

आयकर अपीलिय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL,

INDORE BENCH, INDORE

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

AND SHRI MANISH BORAD, ACCOUNTANT MEMBER

ITA No.743 & 744/Ind/2018

Assessment Years: 2015-16 & 2016-17

M/s. Sanghvi Foods Private Limited, 362A, Silver House, A.B. Road, Indore	Vs.	ITO (IT & TP), Bhopal
(Appellant)		(Revenue)
PAN AACCS4128C		

Appellant by	S/Shri S.N. Agrawal & Pankaj Mogra, CAs
Revenue by	Shri K.G. Goyal, Sr. DR
Date of Hearing	12.03.2020
Date of Pronouncement	03.06.2020

ORDER

PER MANISH BORAD, AM.

The above captioned appeals filed at the instance of assessee pertaining to Assessment Year 2015-16 and 2016-17 are directed against the orders of Ld. Commissioner of Income Tax (Appeals)13 (in short 'Ld.CIT'], Ahmedabad dated 27.06.2018 which is arising

out of the order u/s 201(1A) of the Income Tax Act 1961(In short the 'Act') dated 28.03.2017 framed by ITO (Intl. Taxn.), Bhopal.

2. Assessee has raised following grounds of appeal;

ITA No.743/Ind/2018 A.Y.2015-16

01. *That on the facts and in the circumstances of the case the Learned CIT(A) erred in confirming the action of the assessing officer by treating the Assessee company as assessee in default in respect of non-deduction of Tax at Source u/s 195 of the Income Tax Act of Rs. 2616/- in respect of payment made to Buhler AG Switzerland of Rs. 38093/- during the year under consideration and al so interest charged by the A. O. u/s 201/20I(IA) of the Income Tax Act of Rs. 654/- without properly appreciating the facts of the case and submissions made before her even when the assessee was not liable to deduct TDS on this payment.*

02. *The assessee reserve its right to add, alter, modify or amend the grounds of appeal as and when required.*

ITA No.744/Ind/2018 A.Y.2016-17

01. *That on the facts and in the circumstances of the case the Learned CIT(A) erred in confirming the action of the assessing officer by treating the Assessee company as assessee in default in respect of non-deduction of Tax at Source u/s 195 of the Income Tax Act of Rs. 19,463/- in respect of payment made to Buhler AG Switzerland of Rs. 283438/- during the year under consideration and al so interest charged by the A. O. u/s 201/20I(IA) of the Income Tax Act of Rs. 3892/- without properly appreciating the facts of the case and submissions made before her even when the assessee was not liable to deduct TDS on this payment.*

02. The assessee reserve its right to add, alter, modify or amend the grounds of appeal as and when required.

3. As the issues raised in these two appeals are common these were heard together and being disposed off for sake of convenience and brevity.

3. Brief facts of the case as culled out from the records are that the assessee is a Private Limited company engaged in the business of manufacturing of wheat products, running of Cold Storage and running of Wind Mill under its different units. That during the years under appeal the Company had purchased Spare parts for Old Machines and Flour Milling Machine from a Non-Resident Supplier for which payments were made during Financial Year 2014-15 and Financial Year 2015-16. The year wise details of the same is as under:-

S.No.	Particulars	Financial Year	Amount Paid
01.	Payment to M/s Buhler AG Switzerland	2014-15	38,093
02.	Payment to M/s Buhler AG Switzerland	2015-16	2,83,438
	Total		3,21,531

That a show cause notice was issued by the ITO (IT and TP) wherein it was asked from the assessee as to why the Assessee be not treated as Assessee in Default for making the above payments

to NRI without deducting tax at Source u/s 195 of the Act.

4. In reply to show cause notice assessee contended that the alleged purchase is a capital goods in the form of spare parts for old machines and flour milling machine. Purchases have been made directly from the non resident suppliers. It was also submitted that the purchase of capital goods is not subject to deduction of tax at source. Ld. A.O after considering the submissions also called for information from a Bangalore based company namely Buhler India Pvt. Ltd. (In Short `BIPL') which is a wholly owned subsidiary of Buhler AG Holding, Switzerland. Ld.A.O on the basis of information received from BIPL, Bangalore came to a conclusion that the Bangalore based company is working on behalf of the Buhler AG, Switzerland and apart from selling goods in India also provides marketing services to its holding company namely Buhler AG, Switzerland. Ld. A.O examined the communication between the assessee and BIPL. He came to a conclusion that Buhler AG, Switzerland is having its "business connection" in India through its subsidiary/group company namely BIPL and thus the profit element in the sales made to the Indian company is subject to the

withholding tax u/s 195 of the Act and accordingly applied 10% of Net profit rate on the amount remitted. Default of TDS @ 41.2% is calculated on the gross amount for the two payments made at Rs.38,093/- and Rs.2,83,438/- during March 2015 and August 2015 during financial year 2014-15 and 2015-16 respectively in the following manner:-

F.Y 2014-15

Name of Recipient	Total amount remitted in Rs.	Amount of Profit 10% of amount remitted	Gross up amount as per section 195A of the Act	Default of TDS @ 41.2% incld. cess	Date of remittance	Interest thereon u/s 201(1A)
Buhler Switzerland	38093	3809	6349	2616	March 15	654

F.Y 2015-16

Name of Recipient	Total amount remitted in Rs.	Amount of Profit 10% of amount remitted	Gross up amount as per section 195A of the Act	Default of TDS @ 41.2% incld. cess	Date of remittance	Interest thereon u/s 201(1A)
Buhler Switzerland	283438	28344	47240	19463	August 15	3892

5. Aggrieved assessee preferred appeals before Ld. CIT(A) but failed to succeed and now the assessee is in appeal before the Tribunal on the common issues raised in both the years.

6. Ld. Counsel for the assessee referred to the following written submissions which are reproduced below :-

01]. *The Brief Facts of the case are that Assessee is a Pvt. limited company engaged in the business of manufacturing of wheat products, running of Cold Storage and running of Wind Mill under its different units.*

02]. *That during the year under appeals the Company had purchased Spare parts for Old Machines and Flour Milling Machine from a Non-Resident Supplier for which payments were made by it in F.Y. 2014- 15 and 2015-16. The year wise details of the same is as under:-*

S.No.	Particulars	Financial Year	Amount Paid
01.	Payment to M/s Buhler AG Switzerland	2014-15	38,093
02.	Payment to M/s Buhler AG Switzerland	2015-16	2,83,438
	Total		3,21,531

3.1] *That a show cause notice was issued by the ITO (IT and TP) wherein it was asked from the assessee as to why the Assessee be not treated as Assessee in Default for making the above payments to NRI without TDS u/s 195 of the Act.*

3.2]. *In the show cause notice it was also mentioned that payments to Non-Resident parties for purchase of various items (Flour Milling Machines and its spare parts) were made and said transactions were made through Indian Parties which were agents/ brokers in India of these non-Resident namely Buhler AG, Switzerland.*

3.3] *That in para 3 of the said Show cause notice the ITO mentioned that since the assessee has placed order through Agent/Broker as mentioned above in the table. These Agents / Brokers are working for the Non-Residents in India as their business connection and hence the amount paid to these parties are in the nature of Business Income Chargeable to Tax in India and TDS is applicable as per Sec. 195 of the Income Tax Act.*

3.4] It was explained to the ITO (TP & IT) that the Assessee Company and basically purchased the Spare parts for Old Machines and Flour Milling Machine from the above Non-Resident parties. Thus it has made payment towards purchase of Capital Goods. That for purchase of said items the company has floated enquiries to various foreign suppliers and obtains technical specification and rates of same from them. Subsequently it has placed the Purchase Order to the respective party who meet out the Quality specification which is also competitive in terms of price.

3.5] It was also explained to the Ld. ITO (IT & TP) that assessee has placed order to the Non Resident supplier directly for purchase of spare parts Since and since there is no liability of TDS u/s 195 on purchase of Capital Goods from Foreign Supplier of Goods hence there was no liability towards withholding tax u/s 195 on said payment made to non-residents

04] The Ld. Income Tax Officer has not appreciated the facts placed before him and has passed an order u/s 201(1)/201(1A) of the Act on 28.03.2017 wherein he was of the view that payment made by the Assessee company to M/s Bhuler AG , Switzerland towards purchase of Spare Parts for Old Machines and Flour Milling Machine is governed by the provisions of Sec. 9(1) of the Act and on which no withholding Tax u/s 195 of the Act was deducted. Hence he has considered the assessee as assessee in default and created the demand in his case.

S.No.	Particulars	Amount paid	Gross up amount	Default of TDS	Interest u/s 201(1A)
01	Payment to M/s Buhler AG Switzerland	38,093	6,349	2,616	654
02	Payment to M/s Buhler AG	2,83,438	47,240	19,463	3,892

	Switzerland				
	Total			22079	4546

05] That on perusal of the Purchase Order and Invoices Your Honours will appreciate that Assessee company has basically purchased Spare parts for Old Machines and Flour Milling Machine from the above Non-Resident parties. That to purchase the said items the company floats enquiries to various foreign suppliers and obtains technical specification and rates of same from them. Subsequently it placed the Purchase Order to the respective party who meet out the Quality specification which is also competitive in terms of price. It is also notable that payment to said party was towards purchase of Capital Goods being Spare parts for Old Machines and Flour Milling Machine.

06] The Ld . ITO prior to treating the assessee company as a assessee in default referred the provision of section 195 and Section 5 of the Act. For the sake of convenience, provision of all these sections are reproduced hereunder:-

195. (1) 21Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause,

deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :

Provided further that no such deduction shall be made in respect of any dividends referred to in [section 115-O](#).

Explanation 1.—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction there under applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

(i) a residence or place of business or business connection in India; or

(ii) any other presence in any manner whatsoever in India.

(2)

(3)

(4)

(5)

Section 5 in The Income- Tax Act, 1995

5.(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which-

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year: Provided that, in the case of a person not ordinarily resident in India within the meaning of sub- section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non- resident includes all income from whatever source derived which-

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1-Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.- For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

7.1] That on close reading of section 195 of the Income Tax Act any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest

referred to in section 194LB or section 194LC) [or section 194LD] or any other sum chargeable under the provision of this Act

7.2] The assessee company is liable to deduct withholding tax only when the amount as paid by it is liable to tax in India as clearly mentioned under the provision of section 195 of the Act. The amount as paid by the assessee company to M/s Buhler AG Switzerland was liable to tax or not, we have refer the provision of section 5 of the Income Tax Act.

7.3.1] That as per sub- section [2] of section 5 of the Income Tax Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source of derived which -

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

[b) accrues or arises or is deemed to accrue or arise to him in India during such year, accrues or arises or is deemed to accrue or arise to him in India during such year.

7.3.2] That on perusal of the Bills along with the correspondence made by the assessee with the said supplier you will find that payment to the Non-resident Supplier was towards purchase of Capital Goods being Spare parts for Old Machines and Flour Milling Machine. The assessee has placed order to the Non-Resident supplier directly.

8.1] It was also mentioned that said transactions were made through Indian Parties which were agents brokers in India of those non-Resident. The detail of the same as mentioned by the Ld. A.O. is as under:-

S.No.	Name of Recipient	Name of Agent/Broker through which order is placed
01	Buhler AG Switzerland	Buhler India Pvt. Ltd Bangalore

8.2] In this respect the assessee has already clarified to Ld. ITO that assessee Company has purchased Spare parts for Old Machines and Flour Milling Machine from the above Non Resident party.

8.3] That to purchase the said items the company floats enquiries to various foreign suppliers and obtains technical specification and rates of same from them. Subsequently it places the Purchase Order to the respective party who meet out the Quality specification which is also competitive in terms of price.

8.4] That the payment to said party was towards purchase of Capital Goods being Spare parts for Old Machines and Flour Milling Machine and the assessee has placed order to the Non Resident supplier directly.

8.5] That as per Expl. 2 to Sec. 9(1)(a) M/s Buhler India Pvt. Ltd. has not acted as an agent for its Non Resident Principal Company M/s Buhler AG Switzerland. The Assessee company has purchased the Material on Principal to Principal Basis. Thus no liability of TDS u/s 195 is attracted on said payment made to non-residents. In reply to notice issued by the 1T'O TDS u/s 133(6) to the said party, it was categorically mentioned that customers enquiry received by it is forwarded to Buhler AG (Principal) and Quotation from Buhler AG (Principal) to prospective customers. The Indian counterpart has no Authority to conclude the contract on its own and therefore the Bulher AG has no business connection in India so as to consider income deemed or accrue arise in India as per provisions of Sec. 9(1) of the Act.

09] *Copy of Audited Balance Sheet, Annual Return in Form No. MGT -7 as filed by M/s Buhler India Pvt. Ltd. for the year ending 31.03.15 and 31.03.16 under the Companies Act filing the Particulars of Holding, subsidiary, Joint Venture and Associate companies of said company are also enclosed for your kind reference. That on perusal of the same you will find that Buhler AG Switzerland was not holding any shares in Buhler India Pvt. Ltd.*

10] *That Hon'ble IT AT Indore Bench in its Latest order in the case of Hind Energy and Coal Benefication (India) Ltd. reported in 110 Taxmann.com 72 in para 46.*

In view of the above, your Honour is very kindly requested to delete the entire amount of Demand as raised by the Ld. A.O. under the withholding tax u/s 195 of the act of Rs. 2616/- and Rs. 19463/- for the A.Y. 2015-16 and A.Y. 2016-17 respectively and also delete the interest charged u/s 2011201(1A) of the Act of Rs.654/- and Rs. 3892/- for the A.Y. 2015- 16 and A.Y. 2016-17 respectively.

7. Per contra Ld. Departmental Representative vehemently argued supporting the orders of Ld. CIT(A).

8. We have heard rival contentions and perused the records placed before us and carefully gone through the decision referred and relied by the assessee. The common grievance raised by the assessee in the instant two appeals for Assessment Year 2015-16 and 2016-17 is against the finding of Ld. CIT(A) confirming the action of Ld. A.O treating the assessee company as an assessee in

default for non deduction of tax at source u/s 195 of the Act at Rs.2616/- and Rs.19,463/- on the payment for purchase of spare parts to non resident company namely Buhler AG, Switzerland at Rs. 38,093/- and Rs.2,83,438/- during Financial Year 2014-15 and Financial Year 2015.16.

9. We observe that the assessee company is engaged in the business of manufacturing of wheat products. It intended to purchase spare parts for its old flour mill machines. The assessee after making necessary enquiry finally purchased goods from M/s Buhler AG, Switzerland vide invoice dated 24.3.2015 and 11.8.2015. In order to make payments to the supplier, form 15CA/15CB of I.T. Rules was not filed on the ground that no such forms needs to be filed online and need not be provided to bank in case of purchase of capital goods/spare parts of machineries.

10. When the matter was taken by the Ld. A.O, necessary details were called and it was revealed that M/s Buhler AG, Switzerland is having group company's office in Bangalore working in the name of Buhler India Pvt. Ltd (In short 'BIPL') wherein 99.99% equity share is held with M/s Buhler AG, Switzerland. Ld. A.O also came across

the correspondences through e-mail between the assessee company and BIPL, Bangalore showing that the orders for supply of spare parts were finalised between these two companies based in India and finally the orders were placed to M/s Buhler AG, Switzerland who had issued the invoice. On the basis of these information Ld. A.O was of the view that as per provisions of Section 9(1) of the Act since the non resident company is having a “business connection” in India through BIPL through the communication attributable to these transaction for spare parts is subject to withholding tax u/s 195 of the Act.

11. When the matter came before the Ld. CIT(A) who after considering the reply of the assessee which summarised that transactions has been directly carried out with the non resident company which has issued the invoice/supply the goods and payment have been made directly to it. It was also submitted that purchase of capital goods from non resident is not subject to tax withholding.

12. We further find that Ld. CIT(A) elaborately discussed the facts and related sections of Income Tax Act and came to the conclusion

that BIPL is working on behalf of Buhler AG, Switzerland and thus confirmed the action of Ld. A.O. observing as follows:-

“8. I have carefully considered the facts of the case, order passed by the AO and the written submissions placed by the appellant. In the present appeal, the basic question that needs to be decided is whether Buhler AG Switzerland has a business connection / PE in India. through its subsidiary company / group company Buhler (India) Pvt, Ltd. Bangalore. It is noted that vide submission dated 11.8.2016 before the AO, the appellant had denied having knowledge of any business connection! place of business of Buhler AG Switzerland in India. To verify the veracity of the above statement the AO called for copy of invoices, purchase orders and copy of mail correspondences between the appellant and Buhler AG Switzerland. The appellant had initially refused to be aware of presence of BAGS's office I branch or subsidiary in India. However-, on perusal of email correspondences between appellant and Buhler (India) Pvt. Ltd. Bangalore. it is noted that the appellant is primarily dealing with Indian counterpart subsidiary/group company - Buhler (India) Pvt. Ltd Bangalore. At page No. 5 of the AO's order, AO has reproduced extracts of said mail correspondences carried by appellant company with BIPL. Extract of said mail correspondences (lie produced herein under:

66

Assessee to Buhler India Bangalore- As per your quotation No-20123456284/002 we are sending herewith a purchase order of spare parts of Sanghvi Foods Pvt. Ltd.

Buhler India Bangalore to Assessee- Please find herewith attached revised quotation for the part required by you, kindly go through the same and send your confirmation for our further process looking forward for your valuable order. Thanks and regards. Buhler India Put. Lid. Bangalore.

Assessee to Buhler: India Bangalore- We require below, items:

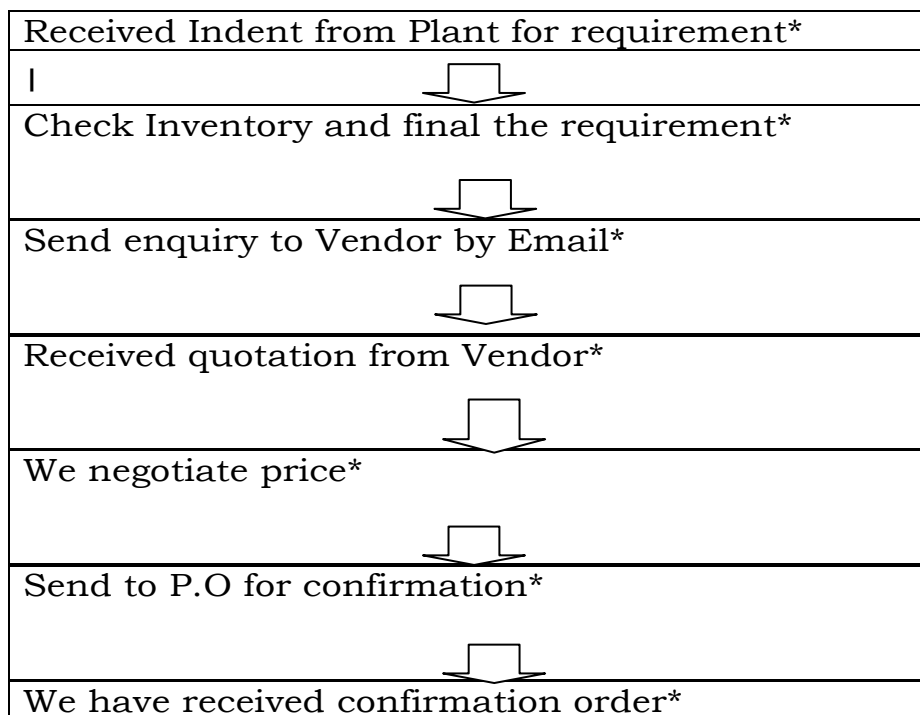
<i>.Material</i>	<i>Qty</i>
<i>..... (Details Provided)</i>	<i>.....</i>

Buhler India Bangalore to Assessee- Please find herewith attached quotation for the part required by you kindly go through. the same and send your confirmation; for our further process, Looking forward for your valuable order. Thanks and regards .

.....”.

8.1 There is apparent contradiction in the claim made by the appellant and the facts of the case. On one side, appellant is contending that it is not aware that non-resident BAGS has any Indian Counterpart and on another side appellant itself has carried continuous mail correspondences with the Indian subsidiary BIPL of the non-resident. BAGS. Further, in entire submission placed before this office there is no rebuttal to the observations raised by the Ld. AO on said mail correspondences. On perusal of the first mail correspondence, it is very much apparent that the appellant company is placing order with RTPL only on reference to quotation received from BIPL. On perusal of second mail correspondence, it clearly transpires that BIPL is authorized to negotiate, raise quotation, revise quotation and also confirm an order. On perusal of

the third mail correspondence- it is very apparent that appellant company sought a combined quotation only from BJPL and also confirmed the purchase order only through it. Fourth mail correspondence also clearly spells that BIPL has the authority to send quotations and taking orders from the appellant. This reveals (mail correspondences) that in entire transaction, SIPL was in active participation till finalization of the order. Series of events show that after substantial tasks carried by SIFL, BAGS have raised only final invoicing. In the light of the above factual position, the contention of appellant that it was not aware of place of business in India of BAGS is contradictory to the facts submitted by itself during the course of assessment proceedings, At this juncture it would be relevant to note that substantial functions pertaining to sales, marketing have been carried out by BIPL for and on behalf of its ,<\E namely BAGS, To put in the same How chart it may be noted that the marked portion of the contract is being carried out by BIPL for and on behalf of BAGS in India.



Transfer the amount by bank as per T&C of P.O*.

Vendor confirm the payment*

Vendor send the schedule of dispatch of goods like by Air/Sea and other detail*

We have given contract for clearance of goods to CHA*

CHA clear Goods from custom for completing all legal compliance*

CHA send goods to our factory premises*

**Mail communications between appellant company and Buhler (India) Pvt. Ltd clearly indicates that appellant company was in conversation with Buhler (India) Pvt. Ltd till finalisation and confirmation of order.*

8.2 Further the Ld. AO has issued notice u/s.133 (6) of the I.T. Act, 1961 to 8IPL to which reply has been received from BIPL, extract of which is available at page-5 of the assessment order. To summarize, BIPL has stated that its role is confined to identity customers , liaison with customers on requirement and product specification and handling their inquiries, and thereafter forwarding enquiries to its AE Le. Buhler AG. However on perusal of the fact s as well correspondences between appellant and B1PL, I am not inclined to agree with the reply received by the Assessing Officer pursuant to notice u/s 133(6), It clearly emanates that SIPL is actually providing very vital services till the confirmation of order and it is not merely restricted to marketing of the product.

8.3 In light of the above facts it now needs to be analyzed whether BIPL constitutes business connection / PE in India for BAGS as per the provisions of Income Tax Act / DTAA. It is a settled position in law that the tax treaty over rides the provision of the Act in so far as they are beneficial to the appellant.

8.4 It is also a settled position pursuant to Section 50(4) that the benefit of the DTAA would be available only if the Tax residency certificate J Form 10 is filed by the appellant. Considering this the appellant was asked both by the AO as well as the undersigned to file Tax Residency Certificate. However, the appellant has submitted that there was no requirement to file TRC or Form 10 as the income of BACS was not taxable in India. However, this stand of the appellant again gets forfeited from the documents provided by the appellant itself and now available on record. During the Course of appellate proceeding [OO, appellant has failed to furnish TRC or Form 10 and therefore reference to provisions of DTAA is not required to be made.

8.5 Therefore the basic question that now needs to be decided is whether under the provisions of Income tax Act, 1961, BAGS has a business connection in India through its Subsidiary company / group Company' BIPL.

Therefore it would be apt to refer to the provisions of Income tax Act which are reproduced here under:

“.....

Scope of Total Income

"5,(2) Subject to the provisions of this Act, the total income of any

previous year of a person who is a non-resident includes all income from whatever source derived which-

(a.) is required or is deemed to be received in India in such year by Or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year."

Income deemed to accrue or arise in India

"9. (1) The following incomes shall be: deemed to accrue or arise in India:

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.

Explanation 2.- For ale removal doubts, it is hereby declared that "business connection" shall include any business activity carried out through a, person who, acting on behalf of the non resident,-

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

(b) has HO such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

(c) habitually secures orders in India, mainly or wholly for the non-resident or for that: non.-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:

Provided that such: business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having all independent status is acting in the ordinary course of his business::

Provided further *that where such broker, general commission agent or any other agent works mainly or wholly on behalf of (1 non resident (hereafter in this proviso referred to as the principal non resident) or on behalf of such non-resident and other non-residents which are controlled by the principal non-resident at have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or can agent of an independent status"*

....."

Section 5(1) r.w.s 9(l) determines the taxability in case of Non-Resident. The Indian Income-tax Act provides for levy of Income-tax on the income of foreign companies and non-residents, but only to the extent of their income source from India. As per Section 5(2) of the Act, a foreign company - non-resident person is liable to tax for income deemed to accrue or arise to in India. Section 9(1) specifies certain types of income that are deemed to accrue or arise in India. Section 9(1)(i)

provides for all income accruing or arising, whether directly or indirectly, through or from any business connection in India. Clause a) to Explanation 2 to section 9(1)(i) further defines business connection to be any business activity carried out through a person who, acting on behalf of non-resident, has habitually exercised in India, an authority to conclude contracts on behalf of (he non-resident.

8.6 In the present case, details provided by the appellant itself shows that it has carried out transactions through BIPL (though prima facie denied by it). Appellant has transacted with BIPL continuously for the said transactions of purchase of machine parts. BIPL is carrying out functions like orders, raising quotations, revising quotations, finalizing terms, confirming the purchase order, etc. BIPL was fully involved during the transaction and played an important role while undertaking discussions, negotiations, offering quotation, accepting purchase orders, liaison work and finalizing the deal etc. In totality, Buhler India is in lead to get deal concluded for BAGS. These functions performed by BIPL for BAGS sufficiently go to prove that it is acting on behalf of BAGS and concludes contracts on behalf of it. It is not mere business sourcing agent but it is taking onerous task till the finalization of business transaction which leads to a close business connection in India.

Further, vide reply to 133(6) BIPL also confirms that it regularly assists BAGS and other group of companies in India and evidences on records go to show that it actually does much more than the services as conveyed. Considering the above factual position, I find no reason to interfere with the findings of

the Assessing Officer. In my considered view, therefore, the BAGS indeed has a business connection in India by way of its Indian subsidiary BIPL which is acting for furtherance of the business interests of the BAGS in India remaining closely connected.

Further, the fact whether the parent company gets any kind of business from the Indian subsidiary would also be relevant in determining whether there exists a business connection in India. In this context, there is a judgment in the case of CIT v Remington Typewriter Co (Bombay) Ltd 5 ITR 177 (PC), which is summarized below: An American company formed a subsidiary company in Bombay for carrying on in Bombay the American company's business of selling its products. Although no contractual obligation existed with the Bombay company, the flow of business between the two companies was secured by the; fact that the ultimate and complete control of the Bombay company was vested in the American company which owned all its shares. Held, a BC existed between the American company and the Bombay company and that the estimated profit must be deemed to have accrued to the American company in India.

When an enterprise of a contracting state carries On business in another contracting state, it needs to be: examined whether a PE is hidden behind a subsidiary/ dependent agent, i.e. if the agent in addition to its own business also carries on the business of the non-resident company. Substance of a transaction is more important than the mere legal form of the transaction. The OECD commentary on the identification of the elements of a PE gave relevance to the substance rather than to the mere legal form of the

transactions.

Without prejudice BAGS can also be considered to have a P.E. in India under Clause c) to Explanation 2 to section 9 (1 Hi), since BIPL is taking and finalizing orders in India, mainly and or wholly for the non-resident - BAGS,

9. The alternative contention of the appellant is that. even if said material was purchased from Indian Company - BIPL, the appellant 'was not liable to deduct TDS. This alternative plea of appellant is academic. It needs to be noted here that once business connection is established in India for any Non-Resident, it has to pay taxes in India for profits or gains secured from business in India. In order to safeguard India's right to tax said income provisions of withholding Tax have been placed so that buyer itself withholds tax and pay it to the income tax department. The contention that if the material would have been bought from Indian entity would not attract TDS u/s.195, as the Indian entities file their return of income in India is otiose. On above detailed discussion, I find that Buhler {India) Pvt Ltd. Bangalore constitutes business connection / PE in India for Buhler AG Switzerland. I find merit in the findings of the Let AO and hence reject appellant's ground of appeal.

10. As a result, the appeal of the appellant is Dismissed.”

13. Though the finding of Ld. CIT(A) and the investigation of Ld. A.O clearly shows that the role of BIPL cannot be ignored at any stage. Since the beginning when the assessee company searched for suppliers of the spare parts, BIPL was very much in the scene of the

transaction of purchase. This fact is further strengthened with the reply submitted by BIPL u/s 133(6) of the Act on 15.2.2017 through e-mail to the A.O and the same reads as follows:-

“We refer to your letter dated 12.01.17 which was received by us on 17.01.17 calling for information with respect to proceedings u/s 201(1)/201(1A) of the Act in the case of Sanghvi Foods Pvt. Ltd Indore TAN BPLS01258F for FY 2014-15 and FY 2015-16.

In this regard we humbly submitted that Buhler India is primarily engaged in the business of manufacture and trade in food processing machineries (Particularly Rice and Flour Milling Machines) and its spare and components. Company also provides repair and maintenance services engineering services etc. It also provides marketing supporting services to some of the group companies including Buhler AG Switzerland.

Provision of marketing support services to Buhler AG Switzerland, inter alia, covers the following activity:

- a. Identifying customers interested in the products*
- b. Liaison with customers on their requirement and product specification as well as handling customer enquiries relating to the product.*
- c. Forwarding customer enquiries to Buhler AG and quotation from Buhler AG to the prospective customers”*

14. The above reply of BIPL leaves no confusion that BIPL being subsidiary/group company of Buhler AG, Switzerland is having

regular business activity in India and apart from the trading business it also regularly providing marketing services to Buhler AG, Switzerland. Whether the activity carried out by BIPL falls under the definition of “business connection” provided in explanation 2 to Section 9(1) of the Act which deals with the “Income accrued and derived in India” needs to be examined.

15. We find that the definition of “business connection” is provided in Explanation 2 to Section 9(1) of the Act. Section 9 of the Act deals with “Incomes deemed to accrue or arise in India”. Section 5 of the Act deals with the “scope of total income” and section 195 of the Act deals with the “deduction of tax at source on other sum” paid has already been mentioned in the finding of Ld. CIT(A). The most important word in the instant case is the “business connection” which is defined in Explanation 2 to Section 9(1) and the same includes following business activities carried out through a person who is acting on behalf of non resident:-

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods of

merchandise for the non-resident; or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non resident; or

(c) habitually secures orders in India, mainly or wholly for the non- resident or for that non-resident and other non- residents, controlled by, or subject to the same common control, as that non-resident.

The activities carried out by B/s BIPL for Buhler AG, Switzerland squarely falls in activity (a), (b) & (c). Since “Business connection” of Buhler AG, Switzerland in India and “M/s BIPL, Bangalore” is established beyond doubt, the income portion in the transaction between the Buhler AG, Switzerland and the assessee is subject to tax and the same has been rightly carried out by Ld. A.O.

16. As regards the decision referred and relied by Ld. Counsel for the assessee of ITAT, Indore Bench in the case of “*Hind Energy & Coal Benefication (India) Ltd*” (supra) the same is not applicable in the instant case since the facts are different. In the case of Hind

Energy & Coal Benefication (India) Ltd where the activity of receiving order was carried through an Indian agent who along with the non resident company in question provided services to many other companies also and thus was not “wholly” working for the non resident company. The fact is also different since in the case of agent through which the transaction was carried in the case of Hind Energy & Coal Benefication (India) Ltd was not a subsidiary/group company of non resident company whereas in the instant case the activity of supply of goods/providing quotation/confirming orders have been carried through the Indian subsidiary i.e. BIPL. Therefore the decision of the *Hind Energy & Coal Benefication (India) Ltd* (supra) is not applicable in the instant case.

17. Therefore in the given facts and circumstances of the case and series of facts brought on record, we are of the view that since the non resident supplier Buhler AG, Switzerland has carried out the transaction of sale of goods to the assessee company through its subsidiary/group company BIPL, Bangalore “*business connection*” is established and therefore Section 9 of the Act dealing with

“Income deemed to accrue or arise in India” comes into operation and thus the transaction needs to pass through Section 195 of the Act. We, therefore find no inconsistency in the finding of Ld. CIT(A) and the same is confirmed. In the result common issue raised in Ground No.1 of appeals No. ITA/743/Ind/2018 and ITA/744/Ind/2018 stands dismissed. The other grounds are general in nature which needs no adjudication.

18. In the result both the appeals of the assessee stands dismissed.

The order pronounced in the open Court on 03.06.2020.

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

नांक /Dated : 03rd June, 2020

/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore