would suggest that the AAC was being directed to deal with the entire appeal on its own merits. The order of the Tribunal must, however, be read and understood in the proper context and in the light of all that is stated in the order itself and if we do so, as indeed we should do so, there is considerable force in the submission on behalf of the assessee that the order must be read as restricting the scope of the inquiry by the AAC only to the question of merits affecting the claim for relief from super-tax. We must, however, observe that there is in this case scope for the contention very strongly pressed before us by Mr. Joshi on the consideration of the matter, we prefer to take the view that the order of the Tribunal required the AAC to enquire only into the matter of relief from super-tax on its merits."

- *The decision of the Hon'ble ITAT Ahmedabad in the case of Krishna Terine (P.) Ltd. vs. ACIT reported at 130 ITD 0411 (Ahd) that has held as under:*

"12. The order of the Tribunal is stated to be final between the parties because nobody pointed out if the said order was challenged by the Revenue before the Hon'ble High Court. It is also settled law that in the set aside proceedings the authorities below are bound to decide as per the direction contained in the order and it is not open to conduct fresh enquiry. The authorities below are precluded from entertaining a new plea. It appears that the authority is confined to the subject-matter on remand by the Tribunal, no other question could be considered or to enlarge the scope of the proceedings in contradiction to the findings given by the Tribunal. We are fortified in our view by the judgment of the Hon'ble Andhra Pradesh High court in the case of Pulipati Subbarao & Co. vs. AAC (1959) 35 ITR 673 (AP), decision of the Hon'ble Calcutta High court in the case of Katihar Jute Mills (P) Ltd. vs. CIT (1979) 120 ITR 861 (Cal), decision of Allahabad High court in the case of S.P. Kochhar vs. ITO (1983) 37 CTR (All) 49 (1984) 145 ITR 255 (All), Sri Vindhya Vasini Prasad Gupta vs. CIT (1990) 186 ITR 253 (All) and the decision of the Hon'ble Madhya Pradesh High Court in the case of CIT vs. Hope Textiles Ltd. 09g7) 143 CTR (MP) 33 . (1997) 22s ITR 993 (MP). "

21. Further, this Tribunal had set aside the order on the limited issue to the Ld. AO. to verify whether any of the foreign suppliers had a Permanent Establishment in Under the respective DTAAs.

This ITAT has held that the installment or supervisory services in connection to sale of machinery or equipment has to cross the specified time threshold limit for the non-resident entity too be treated as having a permanent establishment in India. The Ld.AO. while passing the order has not followed the directions of this ITAT and has in fact relied on the provisions of section 5(2)(b) read with section 9(1)(i) of the Act to hold that the nonresident entities had a business connection in India. Further, Ld. AO. has failed bring in material on record to establish that the foreign suppliers had a PE in accordance to the DTAA's and the decision of this ITAT.

22. Thus, in light of the aforementioned case laws it is clear that the Ld. AO. has clearly exceeded his jurisdiction by making enquiries and examining issues which were clearly beyond the ambit of the set aside proceedings directed by the this Tribunal. Thus, the findings and observations recorded by the Ld. AO. are factually and legally unjustified, untenable and unsustainable therefore, the order of the Ld. AO is quashed on the ground of being illegal and beyond jurisdiction and demand raised in the said order are deleted. Common legal issues raised in ground no.1 & 2 of assessee's appeals for A.Y. 2010-11 & 2011-12 are allowed.

23. As regards the second common issue about the existence of Permanent Establishment (in short (PE) of the alleged non-resident in India is concerned though the issue has become merely academic as we have already quashed the assessment order being illegal and bad in law but still will deal the same for academic purpose.

24. During the course of assessment proceeding the assessee submitted various documents related with the foreign vendor including purchase orders in response to the AO's roving queries so as to prove that alleged non-resident have no PE in India. However, Ld. AO held that these foreign vendors had an agency PE in India on the following grounds:

a. The communication has been routed through agent and the agent was involved in the negotiations and discussion with appellant to finalise the transaction. The AO has arrived at the aforesaid conclusion as the purchase orders/letter of intent stated that "discussions your representative had with us.....we are pleased to release the detailed order for the following on the undernoted terms and conditions."

As per the AO's assessment order, "The assessee also stating in purchase order that – we are pleased to release this detailed order for the following on the undernoted terms and conditions", means that all the terms and conditions has been decided through discussion with the agent and based on that the assessee has placed the order"

b. The agent was fully involved during the transaction and played important role while making discussion, negotiation, communication and finalizing the deal. In this way the agent is deemed authorized to conclude the contract on behalf of non-resident"

25. Ld. counsel for the assessee submitted that on the basis of purchase order, the AO has concluded that Non-resident Vendors had an Agency Permanent Establishment in India since a third party is marked in the communication and the letter refers to certain "discussions with representatives". Apart from this ld. Assessing officer has brought nothing on record to suggest that these are dependent agents working exclusively for the foreign parties. It can be seen from the objections raised by the AO that he has nowhere given a finding in the order u/s 201(1)/201(1A) of the Act that the aforesaid representatives have fulfilled the three conditions as laid down in the DTAA to establish that the concerned parties were dependent agency PE of the non-residents

as alleged by the ld. Assessing officer. The AO has brought nothing on record to establish that:

- *These parties have the authority to conclude contracts on behalf of the non-resident suppliers, or*
- *That these parties habitually maintain in India a stock of good or merchandise on behalf of the non-resident, or*
- *These parties habitually secure orders in India (mainly or wholly) for the non-resident or for non-residents in India under the same management.*

26. Further, Ld. AO did not verify from these parties whether they were independent agents or acted wholly or mainly on behalf of the non-residents. The AO did not follow the directions of the Tribunal, Jabalpur Bench inasmuch as the matter was set aside to the file of the AO for proper verification.

27. Ld. counsel for the assessee also submitted that Ld. AO ought to have carried out thorough verification with the said parties. Instead, the AO has simply relied on the wordings of the purchase orders without verifying the complete facts of the case. No material has been brought on record by the AO to show that these Indian entities habitually acted on behalf of the non-resident entities. The finding arrived at by the AO are based on irrelevant and insufficient material.

28. From perusal of all the communication (through purchase orders and others) between the assessee and non-resident vendors we find that the entire transactions were carried out with the non-residents on a principal-to-principal basis. As can be seen from the purchase orders and contracts of purchase entered into with the non-resident suppliers, that these Indian entities (agents) did not have any authority to bind the non-resident or the appellant. All

the purchase orders were directly raised by the appellant in the name of the non-resident parties. The delivery of the machineries were taken directly by the appellant from the non-resident entities without any involvement of the Indian concerns as can be seen from the invoices raised by the non-resident entities (*Pages 491 to 576 of Paper Book-I*) as well as the bill of entry (*Pages 491 to 576 of Paper Book-I*). As far as the role of these Indian entities is concerned it can be only termed as preparatory/auxiliary in nature. Further, the non-resident entities/vendors have provided the appellant with certificates confirming that they did not have any permanent establishment in India during the relevant period and the same were submitted before the Assessing Officer (*Pages 948 to 953 of Paper Book-I*).

29. Further, the appellant has provided all contracts of purchase which highlight the fact that risks and rewards of the transaction were retained with the non-resident suppliers and the appellant without the existence of an agent who holds decision making power. The ld. Assessing officer has ignored the information in these contracts available on record and only jumped to a conclusion on the basis of wording of communication between the appellant and the non-resident vendors as illustrated in his contention above.

30. It is submitted before us that the Assessing Officer has determined the permanent establishment as per DTAA ignoring the finding given by the order of the this ITAT Jabalpur in the case of the appellant. This ITAT has held that the installment or supervisory services in connection to sale of machinery or

equipment has to cross the specified time threshold limit for the non-resident entity to be treated as having a permanent establishment in India. The treaty-wise relevant definition of 'permanent establishment' to be considered in the case of the appellant have already been specified by this ITAT at Para 36 and 37 of its order. The relevant portion of the said order is reproduced herewith for ready reference:

"36. As to whether these non-resident vendors have a PE in India or not, it is not even the case of the revenue that any of these non-resident vendors had a place of business in India and as such a PE under the basic rule, i.e. Article 5(1). While taking note of this fact, it is useful to bear in mind, as was held in the landmark Special Bench decision in Motorola Inc's case (supra), "DTAA is only an alternate tax regime and not an exemption regime" and, therefore, "the burden is first on the Revenue to show that the assessee has a taxable income under the DTAA, and then the burden is on the assessee to show that its income is exempt under DTAA". There is not even whisper of a suggestion that the non-resident vendors had a place of business in India. We have carefully perused the material on record and the orders of the authorities below and we do not find that suggestion anywhere. The case of existence of the PE thus hinges on whether by the virtue of, what is normally termed as, installation PE as could come up by the nature of the activities leading to the income impugned before us. The related provisions in respect of all these jurisdictions above are as follows:

Indo Austria tax treaty

ARTICLE 5

Permanent Establishment

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(i) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (for the same or connected project, site or activities) continue for a period of more than six months.

*(Emphasis by underlining supplied by us;
portion not reproduced not relevant for our purposes)*

Indo Belgium tax treaty

Article 5

Permanent Establishment

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(j) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities , if any) continue for a period of more than six months, or where such project or supervisory activity, being incidental to the sale of machinery or equipment, continues for a period not exceeding six months and the charges payable for the project or supervisory activity exceed 10 per cent of the sale price of the machinery and equipment.

*(Emphasis by underlining supplied by us;
portion not reproduced not relevant for our purposes)*

Indo China tax treaty

ARTICLE 5

Permanent Establishment

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(j) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 188 days;

*(Emphasis by underlining supplied by us;
portion not reproduced not relevant for our purposes)*

India Germany tax treaty

ARTICLE 5

Permanent Establishment

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(i) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities continue for a period exceeding six months.

*(Emphasis by underlining supplied by us;
portion not reproduced not relevant for our purposes)*

India UK tax treaty

ARTICLE 5

Permanent establishment

1. For the purposes of this Convention, the term "permanent establishment" means a fixed

place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include especially:

(j) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or supervisory activity continues for a period of more than six months, or where such project or supervisory activity, being incidental to the sale of machinery or equipment, continues for a period not exceeding six months and the charges payable for the project or supervisory activity exceed 10 per cent of the sale price of the machinery and equipment;

*(Emphasis by underlining supplied by us;
portion not reproduced not relevant for our purposes)*

Indo US tax treaty

ARTICLE 5

Permanent Establishment

1. For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term 'permanent establishment' includes especially:

(k) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 120 days in any twelve month period;

*(Emphasis by underlining supplied by us;
portion not reproduced not relevant for our purposes)*

"37. The underlying principle in all the above definition, even as there is a variance on the threshold time limits, is that unless the installation or assembly project or supervisory activities in connection therewith cross the specified threshold time limit, the non-resident enterprise cannot be treated to have a permanent establishment in India. However, as an exception to this general principle in the above cases, in the case of Belgian and UK tax residents, even when threshold time limit is not crossed but where the charges payable for these services exceeds 10% of the sale value of the related machinery or equipment, the profits

attributable to this activity can also be brought to tax. As a corollary to this legal position, even in the case of Belgian and UK tax residents, profit relatable to installation or assembly project or supervisory activities connected therewith, which do not cross threshold time limit of six months, cannot be brought to tax unless it is demonstrated that the consideration for such services is more than 10% of the sale value. There is nothing on record to establish, or even suggest, that this condition is satisfied in the cases before us. It is well settled in law, as we have noted earlier in our discussions, that the onus is on the revenue authorities that the conditions for permanent establishment coming into existence are satisfied, and that onus is clearly not discharged. The assessee's contention is that no part of the income embedded in the impugned payments is in respect of the installation, assembly or commissioning activities of the plant, machinery and equipment purchased. There has to be something, apart from shallow prolixity, to even point in the direction that the consideration for installation or assembly project, or supervisory activities connected therewith, exceed 10% of the value of related plant, machinery or equipment."

i. Further As per Article 5(5) of the DTAA between India and Austria,

"Where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if such a person:

*(a) has, and **habitually** exercises, in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or*

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

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

ii. Further, as per **Article 5(6)** of the said DTAA,

"an enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State

through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise itself or on behalf of that enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.”

31. In view of the finding of the Tribunal in assessee's own case and article extracted above, we notice that Ld. Assessing Officer has not brought any other material to substantiate his allegation that may demonstrate that the agent involved has habitually concluded contracts on behalf of the vendor, or has habitually maintained the vendor's stock of goods, or has habitually secured orders for the assessee. It is to be noted that all three clauses in the DTAA use the word 'habitually'. It may be relevant to further mention that the expression 'has' shall mean a legal existence. The vendors of the appellant only used auxiliary and supplemental services in the process of procurement. The ability to accept and refuse contracts and negotiate technical and financial terms was retained with the vendors itself and in no way delegated to any party in India. Whereas 'habitually secures orders' shall mean a systematic conduct on the part of the agent. The AO has considered these parties to be an agency permanent establishment of the vendors solely based on the fact that the parties were marked in the purchase order/letter of intent sent to the vendors. Thus, it is not only a legal right to secure order but also it is to be found, as a matter of fact that agent has habitually secured order or habitually negotiates contract. The ld. Assessing officer could not bring any material on record which would establish such a relationship between the independent parties and non-resident

vendors wherein habitual/sustained ability to negotiate or secure contracts could be demonstrated. The ld. assessing officer has jumped to the conclusion of existence of permanent establishment due to the involvement of local parties providing auxiliary services. The assessing officer's contention is that the communication has been routed through the agent and the agent was involved in the negotiations and discussion with the appellant to finalise the transaction. The assessing officer made the farfetched assumption that all negotiations were entered into by agents on behalf of the vendors only on the basis of marking of such parties in communication of final POs and LOIs between the appellant and the vendors.

32. In the case of Mitsui & Co Ltd vs DCIT ITA No 4377, Coordinate Bench Delhi held as follows:

"It is not the case of the Assessing Officer that MIPL habitually exercised authority to conclude contracts. It is also not the case of the Assessing Officer that MIPL habitually maintains a stock of goods or merchandise. Thus, the condition of (a) and (b) are not fulfilled. The third condition in (c) is habitually securing orders for the assessee. In this regard we note that the Assessing Officer has made this allegation on the basis that commission has been paid by the assessee company to the MIPL. On this basis it has been assumed that MIPL is securing orders. This contention of the Assessing Officer does not appear to be correct. As per the agreement which has been quoted by the Assessing Officer in the assessment order, MIPL is supposed to put best effort to collect information with regard to Instant Noodle project etc. to make the best effort to find the best candidate, to attend/take care of the visitor from Japan, to make the best effort to analyze the feasibility report. None of these clauses can be interpreted to mean that MIPL is securing orders. On the basis of this clause the Assessing Officer was wrong in assuming that MIPL is securing orders."

33. We also observe that learned assessing officer ignored the basic requirement i.e. fulfilling one of the three conditions laid down in

Article 5(5) of the DTAA. DTAA provides for treating a person as Dependent Agent. The DTAA has to be strictly interpreted. The DTAA having prescribed the conditions, no further conditions can be read. What learned assessing officer is canvassing will mean adding new condition in the DTAA. Further, it may be relevant to note that as per the DTAA, it has been specifically provided that if a company in the contracting state is controlled by a company in the other contracting state that itself shall not itself constitute either of company a permanent establishment of the other.

34. Further, as per Page 111 of the ld. Assessing officer's order (Page 367 to 488 of the assessee's Paperbook-I), it is observed that

“Considering the above facts and guidelines given by various authorities the undersigned is in view that 12% of the payment is reasonable portion of income which is reasonably be attributed to operation carried out in India by non-residents through their Permanent Establishment”

35. This observation in itself shows that the ld. Assessing officer thus contradicts all his arguments made to establish a Dependent Agency PE by suggesting that only 12% of payment made to the non-resident vendors by the assessee is attributable to income which in no way establishes existence of financial dependency of the third parties. Further, no documents or evidence was brought on record to conclude that contracts were habitually concluded by the third parties on behalf of the non-resident vendors. No enquiry with any of the parties was conducted by the ld. Assessing officer to establish that the conditions of existence of PE as per the DTAA were satisfied. Further, dependency of the third parties was not established by the ld. Assessing officer. It is the assessee's

contention that the ld. Assessing officer has incorrectly established existence of permanent establishment without conducting sufficient enquiries and bringing sufficient material on record in light of the articles of the DTAA's.

36. The ITAT in the case of *Pubmatic India Pvt. Ltd.*(2013) 36 *taxmann.com* 100(Mum Tribunal) held that “*where risks and rewards of the transaction are borne by the two contracting parties from different countries, the transaction is on a principal-to-principal basis and thus agency PE cannot be established.*”

37. Further, to interpret the words ‘has’ and ‘habitually exercises’, guidance taken from the Advance Ruling in the case of *TVM Limited vs. Commissioner of Income Tax* (199) 237 ITR 230 It was held:

*While the expression "has" may have reference to the legal existence of such authority on the terms of the contract between the principal and agent, the expression "habitually exercises" has certainly reference to a **systematic course of conduct on the part of the agent.***

38. The ld. Assessing officer has brought nothing on record to suggest that such a systematic course of conduct existed on part of the parties providing auxiliary services. We also notice that Ld. AO did not verify from these parties whether they were independent agents or acted wholly or mainly on behalf of the non-residents. The AO ought to have carried out thorough verification with the said parties. Instead, the AO has simply relied on the wordings of the purchase orders without verifying the complete facts of the case. No material has been brought on record by the AO to show that these Indian entities habitually acted on behalf of the non-

resident entities. The finding arrived at by the AO are based on irrelevant and insufficient material. The Hon'ble Supreme Court in the case of *CIT vs. R.D. Aggarwal* reported at 56 ITR 0020 (Refer Page No 117 to 126 of Paper Book-II) has held that:

“Turning to the facts of the present case, as found by the revenue authorities, contracts for the sale of goods took place outside the taxable territories, price was received by the non-residents outside the taxable territories, and delivery was also given outside, the taxable territories. No operation such as procuring raw materials, manufacture of finished goods, sale of good or delivery of goods against price took place within the taxable territories: the assessee merely procured orders from merchants in Amritsar for purchase of goods from the non-resident companies. The orders were offers which the assessee had no authority to accept on behalf of the non-residents. Some commercial activity was undoubtedly carried on by the assessee in the matter of procuring orders which resulted in contracts for sale by the non-residents of goods to merchants at Amritsar. But on this account no business connection of the assessee with the non-residents within the taxable territories resulted. The activity of the assessee in procuring orders was not as agents of the non-residents in the matter of sale of goods manufactured by the latter, nor of procuring raw materials in the taxable territories for their manufacturing process. Their activities led to the making of offers by merchants in the taxable territories to purchase goods manufactured by the non-residents which the latter were not obliged to accept. The expression "business connection" postulates a real and intimate relation between trading activity (1) 22 I.T.R. 241 carried on outside the taxable territories and trading activity within the territories, the relation between the two contributing to the earning of income by the non-resident in his trading activity. In this case such a relation is absent.”

39. As regards the decisions relied by Ld. AO we find that Ld. counsel for the assessee has placed contentions by distinguishing the facts of the case relied by Ld. AO. The facts of the assessee depicted in the chart below:

Case Law	Facts of Case Law	Facts in Assessee's Case
<i>GVK Industries v</i>	<i>The issue was pertaining to existence of</i>	<i>Only issue of Agency PE as</i>

<i>Case Law</i>	<i>Facts of Case Law</i>	<i>Facts in Assessee's Case</i>
<i>ITO (1997) 228 ITR 564</i>	<i>business connection</i>	<i>per DTAA was to be examined</i>
	<i>Held that the essence of BC is the existence of close, real, intimate, relationship, and common interest</i>	<i>Nothing brought on record to establish this.</i>
	<i>Held that BC to be determined on the facts and circumstances of each case</i>	
	<i>Correspondence between assessee company and non residents and assessee company examined to determine assessee company was handling the loan process</i>	<i>No such between alleged agents and non residents examined</i>
<i>Abdullabhai Abdul Kader v CIT (1952)22 ITR 241</i>	<i>The assessee was appointed as statutory agent as per Section 43</i>	<i>No document brought on record to prove agency contract.</i>
	<i>Issue was pertaining to existence of business connection as per Section 42</i>	<i>Only issue of Agency PE as per DTAA was to be examined</i>
	<i>Continuity of agency was established as per facts of the case and material available on record. Relationship between non-resident and assessee was established to be not of casual character with a few isolated transactions.</i>	<i>No such material brought on record</i>
	<i>Assessee was acting as a commission agent on behalf on non-resident for several years. Large number of transactions were entered into.</i>	
	<i>Correspondence between assessee and non resident from 1943 to 1947</i>	<i>No such direct correspondence between alleged agents and non-residents</i>
<i>TVM Limited v CIT (1999) 102 taxmann 578</i>	<i>The fact that TVI habitually concluded contracts on behalf of TVM was well established through facts of the case and material brought on record</i>	<i>No material brought on record to prove habitual behaviour.</i> <i>Assessee has quoted extract in his submission.</i> <i>While the expression "has" may have reference to the legal existence of such authority on the terms of the contract between the principal and agent, the expression "habitually exercises" has certainly reference to a systematic course of conduction the part of the agent.</i>
<i>- CIT v Vishakhapatnam Port Trust (1983) 144 ITR 146 (India)</i>	<i>The agent negotiated terms of the contracts with the customers</i>	<i>No evidence to suggest so in the assessee's case.</i>
	<i>Contracts between agent and Swiss company were brought on record and</i>	<i>No such material brought on record to establish authority</i>

<i>Case Law</i>	<i>Facts of Case Law</i>	<i>Facts in Assessee's Case</i>
- Gut Trader (Amsterdam) 1106/76 M II dt 20.06.1978 - Marine Insurance Agent (SC Netherlands)- Case no. 14458 dt 17 May, 1961 12. - Philip Morris Case no. 3367,3368,7682 and 10925 dt. 20.12.01	<i>examined. Authority was established on the basis of facts of the case.</i>	<i>of agents to conclude contracts on behalf of the non-residents.</i>

40. We further notice that Ld. AO in his finding has recorded that the foreign suppliers had PEs in India which marketed and sold the machineries to the appellant or that the contract or agreement for sale of plant and machineries were concluded in India or that the sale of machineries were concluded in India and thereby entire income on its sale accrued in India are based on no tangible or relevant material or evidence. Before recording such finding the AO did not bring any conclusive proof to substantiate such finding. The AO's findings were based on irrelevant information and material. Merely because correspondence between the appellant and the foreign suppliers was marked to the local representatives; did not ipso facto lead to conclusion that the Indian representatives were agents of the foreign companies having authority to conclude sale transactions. The appellant submits that the Indian representatives had merely liaised with the appellant for dissemination of information and they were in no way connected with finalization of the terms as well as orders placed on the foreign suppliers for plant and equipment

ultimately purchased. In particular it emerges that these representatives had no role whatsoever in connection either with supply of equipments or installation and commissioning of the equipment and plants at the appellant's site at Satna.

41. Also on perusal on the copies of purchase order/agreements with the foreign suppliers which contain the terms and conditions we find that these documents clearly spelt out the prices agreed to be paid by the appellant for supply of plant and machinery. These documents categorically specified the price agreed between the parties for "supply" of plant and equipments. In the original proceedings u/s 201 the appellant had filed copies of invoices raised by the foreign suppliers and other documents prepared at the time of processing of documents by the Customs department while complying import formalities and payment of duties. With reference to these documents it was clarified that the prices specified in the purchase order or agreements matched with the prices specified in the invoices raised by the customers. It was also clarified at the time of clearance of custom barrier, custom duties was assessed on the basis of declared value of the plant. These documents thus establish beyond doubt that ownership of plant and equipment was transferred in the assessee's favour outside India and the transactional documents prepared at the material time declared the price as specified in the purchase order. The price so declared was accepted by Indian Customs Department for collecting customs duty. In other words in customs proceedings the said Revenue department accepted the declared value of plant and equipment supplied by the foreign companies and where the

property in the goods supplied was transferred outside India. On these facts therefore it was wholly inappropriate for the to allege that the sale of equipment was completed in India and therefore the income accrued in India. The transactional documents show that the entire value creation in supply of plant and machinery by foreign companies had taken place outside India prior to the date on which the ownership in the assets was transferred in assessee's favour. In the circumstances no part of any income associated with or embedded in sale of plant and machinery accrued in India and therefore liable to be taxed. For these reasons the assessee had no obligation to deduct tax u/s 195 of the Act. Without appreciating these material facts and tangible evidences on record the AO in the most arbitrary manner held that income embedded in supply of plant and machinery was liable to be taxed in India.

42. Further we find that Ld. AO computing income to the foreign remittance was entirely arbitrary, high pitched and based on no material evidences. The documentary evidences on record clearly show that the deliveries of plant and machinery were taken by the appellant outside India and the property in goods passed in assessee's favour outside India. It is a settled legal proposition that even if any income is to be imputed to any transaction on account of business connection then also the entire income associated with the transaction cannot be considered to be assessable in India. What is chargeable to tax in India is the income which accrues or arises as a result of business activities carried on in India. It is not AO's case nor he has proved by the cogent evidence that all business activities connected with manufacture and supply of

plant and equipments were carried on in India and therefore whole of the profits arising from sale were liable to be taxed in India. According to AO the profit margin of the foreign suppliers on sale of equipments was 12%. The entire profit which the foreign manufacturers allegedly earned; have been held by AO to be “income” accruing in India. In other words in AO’s opinion even though the foreign suppliers conducted their manufacturing operations outside India yet the entire income from supply and sale of machinery accrued only in India and was therefore liable to be taxed in India. In the impugned order the AO failed to identify as to which specific activity giving rise to income was carried on by the agents of the foreign supplier in India and which resulted in accrual of income. The AO was not permitted to make a high pitched assessment arbitrarily; alleging that the activities carried on by the agents in India. However in the most perfunctory and high handed manner the AO estimated that 125 of the remittance amount represented income of the foreign suppliers which accrued in India from supply of plant and machinery. The entire process of quantification of income and the sum payable thereon was conducted by the Ld. AO only on conjecture, surmise and suspicion. The Ld. AO fail to take into consideration the material facts and evidences on record nor he considered applicable legal provisions and in violation of all cannons of taxation, he arbitrarily determined alleged income chargeable to tax.

43. We, therefore, under the given facts and circumstances of the case and on careful analyzing the purchase order,

documentary evidences find that majority of the transactions are for supply of items like plant and machinery and equipment and are not for providing any other additional services relating to installation and supervision charges. In the cases where such charges were paid the same have already been subjected to tax. Ld. AO grossly erred in analyzing the issue of PE of the non-resident vendors in light of the provisions of section 5(2)(b) r.w.s. 9 of the Act completely ignoring the finding of this tribunal that provision of DTAA are more favourable to the assessee and therefore PE of the vendors was required to be analysed only in view of the Article 5(5) of DTAA which prescribes certain conditions of the period of such installation and supervisory work limit. Ld. AO has not recorded any such finding. Even otherwise on our examination of the facts we find that the transaction carried out between the assessee and non-resident vendors are on principle to principle basis and rates were finalized by way of communication between principle to principle and there was no permanent establishment of the foreign supplies in India as per relevant provisions of the DTAA. We notice that

the foreign supplies have not exceeded the threshold time limit to constitute the PE as specified in the respective DTAA. We hold that the alleged Indian entities(agents) did not had any authority to conclude contracts on behalf of the non-resident suppliers and the alleged Indian entities do not maintain any stock of goods or mercantile on behalf of the alleged non-resident entities in India. We also hold that the alleged Indian entities/agents are not mainly or wholly securing orders on behalf of the non-resident in India. Therefore, the finding of both lower authorities of constituting PE of the vendors in India deserves to be set aside and since we have hold that none of the alleged non-resident entities/vendors have any permanent establishment under the provisions of section 5(2)(b) r.w.s. 9 as well as DTAA, finding of Ld. CIT(A) in treating the assessee in default for not charging tax u/s 195 of the Act is reversed. Accordingly, ground no.3,4 & 5 of both appeals in ITANo.33 & 34/Ind/2020 are allowed.

44. Ground No.6 raises common issue for not allowing credit for payment of tax deposit to the credit of Central Government from time to time is consequential in nature in

view of our decision of allowing the assessee's ground no.1 & 2 raising legal issue quashing the assessment order as illegal and bad in law and allowing ground no.3,4 & 5 on merits of the case.

45. Ground no.7 is general in nature which needs no adjudication.

46. In the result, Assessee's appeals ITANo.33 & 34/Ind/2020 are allowed.

The order pronounced as per Rule 34 of ITAT Rules, 1963 on 31.01.2022.

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /Dated : 31 .01.2022

Patel/PS

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/
DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore