

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

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI YOGESH KUMAR, JUDICIAL MEMBER**

ITA No. 907/DEL/2017 [A.Y 2011-12]

M/s Kronos Aktiengesellschaft C/o Mohinder Puri & Co 1A-D, Vandana, 11 Tolstoy Marg New Delhi	Vs.	The Dy. C.I.T Circle 2(1)(2) International Taxation New Delhi
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PAN: AADCK 9912 B

ITA No. 2617/DEL/2017 [A.Y 2011-12]

The Dy. C.I.T Circle 2(1)(2) International Taxation New Delhi	Vs.	M/s Kronos Aktiengesellschaft C/o Mohinder Puri & Co 1A-D, Vandana, 11 Tolstoy Marg New Delhi
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PAN: AADCK 9912 B

(Applicant)

(Respondent)

**Assessee By : Shri Percy Pardiwalla, Sr Adv
Shri Jatinder Singh, CA**

Department By : Shri Sanjay Kumar, Sr.DR

Date of Hearing : 21.12.2022

Date of Pronouncement : 30.12.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above cross appeals by the assessee and revenue are preferred against the order of the Id. CIT(A) - 43, New Delhi dated 16.12.2016 framed u/s 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to Assessment Years 2018-19 and 2019-20.

ITA No. 907/DEL/2017 [Assessee's appeal]

2. The grievances of the assessee read as under:

“1. That the order passed by the Commissioner of Income-tax(Appeals)-43, New Delhi [“CIT (A)”] is bad both in law and on facts of the case.

2. That the learned CIT(A) has erred in upholding the subsidiary of the assessee viz. Kronos India Pvt. Ltd. (“KIPL”) as Dependent Agent Permanent Establishment of the assessee, based on his erroneous observations that the conditions of Article 5(5) of the DTAA between India and Germany (“the DTAA”) are fulfilled in the present case.

3. That the learned CIT(A), without appreciating the nature of the business activities carried out by the assessee and KIPL, has erred in making erroneous observations, contrary to the facts, that:

a) KIPL habitually secures orders for the assessee;

- b) *KIPL maintains stock of inventory of the assessee; and*
- c) *KIPL is economically dependent on Kronos AG.*

4. *That the learned CIT(A) has erred in upholding the taxation of offshore supplies in the hands of the alleged Permanent Establishment (“PE”), without appreciating that offshore supplies are not chargeable to tax;*

- a) *under the provisions of the Act;*
- b) *as per Article 7 of the DTAA read with Protocol thereto.*

4.1 *That the learned CIT(A) has erred in confirming attribution of profits in relation to offshore supplies to the alleged Dependent Agent PE, by erroneously holding that the receipts from such business activities were effectively connected with the alleged PE in India.*

4.2 *That without prejudice to the above ground, the Cui has erred in confirming 10% rate of profit on offshore supplies as applied by the Assessing Officer as against actual/global rate of profit available on record, for the purpose of attributing the same to the alleged PE of the assessee.*

4.3 *That, without prejudice to the above grounds, the learned CIT(A) has erred in confirming attribution to the extent of 35% of profit pertaining to offshore supplies to the alleged PE of the assessee in India, on arbitrary basis.*

4.4 *That, without prejudice to the above grounds, the learned CIT(A) has erred in attributing profits in relation to offshore supplies, over and above the remuneration paid by the assessee to KIPL, not appreciating that KIPL was remunerated on arm's length basis for all the functions performed by it, as also accepted by the TPO.*

4.5 That, without prejudice to the above grounds, the learned CIT(A) has erred in not reducing the amount of commission paid to KIPL from the profit of the alleged PE as so computed, for the purpose of attributing and taxing additional income in the hands of the alleged PE.

5. That the learned CIT(A) has erred in wrongly observing that conditions of Article 5(2)(i) of the DTAA are fulfilled in respect of Installation & Commissioning activities, for holding a PE in India, without appreciating the facts of the case and position in law.

6. That the learned CIT(A) has erred in upholding the action of the learned AO of taxing the receipts from technical services and Installation & commissioning charges by the assessee @ 40%, by holding that the assessee has a PE in India, as against income offered by the assessee as taxable as 'fees for technical services' @ 10%.

7. That the learned CIT(A) has erred in confirming attribution of profits in relation to Installation & commissioning charges/ technical services, by erroneously holding that the receipts from such business activities were effectively connected with the alleged PE in India

7.1 That, without prejudice to the above grounds, the learned CIT(A) has erred in arbitrarily confirming 80% rate of profit on Installation & commissioning charges/ technical services as applied by the learned AO, for the purpose of attributing the same to the alleged PE of the assessee.

7.2 That, without prejudice to the above grounds, the learned CIT(A) has erred in confirming attribution of 100% of profit pertaining to Installation & commissioning charges/ technical services to the alleged PE of the assessee in India, on arbitrary basis.

7.3 That, without prejudice to the above grounds, the learned CIT(A) has erred in not reducing the amount of service charges paid to KIPL from the profit of the alleged PE as so computed, for the purpose of attributing and taxing additional income in the hands of the alleged PE.

7.4 That, without prejudice to above grounds, the learned CIT(A) has erred in upholding taxation of the amount of Installation & commissioning charges received from customers, offered to tax on conservative basis by the assessee without prejudice to its claim for non-taxability, in the absence of Installation PE in India of the projects.

8. That the learned CIT(A) has erred in mechanically holding the provisions of levy of interest under section 234B of the Act as consequential in nature, without appreciating that the provisions of the same are not applicable on facts and in law to the assessee for the year under consideration, as held by the Hon'ble High Court of Delhi in DIT v. GE Packaged Power Inc. [2015] 373 ITR 65 (Delhi).

9. That the learned CIT(A) has erred in directing the AO to compute arm's length price of Bank Guarantee, without appreciating that:

- a) *Bank Guarantee does not constitute income of the assessee in India under the provisions of the Act as well as the DTAA;*
- b) *The bank Guarantee was not given in the financial year relevant to the subject assessment year.
The direction as made is, as such, without jurisdiction.*

The appeal is within time as the order was received on December 27, 2016”.

3. Facts, as culled out from the orders of the authorities below show that the assessee is a German company and is a world market leader in beverage filling and packaging technology. It plans, develops and manufactures, supplies and installs machinery and complete systems for filling and packaging and for beverage product from outside India.

4. Kronos India Private Limited [KIPL] is a wholly owned subsidiary of the assessee and is primarily engaged in trading in machinery spares, undertaking engineering installation and commissioning projects, providing after sales services and marketing of products of its AEs.

5. The business profile of the assessee shows that it provides its services to its various customers in India. The assessee takes up the work of beverage filling and packaging technology. It plans, develops and manufactures, supplies and installs machinery and complete systems for filling and packaging and for beverage production for customers in India. The customers directly approach the assessee for their requirements, from all over the world including India and does not maintain any liaison office, Branch office, Project office, Godown/Warehouse or any other construction of business site in India.

6. Though the employees of the assessee have regularly visited India, the Assessing Officer, taking a leaf out of the TP Study Report of KIPL found that KIPL, has the following activities in India:

- Trading in Spare parts
- Engineering and after sales service
- Commission income

The Assessing Officer further noted that that KIPL is primarily engaged in procuring machinery spares from its AEs and marketing the products of AE. KIPL finds out the potential customers for the systems, machines and solutions for the beverage and food industry. KIPL procures machinery spares produced by its AE's and provides to its

customers along with engineering, commissioning and after sales services.

7. The Assessing Officer was carried away with the mention in the TP Study Report KIPL is wholly dependent on use of intangibles owned by the assessee. KIPL is the sole selling and marketing agent of the products of the assessee. KIPL Co-ordinates with the delivery and payment with the customer for which KIPL gets commission.

8. Basis the observations made in the TP Study Report of KIPL, the Assessing Officer formed a belief that KIPL should be treated as agency PE and further the Revenue derived by the assessee should be attributable/effectively connected with such agency PE.

9. In its reply, the assessee emphatically refuted the charges made by the Assessing Officer and strongly contended that it is not a Dependent Agent Permanent Establishment [DAPE] of the assessee. It was strongly contended that even in a case where an enterprise is not held as 'independent agent', it will not automatically become dependent agent.

10. It was brought to the notice of the Assessing Officer that KIPL has no authority to conclude the contracts on behalf of the assessee company. KIPL has never acted as the stockist of the assessee company and has never maintained the stock records on behalf of the assessee. It is a separate legal entity which was incorporated in 1997 and is an economically independent entity and the assessee does not have any financial control over KIPL.

11. The contentions of the assessee were dismissed by the Assessing Officer who was of the firm belief that KIPL is financially dependent upon the assessee and is fully depending on the assessee economically and habitually maintains stock inventory of the assessee and markets goods of the assessee in India and gets commission on habitually securing orders of the assessee.

12. The Assessing Officer was of the opinion that KIPL has not been remunerated for many activities performed beyond the mandate for which it has received commission and for such activities, KIPL has not been remunerated and such activities have led to creation of PE in India and such PE is required to be attributable to profit and finally assessed income of the assessee as under:

<i>FTS as declared in the return:</i>	<i>Rs. 8,15,42,594/-</i>
<i>Less: Expenses to be allowed @ 20% of FTS</i>	<i>Rs. 1,63,08,519/-</i>
<i>Taxable FTS (@ 40%) (A)</i>	<i>Rs. 6,52,34,075/-</i>
<i>Profit on Sales made to Indian Customers (B)</i>	<i>Rs.14,88,79,377/-</i>
<i>(As discussed above: 10% of (EURO 2,35,23,365 *63,29¹)</i>	
<i>Total income (A) + (B)</i>	<i>; Rs. 21,41,13,452/-</i>
<i>Total income proposed to be assessed</i>	<i>: Rs. 21,41,13,450/-</i>

13. Aggrieved, the assessee carried the matter before the ld. CIT(A) but without any success.

14. The ld. CIT(A), at para 5.14 of his order observed as under:

“I have already held that M/s Krones India constitutes a Dependent Agent PE of M/s Krones AG. I have also noted that several projects continued in India for more than 6 months. I also find that many experts/employees sent by M/s Krones AG in India shuttled between various projects of M/s Krones AG in India. Since I have already held that M/s Krones India constitutes a Dependent Agent PE of M/s Krones AG, I am not going further into this issue.”

15. Before us, the ld. counsel for the assessee argued at length and vehemently stated that both the authorities below have grossly erred on facts in treating the assessee as DAPE whereas the ld. DR strongly supported the findings of the Assessing Officer/DRP and read the operative part of the respective order.

16. We have given thoughtful consideration to the orders of the authorities below alongwith the relevant documentary evidences brought on record in light of Rule 18(6) of the ITAT Rules. Pursuant to the findings of the ld. CIT(A), the quarrel boils down to the determination of DAPE only. The allegations of the Assessing Officer /DRP in so far as DAPE is concerned are :

- (i) KIPL habitually secures orders for the assessee;
- (ii) KIPL maintains stock inventory of the assessee; and
- (iii) KIPL is economically dependent on the assessee.

17. The agreement consisting of Delivery of Kronos Products and services between the assessee and KIPL is at pages 3 to 8 of the Paper Book which have been duly considered by us. This agreement begins on 0101.2007.

18. A perusal of the agreement shows that KIPL does not carry out any manufacturing or processing activity in India using intangibles of the assessee and therefore, assumption of the Assessing Officer is factually incorrect. It further comes out from the agreement that research and development function and the risk in respect of technical obsolescence is assumed by the assessee only and not by KIPL as assumed by the Assessing Officer.

19. The plant as supplied has to be made to the specifications of each customer. The contracts for supplies are directly negotiated, concluded and signed by the assessee with the Indian customers, based on referrals made by KIPL as per its agreement with the assessee. Supplies are made on CIF basis by the assessee directly to the customers who bore the responsibility with respect to clearing, forwarding, loading and unloading, transportation and insurance.

20. KIPL is only required to coordinate KIPL the delivery and payment with the customer as part of its activities with respect to the order, for which it gets the commission. His allegation that KIPL habitually secures and concludes orders on behalf of the assessee is factually incorrect. In our understanding of the facts, mere undertaking marketing by meeting customers by one

enterprise does not constitute habitually securing and concluding order on behalf of the other enterprise.

21. In our considered opinion, for an enterprise to be considered as habitually securing orders wholly or almost wholly for the other enterprise, it is essential that the enterprise frequently accepts orders on behalf of the other enterprise or habitually represents to persons offering to buy goods or merchandise that acceptance of an order by such enterprise constitutes the agreement of the other enterprise to supply goods or merchandise under the terms and conditions specified in the order and further the other enterprise takes actions that give purchasers the basis for a reasonable belief that such person has authority to bind the other enterprise.

22. We are of the considered view that KIPL is only undertaking marketing enterprise and contracts are finalized by the assessee and signed by the assessee outside India. Therefore, KIPL cannot be said to be habitually securing and concluding order on behalf of the assessee.

23. Coming to the second and third allegation that KIPL maintains stock inventory and economically dependent on the assessee has to be considered in light of the following financials of KIPL:

INCOME			
Installation and Commissioning Charges		1,366,000	47,531,156
Installation and Commissioning Project		58,343,121	30,589,059
Service Charges - Local	6	22,615,445	9,807,162
Service Charges - Foreign	7	22,536,791	29,657,521
Increase / (Decrease) in Cost of Incomplete Projects	8	28,050,000	
Total		590,886,477	447,520,89

SCHEDULE - 3 : DEFFERED TAX ASSETS		
Deferred tax. Asset	3,074,437	785,121
TOTAL	3,874,437	785,121
SCHEDULE -4 : CURRENT ASSETS, LOANS AND ADVANCES		
Current Assets	17,818,000	4,821,675
Inventory (Valued at lower of cost and net realisable value)	17,818,000	4,821,675
Trading Inventory	28,050,000	
Cost of Incomplete Projects Unbilled	139,354,844	21,462,282
Service Charges	6,356,0671	231,671,247
	145,710,910	2531133,529

Sundry Debtors (Unsecured, cohsidorod good) Outstanding for more than six months Others		
SCHEDULE - 9 : COST OF SALES		
	4,821,675	1,043,300
Opening Stock Add: Purchases	326,948,085	276,110.779
	331,769,760	277,154,079
Less: Closing Stock	17,818,000	4,821,675
	313,951,760	272,332,404

24. It can be seen from the financials that the commission income of KIPL is only Rs. 6,74,61,516/- on total revenue of Rs. 59,08,86,477/- which comes to around 11.5% of total revenue which means that 89% of the Revenue of the assessee is from its own sources. Therefore, it cannot be said that KIPL is economically dependent on the assessee.

25. In so far a maintaining stock/ inventory is concerned, the Assessing Officer has based his findings on completely wrong facts. As can be seen from the above, the assessee is maintaining its own trading inventory. Therefore, the allegation of the Revenue is based on erroneous facts.

26. Article 5 of India - German DTAA reads as under:

“Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if this person,—

(a) has and habitually exercises in that State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise ;

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

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

6. An enterprise shall not be deemed to have a permanent establishment Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business and in their commercial and financial relations to the enterprise no conditions are agreed or imposed which differ from those usually agreed between independent persons.”

27. A conspectus reading of Article 5 brings out the following key points in connection with Agency PE:

- (i) A person is acting on behalf of an enterprise.
- (ii) This person is acting in the other contracting state, i.e. India.
- (iii) This person habitually concludes contracts or habitually play the principal role leading to the conclusion of contracts that are routinely concluded without material modification.
- (iv) Agency PE would not be triggered if the person is an independent agent and acting in the ordinary course of that business.
- (v) This person maintain in the other contracting state a stock of goods or merchandise from which that person regularly delivers goods or merchandise on behalf of an enterprise.

28. The agreement shows that entrepreneurial risk is with the assessee and sharing of risk indicates that each party perform non integrated business activities.

29. The co-ordinate bench Mumbai in the case of Airline Rotables 44 SOT 368 describes rationale of DAPE as follows:

“The rationale for dependent agent permanent establishment is simple. A foreign enterprise may chose between business activity itself , or having it done through a domestic agent. In case this domestic agent acts in the normal course of business, and is not wholly or almost wholly dependent on the foreign enterprise, the PE situation is out of reckoning because it is business of the agent, rather than business of the foreign principal, that the agent is mainly carrying out. In case of a dependent agent, the PE situation arises because when the foreign enterprise prefers to perform the business activity through a domestic agent, he does not need to depend on having a right to use a fixed place of business as the business is carried through the dependent agent. However, taxation would infringe neutrality vis-à-vis the choice of manner in which business is carried out , in the event tax position of a foreign enterprise is to depend on whether business is carried out by the foreign principal directly or through the a dependent agent - who, being a dependent agent, is integrated into principal’s business to a substantial extent. In case the tax position is to be based www.taxguru.in ITA No. 3254/Mum/06 Assessment year 1998-99 Page 23 of 31 on whether or not the business activities are carried out directly or through the agent, it would be a bit too easy to circumvent the PE taxation if no PE taxation is applied on business through the dependent agent permanent establishment. This is the unmistakable underlying principle behind the DAPE clause in tax treaties. It is thus clear that DAPE can come into existence only when business is carried out through the dependent agent.”

30. As mentioned elsewhere, the agreement with KIPL is effective from 2007 and we are in Assessment Year 2011-12 which means that no adverse view has been taken by the Revenue in the past and we have been told by the ld. counsel for the assessee that no adverse view has been taken by the Revenue after the present assessment.

31. Though the Assessing Officer has heavily relied upon the TP Study Report of KIPL, but has not brought any evidence on record that KIPL has habitually secured orders for the assessee. None of the customers have been examined by the Assessing Officer though the customers from India include renowned organizations like Nestle, Coco Cola, Pepsico etc.

32. Considering the facts in totality, we are of the considered view that the observations made in the TP Study Report of KIPL regarding scope of its business activities do not result in holding KIPL as DAPE of the assessee and further, since KIPL has been remunerated by the assessee for commission activities on arm's length basis, no further attribution is required in lieu of law laid down by the Hon'ble Supreme Court in the case of Morgan Stanley 292 ITR 416.

33. We, accordingly, hold that pursuant to the specific exclusion of independent agent under Article 5(5) of the DTAA, the case of the assessee falls outside the scope of PE. We, accordingly, direct the Assessing Officer to delete the impugned addition.

34. Appeal of the assessee is allowed.

ITA No. 2617/DEL/2017 [Revenue's appeal]

35. The only grievance is that the ld. CIT(A) erred in holding that the assessee could not be held liable to pay interest u/s 234 B of the Act.

36. This issue is no more res integra as it has now been settled by the decision of the Hon'ble Supreme Court in the case of DIT Vs. Mitsubishi Corporation 130 Taxmann.com 276 wherein the Hon'ble Apex Court has held as under:

“19. The dispute relating to the interpretation of the words “would be deductible or collectible” in [Section 209 \(1\) \(d\)](#) of the Act can be resolved by referring to the proviso to [Section 209 \(1\) \(d\)](#), which was inserted by the [Finance Act, 2012](#). The proviso makes it clear that the assessee cannot reduce the amounts of income-tax paid to it by the payer without deduction, while computing liability for advance tax. The memorandum explaining

the provisions of the Finance Bill, 2012 provides necessary context that the amendment was warranted due to the judgements of courts, interpreting [Section 209](#) (1) (d) of the Act to permit computation of advance tax by the assessee by reducing the amount of income-tax which is deductible or collectible during the financial year. If the construction of the words “would be deductible or collectible” as placed by the Revenue is accepted, the amendment made to [Section 209](#) (1) (d) by insertion of the proviso would be meaningless and an exercise in futility. To give the intended effect to the proviso, [Section 209](#) (1) (d) of the Act has to be understood to entitle the assessee, for all assessments prior to the financial year 2012-13, to reduce the amount of income- tax which would be deductible or collectible, in computation of its advance tax liability, notwithstanding the fact that the assessee has received the full amount without deduction.

20. We do not find force in the contention of the Revenue that [Section 234B](#) should be read in isolation without reference to the other provisions of Chapter XVII. The liability for payment of interest as provided in [Section 234B](#) is for default in payment of advance tax. While the definition of “assessed tax” under [Section 234B](#) pertains to tax deducted or collected at source, the pre-conditions of [Section 234B](#), viz. liability to pay advance tax and non-payment or short payment of such tax, have to be satisfied, after which interest can be levied taking into account the assessed tax. Therefore, [Section 209](#) of the Act which relates to the computation of advance tax payable by the assessee cannot be ignored while construing the contents of [Section 234B](#). As we have already held that prior to the financial year 2012-13, the amount of income-tax which is deductible or collectible at source can be reduced by the assessee while calculating advance tax, the Respondent cannot be held to have defaulted in payment of its advance tax liability. We uphold the view adopted in the

impugned judgement of the Delhi High Court in Civil Appeal No. 1262 of 2016 as well as by the Madras High Court in the Madras Fertilizers case (supra), that the Revenue is not remediless and there are provisions in the Act enabling the Revenue to proceed against the payer who has defaulted in deducting tax at source. There is no doubt that the position has changed since the financial year 2012-13, in view of the proviso to [Section 209](#) (1) (d), pursuant to which if the assessee receives any amount, including the tax deductible at source on such amount, the assessee cannot reduce such tax while computing its advance tax liability.”

37. In the result, the appeal of the assessee in ITA No. 709/DEL/2017 is allowed whereas appeal of the Revenue in ITA No. 2617/DEL/2017 is dismissed.

The order is pronounced in the open court on 30.12.2022.

Sd/-

**[YOGESH KUMAR]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 30th December , 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
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	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	