

**In Re: Abc**

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**Court :** Authority for Advance Rulings

**Decided On :** Oct-04-2004

**Reported in :** (2005)193CTRAAR328

**Judge :** S S Quadri, K Singh, K Gupta

**Appellant :** In Re: Abc

**Judgement :**

Syed Shah Mohammed Quadri, J. (Chairman), K.D. Singh and K.D. Gupta, Members For Appellant/Petitioner/Plaintiff: Dinesh Kanabar, Punit Shah and M.Gupta, Advs.Lakshminarayan Ram Gopal & Sons v. The Government of Hyderabad, (1954) 25 ITR 449 (SC); CIT (Inv.) v. Elbee Services Ltd.; Ministry of Finance (Tax Office) v.Philip Morris GmbH, 4 ITLR 903 1. In this application under s. 245Q(1) of the IT Act, 1961 (for short "the Act"), the applicant, (omitted), is an Indian company (hereinafter termed as "Indian JV Company"). It is a joint venture of a US JV Partner which is an American company holding 60 per cent equity shares and, Indian JV Partner, another Indian company, having 40 per cent equity shares. The US JV Partner is engaged in the business of international integrated transportation services. The Indian JV Partner is engaged in the business of a general sales agent for and on behalf of international and domestic airline companies in India. The American company is also another company incorporated in and, a tax resident of the USA (referred to in this ruling as 'the American company'). All these and some other companies are members of an international group of companies which are engaged in the business of international transportation services and use an international group logo/trademark.

On 30th Oct., 2000, the applicant entered into an agreement with the American company in regard to the international transportation services (hereinafter referred to as 'the transportation agreement') for the movement of parcels/packages within and outside India. Under the agreement, the applicant is to provide services to the American company for transportation of packages in India and the American company has to provide services to the applicant for transportation of packages throughout the world. For the services rendered by the American company to the applicant in respect of outbound consignments, it would make payment; so also the American company would pay to the applicant for the services rendered by it in respect of inbound consignments. The applicant and the American company work on principal to principal basis. The American company does not own or otherwise operate through any business premises in India. From January, 2001, the applicant has been carrying on business operations of international/domestic transportation of packages. On these facts, the applicant sought ruling of the Authority on the following question : "Whether the income derived by the American company, a company incorporated in and tax resident of USA, from the services rendered by it to the applicant under the International Transportation Services Agreement dt. 30th Oct., 2000, would be taxable in India having regard to the provisions of the IT Act, 1961, and the Double Tax Avoidance Agreement between India and USA ?" 2. The applicant requested the Authority to reframe the said question as under and there being no objection from the Revenue, the same is reframed as requested : "Whether the income arising to the American company, a company incorporated in and tax resident of USA, from transactions entered into by it with the applicant under the International Transportation Services Agreement dt. 30th Oct., 2000, would be taxable in India having regard to the

provisions of the IT Act, 1961, and the Double Tax Avoidance Agreement between India and USA?" 3. The jurisdictional CIT (referred to in this ruling as 'the Revenue') submitted its comments thrice. After passing the order under sub-s. (2) of s. 245R of the Act, the following comments are offered : The applicant-company is an agent of American company to carry out its business in India. The applicant is working directly under the control and supervision of the American company which has deputed the CEO and the general managers to look after its overall business.

The business operations of the international transportation of packages of the applicant are conducted in India under the brand name of the international group. The contents of the agreement show that in the case of inbound consignments, the responsibility of the American company does not cease on handing them over at the international hub; it is bound to deliver parcels to consignees in India either directly or through its agents. Further, the stipulation that the American company has to bear the loss or damage to the shipment, indicates that the risk is that of the American company and not of the applicant. Activities of the applicant in regard to inbound consignments constitute integral part of worldwide business of the American company and contribute to American company earning income in India. Therefore, they constitute activities of the American company in India. The Indian company is a dependent agent of the American company because the former habitually procures orders in India wholly or almost wholly for the latter which has business connection in India within the meaning of s. 9(1)(i) of the Act. The applicant is a permanent establishment (PE) of the American company in India. The profits attributable to American company from all its operations in India are, therefore, taxable under the Act.

4. In the rejoinder of the applicant, it is denied that the CEO and the general managers of the applicant are deputed by the American company.

It is also denied that the directors of the applicant are nominated by the American company. In regard to the international group logo, it is stated that the applicant being a member of the international group, is allowed to use the international group logo for carrying out its business activities in India like any other member of the group. It is pointed out that in respect of outbound consignments, the applicant picks up the parcels/packages in India and raises invoices on its customers. There is privity of contract between the applicant and the Indian customers. The applicant is responsible to the Indian customers for transportation of packages and also for the risk pertaining to the loss and damage to the consignments. It is submitted that the outbound consignments are not handed over to the American company but are rendered to international airline/onboard courier for transportation and delivery outside India. Insofar as the inbound consignments are concerned, the American company picks up parcels/packages from various customers of foreign countries and renders them to international airlines/onboard couriers for delivery in India. It is only after the consignments reach India that the applicant clears them by filing necessary documents and takes steps for delivery of the parcels to the consignees. The applicant collects charges, taxes, duties, etc. which it incurs on behalf of consignees and takes the risk in regard thereto.

The applicant and the American company are distinct separate legal entities and they work together as a global network on principal to principal basis. The applicant cannot, therefore, be treated as an agent of the American company in India.

5. Mr. Dinesh Kanabar, appearing for the applicant, has summed up his submissions thus : no business operation is carried on by the American company in India and all the operations of transportation business are carried on by it outside India; so no part of income arises to the American company in India so as to be taxable under s. 9(1)(i) r/w Explan. 1 thereto. It is represented that before the transportation agreement with the applicant, the American company had agreement with the ELBEE and on similar facts, the Tribunal held that no income would be deemed to accrue or arise to the American company for the purpose of s. 9(1)(i) r/w the Explanation thereto; against the order of the Tribunal the application for reference of the question of law, namely, whether any deemed income could be said to accrue or arise under s.

9(1)(i) r/w the Explanation, was dismissed by the High Court.

6. Mr. S.P. Singh, who had put forth the case of the Revenue, drew our attention to the transport agreement and submitted that : (i) the applicant is described as a contractor to perform services as required by the American company and in so doing it has to follow the international group manual and will be subjected to audit by the American company; (ii) the applicant is working directly under the control and supervision of the international group and the CEO and general managers are deputed in India by the American company to look after the overall working; (iii) the applicant gets its commission/compensation from its American company for the services rendered by it in respect of import consignments as well as export consignments and is, therefore, agent of the American company and not an independent contractor dealing on principal to principal basis, which has business connection in India through which it is earning income, directly or indirectly, from operations carried out in India and, therefore, is liable to pay tax in India.

7. Before advertng to the contentions of the parties, it will be appropriate to note that s. 5 of the Act deals with the scope of total income which forms the subject-matter of charge under s. 4 of the Act.

We pass over sub-s. (1) of s. 5 which speaks of total income of a resident. We are concerned with the total income of any previous year of a non-resident which is dealt with in sub-s. (2) of s. 5 of the Act.

It provides, inter alia, that all income, from whatever source, which is received or deemed to be received in India for or on behalf of such person or accrues or arises or is deemed to accrue or arise in India in any previous year to him, will be included in his total income. It is nobody's case that the American company receives or is deemed to receive any income in India. The parties focused their arguments on s.

9(1)(i) r/w Expln. 1 on the point whether any part of business profits of the American company can be deemed to accrue or arise in India. It may be apt to clarify that it is only when no income (profits) accrues/arises in India, the further question whether it shall be deemed to accrue/arise, would fall for consideration.

8. The provisions of cl. (i) of sub-s. (1) of s. 9 and Expln. 1 thereto, which incorporate the principle of deemed accruing or arising of income, insofar as they are relevant for the present discussions, may be referred to here.

"9. (1) The following incomes shall be deemed to accrue or arise in India : (i) all income accruing or arising, whether, directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;" A perusal of the provisions extracted above shows that all income accruing or arising, whether directly or indirectly, through or from any business connection in India or from any property in India or through any assets or source of income in India or through transfer of capital assets situate in India, shall be deemed to accrue or arise in India. The mandate contained in Expln. I(a) is that for the purpose of the aforementioned clause where the business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India, shall be only such part of the income as is reasonably attributable to the operations carried out in India.

9. It follows that to invoke the said deeming provisions, two requirements have to be satisfied; (1) income must accrue or arise to the American company (whether directly or indirectly) through or from any 'business connection' in India, and (2) some business operations of the American company must be carried out in India. The first requirement, namely, the American company has "business connection" in India is not put in issue.

10. The second requirement that there must be some business operations of the American company in India, emanates from the said Expln. I(a) which limits the taxable income to only such part of the income as is

reasonably attributable to the operations carried out in India in the case of a business of which all the operations are not carried out in India. If the American company is not carrying out any business operations in India by itself or through its agents, no tax liability would arise in respect of such income. It is claimed that the American company is not carrying on any business activity in India by itself in regard to the delivery of packages from airlines or couriers to consignees operations and it is asserted that these are conducted by the applicant as an independent contractor. Indeed this position was conceded by the Revenue in its comments sent to the Authority on 14th Oct., 2002, noting "under the circumstances, it is concluded that the American company would not be carrying out any operations in India and hence it would not taxable in India vide s. 9(1) (i) of the IT Act, 1961". Had this been the consistent stand of the Revenue, no further discussion would have been necessary as no income could be deemed to have accrued or arisen in India under the Act to the American company so as to be chargeable to income-tax under s. 9(1)(i) r/w the Explan.

1(a) of the Act [see *Carborandum Co. v. CIT* (1977) 108 ITR 335 (SC)].

However, it appears that the Dy. Director of IT (International Taxation), Mumbai, passed an order under s. 197 of the Act on 10th Jan., 2003, holding, inter alia, that the income derived by the American company from the services rendered by it to the applicant under the transportation agreement would be taxable in India having regard to the provisions of the IT Act and the Double Taxation Avoidance Agreement (DTAA) and directing the applicant to deduct tax from the net sum payable to the American company at the rates specified in the order and issue a certificate to that effect. Thereafter, further comments were sent by the Revenue on 16th March, 2004, taking a U-turn and contending that applicant is nothing but an agent of the international group to carry out its business operations in India and that it is working directly under the control and supervision of the international group; that it is the American company which bears any loss/damage, therefore, it cannot be said that the American company has no activity in India.

11. In view of the change in the plea of the Revenue to which the applicant replied in its rejoinder without demur, it has become necessary to determine whether the aforementioned requirement is satisfied. This takes us to the question whether under the aforementioned agreement the applicant was acting as an agent of the American company or was acting as an independent contractor doing its own business. In the light of the contentions of the parties we shall advert to this aspect.

12. The international group has an international group logo/trademark (the brand name) which is owned by [omitted]. It has compiled manuals of the standard forms, operating procedures rates for invoices and allied matters relevant to international transportation business, which are required to be followed by all the members of the international group for the sake of uniformity in functioning and inter se operations. Both the American company as well as the applicant, being the members of the international group, are committed to adhere to the standard procedure, etc., laid down in the said manual. Undoubtedly, it is open to the parties to incorporate any term in their agreement or to refer to a code or manual to describe their rights and obligations. In our opinion, the applicant following the manual of the international group, without anything more, in carrying out its obligations under the said agreement would not advance the case of the Revenue. Insofar as audit of the applicant's accounts by the American company is concerned, we shall revert to it presently.

13. It is disputed that the CEO and the general managers are deputed by the American company. It is also denied by the American company that six out of ten directors are nominated by it. No record is produced by the Revenue to support its case on this aspect. The deputation of the staff and nomination of directors are said to be not by the American company but by other members of the international group in a different capacity. Even assuming that there is no control and supervision on the applicant by the American company due to deputing the CEO and the general managers by another member of the international group, it is evident that there are checks and balances within the international group of companies and it is in that context that each group member is working as a well knit group, one catering to the need of the other, each being entitled to use the international group brand name. These aspects cannot be taken to support the

status of the applicant as a dependent agent.

14. Now, the position under the terms of the transport agreement remains to be examined. We may recount the business operations of the applicant and the American company vis-a-vis the said agreement. They can be broadly placed in two categories. The first is 'outbound consignments'-those which are sent from India to abroad. In such consignments the applicant enters into contract with the consignors, collects the packages from them in India, raises invoices on them, accepts consignment on its behalf and is irresponsible to the Indian consignors for transportation of the packages and for all risks pertaining to loss/damages to the consignments. There is thus privity of contract between the Indian consignors and the applicant. The controversy as to whether the packages are handed over to the American company for air transportation and delivery outside India or whether they are tendered to any international airlines or onboard couriers for delivery, is not material. In our view, it is not necessary to resolve this controversy as admittedly the American company delivers the packages to the consignees outside India for which it is paid. The second is 'inbound consignments' where the American company enters into contract with the consignors outside India, raises invoices on them, collects necessary charges and picks up all the packages from them. The packages are transported to India through airlines. The privity of contract is between the American company and the consignors abroad. The parties differ on the point as to whether the consignments are handed over by the American company directly to the applicant in India or tendered to international airlines or onboard couriers for delivery in India. This, however, is not relevant because admittedly on such consignments reaching India, the applicant gets them cleared and delivers them to the consignees for consideration paid by the American company. It may be that the applicant directly deals with the consignee, collects the charges expended by it and bears the risk of not collecting those charges. But, that is in regard to customs clearance, etc. and not for delivery of packages received by it from airlines/couriers for which the American company pays compensation.

Now, we take the question whether in regard to the 'outbound consignments' as well as 'inbound consignments', the applicant is acting as an agent of the American company or as an independent contractor while attending to its own business operations.

15. There is a well defined distinction between a contractor and an agent. The word 'agent' is defined in the Concise Oxford English Dictionary, inter alia, as under: "1. a person that provides a particular service, typically one working transactions between two other parties. A person who manages financial or contractual matters for an actor, performer, or writer.

2. a person who works in secret to obtain information for a Government. 3. a person or thing that takes an active role or produces a specified effect. Grammar-the doer of an action. 4.

Computing-an independently operating internet programme, typically one set up to locate information on a specified subject and deliver it on a regular basis." The meaning of the term 'agent' is given in Black's Law Dictionary, inter alia, as follows : "The etymology of the word agent or agency tells us much. The words are derived from the Latin verb, ago, agree; the noun agens, agentis. The agent denotes one who acts a doer, force or power that accomplishes things." And, s. 182 of the Indian Contract Act defines 'agent' as a person employed to do any act for another or to represent another in dealing with third parties.

The word 'contractor' is defined in Concise Oxford Dictionary to mean a person who undertakes a contract to provide material or labour for a job : "Contractor is a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons, without submitting himself to their control in respect to the detail of the work."Lakshminarayan Ram Gopal & Sons v. The Government of Hyderabad (1954) 25 ITR 449 (SC) pointed out the distinction between an agent, a servant and an independent contractor, and quoted with approval the following passage from Halsbury's Laws of England (Hailsham Edn. Vol. 1, p. 193 para 345) : "An agent is to be distinguished on the one hand from a servant and, on the other, from an independent contractor. A servant acts under the direct control and supervision of his master and is bound to conform to

all reasonable orders given to him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in his exercise to the direct control or supervision of the principal." From the above discussion it follows that though contractor is independent of any control or interference and is only bound to produce the specified result as per the contract, the agent has to exercise his authority in accordance with the lawful instructions given to him by his principal but he is also not subject in his exercise to the direct control or supervision of the principal.

16. Keeping this distinction in mind, we shall consider the terms of "the transportation agreement". The applicant who is referred to therein as an independent contractor has undertaken to perform services of transportation of small packages in the service area for the American company as set forth in [omitted] as amended from time to time. It has to calculate dimensional weight of the packages in accordance with the procedure set forth in Ex. C. The American company is entitled to audit the shipment for the dimensional weight to ensure compliance with the aforementioned procedure by the contractor. The applicant has to submit to the American company its plan for transportation service setting forth at all time proper facilities, equipment and personnels to fulfil its obligation. For the services rendered by the American company, applicant is required to pay compensation as set forth in Ex. B (cl. 3). It is also stipulated that for the services rendered by the applicant, the American company shall pay compensation in accordance with Ex. B (cl. 1.2). The American company shall be liable for all admitted claims for loss or damage to shipments and will hold the applicant harmless except if the loss or damage to the shipments was due to the contractor's gross negligence or wilful conduct (cl. 1.3). The elements of the compensation, referred to above, are described in cl. 2.12 which are in the following terms : Each policy of insurance, except owned automobile insurance, which the contractor is required to obtain and maintain pursuant to para 2.14 above shall name the American company as an additional named insured and shall include a cross-liability and/or severability of interest clause protecting the American company against claims by the contractors if the American company were separately insured and protecting the contractor against claims by the American company as if the contractor were separately insured (cl. 2.15).

Ex. B is titled as "Compensation and Revenue Transfer". It provides that American company shall pay to applicant the amount calculated on the basis of each shipment (document and non-document) which the American company tenders to the applicant. Further, the American company has also to pay to the applicant, the compensation of services subject to the condition that each shipment must be made on time and upon presentation to the American company proof of delivery. The applicant is also entitled to compensation for export shipment to various countries outside India noted in the following table at the rate mentioned therein. ....(Omitted) From the perusal of the various clauses of the agreement and Ex. B, referred to above, it is noticed, inter alia, that the applicant is termed as an independent contractor and it is specifically provided therein that terms of the agreement shall not be deemed to constitute a partnership relationship between the parties and neither party has any authority to bind or to contract in the name of the other. However, in law, such terms of the agreement cannot be determinative as to whether a person is a contractor or an agent acting for and on behalf of the other party, which has to be decided on a true interpretation of the agreement as a whole in the light of the circumstances of the case. It is evident that for the services rendered by the applicant, the American company would pay to the applicant and for the services rendered by the American company, the applicant has to pay what is termed as compensation in accordance with Ex. B. It is provided in Ex. B that the American company shall pay to the contractor compensation for the services for each shipment and upon presentation to the American company proof of delivery. Paras 2 and 3 of Ex. B, as could be seen, refer to contractor export shipment and contractor import shipment, respectively. (Omitted) Admittedly, in the case of inbound consignment only specified amounts, as noted in Table-1, are paid to the applicant and the balance remains with the American company. The same position does not prevail in the case of outbound consignments; here, instead of the American company receiving compensation from the applicant, pays to it

compensation for its services which can only be booking and collecting parcels and sending them to airlines/couriers from where the American company collects and delivers to the consignees in foreign countries. This indicates that the business of outbound consignments and inbound consignments belong to the American company and although the applicant is purporting to act on its own behalf in entering into contract with the Indian customers in the former case and delivering parcels, etc.

to the consignees in the latter case, it is so acting for and on behalf of the American company. It is also interesting to note the import of the term 'compensation' outlined in the widest possible terms in cl. 2.12 of 'the transportation agreement' so as to include not only charges for the services of the applicant but also for all the operations of the contractors encompassing all compensation of the employees of the applicant, their salaries and other benefits, maintenance and repair expenses of equipment of the applicant and insurance expenses, etc. incurred by it. Had the applicant been an independent contractor, there is no reason why the American company would have taken care of the employees, equipment, insurance charges, etc. of the applicant. Further, both cl. 2.2 of the agreement and para 9 of the Ex. B mention that the American company has a right to audit the shipment of dimensional weight of the packages as also the internal accounts and operating records of the applicant which also indicates that it is operating for the American company. The American company has undertaken all the risks to the shipments which are got insured in which the name of American company is also included. Clauses 2.13, 2.13A to 2.18 which deal with indemnity and insurance of the applicant and the American company and its anxiety in keeping the policies of insurance of the applicant alive by paying the premiums subject, of course, to right to recover the same, go a long way to show that the American company has vested interest in the said business of the applicant.

All these aspects militate against the applicant being an independent contractor in performance of services for the American company as it purports to be. They lead to the conclusion that the applicant is an agent acting for and on behalf of the American company. Though in law the applicant and the American company are independent entities, for the aforementioned reasons we are of the view, in their business operations they are inter-connected and under the transportation agreement, the applicant has assumed the role of such an agent that it purports to act on its own behalf but in fact its activities enure to the benefit of the American company and, therefore, the business activities carried out by it in India cannot be said to be that of its own but are for and on behalf of the American company. In view of this conclusion, the requirement of the Expln. 1(a) to s. 9(1)(i) that there must be business operations of American company in India, is satisfied and the tax liability will, however, be limited to the business operations carried out by the applicant under the said agreement in India.

Insofar as the order of the Tribunal, Mumbai Bench-B, in the case of CIT (Inv.) v. Elbee Services Ltd. dt. 26th May, 1999, is concerned, the High Court took note of the finding of fact recorded by CIT(A) to the effect that no part of the operations which are attributable to the dispatch of consignment out of India is carried out by [omitted] in India which finding was not controverted by the Revenue in that case. It was pointed out that it related to the remittances made by the Indian company to [omitted] for the services rendered in connection with consignment sent by the assessee to international destination. It was on that basis the High Court held that no part of the operations were carried out by [omitted] in India and the CIT(A) had rightly directed that such income could not be deemed to have been accrued in India. In view of the finding of fact concluded by us that the operations of the applicant under the transportation agreement are for and on behalf of the American company, the order in that case is of no assistance to the applicant.

The conclusion we have arrived at in regard to the tax liability of the American company under the Act would suffice to pronounce a ruling on the tax liability of the American company, but in view of expansive language of the question and the contentions urged before us, we proceed to consider whether any tax liability would arise under the Double Taxation Avoidance Agreement (DTAA).

It is a common ground that the Government of USA and the Government of Republic of India entered into Agreement (referred to as DTAA) under s. 90 of the Act on 12th Sept., 1989, and the American company is

entitled to the benefit of the said agreement even if the amounts receivable by the American company from the applicant are in the nature of business profits chargeable to income-tax under the Act.

The main contentions of Mr. Kannabar are that the transport agreement is governed by Article 7 of the DTAA and as the American company does not have any PE in India within the meaning of Article 5 of the DTAA, it is not liable to be taxed on the amounts receivable also under the DTAA from the applicant. On behalf of the Revenue it is contended that in view of : (i) deputation of employees and nomination of directors; (ii) commercial/functional dependence on the American company; (iii) securing orders; and (iv) not being an independent entity but being a projection of American company, the applicant is the PE of the American company.

Article 7 of the DTAA, insofar it is relevant for the present purpose, is in the following term : 1. 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. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; (b) sales in the other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in the other State of the same or similar kind as those effected through that permanent establishment." A plain reading of this article shows that the business profits of the American company shall be taxable in USA unless it carries on business in India through a 'permanent establishment' (PE) situated therein. If the American company so carries on its business, its profits may be taxed in India but only so much of them as is attributable to the PE. The other parts of this article are not relevant.

The expression 'permanent establishment' is defined for the purposes of the treaty as follows : 1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

3. Notwithstanding the preceding provisions of this article, the term 'permanent establishment' shall be deemed not to include any one or more of the following: (a) the use of facilities solely for the purpose of storage, display, or occasional delivery of goods or 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, display or occasional delivery; (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of providing by the another enterprises; (d) the maintenance of a fixed place of business solely for the purpose purchasing goods or merchandise, or a connecting information, for the enterprise; (e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for other activities which have a preparatory or auxiliary character, for the enterprise.

4. Notwithstanding the provisions of paras 1 and 2, where a person-other than an agent of an independent status to whom para 5 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 (a) he has and habitually exercises in the first-mentioned State an authority to conclude contracts on behalf of the enterprise, unless the activities are limited to those mentioned in the para 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph; (b) he has no such authority but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivered goods or merchandise on behalf of the enterprise, and some additional activities conducted in that State on behalf of the enterprise have contributed to the sale of goods or merchandise; or (c) he habitually secures orders in the first-mentioned State, wholly or almost wholly for 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, provided that such persons reacting in the ordinary course of their business. However, when the activities of such agent are devoted wholly or almost wholly on behalf of that enterprise and the transactions between the agent and the enterprise are not made under arm's length conditions, he shall not be considered an agent of 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 State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other." A combined reading of all the paras of Article 5 brings out the import of the expression 'permanent establishment'. Whereas para 1 defines the expression to mean a fixed place of business through which a business of an enterprise is wholly or partly carried on, para 2 includes seven places specified in sub-cl. (a) to (k) and furnishing of services specified in sub-cl. (1) within the scope of the expression and para 3 excludes the facilities noted in cl. (a), maintenance of stock mentioned in cls. (b) and (c) and maintenance of fixed places for the purposes indicated in cls. (d) and (e) from the scope of the expression. Para 4, which commences with a non obstante clause, says that notwithstanding the definition of the expression outlined in paras 1 and 2, a person acting in a Contracting State on behalf of an enterprise of the other Contracting State shall be deemed to have a PE in the first-mentioned State, if any one of the three clauses-(a), (b), or (c) thereof-applies. Clause (a) deals with a person who has and habitually exercises authority to conclude contract on behalf of the enterprise in the first-mentioned State unless (i) the activities are limited to those mentioned in para 3 (excluded activities), and (ii) if they are exercised through a fixed place of business, would not make that fixed place of business, a PE under the provisions of that para.

Clause (b) deals with a person who acts without authority, therefore, is not relevant for our purpose. Clause (c) says that the person habitually secures orders in the first-mentioned State wholly or almost wholly for the enterprise. Para 5 contains an exclusionary clause and says that an enterprise of a Contracting State shall not be deemed to have PE in the other Contracting State merely because it carries on business in the other 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 business. Nonetheless, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise and the transactions between the agent and the enterprise are not made under arm's length condition, he shall not be considered as an agent of an independent status within the meaning of those paragraphs. Para 6 is clarificatory and excludes the possibility of any one of the following companies being construed as PE of the other : a resident company of a Contracting State controlling or being controlled by a resident company of the other Contracting State or a company which carries on business in the other State (whether through a PE or otherwise).

The definition of "Permanent Establishment (PE)" in Article 5 of DTAA is based on OECD model. The clauses of OECD model are incorporated invariably in all the Double Taxation Agreements entered into between various countries. The concept of PE has assumed considerable significance in view of development of global trading. A person who is PE of a non-resident person is not only instrumental to fasten tax liability but is also eligible to tax benefits available to a resident person. In a recent judgment of the Court of Justice of the European Communities in Case C-307/97 between Saint-Gobain and Finanzamt Aachen Innenstadt [21st Sept., 1999(1)], it was held that Article 52 of the EC Treaty (amended Article 43EC and Article 58 of the EC Treaty) precludes exclusion of the PE in Germany of a company limited by shares having its seat in another member State from enjoyment of the same conditions as those applicable to the companies limited by shares having their seat in Germany of a tax concession taking the form of exemption from corporation tax for dividend received from companies established in a non-member countries (operation taxation relief for international groups) provided for by a treaty for the avoidance of double taxation concluded with a non-member country and exemption from capital tax for shareholding in companies established in non-member countries (capital tax relief for international groups) also provided for by German legislation.

We have already held above that the applicant is an agent of and it is acting for and on behalf of the American

company. In view of that finding para 1 of Article 5 will be attracted and the applicant will have to be treated as PE of the American company. Further, our findings also fulfil the requirements of para 4 of Article 5, namely, that the person (applicant) acting in a Contracting State (India) on behalf of an enterprise (American company) of the other Contracting State (USA) shall be deemed to have a PE in India, if any one of the three cls. (a) to (c) are satisfied. Clause (c), which is relevant for our purpose, provides that such a person habitually secures orders in the first-mentioned State wholly, or almost wholly for the enterprise. To hold that cl. (c) is satisfied it has to be shown that the applicant habitually secures orders in India wholly or almost wholly for the American company. On examination of the contents of the transportation agreement and Ex. B it was concluded hereinabove that in case of outbound consignments, booking orders, collecting parcels, etc., as also in the case of 'inbound consignments' in regard to clearance and delivery of parcels/packages, the applicant was acting for the American company. Therefore, para 4 will also be applicable.

Once it is found that the applicant satisfies requirements of the definition of PE-art. 5 of DTAA-the fact that the applicant is an independent legal entity being a company incorporated under the Companies Act will make no difference and will not be a relevant factor in holding that it is a PE. We may note here that we find in support of our view a judgment of the Supreme Court Cassazione (Italy) in the case of Ministry of Finance (Tax Office) v. Philip Morris GmbH 4 ITLR 903.

Philip Morris was assessed to corporate tax and income-tax in respect of the period 1992-95 on the ground that it had a PE in Italy through the activities of Intertaba which was an Italian company. Against the order of assessment, Philip Morris appealed to the Provincial Tax Court of Milan. The appeal having been allowed, a further appeal to the Regional Tax Court of Lombardy failed confirming the judgment of the Provincial Tax Court. Ministry of Finance carried the matter in appeal to the Supreme Court of the Cassazione. The Supreme Court did not decide as to whether Intertaba was a PE of Phillip Morris; it laid-down the following guidelines and remanded the case to the tax officer : (i) a joint stock company having its legal seat in Italy may take on the role of a. multiple PE of foreign companies belonging to the same group and pursuing a common strategy.

(ii) the supervision or control of the proper performance of a contract between a resident entity and a non-resident entity cannot be considered-in principle- auxiliary,' within the meaning of Article 5(4) of the OECD Model Convention and Article 5(3) of the treaty of 18th Oct., 1989, between Italy and' Germany regarding double taxation, ratified in Italy pursuant to law No. 549 of 24th Nov. 1992, (iii) the participation of representative or officers of a national structure in a phase of the conclusion of contracts between a foreign company and another 'resident entity can fall within the concept of the authority to-conclude contracts in the name of the company, even without any power of representation; (iv) the entrusting of the management of business transactions to a national structure by a company which is not based, in Italy, gives rise to the acquisition, by that structure, of the status of a PE for the purposes of income- tax, even if it concerns a certain area of business; (v) the verification of the requisites of a PE, including those of dependence and of participation in the conclusion of contracts, must not only be. conducted from the formal standpoint, but also- and above all-from a substantial standpoint; For the abovementioned reasons, we rule that the income arising to the American company, a company incorporated in and. resident of USA (referred to above as "American company") from transactions entered into by it with the applicant under the International Transportation Service. Agreement dt. 30th Oct., 2000, would be taxable in India both under the, provisions of IT Act, 1961 as well as DTAA between India and USA.