

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'D', NEW DELHI**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER  
AND  
MS. ASTHA CHANDRA, JUDICIAL MEMBER  
(THROUGH VIDEO CONFERENCING)**

ITA No.1381/Del/2019  
Assessment Year: 2015-16

<b>DDIT Circle – 3 (1)(1) New Delhi</b>	<b>Vs</b>	<b>Western Union Financial Services Inc. C/o BSR &amp; Associates LLP, Building No.10, 8<sup>th</sup> Floor, Tower-B, DLF Cyber City, phase-II, Gurugram (Haryana)-122002 PAN No.AAACW1936E</b>
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Appellant by	Sh. Sanjay Kumar, Sr. DR
Respondent by	Sh. Tarandeep Singh, Advocate

Date of hearing:	14/02/2022
Date of Pronouncement:	14/02/2022

**ORDER**

**PER N. K. BILLAIYA, AM:**

This appeal filed by the revenue is preferred against the order of the CIT(A)-43, New Delhi dated 20.12.2018 for A.Y. 2015-16.

2. The grievance of the revenue read as under :-

1. *Whether on the facts and in the circumstances of the case and in law, the CIT(A) has erred in holding that the income earned by the assessee from the business of money-transfer services in respect of remittances made to individuals in India is not liable to tax in India.*
2. *Whether on the facts and in the circumstances of the case and in law, the CIT(A) has erred in holding that the assessee does not have a Permanent Establishment ('PE') in India and therefore, profits attributable to operation in India are not liable to taxed in India as business profits in terms of the Article 7 of the India- USA DTAA.*
3. *Whether on the facts and in the circumstances of the case and in law, the CIT(A) has erred in holding that the software application installed on the machines in the premises of the agents and dedicated to the business of the money-transfer, do not constitute assessee's Permanent Establishment in India.*
4. *Whether on the facts and in the circumstances of the case and in law, the CIT(A) has erred in holding that the representatives of the assessee in India do not constitute its Dependent Agent PE in India.*
5. *Whether on the facts and in the circumstances of the case and in law, the CIT(A) has erred in not attributing to India any profits against the business activities carried by it through it PE in India.*
6. *The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal*

3. At the very outset the counsel for the assessee stated that the issues raised by the revenue have been decided by the Tribunal in assessee's own case in earlier assessment years and drew our attention to the relevant decisions of this Tribunal.

4. Per contra the DR fairly conceded to this.

5. We have carefully perused the orders of the authorities below. The order of the CIT(A) shows that at para -5.5 he has followed the earlier years orders in assessee's own case and allowed the appeal of the assessee.

6. This Tribunal in ITA No.7211/Del/2017 order dated 20.09.2021 for A.Y.2013-14 had the occasion to consider the similar grievance. The relevant findings of the coordinate Bench read as under :-

5.0 We have carefully considered the facts of the case in light of the orders of the Co-ordinate Benches of this Tribunal for Assessment Years 2001-02 to 2010-11. In ITA No.4889/Del/2004, for Assessment Year 2001-02, the Co-ordinate Bench of this Tribunal had considered this issue at length and had reached the conclusion that though the assessee had a business connection in India, it had neither fixed placed PE nor agency PE in India and in absence of any PE in India the profits, if any, attributable to India operations could not be assessed as business profits under Article 7 of the India-US DTAA. It was also held that the agents engaged by the assessee were independent agents under Article-5(4) of the India US-DTAA and they did not have the necessary authority to conclude the contracts of the assessee and, on that premise, it was held that there is no agency PE of the assessee in India. Under similar circumstances, the Co-ordinate Bench of the Tribunal held that though the assessee had business connection, it did not have any fixed placed PE nor agency placed PE in India, and, in the

absence of any such PE in India, the profits, if any, attributable to India operations could not be assessed as business profits under Article-7 of the India US DTAA. The relevant paragraphs of the order of the ITAT are being reproduced herein under for a ready reference:-

*“(c) Is the software "VOYAGER" the PE of the assessee?*

*26. The department has made out a case that the software, which affords access to the agents to the assessee's mainframe, computers in USA for the purpose of finding out the matching of the MTCN numbers, has been installed in the premises of the agents and hence taken together with the premises constitutes the PE. The premises of the agents are either owned or hired by them. There is no evidence to show that the assessee can as a matter of right enter and make use of the premises for the purpose of its business. The software is the property of the assessee and it has not parted with its copyright therein in favour of the agents. The agents have only been allowed the use of the software in order to gain access to the mainframe computers in the USA. Mere use of the software for the purpose from the premises of the agents cannot in our opinion lead to the decision that the premises-cum-software will be the PE of the assessee in India. Under article 5.2(j) and installation may amount to a PE provided it is used for the exploration of natural resources. Therefore, even if the software is to be considered as an installation, since it is not used for exploration or exploitation of natural resources it cannot per se be treated as a PE.*

.....

*Agency PE:*

*28. The stand of the income-tax department is that the agents are not "independent agents" under article 5.5 of the treaty but are "dependent agents" under article 5.4(a) of the treaty.*

29. (A) Are the agents "independent agents"?

30. We shall first address the question whether the agents are "independent agents" under article 5.4. Three conditions are required to be satisfied in order that an agent may be said to be an independent agent: (1) he should be acting in the ordinary course of his business; (2) his activities should not be devoted wholly or almost wholly on behalf of the foreign enterprise for whom he is acting as agent and (3) the transactions between the foreign enterprise and the agent should be at arm's length.

31. The argument of the learned CIT (DR) was that the agents were not carrying on the activity in the ordinary course of their business. What is "business" has been explained in various decisions. In the leading case of *Narain Swadeshi Weaving Mills v. CEPT* [1954] 26 ITR 772 the Supreme Court explained that business connotes some real, substantive and systematic course of activity or conduct with a set purpose. In *Liquidators of Pursa Ltd. v. CIT* [1954] 25 ITR 265 the Supreme Court held that underlying the expression "business" is the fundamental idea of continuous exercise of an activity. In *Barendra Prasad Ray v. YTO* [1981] 129 ITR 295 the Supreme Court again held that the word is of wide import and means an activity carried on continuously and systematically by a person by the application of his labour and skill with a view to earning income. Therefore any activity which is being systematically and continuously carried on with the object of earning profits is a business activity. That way, the activity engaged in by the agents of paying the monies to the beneficiaries or claimants in India, after satisfying them- selves about their identity and after accessing the MTCN number to verify the genuineness of the claim, amounts to carrying on of the business of money transfer. The agreement of agency is initially for a period of 5 years and to be renewed for successive periods of one year each. The agents could appoint sub-agents for carrying out the activity. They have to maintain records and measure up to the standards set by the assessee. They have received training from the assessee in the use of the software and in

*the communication systems. All these are activities which are carried on systematically and continuously with a set purpose and hence amount to business.*

32. *But then Mr. Rajnish Kumar contended that this was not an activity in the "ordinary course of the business" of the agents, as their ordinary business is in local money transfer in the case of the Department of Posts and banks and not in trans-border money transfer and that in the case of nonbanking financial companies and tour operators appointed as agents money transfer business, whether locally or internationally, is not in their ordinary course of business. In the case of the Department of Posts, it is well-known that they accept money orders for transfer of funds within India. Engaging themselves in the same type of business with international ramifications is just an extension of their business. It cannot be said that it is not in the ordinary course of their business. The same is the case with commercial banks. Though strictly speaking it may not be part of their banking business, as the expression is defined in the Banking Regulation Act, 1949 and as contended by Mr. Rajnish Kumar, still it is nobody's case that it is not a lawful activity which they have embarked upon. In fact, they have obtained the approval for such activity from the RBI under section 3(c) of the FEMA. The approval granted by the RBI to Bank of Punjab Ltd. has been filed in the paper book. Though the approval is only for the purpose of FEMA, as rightly pointed out by the learned CIT(DR), the activity engaged in would still, in our opinion, amount to a business, though not banking business, because it has been carried on systematically and continuously with the objective of earning commission. Having regard to the variegated services provided by the banks these days, which cannot be ignored, all with a business motive, it seems to us too technical an objection to say that the activity carried on by the assessee's agents in India is not a business activity in the ordinary course of their business. Non-banking financial companies deal with money belonging to others and the activity of paying out monies on behalf of the Western Union Financial Services Inc., must be viewed as part of their business activity. In the case of tour operators, acting*

*as agents of an established firm engaged in the international money transfer business may be conducive to their business. A broad view of the matter has to be taken in these matters. We are therefore satisfied that the objection of the Department cannot be accepted.*

33. *The second question to be considered is whether the activities of the agent are wholly or almost wholly devoted to the assessee. So far as the Department of Posts and commercial banks are concerned, the objection of the Department cannot be countenanced at all. The Department of Posts, as noted earlier, functions under the aegis of the concerned Ministry of the Government of India. Its main activity is to serve the public in India in the matter of sending/receiving letters, parcels, packets etc. within or to/from outside India, money orders within India, maintaining small savings account in several forms such as savings certificates, time-deposit accounts, postal life insurance etc. They have a vast network throughout the country. They are a service organization for the benefit of the general public and it would be a misnomer to say that their activities are wholly or almost wholly devoted to the Western Union Financial Services Inc., of the USA. The income-tax authorities have not brought out any data, as they ought to have, to show that the activities undertaken by the Department of Posts on behalf of the assessee herein constitute such a large part of their activities that it can be said that the Department of Posts are dependent on the assessee for their revenues. The position is the same in the case of commercial banks, non-banking financial companies and tour operators appointed as the agents of the assessee. There is no evidence to show that the extent of their activities for the assessee, compared to all their activities, is so large that it can be said that they are dependent on the assessee for their earnings or revenues. The agents in the present case have not been shown to be economically dependent on the assessee. The income-tax authorities have stated that the agents have not acted in that capacity for any other entity engaged in the money transfer business and therefore their activities are wholly or almost wholly devoted to the assessee. We do not see how this conclusion follows. The agents, as we have seen earlier, have their own businesses or activities amounting to business. They are not carrying on the activity for the assessee, as agents, in exclusion of their other businesses or activities. In this situation, just because they are not acting as agents*

*for any other company carrying on money transfer business it cannot be said that their activities are wholly or almost wholly devoted to the assessee.*

34. *The learned CIT(DR) has drawn our attention to paragraphs 36 to 38.8 of the revised commentary on the OECD model and has relied on the same in support of his argument that the agents in the present case are not independent agents within the meaning of article 5.5 of the DTAA. The commentary discusses what in general are the tests to be applied to ascertain whether the agent is an independent agent or not. The extent of legal dependence or control, the undertaking of risks, the fact whether the agent is subject to the control of the principal for the manner in which the work is to be carried out etc. have been discussed. Much of the discussion loses relevance to the controversy before us where we have to apply article 5.5 which requires that the activities of the agent must be wholly or almost wholly devoted to the foreign enterprise. This is the test laid down in the article. Even on this aspect, paragraph 38.6 of the revised commentary has this to say:*

*"Another factor to be considered in determining independent status is the number of principals represented by the agent. Independent status is less likely if the activities of the agent are performed wholly or almost wholly on behalf of only one enterprise over the lifetime of the business or a long period of time. However, this fact is not by itself determinative. All the facts and circumstances must be taken into account to determine whether the agent's activities constitute an autonomous business conducted by him in which he bears risk and receives reward through the use of his entrepreneurial skills and knowledge. Where an agent acts for a number of principals in the ordinary course of his business and none of these is predominant in terms of the business carried on by the agent legal dependence may exist if the principals act in concert to control the acts of the agent in the course of his business on their behalf."*

*What we thus understand from the language used in article 5.5 is that the agent's activities for the foreign enterprise must constitute a large chunk of all his activities taken together so that it can be said that he is economically dependent largely on the activity. Nothing has been brought on record to suggest this. Even if you take the risk factor, the "to send" specimen form which was filed before us in the course of the hearing while explaining the transaction makes it clear on the reverse that the assessee will be liable to refund the principal amount of a money transfer (at the applicable rate of exchange at the time the refund is made) upon the written request of the sender if payment to the recipient is not made within 30 days excluding Sundays and holidays and that the same will be the case of the fees charged. It goes on to say that the assessee or his agent will in no case be liable for damages for the delay, non-payment or underpayment of the money transfer. The agent is not therefore liable to any risk on this account.*

35. *We now proceed to consider the question whether the transactions between the agents and the assessee are under arm's length. The agreements filed before us show that the "base compensation" is 30 per cent in the case of the Department of Posts and 25 per cent in the case of others. It may be reduced under clause 6.2 of the agreement with the Department of Posts if the assessee were to assume responsibility for the advertising and promotion of the services or to establish a customer service centre to handle customer queries. The reduction shall not exceed 10 per cent of the gross revenues earned by the agent concerned from the money transfer business done by it in the relevant year. In the case of banks appointed as agents, the amount of reduction is left to the determination of the assessee. There is no material to show that the rates of compensation are higher in other cases so as to indicate that the agents were discriminated against. The higher rate of compensation in the case of the Department of Posts is probably because its reach is much wider compared to the commercial banks, NBFCs or tour operators. The terms of appointment of sub-agents are*

*uniform in all cases. Thus there seems to be no basis for the charge that the compensation paid is not adequate for the services rendered by the agents. There is no finding contrary to the claim made by the assessee that the rates of compensation are uniform throughout the world. In these circumstances, there is no merit in the claim that the transactions between the assessee and the agents are not under arm's length.*

36. *The result is that (1) the agents are acting in the ordinary course of their business; (2) their activities are not devoted wholly or almost wholly to the foreign enterprise and (3) the transactions are under arm's length. Therefore the agents are independent agents under article 5.5 of the treaty.*

37. *(B) Are the agents "dependent agents"?*

38. *It is now well-settled that merely because the agents are not "independent agents" it does not automatically follow that they are "dependent agents" under the DTAA and that the question has to further examined under article 5.4 of the DTAA. In other words, even if the agent is shown to be not an independent agent, it has to be further shown that he is a dependent agent within article 5.4 and that it must be shown that he has and habitually exercises an authority in India to conclude contracts in the name of the foreign enterprise. In TVM Ltd. v. CIT [1999] 237 TTR 230, a decision rendered by the AAR, it has been accepted that when an agent failed to come up to the standard of independence referred to in article 5.5, the issue regarding PE is not closed but has to be resolved in terms of article 5.4. It was further held that the presence of the words "unless his activities are limited to the purchase of goods or merchandise for the enterprise" in clauses (i) and (ii) may suggest a narrower interpretation restricting the article to agents involved in such activity and as saying that mere purchase or sporadic sale of goods through an agent will not be sufficient to merit such an agent being considered a PE, but that this is not the correct view as it would ignore the generality of the preceding words of the paragraph*

*merely because exceptions are carved out in the latter part of the aforesaid clauses only in respect of a particular category of agents (viz., those buying or selling goods). It was held that paragraph 4 of the article "is applicable in all cases where the enterprise in a Contracting State has an agent in the other who does not have an independent status. Such a person will be deemed to be a permanent establishment only if he has, and exercises, the authority to conclude contracts in the name of the enterprise. But even the existence of such authority will not make him a permanent establishment (i) if he is a mere agent for purchase of goods or merchandise; or (ii) being an agent for sale of goods or merchandise is allowed to habitually to maintain a stock of the goods of the enterprise and effect sales there from. The conclusion seems inevitable that even a non-independent agent can be deemed to be a permanent establishment only if he can act independently in the matter of concluding contracts on behalf of the principal, on his own, freely and without control from the latter..." (pages 241-42 of the report). It is therefore necessary to examine whether the agents in the present case have authority, or habitually exercise authority to conclude contracts for the assessee. Here also, the observations of the AAR in the above case are worth reproducing: At page 242-43 it was noted that paragraph 4 of the article uses two expressions: "has" and "habitually exercises" the authority to conclude contracts on behalf of the foreign enterprise. It was held that "While the expression "has" may have reference to the legal existence of such authority on the terms of the contract between the principal and agent, the expression "habitually exercises" has certainly reference to a systematic course of conduct on the part of the agent. If, despite the specific provision of the soliciting agreement, it is found, as a matter of fact that TVI is habitually concluding contracts on behalf of TVM without any protest or dissent, perhaps it could be presumed either that the relevant provisions of the agency contract are a dead letter ignored by the parties or that the principal has agreed implicitly to TVI exercising such powers notwithstanding the terms of the "contract". The AAR has further observed that this view is reinforced*

*by the Commentary on the OECD Model of Double Tax Conventions as well as the views of text book writers like Klaus Vogel and Baker.*

39. *In line with the above, we have to examine the facts of the case to find out first whether the agents have the authority to conclude contracts (on behalf of the assessee). There is no express authority given to them in the agreement and our attention was not drawn to any clause therein to that effect. All that the income-tax authorities have stated is that (a) that the agents carry out in India the commitment given by the assessee to the remitter of the money abroad and (b) that the agents have the power to appoint sub-agents to do their work. From these facts, taken singly or together, it cannot be inferred that the agents either have the authority to conclude the contracts or have habitually exercise the authority without any protest from the assessee. In paragraph 33 of the commentary referred to in the preceding paragraph, under the heading "Authority to conclude contracts", it has been stated: "the authority to conclude contracts must cover contracts relating to operations which constitute the business proper of the enterprise. It would be irrelevant, for instance, if the person had authority to engage employees for the enterprise to assist that person's activity...". This paragraph has been quoted approvingly by the AAR in TVM Ltd.'s case (supra) (page 244 of the report). Thus the fact that the agents (in the present case) have the authority to appoint sub-agents does not mean that they (agents) have the authority to conclude contracts. The terms of appointment of sub-agents given at page 22 of the paper book as attachment to the contract of agency with Karnataka Bank Ltd. lists the duties and responsibilities of the sub-agents regarding money transfer service requirements, advertising and promotion, exclusivity, locations and hours of operations, payment for the service, delivery standards, maintenance of records, security and confidentiality, accounting, use of software, indemnity, conditions of termination etc. Nowhere in the sub- agency agreement has any authority to conclude contracts has been given to them. In fact, when the agents themselves have no such authority under their agreement, they*

cannot delegate the same to their sub-agents (*delegatus non potest delegare*).

40. There is also no material to hold that the agents have "habitually" exercised the authority to conclude contracts. As already noted, the authority must be to conclude contracts in the conduct of the business proper of the foreign enterprise. The fact that the agents conclude in India the commitment of the assessee made abroad cannot be considered as an authority to conclude contracts. The contract is between the remitter abroad and the assessee. It is entered into outside India. The agents are not party thereto. The agents merely carry out the concluding step in the arrangement embodied in the contract. In other words, the assessee undertakes outside India to transfer the money to India. It is only the payment part of the undertaking that is executed by the agents in India. The contract is already concluded outside India. The agent has no say over the contract. He has to merely execute the payment part, after satisfying himself as to the genuineness of the transaction and the identity of the beneficiary in India. By executing the last leg of the contract which has already been concluded (outside India) he is not concluding the contract for the assessee, much less habitually. The appointment of sub-agents is merely to facilitate the work of the agent. That apart, what is considered to be a "duty" cannot be considered to be an "authority". By making payment to the beneficiary, the agent in India is only performing his duty under the agreement of agency, for which he is remunerated; he is not exercising any "authority", certainly not an authority to conclude contracts on behalf of the assessee. The words "duty" and "authority" are incompatible with each other. The dictionary meaning of the word "duty" is "assignment/burden/commitment that one is obliged to do by law or by calling of one's business". It connotes an obligation, which a person is bound to perform. Per contra, "authority" in law belongs to the province of power (Page 124 of K.J. Aiyar's *Judicial Dictionary*, 13th edition, Butterworths). According to Salmond (*Jurisprudence*, 10th ed., page 243), "the ability conferred upon a person by the law to alter, by his own will directed to that

*end, the rights, duties, liabilities or other legal relations, either of himself or of other persons must be present ab extra to make a person an 'authority". Judged by these tests, the fact that the agents in India pay out the money to the beneficiaries or claimants, which they are bound to under the agreement with the assessee for which they are remunerated does not appear to us to be a case of exercise of any authority. Thus, the agents do not habitually exercise the authority to conclude the contracts on behalf of the assessee.*

*41. For the above reasons, we are of the view that there is no agency PE of the assessee in India. In the absence of any PE in India, it follows that the profits, if any, attributable to the Indian operations cannot be assessed as business profits under article 7 of the treaty."*

5.1 The conclusions reached by this Tribunal for Assessment Year 2001-02 have thereafter been followed by the other Co-ordinate Benches of this Tribunal in Assessment Years 2002-03, 2003-04, 2004-05, 2005-06, 2007-08, 2008-09, 2009-10 and 2010- 11. Facts being similar for all the years involved in this matter, we find it difficult to reach a different conclusion and we are of the opinion that the consistent view taken by the Tribunal for all the earlier assessment orders cannot be disturbed without any comparable reason. We, therefore, hold that findings of the Ld. CIT(A) cannot be interfered with. The grounds raised by the Department are dismissed.

7. On finding parity of facts, respectfully following the decision of the coordinate Bench (supra) we decline to interfere with the findings of the CIT(A).

8. In the result, the appeal filed by the revenue is accordingly dismissed.

9. The order is pronounced in the open court on 14.02.2022 in the presence of both the rival representatives.

Sd/-  
**(ASTHA CHANDRA)**  
**JUDICIAL MEMBER**

Sd/-  
**(N. K. BILLAIYA)**  
**ACCOUNTANT MEMBER**

\*NEHA\*

Date:-14.02.2022

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	14.02.2022
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	14.02.2022
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	