IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 1220/Mum./2021
(Assessment Year : 2017–18)

UPS Asia Group Pte. Ltd.
Bhagwati Compound
Plot no.2, Compartment 10/11
Marol Co–operative Industrial Estate
Off. M.V. Road, Andheri (East)
Mumbai 400 059 PAN – AABCU5192M ……. Appellant

v/s

Asstt. Commissioner of Income Tax
International Taxation ……. Respondent
Circle–4(3)(1), Mumbai

Assessee by : Shri Nitesh Joshi
Revenue by : Shri Milind S. Chavan, Sr. AR

Date of Hearing – 03.02.2022	Date of Order – 08/03/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The captioned appeal has been filed by the assessee against the final assessment order dated 29.04.2021 passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 ("*the Act*") by the Assessing Officer for the assessment year 2017–18.

2. In the present appeal, primarily, two issues arise for our consideration viz., (i) whether or not the assessee has a Business Connection under section 9(1)(i) of the Act and a Permanent Establishment (hereinafter referred to as *"P.E."*) under Article–5 of the India–Singapore Double Taxation Avoidance Agreement (hereinafter referred to as *"India–Singapore DTAA"*); and (ii) if the assessee is said to have Business Connection / P.E., then how much of the profit can be attributed to the said Business Connection / P.E. particularly when the transaction is at arm's length price.

3. The brief facts of the case as emanating from the records are: During the relevant assessment year, the assessee filed its return of income on 30.11.2017, declaring total income of Rs.1,35,759. The assessee is a company incorporated under the laws of Singapore and is engaged in the business of provision of supply chain management including the provision of freight forwarding and logistic services. The assessee had entered into a *"Regional Transportation Services Agreement"* w.e.f. 01.01.2012 with Indian Associated Enterprise ("*Indian A.E.*") namely UPS SCS (India) Pvt. Ltd. for the provisions of freight and logistics services. Under the Transportation Agreement, the assessee arranged to perform international freight transportation through the Ocean Liner / Airlines and provides overseas support services, while the Indian A.E. performed freight and logistics services in India to its India customers and to the assessee.

4. During the course of assessment proceedings, the assessee was asked to explain as to why the Indian A.E. should not be treated as Business Connection of the assessee in India under section 9(1)(i) of the Act and profit be attributable thereto for the relevant assessment year. The Assessing Officer, vide draft assessment order dated 27.12.2019, passed under section 144C of the Act held that the assessee had a Business Connection in India under section 9(1)(i) of the Act in the form of its Indian A.E. and thus its business income attributable to operation in India is taxable in India. The Assessing Officer further held that the Indian A.E. of the assessee constitutes P.E. of assessee in India within the meaning of Article–5(1), 5(2) and 5(8) of India–Singapore DTAA. The Assessing Officer following the approach adopted in the assessment order for the assessment year 2015–16, in assessee's own case, attributed profit of Rs.2,09,53,496 to the said P.E. of the assessee in India.

5. The assessee filed objections before the Dispute Resolution Panel (hereinafter referred to as *"the DRP"*) against the addition proposed in the draft assessment order. The DRP, vide its directions dated 17.03.2021, following its directions issued in assessee's own case for the assessment year 2015–16, rejected the objections filed by the assessee. The Assessing Officer, in conformity with the directions issued by the DRP, passed the final assessment order under section 143(3) r/w section 144C(13) of the Act. Being aggrieved, the assessee is in appeal before us.

6. During the course of hearing, Shri Nitesh Joshi, the learned Authorised Representative (hereinafter referred to as *"the learned A.R."*) appearing for the assessee submitted that the Indian A.E. of the assessee was remunerated at arm's length price and, therefore, no further profit is required to be attributed in the present case. In support of his submissions, the learned A.R. placed reliance upon the decision of the Co–ordinate Bench of the Tribunal rendered in assessee's own case for the assessment years 2013–14, 2014–15 and 2015–16.

7. On the other hand, Shri Milind S. Chavan, the learned Departmental Representative (hereinafter referred to as *"the learned D.R."*) appearing for the Revenue submitted that the decision relied upon by the Tribunal in assessee's own case for the preceding assessment years pertained to DTAA between India and Mauritius and thus is not applicable to the facts of the present case. The learned D.R. further submitted that the determination of the profit attributable to the A.E. should be on the basis of the provisions of the Act.

8. We have considered the rival submissions and perused the material available on record. At the outset, it is pertinent to note that the Transfer Pricing Officer, vide order dated 28.01.2021, accepted the value of international transactions as reported by the Indian A.E. in Form no.3CEB filed along with its return of income and made no adjustment to same. Thus, it is not disputed that the transaction between the assessee and its Indian A.E. was conducted at arm's length and the transfer pricing analysis

of the same was also accepted by the Transfer Pricing Officer. We find that on identical issues, the Co–ordinate Bench of the Tribunal in assessee's own case vide order dated 14th July 2021, passed in UPS Asia Group Pte. Ltd. v/s DCIT, ITA no.7171/Mum./ 2017, etc., for the assessment years 2013–14, 2014–15 and 2015–16, has allowed the assessee's appeal by observing as under:–

> *"4. So far as the above issue is concerned, learned representatives fairly agree, that admittedly as the assessee has paid arm's length remuneration to its Indian agent- as determined by the Transfer Pricing Officer, the issues is covered by the coordinate bench's decision dated 29th January 2021 in the case of ADIT Vs Asia Today Limited, in ITA No 1878 & 1879/Mum/2008 for the assessment years 2002-03 & 2004-05. Learned representatives fairly accept that position. We see no reasons to take any view of the matter than the view taken by the coordinate bench in the aforesaid decision wherein the coordinate bench has inter alia observed as follows:-*
>
> > *"6. To adjudicate on these appeals, at this stage, only a minimal facts need to be taken note of. The assessee before us is a foreign telecasting company incorporated in Mauritius and having a tax residency certificate of Mauritius. It sells advertising time and collects subscription revenues through its Indian affiliates Zee Telefilms Limited and El Zee, but its claim was that since it does not have any permanent establishment in India, no part of its income was taxable in India. The Assessing Officer did not accept the claim. He was of the view that its Indian agent constitutes virtual projection of the foreign company, and, therefore, it has a permanent establishment in India, in the light of Hon'ble Andhra Pradesh High Court's judgment in the case of CIT Vs Vishakhapatnam Port Trust (144 ITR 146). Referring to this judgment, and analyzing the facts of the case of the assessee, in the assessment order for the assessment year 2002-03, for example, the Assessing Officer concluded as follows:*
> >
> > *5.2.3 Now keeping the above in view point, one has to look into the factual aspects of the case, particularly the following:*
> >
> > - *The assessee could not have earned any income from India but for its Indian agent, ZTL/EI Zee.*
> > - *The 'brand name' used by the assessee is same as that of its agent in India, that is, ZEE. Thus, for persons desirous of doing business with the assessee in India, there is no difference between ZTL/EI Zee and Asia Today Ltd. it is seen that in a number of TDS certificates issued to the assessee, the name 'Zee TV' or 'Zee*

ZTL/EI Zee Cinema' or 'Zee Telefilms' were used. There terms were therefore, used interchangeably.

- *The income stream of the assessee is from selling of advertising time and these are 'sold' by ZTL/EI Zee. Almost all the advertisers are from India and the advertisements are solicited by the Indian company. The advertisers book the slots on the channel by coming into contact with employees of ZTL/EI Zee at their office. The other stream of revenue is 'subscription revenue' which is also collected by ZTL/EI Zee on behalf of the assessee.*

- *The payments are collected by ZTL/EI Zee and the same is remitted to Mauritius by it.*

- *The employees of ZTL/EI Zee are employees of Zee group as a whole and they perform functions as required by ATL also.*

- *In the case of other telecasting channels also it is held by the revenue authorities that their agent in India constitute a Permanent Establishment.*

5.2.4. The above stated factual position clearly brings out that the assessee's case falls under Article 5(1) of the Indo-Mauritius treaty when the business of the assessee is carried out through a fixed placed in India and in effect, is a virtual projection of the assessee in India."

7. The Assessing Officer further observed that, without prejudice to the above analysis, the assessee has an agency permanent establishment in India, under article 5(4) of India Mauritius DTAA, inasmuch as its Indian agents are the dependent agents. As for the plea that in case the assessee is held to have a dependent agent permanent establishment, as was held by the Assessing Officer, no further profits can be attributed in the hands of the assessee as the agent has been paid arm's length remuneration services rendered, the Assessing Officer rejected the said plea, and observed as follows:

5.3.3 <u>No Further Profits can be taxed in view of Article 7(2) of the Treaty:</u>

The next submission of the assesses is that even if it is assumed that there is a PE in India, as per Article 7(2) of the Treaty, where an enterprise carries on business in India through a PE, the profits attributable to such PE shall be the profits that the PE would have made, if it were a distinct and separate enterprise dealing independently with the enterprise of which it is a PE. Thus, the profits attributable to the PE shall be the profits it would have made, if it were an independent enterprise. Since the assessee is making an arm's length payment to ZTL/EI Zee, ZTL/EI Zee would have made the same profits dealing with an independent enterprise. Since the said profits are already taxed in the hands of ZTL/EI Zee, no further profits can be attributed to the activities performed by it. Further, the assessee has laid Emphasis on CBDT Circular No. 5 dated September 28, 2004 which states that profits attributable to a PE have to be computed having regard to the arm's length principle. For the detailed reasons given in following paragraphs, I do not find merit in

the claim of the assessee that if payment to ZTL/EI Zee is made at arm's length, then it extinguishes the tax liability of the assessee in India.

8. It was in this backdrop that the taxability of the assessee, in respect of advertisement revenue and subscription revenues earned through its agents in India, was confirmed. However, when he carried the matter in appeal before the learned CIT(A), he held that the assessee does not have any permanent establishment in India. Therefore, the assessee cannot be taxed in respect of its income from Indian operations. The relevant facts for the other assessment year are, as learned representatives fairly agree, materially similar. The Assessing Officer is aggrieved and in appeal before us. The assessee's cross-objections, however, deal with an even more fundamental aspect. That aspect is that given the fact that the assessee has paid arm's length remuneration to its Indian agents, no further taxability can be attributed to its income earned through the agents in India.

9. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

10. We find that it's an admitted position that the assessee does not have any office or place of management of its own, and its presence in India is only through its agents. Undoubtedly, in terms of Hon'ble Andhra Pradesh High Court's path-breaking judgment in the case of Vishakhapatnam Port Trust (supra), " 'permanent establishment' postulate the existence of a substantial element of an enduring or permanent nature of a foreign enterprise in another country <u>which can be attributed to a fixed place of business in that country</u>" and "it should be of such a nature that it would <u>amount to a virtual projection of the foreign enterprise of one country into the soil of another country</u>" [Emphasis, by underlining, supplied by us, here as also elsewhere in this order]. What is equally important is in the fundamental analysis justifying the existence of permanent establishment under Article 5(1) and 5(2), as we have reproduced earlier, there is not even a whisper of a mention about any fixed place of business. All this analysis points out is that "The assessee could not have earned any income from India but for its Indian agent, ZTL/EI Zee" and that "The employees of ZTL/EI Zee are employees of Zee group as a whole and they perform functions as required by ATL also", but then the agent and the principal being from the same busines group would not obliterate their separate legal existence. It is only elementary that there cannot be a permanent establishment under the basic rule, i.e., 5(1), unless there is a fixed place of business. It is by now well settled in law that in order to constitute a fixed place permanent establishment under Article 5(1), there has to a fixed place of business from which business of the foreign enterprise is carried out, and such a place of business should be at the disposal of foreign enterprise. As observed by a coordinate bench of this Tribunal, relying upon the landmark Special Bench decision in the case of Motorola Inc Vs DCIT [(2005) 95 ITD SB 269 (Del)] and in the case of Airlines Rotables Ltd Vs JDIT [(1911) 44 SOT 368 (Mum)], "The physical test, i.e., place of business test, requires that there should be a physical location at which the business is carried out. However, mere existence of a physical location is not enough. This location should also be at the disposal of the foreign enterprise

and it must be used for the business of foreign enterprise as well. A place of business should be at the disposal of the foreign enterprise for the purpose of its own business activities. This place has to be owned, rented or otherwise at the disposal of the assessee, and a mere occasional factual use of place does not suffice". Even a case is not made out for the satisfaction of this condition by the Assessing Officer, and, as such, there is no case for the existence of a permanent establishment under Article 5(1). As for the permanent establishment under Article 5(2), even by definition, there cannot be a permanent establishment under Article 5(2) unless it is at least alleged to be covered by one of the specific clauses in article 5(2). As we discuss the case made out by the Assessing Officer, it is also important to note that the Assessing Officer concludes his relevant analysis by adding that "In the case of other telecasting channels also it is held by the revenue authorities that their agent in India constitute a Permanent Establishment", but in none of these cases the permanent establishment is said to be under basic rule, i.e., Article 5(1) and Article 5(2), and in all these cases, the permanent establishment is dependent agency permanent establishment, i.e., under Article 5(4). Even the case of the Assessing Officer thus hinges on the applicability of Article 5(4). There can be permanent establishments through the presence of the agency, for example. There can be virtual projections even without a fixed place of business, such as in the case of a dependent agency permanent establishment, but such cases will be covered by article 5 (4) rather than article 5(1) and 5(2). The detailed analysis by the Assessing Officer, as extracted earlier in this order, also makes that position evident. At best, therefore, it is a case of dependent agency permanent establishment under Article 5(4), and learned Departmental Representative also accepts that. There is no conflict between 'virtual projection of a foreign enterprise' and the 'dependent agency permanent establishment', and it's in this light that we have to take note of the analysis of legal position. There can be simple situations in which a foreign enterprise operates through an agent, acting as a franchise, and such a franchise can virtually project business of the foreign enterprise on the soil of another country. Clearly, therefore, just because there is virtual projection of business, as the case is made out by the Assessing Officer, it is to be inferred that that there is a permanent establishment under the basic rule, i.e., Article 5(1) an 5(2), and negate the existence of a dependent agency permanent establishment, as would at best emerge out of the facts marshalled out by the Assessing Officer. As we are examining this aspect of the matter, it may also be useful to refer to the following extracts, defining permanent establishment, from the India Mauritius Double Taxation Avoidance Agreement [(1984) 146 ITR (St.) 214]:-

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 the enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include—

(a) a place of management ;
(b) a branch ;
(c) an office ;
(d) a factory ;
(e) a workshop ;
(f) a warehouse, in relation to a person providing storage facilities for others ;
(g) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources ;
(h) a firm, plantation or other place where agricultural, forestry, plantation or related activities are carried on ;
(i) a building site or construction or assembly project or supervisory activities in connection therewith, where such site, project or supervisory activity continues for a period of more than nine months.
(j) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or connected project) for a period or periods aggregating more than 90 days within any 12 month period.

3. Notwithstanding the preceding provisions of this article, the term "permanent establishment" shall be deemed not to include :

(a) the use of facilities solely for the purpose of storage or display of merchandise belonging to the enterprise ;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display ;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise ;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or for collecting information for the enterprise ;
(e) the maintenance of a fixed place of business solely—
(i) for the purpose of advertising,
(ii) for the supply of information,
(iii) for scientific research, or
(iv) for similar activities,

which have a preparatory or auxiliary character for the enterprise.

4. Notwithstanding the provisions of paragraphs (1) and (2) of this article, a person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State [other than an agent of an independent status to whom the provisions of paragraph (5) apply] shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if:

(i) he has and habitually exercises in that first-mentioned State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or

(ii) he habitually maintains in that first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfils orders on behalf of the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted exclusively or almost exclusively on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.

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

11. The case of the Revenue is thus clearly confined to the existence of DAPE on the facts of this case. The question thus arises as to what are the tax implications of the existence of a dependent agent permanent establishment (DAPE) under Article 5(4). The DAPE is, after all, a type of permanent establishment, and the very concept of permanent establishment is a compromise between source rule and residence rule inasmuch as it provides justification to trigger source jurisdiction taxation over business activities of a foreign enterprise. Unless there is a PE in the source jurisdiction, there cannot be taxation of business profits of the foreign enterprise in the source jurisdiction, and when there is a PE in the source jurisdiction, only so much of profits of the foreign enterprise, as are attributable to a PE, can be taxed in the source jurisdiction- as is the unambiguous mandate of Article 7(1). It is in this context one has to examine the tax implications of DAPE, and that tax implication is that the profits attributable to the DAPE are brought to tax in the source jurisdiction. The next logical point, therefore, as to how to compute profits attributable to a DAPE, and it is this aspect of the matter which has been a subject matter of academic debates and controversies. There are two approaches to it i.e., to borrow the terminology employed by International Tax Law Reports (see 2007, Volume 9; Part 5; at pages 963-964), first- a "single taxpayer" or "zero-sum approach", and, second- "two taxpayers" or "non zero-sum approach". While Philip Banker, a well known international tax lawyer, has all along advocated zero-sum approach, late Klaus Vogel touched a different chord, in his column 'Tax Treaty Monitor' in the 'Bulletin for International Taxation (November 2007 at page 475) and given his approval for "two taxpayers approach". The latter is also in consonance with Authorised OECD Approach of the OECD. On materially similar facts of dependent agency permanent establishment for a similarly placed foreign telecasting company as in this case, in the case of DDIT Vs Set Satellite (Singapore) Pte Ltd [(2007) 106 ITD 175 (Mum)], a coordinate bench, speaking through one of us, (i.e. the Vice President), had upheld the "two taxpayer approach", in computation of DAPE profits, and observed as follows:

11. The particular difficulty in the case of a dependent agent permanent establishment is that DAPE itself is hypothetical because there is no establishment - permanent or transient- of the GE in the PE state. The hypothetical PE, therefore, must be visualized on the

basis of presence of the GE as projected through the PE, which in turn depends on functions performed, assets used and risks assumed by the GE in respect of the business carried on through the PE. The DAPE and DA has to be, therefore, be treated as two distinct taxable units. The former is a hypothetical establishment, taxability of which is on the basis of revenues of the activities of the GE attributable to the PE, in turn based on the FAR analysis of the DAPE, minus the payments attributable in respect of such activities. In simple words, whatever are the revenues generated on account of functional analysis of the DAPE are to be taken into account as hypothetical income of the said DAPE, and deduction is to be provided in respect of all the expenses incurred by the GE to earn such revenues, including, of course, the remuneration paid to the DA. The second taxable unit in this transaction is the DA itself, but this taxability is in respect of the remuneration of the DA. The provisions of the tax treaty are silent on this issue, and rightly so, because the taxability of the DA is quite distinct of the taxability of the enterprise of the contracting state which is in respect of PE of such an enterprise. At the cost of repetition, it is not the DA who constitutes PE of the GE, but it is by the virtue of a DA that the GE is deemed to have a PE, a DAPE though, in the other contracting state. We are of the considered view that in addition of the taxability of the DA in respect of remuneration earned by him, which is in accordance with the domestic law and which has nothing to do with the taxability of the foreign enterprise of which he is dependent agent, the foreign enterprise is also taxable in India, in terms of the provisions of Article 7 of the tax treaty, in respect of the profits attributable to the dependent agent permanent establishment. As we have elaborated earlier in this order, a dependent agent permanent establishment is distinct from the dependent agent. While computing the profits of this dependent agent permanent establishment, a deduction is to be allowed for the remuneration paid to the dependent agent as that is cost of operation of the dependent agent permanent establishment and as it has been incurred for generating the revenues attributable to such hypothetical permanent establishment. Let us take a very simple example to understand the mechanism of this approach. Let us assume that there is an electronic equipment distributor by the name of Sing Co. based in Singapore. He sources the electronic equipment from all over the globe and sells the same to its customers in India. Instead of having a regular office in India, and instead of carrying out the marketing activity in India, he projects his business in India through an Indian Co. by the name of Ind. Co. There is no dispute that Ind. Co. is a dependent agent of the Sing Co. In consideration of the services rendered by Ind. Co., Sing Co. pays Ind. Co. commission @ 30 per cent on sales plus reimbursement of expenses. Sing Co., however, procures the electronic equipment from China, shipped directly to India and sells it in India after a mark up of 200 per cent. We further assume that the reasonable handling costs of Sing Co. for souring the merchandise is 60 per cent on cost. In a particular year, Sing Co. sells goods worth $ 3 million in India. Let us further assume that expenses incurred by Ind. Co., to earn the agency remuneration, is $ 8,99,000. The profits taxable in India, in such a case and based on the treaty provisions before us, should be as follows :

A. Commission earned by Ind. Co. *$9,00,000*

Less : Deductible expenses of Ind. Co $ 8,99,000

Taxable in the hands of the Ind. Co. $ 1,000

B. Profits attributable to Sing Co.'s DAPE in India
Sales consideration 30,00,000
Less : Commission paid to Ind. Co. 9,00,000(-)
: Cost of purchases 10,00,000(-)

: Sing Co.'s handling charges 6,00,000(-)
25,00,000
Profit of the DAPE or, in other words,
profits Attribute to India operations of the Sing Co. $ 5,00,000

As far as 'A' in the above example is concerned, it does not have anything to do with the income of the foreign company. This taxability is in the hands of the domestic dependent agent and is on net basis after taking into account the expenses incurred by the agent for earning of remuneration whether or not the same relates to the business of the foreign company or not. As regards 'B' above, it represents the earnings of the foreign company attributable to the dependent agent permanent establishment, on account of its having a dependent agent in source country. This income is taxable in the hands of the foreign company in the source country and the tax credit in respect of such taxability will be available to the foreign company in residence country. If, in this example, we are to assume that the income of the PE is only the remuneration earned by the agent on net basis, we will end up in a situation that while profits of Sing Co. attributable to India operations will be $ 5,00,000, the taxability of the profits will be confined to only $ 1,000. What is to be taxed under Article 7 is income of the foreign enterprise attributable to the permanent establishment in the host country. The income attributable to the permanent establishment in the host country is the income attributable to foreign company's operations in the host country, which, in turn, implies the income attributable to the activities carried on the foreign enterprise in the host country. That income, as shown in 'B' above is the income arrived at by taking into account revenues generated by the PE and deducting therefrom the expenditure incurred by the foreign enterprise to earn those revenues. However, it is open to the foreign enterprise to claim appropriate adjustment for the foreign enterprise's overheads and even a reasonable charge, on account of activities of the foreign enterprise carried on outside the host country, by treating the foreign enterprises as a fictionally separate entity.

12. Learned counsel, however, contends that since the profit attributable to the PE are the profits which the PE "might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is permanent establishment", the taxable profits of the foreign enterprise cannot extend beyond the profit earned by the dependent commission agent. The line of reasoning adopted by the learned counsel is that PE is nothing but the dependent agent, and, the taxability of PE can only, therefore, be in respect of the earnings of the agent. Learned counsel has, with his inimitable oration,

erudition and legal skills, woven a complex web of arguments to support this legal proposition. However, as it sometimes happens, the quality of arguments in support of a legal proposition is inversely proportional, proportional if it is, to the merits of the proposition sought to be advanced. This is one such occasion. Let us set out the reasons why we think so, and, in the process, deal with various arguments of the learned counsel one by one.

13. At the outset, we must reiterate that a dependent agent (DA) and a dependent agent permanent establishment (DAPE), in our humble understanding, are two distinct things. As we have stated earlier, it is as a result of existence of a dependent agent that the foreign enterprise is 'deemed to have' a permanent establishment in the country in which dependent agent is situated.

14. Under Article 7 of the treaty, the taxability is of the foreign company. What is taxable under Article 7 is profit earned by the foreign enterprise, as it Article 7(i) provides that "The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein". Agency remuneration paid by the foreign enterprise is not an income of the foreign enterprise but an expenditure of the foreign enterprise. The taxability of any profit under Article 7 has to be in the hands of the foreign company and not the host company of which dependent agent is resident. Therefore, in it is patently erroneous to suggest that by payment of tax liability by the dependent agent, tax liability of the foreign principal is discharged. So far as Article 7 is concerned, it deals with the taxability of the foreign company.

15. Under the scheme of the Act, the taxable unit is the foreign company, though the quantum of income taxable is such income as may be held to be attributable to the permanent establishment of the foreign company in India. The tax liability of the foreign company and not the Indian dependent agent. However, in case we are to uphold the stand of the learned counsel, we will end up in a situation that taxability of Indian company is to be allowed to extinguish tax liability of the foreign principal.

16. Learned counsel has relied upon the commentaries of various authors including Phillip Baker, Prof. Roy Rohtagi and Prof. David R. Davies. It is contended that according to these distinguished authors, payment of arms length remuneration by a foreign company to its agent extinguishes tax liability of the foreign principal. With respect, and for the reasons we have set out above, we are of the considered view that in the dependent agency permanent establishment situation, this proposition does not hold good. In any event, this approach proceeds on the assumption, which turns out to be fallacious assumption on the facts of the present case, that dependent agent and dependent agent permanent establishment are one and the same thing.

17. Learned counsel has then relied upon the order of this Tribunal in the case of Dy. CIT v.Roxon OY [2006] 103 TTJ (Mum.) 8911 which was authored by one of us. This decision, however, did not deal with the peculiarities of a dependent agent permanent establishment. This decision dealt with the taxability of the

installation PE, and, the principles dealing with computation of profits of installation PE, in our considered view, do not have any bearing on the computation of profits of the dependent agency PE. We are, therefore, not persuaded by this reasoning either.

12. Late Prof Klaus Vogel, one of the very eminent international tax scholars of our times, had favoured the path adopted by the coordinate bench. In his last in Tax Treaty Monitor (Bulletin for International Taxation, November 2007, page 475), referring to the above coordinate bench decision, he had this to say: "One can understand that many have problems imagining how profits should arise to a permanent establishment which, as the Tribunal itself repeatedly stated, does not exist in reality and is a non-entity "wholly hypothetical and fictional". Such sceptics should consider, however, that the parent enterprise as a rule will aim to realize receipts from the contracts concluded by the dependent agent which, in addition to compensating the agent's fee, include a surplus profit, for otherwise the parent would lack any commercial reason for employing the agent. This surplus is not– or only secondarily– attributable to activities in the parent's residence country. Rather, it is a profit that the parent obtains through employing the agent in the country in which the profits arise. Fairness ("inter-nations equity") requires that the surplus profit be taxed in that state. If the drafters of a treaty or model treaty want to provide this, they must notionally attribute it to a contact in that state. This does not mean that they must attribute it to a person or an object in the real world. In the world of law, a legal concept, a figure of thought, will do. The agency permanent establishment is such a figure of thought which makes it technically possible to connect the surplus profit to the agent's state. Thus, it is not only possible, but it is the rule that a profit exceeding the agent's compensation will be submitted to the agent's state". Philip Baker, another eminent international tax expert whose work in referred to, with approval and respect, in many of the judicial precedents from Hon'ble Courts above, did not agree with this approach. In his editorial comments in the International Tax Law Reports, he has favoured the other alternative approach to this issue, i.e., the single taxpayer approach. He observed that, "One view (to which editor of these law reports subscribes) is that if the dependent agent is being remunerated on a correct arm's length price for the function he performs, risks he assumes, and the assets he employs in his agency, there is no basis for attributing any further profits to the DAPE over and above the arm's length remuneration to the agent", and reasoned the same by observing that "As soon as one abandons the single taxpayer approach, one needs to start attributing the DAPE functions that were not performed by the agent, assets that were not employed by it and the risks that were not assumed by it. In other words, the two taxpayer approach requires an abandonment of reality and entirely hypothetical attribution which, in arm's length world which must have some basis in reality, is simply a licence for arbitrary allocation of profits. Ultimately, that's what Tribunal did here". There is thus a cleavage of academic opinion on the approach to the DAPE profit attribution and that is a highly contentious issue on the first principles.

When the matter travelled before Hon'ble High Court, however, these views of the coordinate bench did not find favour with Their Lordships. Rejecting the theory about separate profit attribution for the dependent agency permanent establishment vis-à-vis the dependent agent, Their Lordships have, in the judgment reported as Set Satellite Pte Ltd Vs CIT [(2009) 307 ITR 205 (Bom)], observed as follows:

> *10. From a reading of Article 7(1) of the DTAA it is clear that the profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. The profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment. In para 2 while determining the profits attributable to the permanent establishment the expression used is "estimated on a reasonable basis". The DTAA does not refer to arm's length payment. The principles contained in the matter of income from international transaction on an arm's length price are contained in section 92 of the Income-tax Act. The principles have been clarified by the Finance Act, 2001 as also Finance Act, 2002. From the order of the CIT, which has been accepted it is clear that the Appellant herein has paid to its PE on arm's length principle. It recorded a finding of fact that the Appellant had paid service fees at the rate of 15 per cent of gross ad revenue to its agent, SET India, for procuring advertisements during the period April 1998 to October, 1998. The fact that 15 per cent service fee is an arm's length remuneration is supported by Circular No. 742 which recognizes that the Indian agents of foreign telecasting companies generally retain 15 per cent of the ad revenues as service charges. Effective November 1998, a revised arrangement was entered into between the parties whereby the aforesaid amount was reduced to 12.5 per cent of net ad revenue (i.e., gross ad revenues less agency commission). Simultaneously, the Appellant also entered into an arrangement entitling SET India to enter into agreements, collect and retain all subscription revenues. Considering all these aspects and the fact that the agent has a good profitability record, it held that the Appellant has remunerated the agent on an arm's length basis.*
>
> *This finding of the Tribunal has not been disputed by the Revenue. The entire contention of the Revenue is that the advertisement revenue pertaining to its own channel and AXN Channel are also taxable in India.*
>
> *11. We may firstly point out that CIT has dealt with the issue as to why the advertisements received by the Appellant were not liable for being taxed in India based on the CBDT Circular No. 23, dated 23-7-1969 which clearly sets out that where a non-resident's sales to Indian customers are secured through the services of an agent in India, the assessment in India of the income arising out of the transaction will be limited to the amount of profit which is attributable to the agent's services, provided that (i) the non-resident principal's business activities in India are wholly channelled through his agent; (ii) the contracts to sell are made outside India; and (iii) the sales are made on a principal-to-principal basis. The CIT(A) had recorded a specific finding in favour of the Appellant in*

the affirmative on all three counts. It is in these circumstances that it was held that the advertisement revenue received by the Appellant may be from the customers in India is not liable for tax in India. That CBDT Circulars are binding needs no repetition. If authorities need be cited. We may now refer to the judgment of the Supreme Court in UCO Bank v. CIT [1999] 237 ITR 889. In that judgment the issue was whether Circular of 9-10-1984 was inconsistent or whether there was contradiction in the circular and Section 145 of the Income-tax Act. The Supreme Court observed that :—

"... In fact, the circular clarifies the way in which these amounts are to be treated under the accounting practice followed by the lender. The circular, therefore, cannot be treated as contrary to section 145 of the Income-tax Act or illegal in any form. It is meant for a uniform administration of law by all the income-tax authorities in a specific situation and, therefore, validly issued under section 119 of the Income-tax Act. As such, the circular would be binding on the department." (p. 901)

See also CIT v. Hero Cycles (P.) Ltd. [1997] 228 ITR 463 (SC). It would thus be clear that the Circular No. 23 would be binding on the Assessing Officer and had to be considered while assessing the tax liability of an assessee.

The Tribunal in its judgment has not considered the effect of the finding recorded by the CIT (Appeals) based on the Circular and which circular was relevant for the purpose of deciding the controversy in issue. This circular read with Article 7(1) of the DTAA would result in holding that the income from advertisement if neither directly nor indirectly attributable to that of the permanent establishment, would not be taxable in India. The Tribunal in fact in para 10 has recorded a finding that Article 7(2) provides that the arm's length price is the criterion for computation of these hypothetical profits. In our opinion the entire rational or reasoning given by the Tribunal has to be set aside. In matters of tax what has to be considered and more so in international transactions if there be a treaty, the provisions of the treaty and if the provisions of the treaty are more advantageous to an assessee, then the construction will have to be given which is advantageous to the assessee. At this stage we may note that on behalf of the assessee learned Counsel has produced an order passed by the Additional CIT (Transfer Pricing-II), Mumbai in the matter of determination of arm's length price with reference to all the transactions reported in Form No. 3CEB filed by the assessee. The assessee is SET India, the depending agent. The order records that the assessee is engaged in the business of providing audio-visual television content and also acts as an advertising agent of Set Satellite Singapore Pvt. Ltd. The assessee distributes these channels to the Indian cable operators and that the assessee has applied the TNM method to determine the arm's length price for its international transaction. It, however, clarified that the order is in respect of reference received for assessment year 2002-03 and not for subsequent assessment years.

12. We may now consider the judgment in Morgan Stanley & Co. Inc's case (supra). The Appeals dealt with the Double Tax Avoidance

Agreement (DTAA) between India and United States. That treaty advocated application of the arm's length principle or provided a mechanism for avoiding double taxation on income. The issue involved, Morgan Stanley and Company (for short, "MSCo.") and one of the group companies of Morgan Stanley, Morgan Stanley Advantages Services Pvt. Ltd. (for short "MSAS"). An agreement was entered into for providing certain support services to MSCo. MSCo. outsourced some of its activities to MSAS. MSAS was set up to support the main office functions in equity and fixed income research, account reconciliation and providing IT enabled services such as back office operations, data processing and support centre to MSCo. On 5-5-2005 MSCo. filed its advance ruling application . The basic question related to the transaction between the MSCo. and MSAS. The advance ruling was sought on two counts (i) whether the applicant was having PE in India under Article 5(1) of the DTAA on account of the services rendered by MSAS under the services agreement dated 14-4-2005 and if so (ii) the amount of income attributable to such PE. It was ruled that MSAS should be regarded as constituting a service PE under Article 5(2)(1). On the second question the AAR ruled that the transactional net margin method (TNMM) was the most appropriate method for the determination of the Arm's Length Price (ALP) in respect of the service agreement dated 14-4-2005 and it meets the test of arm's length as prescribed under section 92C of the 1961 Act and no further income was attributable in the hands of MSAS in India. The said ruling of AAR on the question of income attributable to the PE was the subject-matter of challenge by the Department. Insofar as the issue of PE is concerned the Supreme Court was pleased to hold that it agreed with the Ruling of the AAR that stewardship activities would fall under Article 5(2)(1). Dealing with the question of deputation, the Court held that on the facts that there is a service PE under Article 5(2)(1) and as such held that the Department was right in its contention that there exists a PE in India. Considering Article 7 of that treaty the Court observed that what is to be taxed under Article 7 is income of the MNE attributable to the PE in India and what is taxable under Article 7 is profits earned by the MNE. Under the Income-tax Act the taxable unit is the foreign company, though the quantum of income taxable is income attributable to the PE of the said foreign company in India. The Court observed that the important question which arises for determination is whether the AAR is right in its ruling when it says that once the transfer pricing analysis is undertaken there is no further need to attribute profits to a PE. The Court further noted that the computation of income arising from international transactions has to be done keeping in mind the principle of arm's length price. The Court further reiterated that the main point for determination is whether the AAR was right in ruling that as long as MSAS was remunerated for its services at arm's length, there should be no additional profits attributable to the applicant or to MSAS in India. After considering the various methods by which arm's length price can be determined the Court observed as under :—

> *"As regards determination of profits attributable to a PE in India (MSAS) is concerned on the basis of arm's length principle we have*

> *quoted Article 7(2) of the DTAA. According to the AAR where there is an international transaction under which a non-resident compensates a PE at arm's length price, no further profits would be attributable in India. In this connection, the AAR has relied upon Circular No. 23 of 1969 issued by the Central Board of Direct Taxes. This is the key question which arises for determination in these civil appeals."*

After discussing the various issues the Court in its conclusion held as under :—

> *"As regards attribution of further profits to the PE of MSCo. where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE. The situation would be different if the transfer of pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the PE for those functions/risks that have not been considered. The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represent the value of the profit attributable to his service. In this connection, the Department has also to examine whether the PE has obtained services from the multinational enterprise at lower than the arm's length cost."*

In our opinion considering the judgment, if the correct arm's length price is applied and paid then nothing further would be left to be taxed in the hands of the Foreign Enterprise.

13. Considering the above principle as may be discerned from the judgment in DIT (International Taxation) 292 ITR 416 (supra) it would be clear that—

(1) Considering the CBDT Circular No. 742 it would be fair and reasonable that the taxable income is computed at 10 per cent of the gross profits. In the instant case insofar as marketing services are concerned by the arm's length principle what has been paid is more than 10 per cent as can be seen from the order of CIT(A). This was not disputed by the revenue in its Appeal before the ITAT.

(2) The only contention advanced and which found favour with the Tribunal was that the advertisement revenue received by the assessee was also income liable to tax in India. The CIT(A) relied upon Circular No. 23 of 1969. That Circular read with Article 7(1) would result in holding that advertisement revenue received by the appellant are not taxable in India as long as the treaty and the Circular stands.

14. In the light of the above Appeal filed by the Appellant herein is allowed and the order of the ITAT is set aside. Merely because tax on income was paid for some assessment years would not stop the assessee from contending that its income is not liable to tax. The order

of CIT is restored except to the extent that it has said that it cannot interfere because the Appellant had paid the tax. That part is set aside.

13. In the light of Hon'ble jurisdictional High Court's judgment in the case of Set Satellite (supra), so far as profit attribution of a DAPE is concerned, the legal position is that as long as an agent is paid an arm's length remuneration for the services rendered, nothing survives for taxation in the hands of the dependent agency permanent establishment. Viewed thus, the existence of a dependent agency permanent establishment is wholly tax neutral.

14. An interesting offshoot of this legal position is that, as on now, the existence of dependent agency permanent establishment is of no tax consequence. Whether there is a DAPE or not, the taxation is only of the agent's remuneration, which is taxed anyway dehors the existence of a DAPE. Such an approach may sound somewhat incongruous from an academic point of view inasmuch as what was considered to be a threshold limit for source taxation ceases to have any relevance for source taxation, and as, on a conceptual note, PE, whether a fixed base PE, DAPE or any other type of PE, provides for threshold limits to trigger taxation in the source state, but then if as a result of a DAPE, no additional profits, other than agent's remuneration in the source country - which is taxable in the source state anyway dehors the existence of PE, become taxable in the source state, the very approach to the DAPE profit attribution may seem incompatible with the underlying scheme of taxation of cross border business profits under the tax treaties. These aspects, however, cannot come in the way of the binding force of judicial precedents from Hon'ble Courts above. The SLP against this decision is said to pending before Hon'ble Supreme Court, but that does not, in any way, dilute the binding nature of this binding judicial precedent. In all fairness to the learned Departmental Representative, however, we may take refer to observations in another coordinate bench decision in the case of Delmas France vs ADIT [(2012) 17 taxmann.com 91 (Mum)], to the effect, "Similarly, before accepting DAPE profit neutrality theory, we will still have to deal with learned Departmental Representative's plea that as per the law laid down by Hon'ble Supreme Court in the case of DIT v. Morgan Stanley & Co Inc. [2007] 162 Taxman 165 (SC), the arm's length remuneration paid to the PE must take into account 'all the risks of the foreign enterprise as assumed by the PE', but then in an agency PE situation, unlike a service PE situation which was the case before the Hon'ble Supreme Court, a DAPE assumes the entrepreneurship risk in respect of which agent can never be compensated because even as DAPE inherently assumes the entrepreneurship risk, an agent cannot assume that entrepreneurship risk. To this extent, there may clearly be a subtle line of demarcation between the dependent agent and the dependent agency permanent establishment. The tax neutrality theory, on account of existence of DAPE, may not indeed be wholly unqualified- at least on a conceptual note". However, these issues are wholly academic before this forum because Hon'ble jurisdictional High Court has taken a specific call on the issue to the effect that the Morgan Stanley decision of Hon'ble

Supreme Court covers the DAPE situations as well. In a series of decisions of the coordinate benches, the same view is reiterated. The successive coordinate benches in assessee's own case for different assessment years have upheld the contentions of the assessee and held that once an arm's length remuneration is paid to the agent, nothing further survives for taxation in the hands of the DAPE which, at best, can be brought to tax in the hands of the assessee. In any event, whatever be the academic justification for an alternative approach to the issue, the law laid down by Hon'ble Courts above is to be deeply respected and loyally followed. Respectfully following the law laid down by Hon'ble Courts above and consistent with the stand of the coordinate bench decisions, we uphold the plea of the assessee for the present years as well. We, therefore, hold that even if there is held to be a dependent agency permanent establishment on the facts of this case, as at best the case of the Assessing Officer is, it is wholly tax-neutral inasmuch as the Indian agents have been paid arm's length remuneration, and nothing further can, therefore, be taxed in the hands of the assessee.

15. It has not been the case of the revenue authorities at any stage that the remuneration paid to the Indian agent is not an arm's length remuneration for the services rendered by the agents concerned, yet a prayer is now made that the matter should be sent back to the assessment stage for detailed findings in this regard. In a written note filed by the learned Departmental Representative, it has been submitted that, " it is humbly submitted that in the case of DIT Vs Morgan Stanley (292 ITR 416 (SC) The Hon'ble Apex Court in para 32 of its order (page 124 of PB II) has carved out an exception. It has held that 'The situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a situation, there would be a need to attribute profits to the PE for those functions/risks that have not been considered. Therefore, in each case, the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the corporates on the basis of the concept of Economic Nexus is an important feature of Attributable Profits (profits attributable to the PE)'. Taking into considering the above and applying to the facts of the case, it is humbly submitted that all the international transactions entered into by assessee have not been examined by the authorities below". There is no material whatsoever before us to show, or even indicate, that the remuneration paid to the agents is not arm's length remuneration. In any case, the agent has been paid a remuneration at the rate of ten percent of the related revenues which is accepted as an arm's length price, in similar circumstances, in a large number of cases- including assessee's own cases for the assessment years, other than the assessment years in which this aspect of the matter is requested to be sent back for specific adjudication. Learned Departmental Representative himself submits that so far reliance of the assessment on the coordinate bench decisions for the assessment years 2006-07 to 2012-13 are concerned, "in the other cases relied upon by the assessee, the transfer pricing

adjudication was made while in the present case, no such adjudication was made, and hence the decisions are not applicable as distinguishable on facts". We have also noted that the matter has come up for specific consideration of the Assessing Officer, and yet he has not found any deficiencies on the specific issue of adequacy of arm's length remuneration. It is not that this aspect was not examined. It was examined but the Assessing Officer did not find specific fault in the agent's remuneration not being in accordance with the FAR analysis. He has rather proceeded to, in a way, disregard the foreign entity altogether by suggesting that no business risk is assumed by the foreign company, i.e. the assessee, as the content is provided by the Indian agent and the viewership is Indian, and, for that reason, the viewership is linked to the Indian PE. We have noticed that the Assessing Officer has specifically picked up the aspect of "functions and risk taken by the PE" under that heading and title of the paragraph 5.3.4, in the assessment year 2002-03 for example at page 31 of the assessment order, noted that "there is no reason as to why the assessee should assume risk after having acquired the content in a working state from the content provider", that "all risks for up linking and finally relaying the signals in India is borne by the transponder company and not the assessee", and, therefore, concluded that "in view of the above discussions, it can be seen that major part of the risk in terms of market risk and technology risks are borne by the ZTL/El Zee" and that "almost 85% to 90% revenues from advertisement and subscription of the assessee comes through Indian viewership which is undoubtedly linked with the PE i.e., ZTL/El Zee". This is not the Indian viewership which is relevant in this context. What was relevant was the role played by the agent in India and whether the remuneration paid by the assessee company, for the services of the agent, was a fair and arm's length remuneration vis-à-vis the functions performed, assets employed and risks assumed by the Indian agent. No issues are raised on the inadequacy of agent's remuneration by the Assessing Officer, and now a fresh inning is sought to find these inadequacies and improve the case of the revenue. That is impermissible. In his analysis, while the Assessing Officer has proceeded on sweeping generalizations about the risks assumed by the PE but there is no specific FAR analysis which could support that the agent's remuneration not being an arm's length remuneration, and the Assessing Officer has proceeded on the basis that all the business risks of the assessee (i.e. the foreign company) are borne by the PE as PE is the content provider and responsible for up linking activity. That's too sweeping a generalization to meet any judicial approval, and, on the same set of findings, the coordinate benches have disapproved the stand of the Assessing Officer. Under these circumstances, we see no reasons to remit the matter to the file of the Assessing Officer for a fresh round of ALP ascertainment proceedings, as prayed by the learned Departmental Representative. The plea of the assessee, as raised in the cross-objections, therefore, merits acceptance. Whether there is a DAPE or not, there are no additional profits to be brought to tax as a result of the existence of the DAPE, and, therefore, the question about the existence of a DAPE on the facts of this case is wholly academic.

16. Once we hold, as we have held above, that in the light of the present legal position, existence of dependent agency permanent establishment in wholly tax-neutral, unless it is shown that the agent has not been paid an arm's length remuneration, and when it is not the case of the Assessing Officer, as we have noted earlier, that the agents have not been paid an arm's length remuneration, the question regarding the existence of dependent agency permanent establish–ment, i.e., under article 5(4), is a wholly academic question. We humbly bow to the law laid down by Hon'ble Courts above. The limited argument before us is that here is a case of dependent agency permanent establishment, and the existence of a DAPE, in the light of these discussions, is wholly tax-neutral- particularly in the light of the legal position regarding profit attribution to the DAPE. We need not, therefore, deal with the question about the existence of a DAPE, as it is an academic exercise with no tax effect involved. The related grounds of appeal are thus infructuous.

5. Even though learned representative have fairly agreed that the issues raised in these appeals are squarely covered by the aforesaid decision, the learned Departmental Representative has nevertheless relied upon the stand of the Assessing Officer. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Respectfully following the same, we uphold the plea of the assessee and hold that the observations above will apply mutatis mutandis here as well. The assessee gets the relief accordingly."

9. Insofar as the submissions made by the learned D.R. is concerned, we do not find any merit in same as the issues have already been decided by the Tribunal in favour of the assessee and against the Revenue in the preceding assessment years in assessee's own case. Further, facts and circumstances of the present case are similar to the assessment year 2015–16, which have also not been denied by the Revenue. Thus, respectfully following the decision of the Co–ordinate Bench rendered in assessee's own case cited supra, we hold that when the Indian A.E. is remunerated at arm's length price no further profit attribution is required and the issue of existence of P.E. becomes wholly tax neutral. Accordingly, the addition made by the Assessing Officer is directed to be deleted.

10. In the result, appeal by the assessee is allowed in terms of our aforesaid findings.

Order pronounced in the open court on 08/03/2022

Sd/-	**Sd/-**
PRASHANT MAHARISHI	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 08/03/2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai