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Dependant Agent PE

Rano Jain*

INTRODUCTION

The provisions related to the taxability of business income of a foreign enterprise are provided under the provisions relating to 'Permanent Establishment' as provided in various treaties.

A plain reading of Article 5(1) of the model tax treaty makes it clear that permanent establishment implies "a fixed place of business through which the business of an enterprise is wholly or partly carried on".

Article 5(2) describes as to what could constitute a fixed place of business and, being illustrative in nature in that respect, it sets out a whole list of things which could possibly be construed as fixed place of business. It includes a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources, a warehouse in relation to a person providing storage facilities for others, a farm, plantation or other place where agriculture, forestry, plantation or related activities are carried on, a premises used as a sales outlet or for soliciting and receiving orders, an installation or structure used for the exploration or exploitation of natural resources. The common thread in all these things is that an enterprise can carry on business through these establishments.

Generally, therefore, enterprise of a contracting state is said to have a permanent establishment in the other contracting state when such an enterprise has a fixed place of business in that other contracting state through which business of the enterprise is wholly or partly carried on.

However, in the modern age where a business is not always carried on, particularly outside national frontiers of an enterprise, through a fixed place of business of its own as is the lowest common denominator in all the situations visualized in Article 5(2), there is a deeming provision in Article 5(4) which deals with a situation when an enterprise carries on business through an agent in the other contracting state. This refers to a deeming fiction whereby even in cases where the enterprise does not have a fixed place of business in the other contracting state, of the nature described in Article 5(2) or otherwise, the enterprise will still be deemed to have a permanent establishment.

Article 5(5) provides for exclusion of agents being independent agents satisfying certain conditions, from the ambit of the term 'permanent establishment'.

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Meaning of 'Agent'

Before going into the nitty gritties of the provisions of DTAA on the taxability of agents, one must understand the meaning of the term 'agent'. The agent is a person who acts on behalf of the principal and does all acts which could be done by the principal.

The Supreme Court in the case of ***Bhopal Sugar Industries Ltd* v. *STO* [1977] 40 STC 42** had explained the difference between sale and agency in following words:

> ***"Thus, the essence of the matter is that in a contract of sale, title to the property passes on to the buyer on delivery of the goods for a price paid or promised. Once this happens, the buyer becomes the owner of the property and the seller has no vestige of title left in the property. The concept of a sell has, however, undergone a revolutionary change, having regard to the complexities of the modern times and expanding needs of the society, which has made a departure from the doctrine of laissez faire by including a transaction within the vault of a sale even though the seller may by virtue of an agreement impose a number of restrictions on the buyer, example, fixation of price, settlement of accounts, selling in a particular area or territory or so on. These restrictions*** **per se** ***would not confer a contract of sale into one of agency because in spite of these restrictions the transaction would still be a sale and subject to all the incidence of a sale........"***

The Supreme Court has observed in ***Sri Tirumala Venkateswara Timber & Bamboo Firm* v. *CTO* [1968] 21 STC 312** that *"as a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorized to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal."*

The Supreme Court has again held in the case of ***Gordon Woodroffe & Co.* v. *Sheikh M.A. Majid & Co.* AIR 1967 SC 181** that *"the essence of agency to sell is the delivery of the goods to a person, who is to sell them not as his own property, but as the property of the principal, who continues to be the owner of the goods and who is, therefore, liable to account for the proceeds."*

As such, in ordinary sense, an agent is a person appointed by the principal in order to do transactions on behalf of the principal and here lies the importance of provisions for taxing certain agents as PE of a foreign enterprise, so as in the guise of agency no foreign establishment should be escaped from taxing what is to be taxed as business income in India.

Understanding the Concept of Agent for being a PE

It can be seen in the provisions of various tax treaties that though the term 'independent agent' has been defined, the term 'dependant agent' has not been. In fact there is no reference to any such term. As for the purposes of paragraph (4) it has referred to 'any agent not being an independent agent as defined in paragraph (5)'. We use the term 'dependant agent' only for linguistic convenience.

Therefore it would be convenient to first understand the provisions of paragraph (5) before embarking upon to get acquaint with the paragraph(4).

Article 5(5) - Independent Agent

Paragraph (5) of Article 5 of the model treaty reads as under:

> *"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 are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise 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"*

It can be very easily inferred from just a cursory reading, that it is an exclusionary paragraph whereby instances of even the presence of an

agency not leading to a Permanent Establishment are provided.

While interpreting the provisions of this paragraph the terms brokers and general commission agent may be understood in common parlance, the other important terms to be understood are:

1. Any agent of an independent status.
2. Acting in the ordinary course of their business.
3. Devoted wholly or almost wholly on behalf of that enterprise.
4. Arm's length conditions.

However, it is to be appreciated that all the terms are intertwined for the purpose of interpreting the said paragraph, meaning being that an independent agent is excluded from the purview of a permanent establishment only if he is acting in the ordinary course of his business and also he is not wholly or almost wholly devoted to the enterprise. In case dealings between the foreign enterprise and the agent in India are done in arm's length conditions, he is considered to be an independent agent.

This paragraph has been very aptly interpreted by the Authority for Advance Ruling, in a very few words, in the case of ***TVM Ltd.* v. *CIT* [1999] 102 Taxman 578(AAR-New Delhi),** as follows:

> *"This is exactly the situation dealt with by para 5 of Article 5. It negates the existence of a permanent establishment where the enterprise of one Contracting State carries on business in the other Contracting State through a broker, general commission agent or any other agent of an independent status. Thus, a broker or commission agent of such an enterprise cannot be termed as a permanent establishment where such person is carrying on his own business and is dealing with the enterprise only as one of his many clients and the dealings between the two are on a commercial basis. This is further clarified by the language of the paragraph. Changing the syntax somewhat, it stipulates two conditions as necessary before an agent can be treated as having an independent status:*
>
> (1) *Such agent must be acting in the ordinary course of his business;*
>
> (2) *The activities of such agent should not be devoted exclusively or almost exclusively on behalf of that enterprise."*

Almost, as if to summarise the above position, the Delhi ITAT in the case of ***Western Union Financial Services Inc.* v. *Asstt. DIT* [2007] 104 ITD 34,** says as follows:

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

Ordinary course of business

In deciding whether or not particular activities fall within or outside the ordinary course of business of an agent, one would examine the activities customarily carried out within the agent's trade as a broker, commission agent or other independent agent rather than the other business activities carried on by the agent. The comparison should normally be made with the activities customary to the agent's trade.

The meaning of almost all the terms, that too in synchronization, for the purposes of this paragraph has been very aptly explained in the case of *Western Union Financial Services Inc.* (*supra*). The question in this case was whether the activity of paying out money on behalf of the Western Union, by the Department of post can be regarded as activity done during the ordinary course of business:

> *'What is "business" has been explained in various decisions. In the leading case of* Narain Swadeshi Weaving Mills *v* CEPT *(26 ITR 772) the Supreme Court explained that business connotes some real, substantive and systematic course of activity or conduct with a set purpose. In* Liquidators of Pursa Ltd. *v.* CIT *(25 ITR 265), the Supreme Court held that underlying*

the expression "business" is the fundamental idea of continuous exercise of an activity. In Barendra Prasad Ray *v.* ITO *(129 ITR 495) the Supreme Court again held that the word is of wide import and means an activity carried on continuously and systematically by a person by the application of his labour and skill with a view to earning income. Therefore any activity which is being systematically and continuously carried on with the object of earning profits is a business activity.*

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

This aspect has now-a-days been recognized as the test of legal dependence. An independent agent will typically be responsible to his principal for the results of his work but not subject to significant control with respect to the manner in which that work is carried out. He will not be subject to detailed instructions from the principal as to the conduct of the work. The fact that the principal is relying on special skill and knowledge of the agent is an indication on independence of the said agent.

Devoted exclusively or almost exclusively

The main controversy on the interpretation of this phraseology has been as to the party from whose perspective the same has to be seen - the foreign enterprise or the Indian agent.

In ***Morgan Stanley & Co. International Ltd., In re*** **[2005] 142 Taxman 630 (AAR-New Delhi),** whereby the plea of the revenue was that the term 'wholly or almost wholly' are to be understood from the point of view of the foreign enterprise. Meaning thereby that if all or almost all the work of the foreign enterprise in India is done through one agent, it may not be treated as independent agent, negating the said argument, the Authority ruled thus:

> *"There is no merit in the plea of the CIT that the difference between 'dependant' and 'independent' agents has to be seen from the perspective of the 'principal' and not from that of 'agent'. In our view, for a proper understanding of the deeming provisions contained in paras 4 and 5 of art. 5, they have to be read together. Para 4 deals with a person other than an agent of independent status to whom para 5 of the article applies. We shall, therefore, refer to the basic features of para 5, as mentioned above. It contains a deemed non-inclusion and provides that an enterprise of the Contracting State shall not be deemed to have a PE in the other 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 such persons are acting in the ordinary course of the business. This is clear enough.

However, this exclusion is subjected to an exception, namely, where activities of such an agent are wholly or almost wholly devoted for the enterprise or controlling enterprise, in such a situation such a person shall not be considered as agent of independent status. The test is objective and has two limbs. The first limb requires that such persons shall be agent of an independent status acting in the ordinary course of their business and the second requires that the activities of such persons shall not be devoted wholly or almost wholly for the enterprise. The activities referred to therein are that of the broker, general commission agent or any other agent and not of the enterprise. The purpose is to exclude agents who though acting in the ordinary course of their business, are devoted entirely or almost entirely to the work of the enterprise. This implies that they have little work of other enterprises. If properly understood there is no scope to exclude from para 5 'agents' whose activities in the ordinary course of their business not only cover wholly or almost wholly the work of the enterprise but also include work of many other enterprises who are also their clients. In other words, only such agents will be out of purview of para 5, whose ordinary course of business comprises exclusively the work of the enterprise with little work of any other client; like the standing counsel or law officers of Central/State Government."

Also, dealing with the same issue, in a very recent judgment, the Mumbai Tribunal in the case of ***Dy. DIT* v. *B4U International Holdings Ltd.* [2012] 23 taxmann.com 372** dissenting from an earlier judgment of the same bench in the case of DHL Operations held as follows:

'Under Article 5(5), an agent is deemed not to be of independent status when his activities are devoted exclusively or almost exclusively to the non-resident enterprises. Though in ***DHL Operations B.V.*** *142 TM 1 (Mum.) it was held that the question whether the agent is "dependant" has to be seen from the perspective of the non-resident principal,* ***this view cannot be followed*** *because it is contrary to the language of Article 5(5).* ***The wordings refer to the activities of an agent*** *and its devotion to the non-resident and not the other way round.* ***The perspective should be from the angle of the agent and not of the non-resident****. As the income from the assessee was only 4.69% of the agent's income, the agent was not a "dependant agent" (****Morgan Stanley*** *272 ITR 416 (AAR) &* ***Rolls Royce*** *(Del) followed)';*

Going through all this, one can get the logic behind the provision, which mainly tries to capture in the tax net those agents of a foreign enterprise who are dedicated to the functioning of such enterprise only (or almost only), so that in the clothing of agent, no foreign enterprise can earn any income in India, which has to be taxed in India.

This concept has been recognized by most of the modern authors as test of economic dependence. Practically, on this aspect, one has to see the number of principals represented by an agent. Independent status is unlikely if the activity of agent is performed wholly (or almost wholly) on behalf of only one enterprise over a long period of time.

However, this fact in itself is not determinative. All the facts and circumstances are to be taken into account to determine whether the agent's activities constitute an autonomous business conducted by him, in which he himself bears the risks and also enjoys the awards.

Arm's length conditions

The last condition to judge whether an agent is of independent status or not is whether the transaction is entered into under arms' length conditions or not.

The logic lies in the **CBDT Circular No. 23, dated 23rd July, 1969**. The circular provides (though for the purposes of section 9) that it does not seek to bring into the tax net the profits of a non resident which cannot reasonably be attributable to operations carried out in India. Even if there be a business connection in India, the whole of the profit accruing or arising from the business connection is not deemed to accrue or arise in India. It is only, that portion of the

profit which can reasonably be attributable to the operations of the business carried out in India, which is liable to Income-tax.

In the case of ***BBC Worldwide Ltd*. v. *Dy. DIT* [2010] 37 SOT 253,** Delhi Tribunal has held that *'Circular No. 23 of 1969, dated 23rd July, 1969, clearly provides that if the value of services rendered by the agent is fully represented by the commission paid, it should* prima facie *extinguish the assessment.'*

Similarly in the case of ***Delmas, France* v. *Asstt. DIT (International Taxation)* [2012] 49 SOT 719/ 17 taxmann.com 91,** Mumbai Bench of the Tribunal says:

> *"In the absence of any finding by the A.O. that the transactions between the Indian agent and the assessee French company were not made under arm's length conditions, assessee cannot be said to have any PE in India, more so as it is not even the case of the revenue that the assessee has, at its disposal and as a matter of right, agent's premises for carrying out its business."*

Transaction being made under arms' length conditions, logically also it makes sense that the agent should not be considered as dependant agent.

ARTICLE 5(4)- DEPENDANT AGENT

Paragraph (4) of article 5 of the model treaty reads as under:

> *"4. Notwithstanding the provisions of paragraphs 1 and 2 , where a person - other than an agent of an independent status to whom paragraphs 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 his activities are limited to those mentioned in paragraph 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 delivers 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 the goods or merchandise; or*
>
> *(c) he habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise".*

Since we have already understood the meaning of the term 'independent agent', any other agent will come under the ambit of this paragraph. However in order to attract the tax liability, such agent has to satisfy at least one of the conditions as mentioned in points (a), (b) and (c).

Article 5(4) provides that where an agent, other than an independent agent to which Article 5(5) applies, satisfies one of the conditions set out in Article 5(4)(a), 5(4)(b) or 5(4)(c), "the enterprise shall be deemed to have permanent establishment" in the other contracting state. In simple terms, therefore, when an enterprise acts in the other contracting state through a 'dependant agent' who satisfies at least one of the tests set out in Article 5(4), such an enterprise is deemed to have a permanent establishment in the other contracting state.

Authority to conclude contracts

Paragraph 4 uses two expressions: "has" and "habitually exercises" an authority to conclude contracts on behalf of the enterprise in question. While the expression "has" may have reference to the legal existence of such authority on the terms of the contract between the principal and agent, the expression "habitually exercises" has certainly reference to a systematic course of conduct on the part of the agent. Logically, it has to be borne in mind that the 'contracts' referred to in this paragraph are to be substantive contracts as to the business operation of the enterprise and not the subsidiary contracts.

Even the **OECD commentary** on interpretation of this paragraph emphasizes on the view that, the authority to conclude contracts must cover

contracts relating to operations which constitute the business proper of the enterprise. It would be irrelevant, for instance, if the person had authority to engage employees for the enterprise to assist that person's activity for the enterprise or if the person were authorised to conclude, in the name of the enterprise, similar contracts relating to internal operations only. Moreover the authority has to be habitually exercised in the other State; whether or not this is the case should be determined on the basis of the commercial realities of the situation. A person who is authorised to negotiate all elements and details of a contract in a way binding on the enterprise can be said to exercise this authority "in that State", even if the contract is signed by another person in the State in which the enterprise is situated. Since, by virtue of paragraph 4, the maintenance of a fixed place of business solely for purposes listed in that paragraph is deemed not to constitute a permanent establishment, a person whose activities are restricted to such purposes does not create a permanent establishment either.

Regarding the interpretation of paragraph (4), **Klaus Vegas**, says:

> *"The question whether such a person has an authority to conclude contracts within the meaning of treaty law must be decided not only with reference to private law but must also take into consideration the actual behaviour of the contracting parties. An approach relying solely on aspects of private law (the law of contracts) would make it easily possible to prevent an agent being deemed a permanent establishment (and, therefore, to prevent the enterprise from being taxed by the State in question) even where he is engaged most intensively in the enterprise's business; he would be allowed only to negotiate contracts up to the point when they were finalised and ready to be signed, but the final signature, to satisfy the proprieties, would be reserved to someone from the enterprise's headquarters in the other Contracting State. Such a formal split-up of business responsibilities on the one hand and legal authority on the other, is considered by Strobl/Kellmann to constitute a case of 'tax circumvention' (see supra Introduction at m. No. 114) where substance should prevail over form ; a permanent establishment should, therefore, be deemed to exist irrespective of what the formal arrangements were (Strobi, J./ Kellmann, C. 15 AWD 405, 408 (1969). It is submitted that the solution is even simpler, since the agent in question had in fact an authority to conclude contracts, even if not under private law (the law of contracts), but at all events within the meaning underlying article 5. Corresponding clarification is already to be found in some DTCs (cf., e.g., Germany's DTC with Malaysia, para. 3(b) Prot. re article 6).*
>
> *141. The question as to whether the behaviour of the contracting parties is such as to support the opinion that an authority to conclude contracts exists, should be decided against the background of the economic situation. If there are sound reasons for the enterprise represented to reserve its right to conclude the contract itself—say, where major contracts are involved—the agent may not be considered to have an authority to conclude contracts. If, on the other hand, mass contracts made out on standard forms are merely signed by someone at headquarters without showing signs of having been scrutinized by the signatory himself, the agent can be assumed to have taken the ultimate decision and, other words, to have had an authority to conclude such contracts."*

In the case of ***Golf In Dubai, LLC, In re* [2008] 174 Taxman 480 (AAR-New Delhi),** the Authority for Advance Ruling held that as it is not shown that the independant contractors or third party vendors have and habitually exercised authority to conclude contracts on behalf of applicant in India, applicant's income cannot be taxed in India.

Maintains stocks etc. contributing to the sale/securing orders wholly or almost wholly

These conditions do not need much discussion, as it is very clear and in very unambiguous terms it is provided that even if any of the above conditions are satisfied, it quite logically makes the agent a 'dependant agent'.

However, it is also very clear from the above discussion that an agent other than an independent agent by itself cannot be considered as PE unless

it satisfies any of the conditions provided under paragraph 4.

COMPUTATIONAL PART

The rationale for dependant agent permanent establishment is simple. A foreign enterprise may chose between performing business activity itself, and having it done through a domestic agent. In case, foreign enterprise prefers to perform the business activity through a domestic agent, he does not need to depend on the right to use a fixed place of business. The business activity is carried out through an agent, and a dependant agent at that. Whether one carries on the business directly or through the dependant agent, the profit attributable to such business continue to be taxable in the source country. This is the unmistakable underlying principle behind the dependant agent permanent establishment as per the treaties. The next issue is then how do you compute the profits of this fictional or hypothetical PE.

There are some interesting issues with respect to PE profit attribution, *i.e.* the fine points regarding profit attribution in the case of Dependant agent PE. On a conceptual note, PE, whether a fixed base PE, Dependant agent PE 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 Dependant agent PE, no additional profits, other than agent's remuneration in the source country - which is taxable in the source state anyway *de hors* the existence of PE, become taxable in the source state.

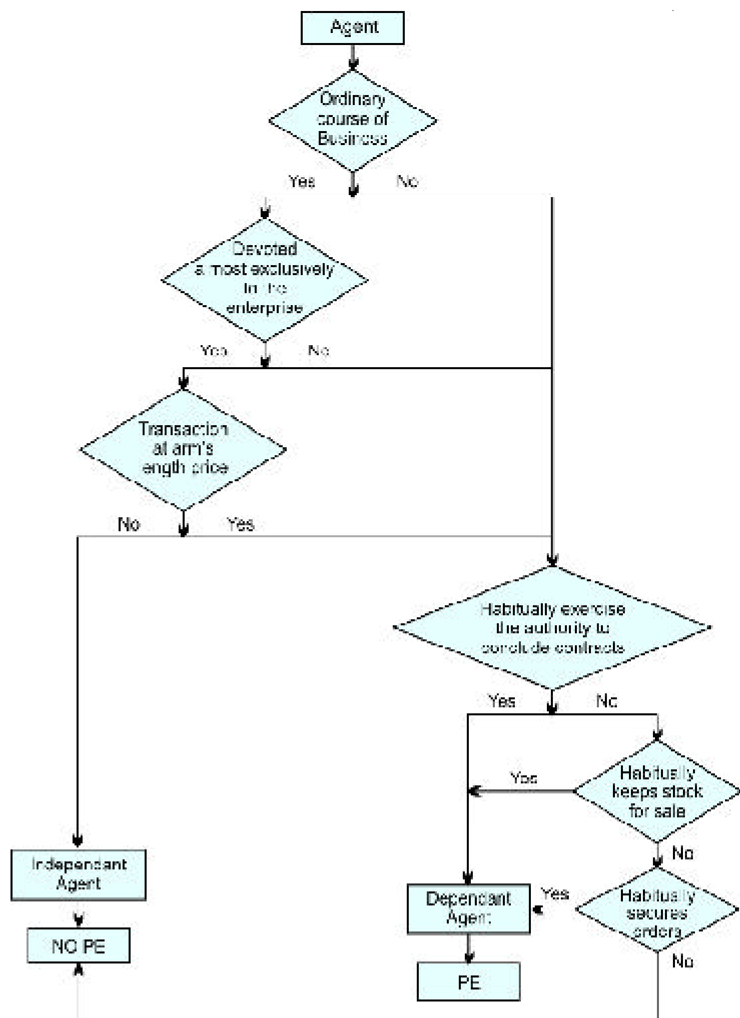
Article 7(1) provides that when an enterprise has a PE in the other Contracting State, profits of the enterprise shall be taxed in that other state but "only so much of them as is directly or indirectly attributable to that permanent establishment". This expression in fact narrows down the scope of taxability in that other Contracting State by excluding profits derived by such enterprise in the source state independently of the permanent establishment.

The first step to be taken for computation of profits liable to be taxed in the source country, therefore, is computing profits directly or indirectly attributable to the permanent establishment. Article 7(2) provides the methodology for computation of profits of the PE. This sub-article, *inter alia*, provides that when an enterprise of "one of the Contracting States carries on the business in the other Contracting State through a PE, so much of the profits of the enterprise shall be attributed to the PE as such a 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". In other words, the profit computations of the PE have to proceed on the basis that the PE is wholly independent of its main enterprise which from a purely accounting and commercial point of view, generally means nothing more than the hypothesis that intra-organization transactions are to be taken into account at arm's length price.

It is important to bear in mind the fact that in the case of intra-organization transactions within an enterprises there are several ways of accounting for the same, *e.g.* at cost, at transfer price, at arm's length price or simply at fair market price. Article 7(2) provides that the arms length price is the criterion for computation of these hypothetical profits. Such profits cannot be determined otherwise than hypothetically and, therefore, no more than approximately, if at all, because in practice there is no such thing as unrelated enterprise available for comparison and satisfying completely all the conditions. The two step process in so computing the profits, therefore, involves identifying the PE, proceedings to compute hypothetical profits of the PE by taking into account intra-enterprise transactions at an arm's length price.

DIFFERENCE BETWEEN A MERE DEPENDANT AGENT AND A DEPENDANT AGENT PE

A dependant agent cannot, strictly speaking, be termed as PE because neither the Dependant Agent belongs to the PE, nor can one have something as a result of having the same thing, *i.e.* if a dependant agent is itself a PE, one cannot have a PE as a result of having a dependant agent. In such a case, the treaty could have simply stated that a dependant agent or agency shall be deemed to be PE of the enterprise an



enterprise shall be deemed to have a PE by the virtue of having a dependant agent and meeting one of tests set out in the relevant sub-article. Dependant Agent and the Dependant Agent PE, therefore, cannot be one and the same thing.

It should be noted that an independent agent may be either individuals or companies and need not necessarily be residents of, nor need to have place of business in, the state in which they act for an enterprise.

This deemed PE is wholly hypothetical and fictional, because, in strict sense of the word, there is no PE at all.

How can one have a permanent or even non-permanent establishment, when there is no establishment at all. It is, however, important to note that what is defined as a permanent establishment is not the dependant agent *per se*, but, on the contrary, it is by the virtue of an enterprise having a dependant agent that the enterprise is "deemed to have a permanent establishment".

IN NUTSHELL

Below, I have tried to make a rough caricature of questions and replies on the basis of which, the status of a Dependant Agent PE can be find out. It is to bear in mind that this is just a symbolic presentation of various provisions, one has to keep the meaning of the various terms and related judicial pronouncements, while interpreting the same.

RELEVANT JUDGMENTS

In any case, presence of a Dependant Agent PE in the 'other contracting state' is purely a matter of facts and circumstances of every case. Following is the list of certain important propositions laid down by various courts on the issue of taxability of Agent PE

1. ***Al Nisr Publishing* v. *CIT* [1999] 105 Taxman 308 (AAR-New Delhi) :** Since BCL was acting as advertisement agents for several newspapers and that under the terms of the agreements it was entitled to advertisement commission at a percentage of the charges received on behalf of the principal. The case thus clearly falls under the terms of paragraph 5 of article 5 of the DTAA and BCL, though an agent for the applicant, was held to be an agent of independent status within the meaning of paragraph 5. This being so, the terms of paragraph 4 relied upon the Department are not available for the purposes of this case as that paragraph is clear that it will apply only where the person carrying on business for the non-resident principal is one other than an agent of independent status referred to in paragraph 5.

2. ***Fidelity Advisor Series VIII*, In re [2005] 142 Taxman 111 (AAR-New Delhi):** Having regard to the provisions of article 7 of the treaty, it was concluded that the ap-

plicant would not be taxable in India under the treaty. On the facts and circumstances of the case, the applicant held not to have a permanent establishment in India in terms of article 5 of the treaty and on the facts and in the circumstances of the case, the gains arising from the sales of portfolio investments in India were held to be the applicant's business profits, covered under article 7 of the Convention dated December 20, 1990.

3. ***BBC Worldwide Ltd.* (*supra*) :** Transactions between assessee, an English telecasting company and its subsidiary in India being at arm's length and commission being paid at par with the market trend, the advertising revenue derived by the assessee through orders procured by the subsidiary was not taxable in India.

4. ***Dy. DIT (International Taxation)* v. *Set Satellite (Singapore) (Pte.) Ltd.* [2007] 106 ITD 175 (Mum):** A dependant agent PE of a foreign enterprise is distinct from the dependant agent and taxability to a dependant agent in respect of remuneration earned by it has nothing to do with the taxability of foreign enterprise in respect of its dependant agent PE is not extinguished by making arm's length payment to the dependant agent.

5. ***Rolls Royce Singapore (P) Ltd.* v. *Asstt. DIT* [2011] 202 Taxman 45/13 taxmann.com 81 (Delhi) :** Agent, whether 'wholly or almost wholly' working for the foreign enterprise, being a moot question, not investigated by the A.O. Matter sent back for this limited purpose.

6. ***B4U International Holdings Ltd.* (*supra*)**

   (*i*) On facts, the agent was not the decision maker and had **no authority to conclude contracts** or to fix the rate or to accept an advertisement. It merely forwarded the advertisement to the assessee. Accordingly, there was neither **legal existence of authority,** nor evidence to show **"habitual exercise" of authority.**

   (*ii*) The language of Article 5(5) **refers to the activities of an agent** and its devotion to the non-resident and not the other way round. **The perspective should be from the angle of the agent and not of the non-resident**. As the income from the assessee was only 4.69% of the agent's income, the agent was not a "dependant agent"

   (*iii*) As the agent had been **remunerated at arms' length basis**, no further profit is attributable to the PE as per Circular No. 742 dated 2-5-1996

7. ***Jt. CIT* v. *Reuters Ltd.* [2009] 33 SOT 301 (Mum.)** The assessee was a company in the U.K. It was engaged in the business of providing news and financial information worldwide. The consideration received by RIPL as distribution fee was claimed as business income of a PE in India. The CIT(A) gave a contradictory finding. He held that there was no P.E. in India. In later part of his order he held that RIPL was an agent of independent status. Therefore case remitted to AO to give a finding regarding existence of P.E.

8. ***Sutron Corpn.* v. *DIT* [2004] 138 Taxman 87 (AAR-New Delhi) :** USA company having entered into contracts with Government of Andhra Pradesh through local paid agent acting for and behalf of USA company in India, it has a PE in India and income from such contracts shall be taxable in India as is attributable to the PE.

9. ***Speciality Magazines (P) Ltd., In re* [2005] 144 Taxman 153 :** The purpose is to exclude agents who though acting in the ordinary course of their business, are devoted entirely or almost entirely to the work of the enterprise. This implies that they have little work of other enterprises. If properly understood there is no scope to exclude from para 5 'agents' whose activities in the ordinary course of their business not only cover wholly or almost wholly the work of the enterprise but also include work of many other enterprises who are

also their clients. In other words, only such agents will be out of purview of para 5, whose ordinary course of business comprises exclusively the work of the enterprise with little work of any other client; like the standing counsel or law officers of Central/State Government.

CONCLUSION

The basic philosophy underlying the force of attraction rule is that when an enterprise sets up a permanent establishment in another country, it brings itself within the fiscal jurisdiction of that another country to such a degree that such another country can properly tax all profits that the enterprise derives from that country- whether through the fixed base PE or through Dependant Agent PE. All provisions relating to the agent in various treaties are made with this objective in mind.