

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

श्री महावीर सिंह, माननीय उपाध्यक्ष, एवं
श्री जी. मंजूनाथा, , माननीय लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकरअपीलसं./IT (TP) A No.14/Chny/2020
निर्धारणवर्ष/Assessment Year: 2011-12

M/s.Redington Distribution Pte. Ltd., v. The Dy. Commissioner-
No.60, Robinson Road, of Income Tax,
#12-02, BEA Building, International Taxation,
Singapore-068892. Circle-2(1), Chennai.

[PAN:AAECR 7054 E]
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Mr.Sriram Seshadri, CA

प्रत्यर्थी की ओर से /Respondent by : Dr.S.Palanikumar, CIT

सुनवाईकीतारीख/Date of Hearing : 22.08.2022

घोषणाकीतारीख /Date of Pronouncement : 16.11.2022

आदेश / ORDER

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against final assessment order passed by the AO u/s.143(3) r.w.s.147 r.w.s.144C(13) of the Income Tax Act, 1961, dated 25.11.2019, in pursuant to the Dispute Resolution Panel-2, Bengaluru, directions issued u/s.144C(5) of the Act, dated 26.09.2019, and pertains to assessment year 2011-12.

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2. The assessee has raised the following grounds of appeal:

Based on the facts and circumstances of the case, Redington Distribution Pte Ltd (here-in-after referred to as the 'Appellant') respectfully craves leave to prefer an appeal against the final assessment order dated 25 November, 2019 issued by Deputy Commissioner of Income Tax, International Taxation Circle 2 (1) (here-in-after referred to as the 'AO') in pursuance to the directions issued by Dispute Resolution Panel -2 ('DRP'), Bangalore under section 144C(l 3) of the Income-tax Act, 1961 ('Act') on the following grounds:

A. Corporate Tax Related:

1. No Permanent Establishment ("PE") in India

i. The Ld. AO/DRP have erred in stating that the Appellant has a Permanent Establishment in India.

ii. The Appellant does not have a Fixed PE nor Dependent Agent PE in India under the provisions of both the Act and the India-Singapore OT AA which was not appreciated by the AO/DRP.

iii. The AO/DRP failed to appreciate that a separate assessment has already been initiated against Redington (India) Ltd, the Holding Company in India, for cross-charge of the expenses of the same 'Dollar Team' of the Appellant which is again said to form the PE, thus a disallowance in the Appellant's hands is unwarranted and lead to a double tax incidence.

2. Incorrect understanding of Business model

i. The Ld. AO/DRP have fundamentally erred in factual understanding of the business model of the Appellant.

ii. The Ld. AO/DRP ought to have appreciated the fact that the business model of the Appellant is back toback sales unlike stock and sell as that of Redington (India) Ltd, hence the asset and employee requirements are not comparable.

iii. The Ld. AO/DRP have not appreciated the basic fact that 'Dollar Team' does only fulfilment activity and does not finalize prices or sign-off orders or make decisions and hence attributing profits to it as a PE is illogical and erroneous.

3. Statement of Oath misinterpreted

i. The Ld. AO/DRP ought to have considered the multiple statements of oath of employees and third party customers which clearly highlight that the 'Dollar Team' does not solicit customers in India.

ii. The Ld. AO/DRP have deliberately cherrypicked the only statement of oath of one junior employee who was new to the organization and thus was not fully cognizant of the Appellant's functioning and which he gave under duress and has since retracted.

4. Incorrect Attribution of Profits in India

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1. Arbitrary turnover value used: The Ld. AO/DRP have erred in adopting an arbitrary turnover value for arriving at profit attributable to PE in India, instead of the turnover as per the audited financial statement of the Appellant

ii. Incorrect sales figure adopted: The Ld. AO/DRP have further FACTUALLY erred in including in the total sales figure, the direct sales to third-party customers (direct sales), sales to third-party customers involving commissions to channel partners (ORC sales), sales made outside India (overseas sales), sales made directly to Redington India ALL of which have no relation to the instant case.

iii. Flawed attribution to PE: The Ld. AO/DRP without appreciating the following factual points, have erred in arriving at its arbitrary attribution to the Permanent Establishment ("PE"):

- the business of the Appellant is mainly sourced by 3rd Party Channel Partners who work in conjunction with Vendors and End Customers in the normal course of business.
- commission expense incurred on majority of the sales and including the same again for the purpose of Permanent Establishment (PE) in India will be against the principles of natural justice and will lead to double taxation.
- the revenue stated in the audited books of accounts are net of commission paid to such partners.
- accordingly, such sales made through channel partners ought to be excluded from PE.

iv. Average ratio of asset, employee based on incorrect comparables: The Ld. AO/DRP have erred in adopting the average ratio of asset, employee by comparing it with Redington India which is wholly illogical as both entities are fundamentally not comparable.

v. Ad-hoc risk at 20% attribution: The Ld. AO/DRP further erred in adopting an arbitrary risk attribution of 20% without any basis and without appreciating that there was no risk whatsoever undertaken by the 'Dollar Team' in India.

vi. Royalty double addition: The Ld. AO has erred in including the Royalty income again for the purpose of computation which is already included in the turnover of the Appellant, resulting in double taxation.

vii. The Ld. AO/DRP have ended up in arbitrarily assuming the manpower requirement for the Appellant's business with a particular quantum of profitability/turnover exceeding their jurisdiction

5. Erroneous interpretation of directions of Hon'ble DRP

i. The Ld. AO has erred in not following the direction of the Hon'ble DRP which specifically held that "profits shown in the books of RDP L needs to be distributed between the foreign entity"

ii. The Ld. AO has erred in adopting incorrect turnover of the Appellant which is not as per books of RDPL as required by the DRP instead stating that the same was taken from the survey in the premises of the Holding Company in India. Furthermore, even the document evidencing such turnover via the survey has not been shared by the Ld. AO with the Appellant.

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iii. *The Ld.AO has therefore erred in deriving the profit for the subject year as INR 196,444,881 instead of INR 117,623,543.*

iv. *The LD. AO has erred in not following the directions of the Hon'ble DRP to distribute the profits as per the audited books of the Appellant. The profit distributed is higher than the profit as per books of the Appellant (RDPL) which is against the very directions of the DRP.*

6. Derivation of profits attributable resulting in loss to the Appellant in the subject year

i. *The Ld. AO/DRP have erred in arriving at an exorbitant profit which would result in the Appellant incurring losses for the subject year which is illogical and factually incorrect.*

ii. *The Ld. AO erred in not considering the respective rectification petitions detailing the computation mistakes filed by the Appellant.*

7. *The Appellant craves leave to adduce, annul or modify all or any of the above grounds before or at the time of the hearing of the appeal.*

3. The brief facts of the case are that the assessee, M/s.Redington Distribution Pte Ltd., (in short "M/s. RDPL") is a foreign company and a tax resident of Singapore. It is a subsidiary of M/s. Redington (India) Ltd., (in short "M/s. REDIL") a listed Company on the National Stock Exchange & the Bombay Stock Exchange of India, in India. The Redington Group is leading Supply Chain Solutions Provider Worldwide to manufacture of Information Technology, Telecom and Consumer & Lifestyle products. The main business of the assessee group is providing end-to-end supply chain solutions for all categories of IT products (PCs, PC building blocks, networking, software and enterprise solutions products), Consumer & Lifestyle products. The group has presence in various geographies viz., India, Middle East, turkey, Africa, Singapore and South Asian countries. A TDS survey was conducted at the premise of the M/s.REDIL, wherein certain details were found which showed that the

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assessee, M/s. RDPL, is having a Permanent Establishment (in short "PE") in India. During the course of survey conducted on 12.12.2017, it was noticed that the team called 'Dollar Business' was identified from the employee list and on a detailed enquiry with the sales staff, it was found that the said 'Dollar Business' pertains to the USD business of Indian customers like Cognizant Technology, Sify Technology, Zoho Corporation, etc. It was further noticed that the 'Dollar Team' of employees of M/s.REDIL oversee the import requirements of customers of M/s.REDIL. It was further noticed that the 'Dollar Business' is the same business with the distinction that the billing was done in USD instead of INR and such request is usually made by companies having Units in SEZ etc., who can avail import duty benefits from imports made in USD. During the course of survey, employees of 'Dollar Team' were questioned about the work being done by them. At the same time, supporting documents like e-mails, etc., were checked. The Department has analyzed statements recorded from employees of 'Dollar Team' and corresponding evidences which shows entire sales process from identification of customers through granting of credit till collection of receivables in this 'Dollar Business' was happening from India and was being performed by the 'Dollar Team' of M/s.REDIL.

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4. The assessee is a foreign company and a tax resident of Singapore claimed that it is not liable to tax in India and thus, return of income was not filed for the impugned assessment year. The assessment has been subsequently re-opened u/s.147 of the Act, for the reasons recorded, as per which, income chargeable to tax, had been escaped assessment and thus, notice u/s.148 of the Act, dated 29.03.2018 was issued and served on the assessee. In response to s.148 Notice, the assessee filed its return of income on 25.04.2018 admitting total income of Rs.1/- and total tax and interest payable of Rs.1,15,01,279/-. The assessee had requested for reasons for re-opening of assessment and such reasons were communicated to the assessee on 26.09.2018. The case has been, subsequently, taken up for scrutiny and during the course of assessment proceedings, the AO on the basis of information gathered during the course of survey coupled with statement recorded from employees of 'Dollar Team' and also on analysis of various evidences including e-mails, correspondence between M/s.REDIL and M/s.RDPL, Singapore, opined that the assessee is having a fixed place of PE in India, because of employees of 'Dollar Team' looking after complete business model of the assessee, including identification of customers in India, submitting quotes for various equipments, fixing price and ultimate collection of receivables from the parties, has been done by 'Dollar Team' and thus, opined that there is a PE in India and accordingly, the assessee is liable to pay tax in India on its income. The AO has discussed the issue in light of

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Explanation-2 to Sec. 9(1)(1) of the Act, and Article-5 of India Singapore DTAA, to come to the conclusion that except shipping of equipments from Singapore, all other works has been done by Indian 'Dollar Team' of M/s.REDIL. Therefore, said work done by 'Dollar Team' constitutes a fixed place of PE in India and thus, rejected the arguments of the assessee and assessed income of the assessee in India for taxation. The AO while doing so, had considered statements of Mr. Prabhakaran, Sales Manager of 'Dollar Team' and Mr. Ashish Arora, who is head of Singapore operations of the assessee and observed that right from appointing staff required for Singapore operations to carry out various business activities in India for the assessee, the employees of M/s.REDIL, are doing the work. Therefore, said services come under dependent agency PE also. Therefore, the Assessing Officer opined that income is also liable to tax in India, even on this count. Therefore, rejected the arguments of the assessee that 'Dollar Team' of Indian entity was only doing back office work and all other work, including concluding contracts is lies with the assessee i.e. M/s.RDPL, Singapore, and thus, assessed total income of the assessee to tax in India. As regards profit attribution, the AO after considering total employee cost of M/s.REDIL& M/s.RDPL, Singapore, and also asset base, come to the conclusion that the assessee is having 89.65% profit attributable to Indian operations. Therefore, computed net profit of the assessee at Rs.19,64,44,881/- and attributed 89.65% profits to Indian operations.

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5. Being aggrieved by the draft assessment order, the assessee has filed objection before the DRP-2, Bengaluru, and raised various objections against draft assessment order passed by the AO. Before the DRP, the assessee contended that the AO is erred in treating 'Dollar Team' of Indian entity M/s.REDIL, has fixed place of PE in India only on the basis of certain functions carried out by them for Singapore entity without appreciating the fact that the 'Dollar Team' is performing only back office support services like billing, follow-up action and collection of receivables from the customers. In other words, the 'Dollar Team' of Indian entity does not have any authority to conclude contracts and in absence of any authority to conclude contracts, the question of existence of fixed place of PE, does not arise. The assessee had also questioned profit attribution worked out by the AO and argued that the AO is grossly erred in working out 89.65% profit to Indian operations.

6. The DRP in their directions issued u/s.144C(5) dated 26.09.2019 opined that the entire sales functions are habitually performed in India through 'Dollar Team' and thus, all the conditions of PE are satisfied. The DRP further opined that the 'Dollar Team' has performed the functions of agent in India and accordingly, the dependent agency i.e. PE is constituted in India. Therefore, opined that there is no error in the reasons given by the AO to conclude that the assessee is having a fixed place of PE and dependent agency PE in India and its income is liable to tax in India. As regards attribution of profits, the DRP observed that the

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AO has adopted profit before tax ratio of M/s.REDIL, instead of Singapore entity. Therefore, opined that what needs to be attributed to PE is the profits of foreign entity i.e. M/s.RDPL, Singapore. Therefore, directed the AO to consider profits shown in the books of the assessee and attribute said profits to Indian operations. The relevant findings of the DRP are as under:

2.1 The Panel has perused the evidence brought on file by the AO and the factual and legal findings of AO. The Panel also perused the detailed objections filed by the assessee. Based on this the findings of the Panel are summarized in the following paragraphs:

Firstly, the returned income is erroneously shown as Rs.1/ in the DAO and the same may be rectified by the AO after due verification.

The AO based his findings heavily on the findings of survey during which the existence and functioning of "Dollar Team" came to light. Hence it is relevant to delve on the issue of "Dollar Team" and its functions. As stated earlier, this is a specialized team employed by REDIL in India whose primary/sole function is to take care of dollar-based purchases of Indian customers, meaning purchases which require import of goods and services. The AO discussed the issue at para 7 of her order REDIL has a host of customers in India. Most of their purchases are in Rupees meaning the Indian entity acts as a distributor for the supply. However, when the customers have a requirement to make zero duty purchases from their SEZ units etc., the distribution activity is referred to the "Dollar Team" in REDIL office. That is when 'Dollar Team' is activated and the members of 'Dollar Team' perform all the ingredients of sales' function and post sales function. These functions include identification of suitable vendor for the customer. Negotiation of price etc., is done by the 'Dollar Team' of REDIL, except that the final billing is done in the name of RDPL. The findings of the survey demonstrated that all the functions that are performed for sale in India for rupee business is exactly replicated in Dollar sales also except that the final billing and payment are done in the name of RDPL. The AO has reproduced the Stepwise functions performed by the 'Dollar Team' of REDIL at Para-7 and the same is reproduced below:

"ii. The customer seeks a quote towards the Bill of Materials. The negotiation and conclusion of terms of sales with customer will be done by the 'Dollar Team' of REDIL in India on behalf of the foreign company.

iii. The 'Dollar Team' in REDIL furnishes the quote with a request to place the order in the name of Redington Pte. Ltd. and then the customer places the purchase order in the name of RDPL.

iv. The 'Dollar Team' in REDIL in India generates and sends the proforma of invoice under the letter head of the foreign company RDPL on

A. "Generally, based on existing relationship, I would approach the Procurements teams at the respective customer place and explain them about our tie-ups with OEMs and try to understand the future and current requirements of for IT infrastructure. I have provided you with a copy of such analysis in the file titled: c:/users/Krishnakumar/Desktop/IT/PPT.xlsx, prepared by me. When I approach

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my customer I'll approach them in the capacity of Redington India Ltd., sales team.

- B. Then I will contact the respective OEMs like cisco, Juniper, Ruckus, IBM sales representatives available locally in India to prepare the Bill of Materials and the commercials i.e. customer Transfer price i.e. the price at which you have to sell to the customer and Redignton Transfer Price i.e. the price at which the OEM will sell it to you.
- C. Then the formal proposal will be submitted to the customer for purchase order generation. If the customer is not satisfied with the commercials, I will put the customer to the respective OEM for further negotiations.
- D. The Redington commercials will be as per the rates agreed on transition basis negotiated by me initially and further if required by my business Head, Shri Abraham Cherian. The decision on rate to be negotiated will be taken by me based on factors like, order closure, material urgency, competitor involvement in the opportunity etc. Such decisions taken by me would be acceptable to my team head as I am only aware of the prevailing circumstances.
- E. I am producing a sample copy of said proposal dt 30.10.2017 in respect of a proposed order from Cognizant Technology Solutions.
- F. On receipt of the purchase order from the customer, I have to receive a formal quote (ready to sell the agreed quantity at agreed rate) from the respective OEM. On receipt of the quote from the vendor by mail, I'll forward the same to the team which loads the order onto the vendor system thro the online interface. The Proforma invoice will be generated automatically thro our JBA based on purchase order given by the customer which will be downloaded and sent by me to the customer.
- G. Post order loading by Redington to the vendor interface, mail will be received from OEMs regarding the order status, readiness of the item ordered at the vendor facility.
- H. Based on that I will take a confirmation on the shipment plan from the customer.
- I. Mail will be sent to Mr.Muthu stationed at Singapore for both hardware.
- J. As per the agreed terms in the purchase order, payment follow up will be made by me.
- K. The terms in respect of timing of payment i.e. credit or immediate will be decided by me.
- L. In case of any default by the customer, I will be consistently following up on the same with the customer.
- M. On receipt of payment, the sales cycle ends there".

2.3 The assessee's primary contention is that RDPL has performed all the functions of distribution in case of "Dollar" based sales with the help of wide network of "Channel partners" to whom commission is paid. It is the contention of the assessee that channel partners in conjunction with the vendors perform all the critical steps in distribution. The assessee claims that it is the customers who decide the billing modalities in INR or USD and RDPL does not have a role in such decision making. This argument of the assessee is not acceptable. To understand the distribution of functions between various stakeholders like customer, vendor, channel partners and distributors, it is better to look at the INR sales before going to Dollarsales. Each entity has a specific role to play in the supply chain management. The role of customer who wants to purchase goods and the role of vendor/manufacturer/supplier need not be discussed here. The distributor (REDIL in case of INR sales) and channel partners both perform distinct functions in the procurement, and

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supply. One can't be replaced by another. The channel partner who acts like a sub-distributor is compensated in the form of commission for such function. It can't be stated that in case where channel partner is involved REDIL has not performed any functions. Nor can it be said that channel partner can replace sales/marketing team of REDIL. Hence, the functions of the 'Dollar Team' and their role in sales proved. The sale may happen with or without the channel partner. But the argument of the AO based on the evidence is that the functions otherwise performed by the REDIL in respect of INR sales are continued to be performed by REDIL through their 'Dollar Team'. This is the reason why the business is done in India and PK is attributed in India. Considering this it can be stated that the existence of channel partners and payment of commission to the channel partners in no way interferes with the findings of the AO and the existence of PR in India.

2.4 The assessee also contended in its submissions dated 30.08.2019 before the Panel that business models of REDIL and RDPL are different, it is contended that customer base of RDPL consists of entities like SEZ units, customers with duty scripts etc., who wish to avail duty benefits on import while REDIL caters to the requirements of local INR purchases. In this regard, it is seen that many customers who are big technology companies have composite requirements. They need purchases in INR for normal units and Dollar purchases for SEZ and duty free units. Further, even if the customer base are different, the role played by 'Dollar Team' cannot be overlooked. Further the assessee admitted that both RDPL and REDIL work through channel partners and commission is paid by them. The assessee contended that 'Dollar Team' performs only fulfillment activity and do not finalize the prices or sign-off the orders. But this assertion is not based on evidence. The AO has put on record sufficient evidence to show that 'Dollar Team' performed all the functions of distribution what the rest of REDTL performed. The AO demonstrated that RDPL establishment in Singapore was bare minimum with least deployment of assets and skeletal staff has no wherewithal to perform the distributor function; Hence, we are unable to accept the arguments forwarded by the assessee.

2.5 With regard to the type of PE, it is seen that REDIL along with 'Dollar Team' has performed the functions of agent in India and DAPE is accordingly constituted in India.

The AO in the Order discussed the legal provisions in view of Sec.5 and Sec.9 and the provisions of Indo-Singapore DTAA as under:

"Sub Section 2 of Section 5 of the Act reads that -

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.

The total income of RDPL a non-resident in India includes the income derived which accrues or is deemed to accrue to it in India. Section 9 gives out the scope of total income of RDPL chargeable to tax in India.

Clause (i) of Sub-section 1 of Section 9 of the Act reads

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.

Explanation I. - For the purposes of this clause—

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(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;

(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export;

(c)

(d)

Explanation 2,—For the removal of 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 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 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 an 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 a 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 or 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 an agent of an independent status.

Explanation 3, - Where a business is carried on in India through a person referred to in clause (a) or clause (b) or clause (c) of Explanation 2, only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India.

Explanation 4.- For the removal of doubts, it is hereby clarified that the expression "through" shall mean and include and shall be deemed to have always meant and included "by means of", "in consequence of" or "by reason of".

Article 5 of Singapore vs. India DTAA

1 .For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on & Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 9 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—

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

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

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

2.6 As seen above and considering the evidence that the entire sales function is performed in India through the 'Dollar Team' all the conditions of a PE are satisfied. The Panel agrees with the AO in concluding that the assessee's PE is established in India. The assessee filed additional submissions dated 26/08/2019 received on 30/08/2019. The additional submissions are essentially same as originally raised. As these issues are discussed at relevant paras of this Order separate adjudication is not warranted on these issues, :

2.7 With regard to the attribution of PE profits, the assessee alleged that AO erred in adopting the PBT ratio of Redington India (REDIL) which according to assessee is not comparable. The assessee contends that PBT ratio of RDPL should be used for profit attribution. The Panel has considered the issue. What needs to be attributed to PE is the profits of foreign entity i.e. RDPL; Singapore. The profits shown in the books of RDPL needs to be distributed between foreign entity and PE. Hence, we concede the argument raised by the assessee and that the margin of RDPL, Singapore should be adopted to arrive at the profits attributable to the PE.

2.8 The next issue of profit attribution is the allocation of ratio of profit to the PE. The AO allocated ratio of 17.73% and 82.27% between RDPL and PE (through REDIL). 'While working out the percent of risk the AO arrived at various risks as under:

1	<i>Ratio of employee cost</i>	11.02%
2	<i>Ratio of assets</i>	0.046%
3	<i>Risks assumed by RDPL (estimated)</i>	20%
Average		10.35% (wrongly taken as 17.73%)

2.9 On careful consideration the Panel do not consider the estimation of risk on right footing. The employees cost, and assets of REDIL and RDPL are compared and the ratio is arrived at. As discussed by the AO in the order, Indian PE has performed all the major functions, assumed risks and deployed the assets, Marketing, sales collection and distribution in India are performed by the PE. The Singapore entity has skeletal staff and performed very minimal functions with regard to pronouncement and warehousing. Accordingly, as computed by the AO profit attribution of 10.35% and 89.65% between Singapore entity and Indian PE should be computed. The financials provided do not show the revenue generated from outside India. Hence, it is assumed that Indian PE has performed all the above functions in respect of entire Revenue of Singapore Entity. The profit margin of 2.274% by AO is based on the historical margin of Indian entity. However, the Panel is of the considered opinion that the AO should adopt the margins of Singapore entity and attribute the same between Indian PE and Singapore entity. Directed accordingly.

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7. The Ld. Counsel for the assessee Mr. Sriram Seshadri, CA, submitted that the AO/DRP have erred in stating that the assessee has a PE in India. The Ld. Counsel for the assessee further submitted that the assessee neither have a fixed PE nor dependent agent PE in India under the provisions of Income Tax Act, 1961 and the India Singapore DTAA. The Ld. Counsel for the assessee further referring to the business model of the assessee submitted that the group is engaged in the business of providing end-to-end Supply Chain Solutions for all categories of Information Technology products and Consumer & Lifestyle products. The assessee follows a direct business model wherein, the products and services are sold predominantly to the end customers, who are medium and large enterprises. The assessee acts as fulfillment center between the vendor and the end customer, wherein, the deal is stroked either by the vendor or end customer directly or through the channel partner. The assessee chosen as the distributor for the deal based on the ability of giving viable credit period. In so far as business in India, the assessee does business with customers with SEZ/STPs. In the process, the assessee had taken support from its holding company M/s.REDIL, referred to as 'Dollar Team' in respect of certain back office operations. The support provided by the 'Dollar Team' is mainly that of acting as a communication channel between the assessee and the customer/vendor and channel partners.

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8. The Ld. Counsel for the assessee further rejected observations of the AO in light of survey conducted u/s.133A of the Act, and submitted that the AO predominantly relied upon statement recorded from some employees of Indian entity called 'Dollar Team' and certain e-mail communications between the assessee and its holding company in India and came to conclusion that there is a fixed place of PE in India and dependent agent PE in India. The AO had mainly relied upon one junior employee namely Mr. Prabhakaran who was not even employed with the assessee during the relevant assessment year. Further, Mr. Prabhakaran himself in his statement highlights that if the customer is not satisfied with the commerce, then the customer is directed to report Original Equipment Manufacturers (in short "OEMs") for further negotiation. The sworn statement of Mr. Prabhakaran is contrary to statement of various representatives of customers and other senior employees and therefore, cannot be relied upon. He further referring to the decision of the Hon'ble Madras High Court in the case of CIT v. S. Khader Khan Son reported in [2007] 300 ITR 157, submitted that sworn statement recorded during survey, has no evidentiary value and cannot be relied upon. Further, the Revenue has ignored the statement given by client i.e. Zoho Corporation from its employee Mr.G.N.Nagarajan and Sify Technologies from their employees Mr.V.Venkataraman, whereby it is evident that they negotiate directly with OEM. The Revenue ignored statement given by various other employees who were employed during the relevant year like statement of

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Mr.Marimuthu, Ms.Nalini, Mr.Venkateswara Rao, Mr.Abraham Cherian and all these employees were employed during the relevant assessment year and are aware of business model of the assessee. If you go through their statements, they clearly stated that employees of 'Dollar Team' only do back end support services and they do not have any targets, responsibilities of sales, etc.

9. The Ld. Counsel for the assessee further submitted that the Revenue had also relied upon certain e-mail communications between the assessee and Indian entity and also quotations sent by Mr. Prabhakaran, to few customers and argued that the assessee is catering to clients of its holding company for their import requirements in order to get them duty benefit and for this purpose, the assessee procures goods from OEM through its Singapore Office, but all works related to supply and service activities is carried out from Indian Office through 'Dollar Team',. But, facts remains that although, Indian team sent quotations to customers in India, but such quotations are subject to approval of OEMs. In case, any negotiations are required to finalize the price, then the assessee does not have any role and ultimately the end customers and OEMs are negotiating the price and settle the contract. Therefore, from the above, it is very clear that the observations of the AO that 'Dollar Team' of Indian entity constitutes fixed place of PE in India is highly incorrect.

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10. The Ld. Counsel for the assessee referring to Article-5 of India Singapore DTAA submitted that in order to establish fixed place of business for the non-resident existed in India, the premise where the non-resident carry out its operations, was at the disposal of the non-resident for the impugned assessment year. The Revenue does not show that employee of a foreign company had travel to India to occupy the premise of M/s.REDIL and such a place was habitually available at the disposal of the foreign company through the persons of those employees in India. The Revenue has ignored the statement of all employees indicate that their work is confined to clerical or support activities such as invoicing purchase order, listing, credit evaluation, coordinating for payments and passing on all information relating to shipping, etc. The Revenue had also ignored the statement of clients of the assessee which clarifies the position of the assessee. Therefore, he submitted that merely on the basis of statement of one employee who was not employed during the relevant assessment year, the AO cannot take a stand that the 'Dollar Team' has performed all sales functions of the assessee in India and thus, said functions constitutes fixed place of PE in India. In this regard, he relied upon the decision of the Hon'ble Supreme Court in the case of E-funds IT Solution Inc. reported in [2017] 399 ITR 34 (SC). The assessee had also relied upon the decision of the Hon'ble Supreme Court in the case of UOI v. UAE Exchange Centre Ltd. reported in [2020] 425

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ITR 30 and also the decision of Mumbai Bench of ITAT in the case of Airlines Rotables Ltd. v. JDIT reported in [2010] 44 SOT 368.

11. The Ld. Counsel for the assessee further referring to various documents submitted that the onus is on the Revenue to prove that the assessee has a dependent agent PE in India and to show this, the Revenue has to prove that the 'Dollar Team' acted as agent. In order to bring dependent agency PE, the agent is legally and economically dependent on the foreign company and that the 'Dollar Team' had authority to conclude contracts in India and such authority habitually used and further, such contracts were not purchase of goods or merchandise. The AO has not shown that the 'Dollar Team' acted as agent who had the authority to conclude contracts and habitually did so, in contrast, the evidences with the AO clearly shows that its clients who have directly deal with the OEMs and concludes the contracts. The Revenue had also completely discredit the role of channel partners who have also been paid Overriding Commission by the assessee. The entire premise of the case of the Revenue has been that foreign companies operating under the control of the Indian company, this completely takes away the characterization of the dependent agency PE for the Indian company. On the contrary, Indian entity is a large listed company, which is manifold items larger than the foreign company and thus, it cannot be said that India entity is dependent on foreign entity. In this regard, he relied upon

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the decision of the ITAT Mumbai Benches in the case of Varian India (P) Ltd. v. ADIT reported in 142 ITD 692.

12. The Ld. Counsel for the assessee on attribution of profits submitted that the AO for the purpose of attribution of profits took un-audited turnover figures as the starting point which was found during the course of survey for computing the profit of the assessee. The DRP has given directions to the AO to use audited financial statement of assessee, but the AO has not followed the directions of the DRP. He further submitted that for computing profit attributable to Indian operations, the Revenue has included non-India region sales for the purpose of attribution of profits to India. This is clearly against the principles of taxation. Therefore, he submitted that while computing profit attributable to India sales made to other countries through channel partners must be excluded for attribution. The AO had also arrived at the attribution percentage by taking average of three components i.e. percentage of employee cost of the assessee as compared to that of M/s.REDIL, percentage of assets of the assessee as compared to that of M/s.RDPL and arbitrary risk, weightage of 20% to the assessee on the basis of invoicing is done under the name of the assessee. Accordingly, the average of 10.35% was attributed to the assessee and the balance 89.65% was attributed to the PE. Therefore, he submitted that if at all, it is held that there is a PE in India and profits is liable to tax, then a reasonable amount of profit needs to be attributed and in this regard, relied upon the decision of the Hon'ble

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Madras High Court in the case of Annamalais Timber Trust & Co. v. CIT reported in [1961] 41 ITR 781 (Mad.) and the decision of Special Bench of ITAT in the case of Motorola Inc. reported in 95 ITD 269.

13. The Ld.DR strongly supporting the order of the AO as well as the Id.DRP submitted that survey conducted u/s.133A of the Act, reveals that although the assessee is having a PE in India, but was not filing return of income. Further, during the course of survey, it was noticed that a group of employees called 'Dollar Team' of M/s.REDIL, was looking after the business activities of the assessee, M/s.RDPL, Singapore. The AO had explained the 'Dollar Business' and as per which, some of the Indian customers for import requirement, approaches the Indian holding company and the holding company staff facilitated import of goods through the assessee from Singapore for the purpose of availing duty benefit. During the course of survey, statements from various employees were recorded and in response to a specific question, they admitted that right from procuring orders from customers to recovery of receivables, all work is done by 'Dollar Team'. However, the material has been dispatched from Singapore Office and further, in case of price difference or any negotiations, the same will be directly done by OEM and customers. The Ld.DR further referring to various e-mail communications and other evidences submitted that the all employees were appointed by holding company. Further, the assessee is employed very few employees, which means, there is no much work carried out in Singapore

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office, except shipping of goods. It is further noted that 'Dollar Team' employees directly reported to Mr. Ashish Arora, Singapore Office, for various issues including concluding contracts with the customers, terms of payment and credit period, etc. From the above, it is clear that except shipment, all other work is carried out by Indian Office. The Ld.DR further referring date of incorporation of Assessee Company submitted that when SEZ Act came into effect in India, the Indian holding company has established a subsidiary in Singapore, to facilitate import of goods to its Indian customer. The assessee is catering needs of customers of its holding company in India. In fact, except billing done in USD, all other aspects including supplying very same equipments to non-SEZ Units, is done from holding company. The AO has brought out various facts to come to the conclusion that there exist a fixed place of PE and dependent agent PE in India and the income of the assessee is liable to tax in India. Therefore, he submitted that there is no merit in the arguments of the assessee that 'Dollar Team' does only back Office operations for Singapore entity and does not constitute a PE in India. As regards, attribution of profits, the Ld.DR relied upon the findings of the DRP. In this regard, he has filed detailed written submissions, which has been reproduced as under:

1. Survey and detection of 'Dollar Business' of Redington India (REDIL):

A survey operation carried out in the business premise of Redington India (RED IL) resulted into detection of group of employees of Indian company REDIL were working as 'Dollar Team' and they looked after the business activities of appellant Redington Distribution Pte Ltd, Singapore (RDPL).

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- i. In page no.5, the A.O had explained the 'Dollar Business'. Some of the Indian customers for their import requirement for I. T infrastructure booked the items to Singapore subsidiary in US dollar instead of INR for the import duty benefit of their units operating in SEZ. In the employee list certain employees were shown as being in the 'Dollar Business' Department.
- ii. Paragraph-6 is a crucial finding recorded by the A.O. It was recorded that the 'Dollar Business' was happening from India and was being performed by 'Dollar Business' team of Redington India (REDIL).
- iii. At paragraph- 7, the A.O recorded all the factual findings of the survey. Specifically, the modus operandi adopted for business between Cognizant and the appellant/ RDPL.
- iv. The Team Leader of 'Dollar Team', Mr.Prabhakaran had explained the process flow of the entire business and it was discussed by AO in detail at paragraph-8 by referring some of the email correspondences found and impounded during the course of survey.
- v. MrPrabhakaran had explained step by step the whole process from point no.A to N. It is starting with approach of procurement team at the respective customer place, understanding their future and current requirement, contacting respective OEM (Original Equipment Manufacturer), preparation of bill of materials, negotiating the deal, finalizing the deal, confirmation of shipment plan, preparation of shipping documents with the support of MrMuthu stationed at Singapore, follow up of the payment etc. From approaching the customer to end of sale cycle, MrPrabhakaran had explained the process clearly. These two pages of the assessment order is sufficient to demonstrate that 'Dollar Team' of RED IL only carrying out the whole business on behalf of RDPL, Singapore.
- vi. In paragraph-9 another set of emails between the vendor Oracle and REDIL was referred by the AO for demonstrating the role of REDIL, India.
- vii. The A.O. relied upon the crucial e-mail in page no.10 of the assessment order and observed at para-10 that the subject of the e-mail was pertaining to outstanding payment from the end of RDPL, Singapore. However, this mail was addressed to REDIL employees.
- viii. Ample material evidences gathered from the premise of REDIL had resulted into a finding that **'Dollar Team' of Redington India is both Fixed PE as well as dependent PE of Redington Singapore (RDPL)**. It was elaborated at paragraph 79 to 92 from page number 54 to 61 of the assessment order passed.

2. Creation of Redington Distribution Pte Ltd (RDPL) Singapore:

In the year 2005, the SEZ Act was introduced by Ministry of Commerce. Simultaneously, section 10AA of the IT Act was also brought into the Statute where it allowed tax benefit for the units begins to manufacture or produce articles or things or provide services in SEZ.

Those companies where their units were set up in SEZ approached the REDIL, India for getting duty benefit on their goods imported from foreign countries. REDIL had the strong customer base in India over a period of years. In the year 2005 only, R.DPL was formed outside the country in Singapore. This fact is evident from the audit report of RDPL submitted by the company for the A.Y 2011-12 in the paper book. [refer page no.212].

To meet out their client's demand 'Dollar Business' of REDIL-India was started in the office premise of REDIL in India.

2.1 Whether any dispute that 'Dollar Team' of RED IL assisted those customers to get duty benefit of their units situated in SEZ?

No dispute on the above facts. This was accepted categorically that the **'Dollar Team' of REDIL** actively involved in this business to book the invoices in US\$ value in the name of RDPL Singapore to enable the Indian customers to get duty benefit of their SEZ unit.

2.1 Whether the employees of RED IL, India engaged in the said business?

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YES. This has been proved by gathering sufficient material evidences from the survey premise of RED IL through a survey operation.

3. Recruitment and management of 'Dollar Team':

How the 'Dollar Team' supported RDPL and who manages the 'Dollar Team' has been elaborated by the AO in various paragraphs.

3.1. Who recruited 'Dollar Team'? Whether RDPL or REDIL?

Ans: The employees of 'Dollar Business' were recruited by REDIL. All their appointment letters, promotion, increment was given under the signature of HR team of REDIL. The AO reported the details in the assessment order. They were all in the pay role of REDIL, India.

At paragraph-14 in page no.17, A.O recorded that hiring of 'Dollar Team' catering to RDPL was handled by Redington India Ltd on the request of RDPL. It was recorded that employees of the 'Dollar Business' were always recruited by Redington India, where their appointment letter, promotion, increment letter etc were given under the signature of Sri PS Neogi, Joint CEO and Sri Jabez Selwyn, HR head of REDIL team. Refer the chart reproduced at next page of the order.

3.2. Who was the approving authority for RDPL?

At paragraph-15 in page no.18, another finding was recorded where, Mr. Ashish Arora of RDPL cannot decide anything independently for the need for man power for 'Dollar Team'. He has to mandatorily get the approval from Mr.Neogi, Jt. COO, REDIL. The A.O reproduced some of the sample mails in page no.18 & 19. All those employees were sitting in the business premise of REDIL and actively engaged and assisted in 'Dollar Business' of RDPL, Singapore.

3.3. Who manages and control RDPL?

The A.O brought out another crucial fact in paragraph-17 of page no.20 that management of RDPL, Singapore was monitored by REDIL - India.

At paragraph- I 8, the structure of 'Dollar Team' and the role and responsibility of each personnel placed in the hierarchy was brought on record by relying upon a letter written by Sri Ashish Arora. It is scanned and produced at page no.22.

At paragraph-19 in page no.13, he has given the emphasis of the letter of Mr.Ashish Arora and recorded that these group of employees were performing sales and operation activity with both vendors and customers of RDPL. This was also discussed between paragraph 66 and 68 of page no.45 to 47.

4. What was the customer/client base for RDPL?

Attention is drawn to paragraph-7 of page no.7 of the assessment order. The 'Dollar Team' of REDIL, India had the corporate customers in India, Bangladesh and Sri Lanka with whom REDIL already has existing INR business.

REDIL developed client base over a period of years. RDPL, Singapore which is only a branch office of RED IL catered to the existing clients of RED IL for the zero-duty business of SEZ units. These evidences placed at page no.28 to 30.

4.1 Evidence from Financials of RDPL, Singapore:

This fact is can also be supported with RDPL financials placed in paper book of the appellatant at page number 236.

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Out of total receivables of 35,555,125 US\$, nearly 75% of the receivable were from India. Sri Lanka and Bangladesh contribution was negligible.

4.2 Whether the credit term negotiations of RDPL were done by REDIL employees?

YES. Attention is drawn to e-mail correspondences reproduced in P.No. I O & 11. This was also explained in detail by Mr.Prabhakaran, that is discussed at para-8 in page no.8 to 9 of the assessment order.

5. Who did vendor payment follow-up? REDIL or RDPL?

Ample evidences were brought on record that only REDIL, Indian employees of 'Dollar Team' followed up the vendor payment on behalf of RDPL, Singapore. This was once again demonstrated through sufficient e-mails found and impounded during the course of survey. This was demonstrated through Wipro mails scanned and presented in page no.28 & 29 and Oracle vendor mails also scanned and reproduced.

5.1 With whom the RDPL customers were interacting?

For both INR business of RED IL and USD business of RDPL, the only contact point is the REDIL employees. This was demonstrated at paragraph 37 & 38 of the assessment order.

5.2 To whom the e-mails were addressed?

1. The A.O demonstrated this at paragraph-42. The A.O referred that entire set of mails were addressed to Ashish Arora of RDPL, Singapore and all the other addressees were the persons belonging to REDIL 'Dollar Team'. In the next paragraph, he gave the finding that the business of RDPL arises from the existing customer base of REDIL wherever the customer wants duty free equipment for their SEZ unit.

ii. If not Ashish why other employees of RDPL were not contacted?

The assessee was trying to claim that when Ashish of RDPL was not available, the customers had contacted other employees of REDIL employees. However, A.O at paragraph-57, critically observed that why those customers did not communicate with any other persons of RDPL in Singapore. The AO demonstrated that those mails highlighted the closely dependent nature of relationship RDPL with REDIL.

111. The A.O. relied upon the crucial e-mail in page no. IO of the assessment order and observed at para-10 that the subject of the e-mail was pertaining to outstanding payment from the end of Redington -Singapore. However, this mail was addressed to REDIL employees. The communications were sent to end customers that were under the letter head of Redington India under the signature of Redington India employee.

iv. In page no.12, 13 and 14, the A.O had scanned and reproduced some of those letters. These letters stated that order to be placed to Redington -Singapore. This was prepared by **Mr. Prabakaran, Team leader**, in the letter head of RED IL, addressed to the customers.

v. At paragraph-11 in page no.14, the A.O discussed about the statement of **Sri Vignesh, Account Executive of Redington India**. He was responsible for preparing the accounts receivable data for RDPL, based on the bank statements received from Singapore. He was also responsible for following of the payments. His reply to the question no.3 dated 31.12.2017 is crucial.

vi. At paragraph-12 at page no.15, he had discussed about the role of **Sri N. Venkateshwara Rao, Dy. Manager (Credit)**. He is working in Redington India Ltd since January, 2006. The questions and replies given by him at question no.4,5,7 and 10 are

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crucial for the relevant issue on hand. In reply to question no. 10, he was able to give details of entire sales particulars of RDPL, Singapore.

vii. At paragraph-13, the A.O had explained the entire process, activity done, activity of 'Dollar Team' of REDIL and activity of RDPL. He had summarized that all the activities were carried out by 'Dollar Team' of RED IL in India in a tabular Format. RDPL, Singapore only carried out packing, bill of lading, preparation of airway bill.

viii. As per the findings of the AO, RDPL Singapore was only doing logistics service for sending the goods to various destination and rest of the activities were handled and controlled by REDIL-India

6. Process Flow Explanation-Demonstration that RDPL just provide logistic services for Units in SEZ:

At paragraph-8, the whole process explained by Mr. Prabakaran, the team leader was discussed by the A. O. He had categorically admitted that he used to approach the procurement team at the respective customer place, based on existing relationship. He had explained the process flow. The entire process flow was summarized at page no.9.

6.1 Whether the statement of Mr. Prabakaran can be completely ignored?

The appellant counsel relied upon the decision of Madras High Court in the case of CIT Vs. S. Khader Khan Son (2007) in 300 ITR 157 and pleaded that the statements recorded on oath u/s 133(A) of the I.T. Act do not have any evidentiary value. However, this decision was overruled by Bombay High Court in the case of Dr. Dinesh Jain Vs. ITO-11(2)-2 (2014) 45 taxmann.com 442(Bombay) and also Allahabad High Court in the case of Sanjeev Agrawal Vs. Income Tax Settlement Commissioner, Allahabad (2015)56 taxmann.com 214. Hon'bleITAT, Chennai A Bench in the case of ITO Vs. N. Easwaran in ITA No.2117/Mds/2016 have analyzed all these decisions and held that though the Assessing Officer is not permitted to record statement on oath during the course of survey, merely because the statement was recorded on oath, the facts found during the course of survey cannot be brushed aside and the statements recorded during the course of survey cannot be completely ignored. Hence, the statements recorded during the course of survey and the evidences gathered cannot be ignored altogether as contended by the appellant.

The Counsel for the appellant company selectively read the business process explained by Prabhakaran at paragraph-8. He was particular about point 'C' and contended that if the customer is not satisfied with the commercials he will put the customer to the respective OEM. However, at point 'D' Prabhakaran stated that rate negotiation will be done by him and such decision will be acceptable by his team head as he was only aware of the prevailing circumstances. All the rest of the work flow explained by Mr.Prabhakaran was selectively omitted by the him. He was cherry picking few assertions from the statement that suits to his convenience and left remaining part of the same statement that was not favourable to the company.

7. Whether it was a back-office support or back bone support?

This was demonstrated by the AO at paragraph 40-43. She also demonstrated the same from paragraph 63 to 65 of the Assessment Order. It was mentioned that if Ashish Arora of RDPL was not available, the other employees of RDPL should have been addressed by the vendors in their e-mails and not to the employees of REDIL. If it was a simple back-office support, RED IL must have charged RDPL for all those services rendered. In the present case no such back-office support services were charged by REDIL.

8. Whether RDPL can be just a branch office of REDIL existed solely for bill trading in USS for the units operating in SEZ?

YES. RDPL cannot function without the support of REDIL. It doesn't have any separate client base in India.

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The A.O in paragraph-13 of the order presented the functions of RDPL in a tabular format. This had clearly demonstrated that except preparation of packing list, bill of lading, airway bill and shipment plan coordination, no other activities were performed by RDPL. This fact was also confirmed in the sworn statement of Shri Abraham Cherian, recorded on 18.12.2017 u/s 131 of the IT Act. Attention is drawn to question no.14. He had mentioned the names of some of the RDPL employees, where all those persons he mentioned in the sworn statement were working in logistic department only. Rest of the activities were all carried out by 'Dollar Team' of REDIL employees.

He is working as a General Manager of RED IL since 2005. He had explained the nature of business operation from question no.8 to 14.

REDIL, India formed a company in Singapore in the name of Redington Distribution Pte Ltd (RDPL) solely to raise some invoices in US\$ for helping its existing clients in India to get import duty benefit of their SEZ unit.

9. Reason for reopening - Other evidences from e-filing:

The reasons for reopening are enclosed here. It may be appreciated that on account of sufficient data available in the hands of AO, notice u/s 148 of the IT Act was issued by the AO. Coupled with non-filing of tax return, the AO also gathered sufficient evidences during survey to demonstrate the existence of PE in India. The information available in the hands of AO is as under;

- ▶ Prima facie the appellant was a non-filer for the A.Y 2011-12.
- ▶ The first return filed by the company was for A.Y 2012-13 on 29.03.2014.
- ▶ The second return filed for A.Y.2013-14 was on 24.03.2015.
- ▶ Both the returns were filed in ITR Form-6 and both were belated return u/s 139(4) of the IT Act.
- ▶ In both the returns, the appellant company admitted income from business or profession in the part -A "Profit and Loss Account". The relevant copies of ITRs are enclosed.
- ▶ This was another evidence that RDPL had PE in India in those early years.

9.1 Double stand adopted by the appellant:

- i. If Indian customers paid the sum in INR and deduct TDS, the appellant admitted the same as business income accrued in source state.
- ii. If the same Indian customer paid the sum in US\$, then they claimed that it was income of RDPL, Singapore and not Indian Income.
- iii. This is clear cut double stand adopted by RDPL and it is exposed with sufficient material evidences.
- iv. Until 2019 the stand was different; after receipt of notice u/s 148 of the IT Act, those INR receipts of A Y 2012-13 and 2013-14 were shifted to different schedule.
- v. It is clear cut double stand.

10. Whether no evidence pertaining to A.Y.2011-12 was found?

The counsel argued on 27.07.2022 by repeatedly mentioning that not even a single piece of evidence was available in the hands of Department to reopen the assessment for A.Y.2011-12. Whether it was correct?

Answer is **NO**.

Attention is drawn into page no.28 and 29 of the assessment order. This was the e-mail dated 22.11.2010 sent by Mani Kumar to Ashish Arora regarding Wipro orders. The Area Sales Manager, Mani Kumar has sent this mail to approve the order of Wipro. On the same day i.e. 22-11-2010 at 11.15 A.M. Ashish Arora sent reply to Mani Kumar by confirming that if the payment terms are okay.

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In the above mail, Mani Kumar of 'Dollar Team' of REDIL was calculating the profit margin of Wipro. Manikumar requested Mr. Ashish to approve the same so that he can finalize the order.

Another mail dated 30.09.2010 was A VP of Real-time solutions to Abraham Cherian. Mr. Chandrasekaran was a person working in A VP Finance and Commercial and sent the mail to Abraham Cherian regarding finalization of the terms and conditions.

It is to be mentioned here that N.Venkateswara Rao(Dy. General Manager-Credit) has been working in REDIL since January, 2006. Sri Abraham Cherian, General Manager, RED IL has been working since 2005. Their statements recorded u/s 133A and u/s 131 of the IT Act, respectively, also formed evidence in support of the contention of the Revenue that REPL had PE in India.

Hence the argument that no evidence was found for FY.2010-11 is not acceptable. RDPL had not filed any return of income for the A.Y. 2011-12.

11. What was the evidence for existence of channel partners?

- i. Though the appellant claimed that business was carried out through channel partners of RDPL, no evidence like party wise ledger account of channel partners, address and assessment particulars of the channel partners, bank account copy of RDPL, reflecting the payment made to channel partners were given. This was discussed clearly at paragraph 23.
- ii. At paragraph-50 and 51 in page no.37, the appellant's claim that they engaged channel partners and paid commission and hence their salary expenditure was low was countered by the A.O. AO had reiterated that the 'Dollar Team' sitting in RED IL is doing the business and not channel partners of RDPL as claimed. Commission agents cannot be a decision maker.

12. Replies to the emails by the appellant and counter argument by AO:

- i. Between paragraph-52 to 56 in page no.38 to 42, the mail relied upon by the appellant and the AO's critical observation on those submissions were made. This was to demonstrate that 'Dollar Team' of REDIL catered the needs of RDPL.
- ii. At paragraph-58 in page no.42, the A.O discussed about letters signed by Prabakaran, the counter objection by the appellant. He has stated that the appellant had conveniently ignored the second letter addressed to Olam where it has been mentioned that billing needs to be done in the name of RDPL. He had mentioned that the appellant not offered any explanation as why a person of REDIL was communicating with a client and discussing all the aspects of contract by informing them that the communication should be with REDIL employee but the billing should be in the name of RDPL. Hence, the argument of back-end support is no longer hold good.
- iii. At paragraph-59, the A.O relied upon the statements of Vignesh, Nalini, Marimuthu and Venkateshwara Rao and quoted that REDIL team is securing orders from the customers. The same team member is following up the payments. By this way, he disproved the claim that the functions were performed by channel partners.
- iv. At paragraph-62, the A.O relied upon the Wipro mails as well as some of the mails from Oracle and held that it was REDIL people were following up the vendor payment of RDPL.

Before Hon'ble ITAT, the appellant's counsel has only questioned and challenged the evidences gathered by the Revenue during the course of survey without giving their independent evidence that the entire business activities were totally managed only in Singapore. He could not come out with their set of evidences in support of their contention.

13. Whether RDPL, Singapore had any tangible or intangible asset?

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Analysis of Financials of RDPL, Singapore for the AY 2011-12:

It is placed at page number 200 of the paper book

1. It was audited by Ernst and Young LLP. The directors are Sri. Rangareddy Jayachandran, Sri. Ramanadhan Srinivasan and Sri. Raj Shankar.
2. The profit for the year 31-03-2011 was 2,156,746 US\$ and the Rupee equivalent was Rs.9, 70,53,570/ out of total sales of 225,766,277 US\$. It is equal to Rs.1015.94 Cr approximately.
3. For such a huge turnover,
 - ▶ the net book value of Plant and equipment was just 21,256 US\$ that was equal to Rs.9,56,520/.
 - ▶ For the company it was just 6,710 US\$ equal to Rs.3,01,950/.
 - ▶ The intangibles as on 31-3-2010 was NIL for the company and group.
 - ▶ The intangible as on 31-3-2011 for the group was just 2,919 US\$ that was equivalent to Rs.98,595/. The intangible for the company was NIL for the FY 2010-11
4. Inventory was 11,544,461 US\$ (i.e. Rs.51,95,00,000/) whereas there is no office or go down to store the goods. No building was shown as asset in balance sheet filed by RDPL, Singapore to handle those inventory.
5. Trade receivable as on 31-3-2011 for the group was 35,674,253 US\$ and for the company it was 36,679,325 US\$. Out of this receivable, 73% of the receivables are from India. It was disclosed at page number 35 of the Financials.

14. Whether the case law compiled given by appellant were relevant?

12.It is submitted that none of the case laws submitted by the appellant were relevant to the facts and circumstances of the present case in hand. Ample material evidences were brought on record to demonstrate that RDPL Singapore had PE in India. In other words, it is just functioned as branch office of Indian company REDIL to book the invoices in US\$. Hence those case laws relied upon by the appellant were not relevant to the facts and circumstances discussed above.

15. Summary:

- ▶ For the above said reasons it is established that RDPL is acting like a branch office of REDIL-India. It is totally controlled by Redington India. The Singapore office had simply done some logistics service to cater the needs of existing clients of REDIL-India who are operating in SEZ units.
- ▶ To avail duty benefit of those clients, the invoices were raised in the name of RDPL, Singapore.
- ▶ It is for these reasons the AO held that 'Dollar Team' of Redington India is both Fixed PE as well as dependent PE of Redington Singapore (RDPL). It was elaborated at paragraph 79 to 92 from page number 54 to 6 I of the assessment order passed.
- ▶ It is prayed that the findings recorded by AO may be upheld as the appellant did not bring any contrary material to rebut the survey findings and factual findings recorded in the assessment order.
- ▶ Regarding attribution of profit, the findings given by the DRP is relied upon.
- ▶ It is pertinent to mention here that I have also made a written submission dated 18-02-2022 on defective Form-36B filed by the appellant company where I have brought to your attention that the appellant mentioned at first page that the name of the company as Redington Distribution Pte Ltd, Chennai. It is not only in the first Form-36B, but also in the revised form the same name and place was mentioned. It is for these reasons I have requested for the passports of the Directors of the appellant company.

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14. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The facts borne out from the records indicate that the assessee is a part of Redington Group, which is Indian based listed company. The assessee is a subsidiary M/s.REDIL. The group is engaged in the business of providing end-to-end supply chain solutions for all categories of IT products, Consumer & Lifestyle products. The assessee follows business-to-business (B2B) model wherein, the company purchase from the vendors and sales to the customers through channel partners/sub-distributors/multi brand retailers, etc., who will then sell to end-users. The assessee had also an indirect business model i.e. selling the products through channel partners, retailers, who in turn sell such products to the end-users. The main customers of the assessee company in India are Cognizant Technology, Sify Technology, Zoho Corporation, etc. In respect to business in India, the profile of the customers who have business contracts with the assessee includes major Software Development companies and Information Technology companies which have had their units in SEZ/STPIs and also non-SEZ Units and non-STPI Units. Further, the assessee had obtained the support from its holding company M/s.REDIL, referred to as 'Dollar Team' for rendering services to its customers in India.

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15. A survey operation u/s.133A of the Act, was carried out in the business premise of M/s.REDIL and during the course of survey, a group of employees of Indian company (holding company) called as 'Dollar Team' was working and looked after the business activities of the assessee i.e. M/s.RDPL, Singapore. The AO has discussed the modus operandi of business model of the assessee and its holding company on the basis of findings of survey operations and as per said findings, the customers of Assessee Company and its Indian holding company, are one and the same. The assessee Indian holding company M/s.REDIL, supplies various products to companies like Cognizant Technology, Sify Technology, Zoho Corporation, etc., and such business is carried out in the name of M/s.RDPL. Further, as and when very same customers require import duty benefit, the same business was routed through the assessee company from its Singapore Office. It was further noted that the 'Dollar Team' of Indian holding company exclusively works for assessee company right from identifying the customers, negotiating the price, follow-up of outstanding receivables, etc. The AO has discussed how 'Dollar Team' is assisting the assessee company in light of sworn statement recorded from various employees of Indian holding company, M/s.REDIL and observed that the Sales Manager of 'Dollar Team' categorically admitted in a statement that he negotiates with Indian customers for their import requirements so as to avail duty benefit and also fix terms & conditions of sales. He further stated in his statement

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recorded during survey that except shipment of goods from Singapore Office, all other activities are carried out from Indian Office. The AO had also discussed the modus operandi of the assessee company in light of various email correspondence between the 'Dollar Team' of Indian holding company and assessee company in Singapore along with quotations submitted to customers and observed that the business of assessee company was totally carried out by 'Dollar Team' of M/s.REDIL. Therefore, he opined that there is a fixed place PE in India and also dependent agency PE in India of the assessee.

16. In light of above factual back ground, if you examine whether the functions carried out by 'Dollar Team' of Indian holding company constitutes a fixed place PE, one has to understand the term PE as defined in Article-5 of India Singapore DTAA. Article-5(1) of India Singapore DTAA, defines the term 'PE' means a fixed place of business through which the business of the enterprise is wholly or partly carried on. Similarly, Article-5(8) of India Singapore DTAA, defines the term 'dependent agent' PE which means where a person, other than an agent of an independent status, is acting in a Contracting State on behalf of an enterprise of the other Contracting State that enterprise shall be deemed to have a PE in the first-mentioned state, if *"He has and habitually exercises in that state an authority to conclude contracts on behalf of enterprise, and also he habitually secures orders in the first-mentioned state, wholly or almost wholly for the enterprise itself or for the enterprise*

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and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise". If you go by the simple term PE as defined under Article 5(1), which includes a fixed place of business. In this case, the facts brought out by the AO in light of information gathered during survey clearly indicate the existence of fixed place of business for the assessee, because, the 'Dollar Team' of Indian holding company carried out business operations of the assessee in India, which is evident from various facts including statement of Mr. Prabakaran who had explained step by step the whole process starting from approach to customer place, understanding their future and current requirement contract of respective OEM, preparation of bill of materials, negotiating the deal, finalizing the price, confirmation of shipment plan with the support of Mr.Muthu stationed at Singapore, follow-up of the payment, etc. If you go through the nature of activities carried out by the 'Dollar Team' for the assessee, except shipment all other activities had been carried out from Indian Office. Further, the AO has referred certain quotations issued by M/s.REDIL for their USD business to M/s.Olam International, which has been issued in the name of M/s.REDIL which specifically says an order to be placed on M/s.RDPL, Singapore, and other terms & conditions of supply. The AO had also relied upon the statement of Mr.Vignesh, Accounts Executive, and Mr.N.Venkateswara Rao, Dy. Manager (Credit) and both have agreed that the 'Dollar Team' of Indian holding company responsible for USD business of Indian customers.

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Therefore, from the above, it is very clear that right from seeking orders, request for quote from the customer, vendor discussion, negotiation and conclusion of terms of sales, sending proforma invoices, shipment plan from the customer, payment follow-up, etc., are carried out by 'Dollar Team'. But, only documents like packing list, airway bill, has been prepared by Singapore Office. From the above, it is very clear that except preparation of shipping documents, other work has been done by 'Dollar Team' of Indian holding company. Therefore, we are of the considered view that there is a fixed place of PE of the assessee in India and thus, income of the assessee is liable to tax in India. Although, the Ld. Counsel for the assessee vehemently argued in light of statement of Mr.G.N.Nageswaran of Zoho Corporation and statement of Mr.Venkataraman of Sify Technologies that price offered by the assessee is subject to confirmation of OEMs and also OEMs are directly negotiating with customers, but other facts brought out by the AO in the statement of various employees, e-mail correspondence between the assessee and Indian employees, and copies of sample quotation issued to various customers, it is undoubtedly clear that the activities carried out by 'Dollar Team' of Indian holding company constitutes a fixed place of PE in India. Further, the arguments of Ld.Counsel for the assessee that work done by 'Dollar Team', is nothing but a back office, services are devoid of merit, because from the nature of work carried out by the 'Dollar Team' it is abundantly clear that the services rendered by the 'Dollar Team' is back

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bone of business model of the assessee and which is further strengthened by the fact that the customers of Indian holding company and the assessee company are one and the same, except to the fact that supplies from assessee company are only to SEZ Units of Indian customers.

17. In so far as various case laws relied upon by the assessee, including the decision of the Hon'ble Supreme Court in the case of E-funds IT Solution Inc. (supra), there is no dispute with regard to the ratio laid down by the Hon'ble Supreme Court on the issue of fixed place PE in India and as per said judgment, in order to constitute a fixed place of PE, it is essential that the premise of the Indian subsidiary must be at the disposal of the foreign holding company and the business of the foreign company must be carried on through that place. In this case, there is no dispute with regard to the fact that the premise of the Indian holding company is at the disposal of the assessee, because, the 'Dollar Team' carried out their functions from the premise of Indian holding company and thus, said activities constitutes a fixed place PE in India. As regards the decision of the Hon'ble Supreme Court in the case of UAE Exchange Centre Ltd. (supra), no doubt, if the services rendered by subsidiary or holding company are in the nature of preparatory or auxiliary, then no PE could be established. In this case, services rendered by 'Dollar Team' of Indian holding company neither preparatory nor auxiliary, but main functions of

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a business entity and thus, the case law relied upon by the Ld.Counsel for the assessee is of no help to the present case. The Ld.Counsel for the assessee had also taken support from the decision of ITAT, Mumbai Benches in the case of Airlines Rotables Ltd. v. JDIT (supra) and argued that in order to existence of PE not only that there should be a physical location, through which, the business of foreign enterprise is carried out, but also such a place should be at the disposal of the foreign enterprise in the sense that foreign enterprise should have some sort of a right to use the said physical location from its own business. No dispute about ratio laid down by the co-ordinate Bench of ITAT on the issue of existence of PE and it dependent on facts of each case and in this case, there is no dispute of whatsoever with regard to existence of fixed place PE in India of the assessee, because of continuous occupation of 'Dollar Team' of Indian holding company premises and further, the business of assessee is continuously carried out from said location. Therefore, we are of the considered view that there is no error in the reasons given by the AO to hold that the activities carried out by a 'Dollar Team' of Indian holding company for the assessee constitute a fixed place PE of assessee in India.

18. As regards dependent agent PE, no doubt, onus is on the Revenue to prove that the assessee has a dependent agent PE in India and to show this, the Revenue has to prove that the 'Dollar Team' acted as agent and

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further, the agent is legally and economically dependent and also authority to conclude contracts and such contracts were habitually used. The arguments of the assessee that vendor directly negotiates with the customers in terms of pricing and credit and thus, the question of existence of dependent PE does not arise. The Counsel for the assessee further argued that the AO completely disregard the role of channel partners who have also been paid Overriding Commission by the assessee. The statements of the clients indicate that they do not directly deal with Redington, but they deal with vendor. We find no substance in the arguments of the assessee for the simple reason that the 'Dollar Team' of Indian holding company acts as an agent of the assessee for Indian customers and further, they had authority to conclude contracts and such authority has been habitually exercised to conclude contract on behalf of the assessee company. Further, the evidences gathered during the course of survey and during the course of assessment proceedings clearly indicate that right from sourcing of customers, supply of equipments and follow-up payments, all activities have been carried out by 'Dollar Team', except preparation of shipping and export documents from Singapore Office. Therefore, we are of the considered view that the activities undertaken by the 'Dollar Team' of Indian holding company constitutes a dependent agent PE and thus, on this count also the argument of the assessee fails. Further, to constitute agent PE, what is required to be seen is activities carried out by the agent but not economic

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conditions. The Ld. Counsel for the assessee has relied upon the decision of ITAT Mumbai Benches in the case of Varian India (P) Ltd. (supra) and argued that the independent agent cannot constitute a PE. We find that the facts brought on record and also evidences gathered during the course of assessment proceedings clearly indicate existence of dependent agent PE and thus, we are of the considered view that the case laws relied upon by the assessee has no application.

19. In this view of the matter and considering the facts and circumstances of the case, we are of the considered view that 'Dolor Team' of Indian holding Company constitutes a fixed place PE of assessee in India and thus, we conclude that there exists a fixed place of PE and also dependent agent PE of assessee company in India and hence, income of the assessee is liable to tax in India. The AO and the DRP has rightly held that there is a PE in India of the assessee and the income is taxable in India and thus, we are inclined to uphold the findings of the DRP and reject the ground taken by the assessee.

20. The next issue that came up for our consideration from Grounds of the assessee's appeal is attribution of profits. The AO for the purpose of attribution of profits took unaudited turnover as the starting point which was found during the course of survey for computing the profit of the

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assessee. The DRP in Para No.2.7 of its directions directed the AO to distribute the profits shown in the books of the assessee between the assessee and the PE in India. The Ld. Counsel for the assessee submitted that the AO has included non-Indian region sales for the purpose of attribution of profits to PE in India and clearly, this is against the principles of taxation. He further submitted that without prejudice only the Indian sale should be the starting point. He further submitted that royalty receipts have been separately offered to tax and thus, same needs to be excluded from turnover for the purpose of attribution of profits. Therefore, he submitted that the AO may be directed to attribute a reasonable amount of profits to PE in India. In this regard, he relied upon the decision of the Hon'ble High Court of Madras in the case of Annamalais Timber Trust & Co. (supra) and also Special Bench Decision of ITAT in the case of Motorola Inc. (supra).

21. The Ld. DR, on the other hand, supporting the order of the DRP, submitted that the DPR has directed the AO to consider audited financials of the assessee company for the purpose of attribution of profits to PE in India. Therefore, there is no error in the reasons given by the DRP and their orders should be upheld.

22. We have heard both the parties and perused the materials available on record. We find that the AO has considered unaudited profit before tax

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for the purpose of attribution of profits to PE in India. There is no dispute when audited figures are available the question of adopting profit from unaudited financial statement does not arise. Further, what needs to be attributed to PE is the profits of foreign entity i.e. M/s.RDPL. Therefore, the AO needs to distribute profits shown in the books of M/s.RDPL between foreign entity and PE in India. Therefore, we are of the considered view that there is no error in the directions given by the DRP to adopt profit as per books of Assessee Company for attribution of profits to PE. Further, the AO had adopted profit margin of Indian entity for the purpose of attribution of profits to PE. However, the correct legal position is that the AO should adopt margin of Singapore entity and attributing the same between the Indian PE and Singapore entity. The assessee had also disputed non-Indian sales included by the AO for the purpose of computing profits and argued that only sales made in INR to end customers' needs to be considered. The assessee had also disputed inclusion of royalty receipts in the turnover. However, facts are not clear and further, assessee has also unable to file the correct computation of sales made through Indian PE to compute profit which can be attributed to PE in India. Therefore, we are of the considered view that the issue needs to go back to the file of the AO for fresh consideration and thus, we set aside the issue of attribution of profits to AE in India and direct the AO to re-consider the issue in light of the directions given by the DRP as well as the Tribunal and also in light of the decision of the Hon'ble Madras High

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Court in the case of Annamalai Timber Trust & Co. (supra) and also the decision of ITAT Special Bench in the case of Motorola Inc. (supra).

23. In the result, appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced on the 16th day of November, 2022, in Chennai.

Sd/-
(महावीरसिंह)
(MAHAVIR SINGH)
उपाध्यक्ष/VICE PRESIDENT

Sd/-
(जी.मंजूनाथा)
(G. MANJUNATHA)
लेखासदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai,
दिनांक/Dated: 16th November, 2022.
TLN

आदेशकीप्रतिलिपिअग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF