IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCE)

ITA No.2007/Del./2017
(ASSESSMENT YEAR : 2013-14)

ITA No.3494/Del./2018
(ASSESSMENT YEAR : 2014-15)

ITA No.7970/Del./2018
(ASSESSMENT YEAR : 2015-16)

ITA No.7047/Del./2019
(ASSESSMENT YEAR : 2016-17)

Amadeus IT Group SA, C/o Vaish Associates, Advocates, 1st Floor, Mohan Dev Building, 13, Tolstoy Marg, New Delhi – 110 001.	vs.	DCIT, Circle 1(1)(1), Intl. Taxation, New Delhi.
(PAN : AAFCA9629P)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Ajay Vohra, Senior Advocate
Shri Neeraj Jain, Advocate
Shri Anshul Sacchar, CA
Shri Karan Jain, CA
REVENUE BY : Dr. Prabha Kant, CIT DR

Date of Hearing : 20.01.2021
Date of Order : 29.01.2021

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common questions of facts and law have been raised in the inter-connected appeals, the same are being disposed off by way of consolidated order to avoid repetition of discussion.

2. Appellant, Amadeus IT Group SA (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 04.01.2017, 24.11.2017, Nil & 27.06.2019 passed by the Assessing Officer (AO) in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C(13) of the Income-tax Act, 1961 (for short 'the Act') qua the assessment years 2013-14, 2014-15, 2015-16 & 2016-17 respectively on the identical grounds, except the difference of additions/disallowances, inter alia that :-

> **"1. That the assessing officer erred on facts and in law in computing the income of the appellant for the relevant assessment year at Rs.416,18,80,875/- as against 'Nil' income returned by the appellant.**
>
> **2. That the assessing officer erred on facts and in law in alleging that the appellant avoided furnishing specific information called for in the assessment, particularly the various agreements with the airlines.**
>
> **Re: CRS income - Permanent establishment**
>
> **3. That the Dispute Resolution Panel ('DRP')/assessing officer erred on facts and in law in holding the appellant to be liable to tax in India in respect of receipts from airlines, etc. relating to segments booked from India through the appellant's computer reservation system, not appreciating that no income accrued or arose to the appellant in India.**

4. That the DRP/ assessing officer erred on facts and in law in holding that computers, electronic hardware/software and the connectivity provided by the appellant to the travel agents through SITA/ third party nodes located in India, collectively, constituted PE of the appellant in India under Article 5 of the Indo-Spain DTAA ("the Treaty") and the income arising to the appellant from the airlines, etc. was attributable to the activities of the alleged PE in India.

4.1 That the DRP/ assessing officer erred on facts and in law in holding that as the website of the appellant shows that it has various offices in India for performing functions like training, product development, technical support, etc. such office premises constitute fixed place PE of the appellant in India.

5. That the DRP/ assessing officer erred on facts and in law in alleging that Amadeus India (P) Ltd. (AIPL) constituted dependent agent permanent establishment (PE) of the appellant in India and the income arising to the appellant from the airlines, etc., was attributable to the activities of the alleged PE in India.

5.1 That the DRP/ assessing officer erred on facts and in law in alleging that the appellant was not making any payment to AIPL towards the activities of marketing the appellant's CRS and providing the hardware support to the travel agent and therefore, the distribution fee paid to AIPL was not at arm's length and consequently, AIPL constituted dependent agent PE of the appellant.

5.2 That the DRP/ assessing officer erred on facts and in law in alleging that the appellant exercised control over the subscribers/ travel agents through AIPL.

5.3 That the DRP/assessing officer erred on facts and in law in holding that the AIPL constituted PE of the appellant under Article 5(4) of the treaty on the ground that AIPL was carrying out negotiations with the subscribers/travel agents without appreciating that in terms of the said Article, PE is constituted only when such enterprise has and habitually exercises authority to conclude contracts on behalf of the foreign enterprise.

6. That the DRP/ assessing officer erred on facts and in law in holding that the offices of AIPL constitute PE of the appellant in India without even specifying under which paragraph of Article 5 of the Treaty do such offices of Amadeus constitute PE of the appellant.

<u>Re: Attribution of Income</u>
<u>Without prejudice</u>

7. That the DRP/assessing officer erred on facts and in law in computing the profits attributable to the alleged PE of the appellant in India at Rs.311,87,23,875/-.

8. That the DRP/assessing officer erred on facts and in law in not appreciating that even if it is assumed that AIPL or the computers, electronic hardware provided to the travel agents etc., constituted PE of the appellant in India, the income derived from such PE was completely consumed by distribution and other expenses attributable thereto and that no income survives for taxation.

9. That the DRP/assessing officer erred on facts and in law in not following the order of the Delhi Bench of the Tribunal in the appellant's case for the assessment years 1996-97 to 1998-99, wherein the Tribunal had attributed 15% of the revenues relating to the bookings made from India as attributable to the appellant's PE in India and held that no income is taxable as the payment made to dependent agent was more than the revenues so attributed, and in following the rate of attribution of 75% adopted in the order for assessment years 2007-08 to 2012-13.

9.1 That the DRP/assessing officer erred on facts and law in misinterpreting the aforesaid order of the Tribunal and alleging that the Tribunal has attributed revenues to only the software development related services provided by AIPL, not appreciating that the Tribunal considered all the services required to be provided by AIPL under the Distribution Agreement and AIPL continued to provide the same services under the Distribution Agreement during the previous year under consideration, too.

10. That the DRP/assessing officer erred on facts and in law in following the order for assessment year 2007-08 to allege that no remuneration was paid by the appellant to AIPL for main activity of marketing the CRS and providing the hardware support to travel agents and, therefore, profits from such functions were required to be attributed to the appellant's dependent agency PE in India.

11. That the DRP/assessing officer erred on facts and in law in disallowing expenditure of Euro 27,577,000 incurred by the appellant under the head "Distribution fee', while computing' the income attributable to the alleged PE, following the assessment order for assessment year 2007-08.

11.1 That the DRP/ assessing officer erred on facts and in law in not appreciating that the appellant was engaged in the business of providing CRS services and the expenses incurred in connection with product development function carried out outside India were required to be excluded while computing the income of the alleged PE of the appellant in India.

12. That the DRP/ assessing officer erred on facts and in law in disallowing expenditure of Euro 6,139,000/- incurred by the appellant under the head 'Development fees', while computing the income attributable to the alleged PE, following the assessment order for assessment year 2007-08.

13. That the DRP/ assessing officer erred on facts and in law in disallowing expenditure of Euro 8,909,000/- incurred by the appellant under the heads 'Marketing cost', 'Data processing cost' and 'Central operating cost', while computing the income attributable to the alleged PE, on the ground that the appellant has not been able to establish that the aforesaid expenditure has been incurred specifically for the Indian distribution activity and the justification of incurring such expenditure.

13.1 That the DRP/ assessing officer erred on facts and in law in holding that allocation of cost, particularly marketing costs, on the basis of number of bookings generated will always result in over allocation of cost to a fully grown up market like India and consequently, erred in not accepting the cost allocation method adopted by the appellant.

13.2 That the DRP/ assessing officer erred on facts and in law in not appreciating that the aforesaid costs have a direct nexus with the booking fees received from bookings made from India and, therefore, the same were required to be taken into consideration while computing the income attributable to the alleged PE.

13.3 That the DRP/ assessing officer erred on facts and in law in, alternatively, disallowing the aforesaid expenses by invoking provisions of section 40(a)(i) of the Act.

13.4 That the DRP/ assessing officer erred on facts and in law in holding that part of the allocated expenses has already been included in the expenses incurred in India resulting in duplication of deduction.

13.5 That the DRP/ assessing officer erred on facts and in law in alleging that the aforesaid expenses were in the nature of 'head office' expenses and allowed deduction @S% of adjusted income under section 44C of the Act.

14. That without prejudice the DRP/ assessing officer erred in facts and in law in erroneously computing the income of the alleged PE of the appellant.

<u>Re: CRS income - Royalty</u>

15. That the DRP/ assessing officer erred on facts and in law in, alternatively, holding that booking fee of Euro 104,673,000 received by the appellant was taxable in India as 'royalty' both under section 9(1)(vi) of the Act and Article 13(3) of the Treaty.

16. That without prejudice, the DRP/ assessing officer erred on facts and in not appreciating that the booking fee received from non-resident airlines was not sourced in India in terms of Article 13(6) of the Treaty and was not liable to tax in India as 'royalty'.

16.1 That the DRP/ assessing officer erred on facts and in law in holding that source of income accruing to the appellant was located in India by alleging that the most of the airlines from which revenues were received were resident in India, which is factually incorrect.

17. Without prejudice, that the DRP/ assessing officer, having held the appellant to have permanent establishment in India, erred on facts and in law in bringing to tax the alleged 'royalty' income on gross basis, without appreciating that in terms of section 44DA of the Act and Article 13(5) of the Treaty, royalty income effectively connected with the 'PE of the non-resident is required to be taxed as business income on net basis.

Re: Altea system

18. That the DRP/ assessing officer erred on facts and in law in holding that payments 'received by the appellant from British Airways in relation to the alleged use of Altea system was taxable in India as 'royalty' both under section 9(1)(vi) of the Act and Article 13(3) of the Treaty.

19. That without prejudice, the assessing officer erred on facts and in law in not appreciating that the payments received from British Airways in relation to the Altea System were not sourced in India in terms of Article 13(6) of the Treaty, therefore, were not liable to tax in India as 'royalty'.

20. Further without prejudice, the DRP/assessing officer erred on facts and in law in holding on adhoc basis a sum of Euro 15 million as the income of the appellate liable to tax in India as 'royalty' for the alleged use of Altea System by British Airways.

Re: Charge of interest

21. That the DRP/assessing officer erred on facts and in law in levying interest under section 234B and 234D and withdrawing interest under section 244A of the Act."

3. Since all the appeals are having identical grounds, for the sake of brevity, we are taking brief facts of ITA No.2007/Del/2017 for AY 2013-14 to decide the issues in controversy in all the aforesaid appeals.

4. Briefly stated the facts necessary for adjudication of the controversy at hand are : The taxpayer, a tax resident of Spain

along with its affiliated companies, has developed a fully automatic computer information system, which enables display and dissemination of information supplied by various Airlines, which in turn facilitates, inter alia, reservations, communications, ticketing and related functions on a world-wide basis (hereinafter referred to as CSR) for the travel industry. The aforesaid system is for the facility of both travel agencies and Airline offices worldwide. The taxpayer has also developed Altea system which is a three-module solution that manages reservations, inventory and departures for all involved in getting passengers on board. The taxpayer claimed to have entered into agreements with various Airlines (Participating Carrier Agreement) by providing interconnectivity between the host computer of the individual Airline and the Amadeus CRS created by the taxpayer at Erding, Germany. The taxpayer also provides connectivity to its CRS to the travel agents. After analysis of the facts and contentions raised by the taxpayer, ld. DRP reached the conclusion that the assessee is having a Fixed Place Permanent Establishment (PE) and a Dependent Agent PE in India and attribution of profit to such PE. Assessing Officer (AO) computed the profit earned by the taxpayer at Rs.415,82,98,500/- or EURO 59,793,950 from India and

computed the profit attributed to Indian PE at Rs.311,87,23,875/- taxable @ 40% plus surcharge and education cess i.e. 42.024%. AO also proceeded to conclude that the income from booking fees is also taxable on gross basis as royalty income being in the nature of royalty. AO also proceeded to hold that receipts of the taxpayer pertaining to licencing of software are taxable as royalty as per provisions of section 9(1)(vi) of the Act. So, AO computed the booking fees received by the taxpayer from CRS in the nature of royalty income taxable in India, both under the Act as well as under the Double Taxation Avoidance Agreement (DTAA) (between India & Spain) and taxed the same at 10%. The gross booking revenue in respect of bookings arising from India comes to ERUO 104,673,000 (Rs.7,279,366,551) and tax has been computed at Rs.727,936,655. AO also computed the amount of EURO 15 million which is held to be the receipt of the taxpayer on account of use of the Altea system for its operation in India which comes to Rs.104,31,57,000 and same is taxed as royalty @ 10% as per Article 13(2)(ii) of the DTAA between India & Spain amounting to Rs.104,31,57,000/-. AO also levied the interest under section 234B and charging of interest levied u/s 234A, 234C and 234D is mandatory and consequential. AO accordingly

assessed the total income of the taxpayer at Rs.416,18,80,875/- and the profit attributable to PE is taxed at normal rate and the income from royalty is taxed @ 10% as per the provisions of Article 13 of India-Spain DTAA.

5. The taxpayer carried the matter before the ld. DRP by way of filing the objections who have dismissed the same. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

6. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the Revenue authorities below in the light of the facts and circumstances of the case.

7. At the very outset, ld. AR for the taxpayer contended that the grounds raised in the present appeals are covered in **taxpayer's own case vide order dated 26.10.2020 passed in AYs 2007-08, 2008-09, 2009-10, 2010-11, 2011-12 & 2012-13 in ITA Nos.4906/Del/2010, 5150/Del/2011, 60/Del/2013, 1824/Del/2014, 1204/Del/2015 & 1626/Del/2016 respectively**.

8. Ld. DR for the Revenue, on the other hand, has relied on the order passed by the AO/DRP and has failed to point out any

distinguishing facts of the instant appeals vis-à-vis taxpayer's appeals in the earlier years and law applicable thereto.

9. The issues raised by the taxpayer vide different grounds are discussed as under.

GROUNDS NO.1 & 2 OF
ITA No.2007/Del./2017 (AY 2013-14)
ITA No.3494/Del./2018 (AY 2014-15)
ITA No.7970/Del./2018 (AY 2015-16)
ITA No.7047/Del./2019 (AY 2016-17)

10. Grounds No.1 & 2 are general in nature, hence do not require any specific adjudication.

GROUNDS NO.3, 4, 5 & 6 OF
ITA No.2007/Del./2017 (AY 2013-14)
ITA No.3494/Del./2018 (AY 2014-15)
ITA No.7970/Del./2018 (AY 2015-16)
ITA No.7047/Del./2019 (AY 2016-17)

11. Grounds No.3, 4, 5 & 6 are pertaining to the issue that the computers installed at the premises of the subscribers constitute a PE of the taxpayer in India in terms of Article 5(1) of India Spain Tax Treaty. It is the case of the Revenue that that computers provided to the travel agent through which sales are constituted amounts to Fixed Place PE of the taxpayer in India under Article 5 (1) of the India-Spain Tax Treaty and likewise held the taxpayer to

be dependent agency PE in terms of Para 5(4) of the Indian Spain Tax Treaty.

12. AO computed the profit attributed to PE at Rs.311,87,23,875/- taxable @ 40% plus surcharge and education cess i.e. 42.024%. which has been confirmed by the ld. DRP.

13. Ld. AR for the taxpayer fairly conceded that this issue has been decided by Hon'ble High Court against the taxpayer in its own case for AYs 1996-97 to 2006-07 and held that computers installed at the premises of the subscriber constitute a PE of the assessee in India in terms of Article 5 (1) of Indo-Spain Treaty. It is also held that since the Amadeus India is functionally dependent upon the assessee, it also constitute an agency PE in India in terms of Article 5 (iv) of the Indo-Spain Treaty.

14. Aforesaid appeals bearing the identical facts of the taxpayer's case decided vide **order dated 24.01.2011 by the Hon'ble High Court in ITA Nos.191, 192, 193/2011** in which it is held that the assessee constitutes an agency PE. Though it is brought to the notice of the Bench that the matter is pending before the Hon'ble Supreme Court but no interference is called for from the Bench. Consequently, additions made by the AO/DRP are hereby confirmed and grounds no.3, 4, 5 & 6 of ITA

Nos.2007/Del./2017, 3494/Del./2018, 7970/Del./2018 & 7047/Del./2019 for Assessment Years 2013-14, 2014-15, 2015-16 & 2016-17 respectively are decided against the assessee.

GROUNDS NO.7, 8, 9 & 10 OF
ITA No.2007/Del./2017 (AY 2013-14)
ITA No.3494/Del./2018 (AY 2014-15)
ITA No.7970/Del./2018 (AY 2015-16)
ITA No.7047/Del./2019 (AY 2016-17)

15. Undisputedly, the taxpayer or the computers, electronic hardware provided to the travel agents etc. constituted PE of the taxpayer in India and the income derived from such PE is taxable in India. AO by following its earlier years order attributed 75% of the income earned in India to the PE after adding development cost, distribution fees, etc.. Ld. DRP has also confirmed the findings returned by the AO.

16. However, it is brought to our notice by the ld. AR for the taxpayer that this issue has already been decided in favour of the taxpayer by the coordinate Bench of the Tribunal for **AYs 1996-97 to 2006-07** and held 15% of the revenue relating to bookings made from India being attributable to the taxpayer's PE in India after considering the nature and extent of activities in India and abroad and assets employed & risk assumed. Order passed by the Tribunal has been affirmed by the Hon'ble Delhi High Court and

Department reported to have challenged the order of Hon'ble High Court before the Hon'ble Supreme Court.

17. Ld. DR for the Revenue has not controverted these facts nor controverted the fact that the grounds raised and facts and law are identical to the earlier assessment years 2006-07 and 2007-08 to 2012-13 already decided in favour of the taxpayer.

18. We have perused the order passed by the coordinate Bench of the Tribunal **dated 26.10.2020 in taxpayer's own case for AY 2007-08 to 2012-13** which is on identical facts and operative part thereof is extracted for ready perusal :-

> ***"9. The AO held that the assessee has earned a profit of Rs.1,452,550,424/- or Euro 2,50,90,000 from India. The ratio of attribution is to be worked out, by considering the importance & range of functions of AIPL especially in the new agreement dated 01.10.2004. The AO held that as the competition is growing in the market, the role of marketing functions in earning profit increases. Further, it was held that the number of assets of the assessee is growing in India and new facts relating to presence of assets in India have also been found out. Holding thus, the AO worked out the profit attributable to India @ 75% of the total profit. The AO held that the Profit attributable to Indian Permanent Establishments was Rs.1,08,94,12,818/- taxable at the rate of 40% plus surcharge & education cess i.e. 41.82%.***
>
> ***10. The ld. DRP confirmed the order of the Assessing Officer.***
>
> ***11. This issue has been adjudicated over a period of time for various years and the decision of the Tribunal has been affirmed by the Hon'ble Jurisdictional High Court. The Co-ordinate Bench of the Tribunal for the assessment years 1996-97 to 1998-99, after considering the extent of activities in India and abroad, the assets employed and risks assume d, held 15% of the revenues relating to the bookings made from India as attributable to the assessee's PE in India.***

12. The Co-ordinate Bench of ITAT, vide order dated 16.11.2016 passed for assessment years 1999-00 and 2000-01, following the order for the assessment years 1996-97 to 1998- 99, held that 15% of the revenues earned by Amadeus from its activities in India shall be attributable to the PE. It is also pertinent to point out that the ITAT, vide order dated 24.04.2009, in MA Nos. 212 to 213/D/2008, filed by the Department against the order dated 30.11.2007 relating to AYs 1997-98 and 1998-99, categorically held that revenue s of 15% attributed by it to the PE were in relation to activity of the PE as a whole, i.e., considering the agency and as well as fixed place of business functions.

13. The Hon'ble Delhi High Court following its decision in the case of DIT v. Galileo International 224 CTR 251, has affirmed the orders of the Tribunal passed for assessment years 1996-97 to 2006-07.

14. It was brought to our notice that the Assessing Officer had, in the assessment order for assessment year 2005-06, sought to distinguish the decision of the Tribunal in assessee's own case for assessment years 1996-97 to 1998-99 on similar grounds. However, the ld. CIT (A), vide order dated 25.02.2010, allowed the appeal of the assessee holding that no more than 15% of the revenues generated from India could be attributed to the alleged PE of the assessee in India. The aforesaid order passed by the ld. CIT(A) for assessment year 2005-06 has been confirmed by the ITAT, vide order dated 29.10.2010 and the Hon'ble High Court vide order dated 31.05.2011 (Revenue appeal) and dated 13.08.2013 (Assessee appeal).

15. Since, the facts remained unaltered and since payment to the agent is already @33%, no further addition is warranted in the case of the assessee."

19. So, following the order passed by the coordinate Bench of the Tribunal in earlier years and affirmed by the Hon'ble Delhi High Court, we are of the considered view that since there is no change in the business model and facts of the cases at hand and the extent & nature of the activities of the PE in India and abroad, and the assets employed and risk assumed is same as in the earlier

years, distribution fee paid in those years @ 33% approximately of the booking fee per segment, no further addition can be made during the year under assessment. Consequently, grounds no.7, 8, 9 & 10 of ITA Nos.2007/Del./2017, 3494/Del./2018, 7970/Del./2018 & 7047/Del./2019 for Assessment Years 2013-14, AY 2014-15, AY 2015-16 & AY 2016-17 respectively are determined in favour of the taxpayer.

GROUNDS NO.11, 12, 13 & 14 OF
ITA No.2007/Del./2017 (AY 2013-14)
ITA No.3494/Del./2018 (AY 2014-15)
ITA No.7970/Del./2018 (AY 2015-16)
ITA No.7047/Del./2019 (AY 2016-17)

20. AO disallowed expenditure to the tune of Euro 27,577,000 claimed to have incurred by the taxpayer under the head "distribution fee" while computing the income attributed to the taxpayer's PE in India by following assessment order for Assessment Year 2007-08.

21. It is contended by the ld. AR for the taxpayer that description of services is "export of processed data/software" and not "distribution fee", as has been held by the AO. It is also contended by the ld. AR for the taxpayer that AO also disallowed development cost and marketing costs incurred for earning revenue from bookings made from India.

22. Ld. DR for the Revenue confirmed the findings returned by the AO/DRP.

23. Undisputedly, this issue has also been decided in favour of the taxpayer by the Tribunal vide **order dated 26.10.2020 for AYs 2007-08 to 2012-13** (supra). It is also not in dispute that facts of the present case and business model of the taxpayer and its PE in India are identical to the earlier years. We have perused the order passed by the Tribunal in taxpayer's own case vide order (supra). Operative part of which is as under :-

> ***"16. The Assessing Officer has disallowed the claim of the assessee on account of the distribution expenses. The ld. DRP upheld the addition on the grounds that no documents have been filed in support of the distribution activity.***
>
> ***17. We have gone through the history of such expenditure and find that the addition is being made owing to confusion in the description of the services as "export of processed data/software" or "distribution fee"***
>
> ***18. This expenditure has been allowed by the Co-ordinate Bench of the Tribunal from the assessment years 1996-97 to 2006-07. Since, the facts have not been disputed, in the absence of any material change, we hereby allow the claim of distribution expenses."***

24. So, following the order passed by the coordinate Bench of the Tribunal in taxpayer's own case vide order (supra), we are of the considered view that the AO has erred in treating the "export of processed data/software" as distribution fee and has also erred in disallowing development cost and marketing cost incurred for

earning revenue from booking made from India. All these expenditure have been allowed by the coordinate Bench of the Tribunal in earlier years. So, the claim of the taxpayer raised vide grounds no.11, 12, 13 & 14 of ITA Nos.2007/Del./2017, 3494/Del./2018, 7970/Del./2018 & 7047/Del./2019 for Assessment Years 2013-14, AY 2014-15, AY 2015-16 & AY 2016-17 respectively are allowed.

GROUNDS NO.15, 16 & 17 OF
ITA No.2007/Del./2017 (AY 2013-14)
ITA No.3494/Del./2018 (AY 2014-15)
ITA No.7970/Del./2018 (AY 2015-16)
ITA No.7047/Del./2019 (AY 2016-17)

25. In the alternative, Assessing Officer held that booking fee of Euro 104,673,000 received by the taxpayer in India as royalty both under section 9(1)(vi) of the Act and Article 13 (3) of Indo-Spain Treaty for the reason that "booking fee" received by the taxpayer from various airlines is payment for use of process and scientific equipment. Again, it is not in dispute that facts of the years under consideration are identical to the earlier years decided by the coordinate Bench of the Tribunal in **AYs 2006-07 & 2007-08 to 2012-13**.

26. Ld. AR for the taxpayer contended that the payment for use of software is not in the nature of royalty under DTAA and relied

upon the decision rendered by **Hon'ble Delhi High Court in case of DIT vs. Tinto Technical Services 340 ITR 507 (Del.).**

27. Coordinate Bench of the Tribunal in **taxpayer's own case for AYs 2007-08 to 2012-13,** affirmed by the Hon'ble Delhi High Court, held that booking fee received by the taxpayer is taxable as business income and not under the head 'royalty' by returning following findings :-

> ***"19. The AO has held that the income received by the assessee with respect to bookings arising from India is also taxable as royalty income. The AO observed that the assessee supplies/ licenses its proprietary products free of charge to Amadeus India for distribution to the Subscribers. As per the Distribution Agreement, the assessee has authorized Amadeus India to conclude "Subscriber Agreement" with the Subscribers which allows the Travel Agents to use the CRS Owned by it. The Assessing Officer has given a finding that the paying airlines have offices in India. The assessee has granted to Amadeus India the right to further grant the right to access and right to use its platforms/ software/ product offerings to Subscribers. Amadeus India has the exclusive rights to distribute the CRS in India.***
>
> ***20. The AO has held that a software is also type of equipment in the facts of the case. The system comprising of equipments is used by the subscribers to book tickets and the same is source of income for the assessee . The AO held that the income of the assessee is taxable as royalty also as 'use of process'.***
>
> ***21. The ld. DRP confirmed the order of the Assessing Officer.***
>
> ***22. In the assessment framed for assessment year 2006-07, the Assessing Officer had substantively brought to tax, the booking fee as business income and protectively held the same to royalty since in that year the tax worked out in treating the income as royalty was less than the tax worked out after attributing income to the alleged PE of the assessee.***
>
> ***23. The Delhi Tribunal in assessee's own case for the assessment year 2006-07 has held that booking fee received by***

the assessee is taxable as business income and not under the head royalty. For the sake of ready reference and brevity, the relevant portion of the order of the ITAT in ITA No. 1494/Del/2011 is reproduced below:

> ***"In the present case, too, as sub mitted herein above, the appellant uses sophisticated technology/software in the course of providing a service/facility but the appellant does not divulge any process involved in the technology/software to the user of the CRS. The appellant does not make available to the participating airlines any secret formula or process. Also, no equipment is provided by the appellant for use to the participating airlines. Further, no payment is made by the subscribers, viz., the travel agents to the appellant, unlike the aforesaid case.***
>
> ***In that view of the matter, the booking fee received by the appellant from the participating airlines does not answer the description of 'royalty' and, thus, is not chargeable to tax in India."***

24. Since, the facts have not been disputed in the absence of any material changes, we hereby hold that the booking fee received is in the nature of business income."

28. So, following the order passed by the coordinate Bench of the Tribunal in taxpayer's own case for AYs 2006-07 & 2007-08 to 2012-13, we are of the considered view that booking fee received by the taxpayer is to be taxed as business income and not under the head 'royalty'. Accordingly, we decide grounds no.15, 16 & 17 of ITA Nos.2007/Del./2017, 3494/Del./2018, 7970/Del./2018 & 7047/Del./2019 for Assessment Years 2013-14, AY 2014-15, AY 2015-16 & AY 2016-17 respectively in favour of the taxpayer.

GROUNDS NO.18, 19 & 20 OF
ITA No.2007/Del./2017 (AY 2013-14)
ITA No.3494/Del./2018 (AY 2014-15)
ITA No.7970/Del./2018 (AY 2015-16)
ITA No.7047/Del./2019 (AY 2016-17)

29. AO as well as ld. DRP has on ad hoc basis taxed the amount of Euro 50 million as 'royalty' in respect of Altea system, inventory management and hosting system development.

30. It is contended by the ld. AR for the taxpayer that AO/DRP have erred in holding that payment received from the British Airways for alleged use of Altea system as taxable in India as 'royalty' both under section 9(1)(vi) and under Article 13 (3) of the Treaty on the ground that Altea system is not merely an inventory management and hosting system rather it provides key operational services to various airlines like accepting payment and issuance of travel documents, performing credit card validation, maintaining data security, manage customer check-ins, etc.. It is brought to our notice that this issue has also been decided by the coordinate Bench of the Tribunal in **taxpayer's own case for Assessment Years 2007-08 to 2012-13** (supra) by holding that Altea system cannot be characterized as 'royalty' either under the Act or under the Treaty by returning following findings :-

"27. It was canvassed before us, the ARS system is installed at the Airports and is accessed only by the Airlines and no t by the agents of the assessee. It was argued that the system was available only to British Airways for the purpose of accepting payment and travelled documentation only at the Airport counters. It was argued that the payment made by British Airways to the assessee in relation to the ARS is for services rendered by the Amadeus and not for use of any process. It was argued that since the inventory hosting takes place outside India and payment is made by non-resident Airlines to another non-resident outside India, in terms of Article 13(6) of the treaty, the payments deemed to have been not sourced in India. We find that the revenue has brought out information which proclaim that the assessee with British Airways developed Altea Reservation System for distribution through British Airways Sales Outlets, the products namely Altea Inventory for Global Inventory Management and Altea Departure Control for passenger checking and flight departure management. The British Airways uses ARS on its website and for revenue management system. We also heard the argument of the assessee that the ARS has no relation to the PE of the assessee in India. The source of revenue received by the assessee in connection with ARS is not situated in India. We find that ARS is essentially an inventory hosting and management system developed by the assessee which some airlines outsourced to Amadeus, with British Airways as a launch customer. The payment for the ARS is made by the British Airways for the use of the system for the business in India at the Indian Airport is an undisputable fact. While the contention of the assessee is that the software was not available outside the Indian Airport or to any of the agents of the assessee in India, the revenue contended that the ARS also provides key operational services to British Airways like accepting payment and issuance of travel documents and manage customer checking. It was also submitted by the assessee that the arguments taken up with regard to CRS activity as royalty may also be considered while dealing with ARS issue.

28. The Article 7 reads as under:

ARTICLE 7

BUSINESS PROF ITS

1. The profits of an enterprise of one of the States shall be taxable only in that State unless the enterprise carries on business in the other State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of

the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of on e of the States carries on business in the other State through a permanent establishment situated therein, there shall in each State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is permanent establishment. In any case where the correct amount of profits attributable to a permanent establishment is incapable of determination or the determination thereof presents exceptional difficulties, the profits attributable to the permanent establishment may be estimated on the basis of an apportionment of the total profits of the enterprise to its various parts, provided, however, that the result shall be in accordance with the principles contained in this Article.

3. (a) In determining the profits of a permanent establishment, there shall be allowed as deductions, expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the taxation laws of that State. Provided that where the law of the State in which the permanent establishment is situated imposes a restriction on the amount of the executive and general administrative expenses which may be allowed, and that restriction is relaxed or overridden by any Convention between that State and a third State which enters into force after the date of entry into force of this Convention, the competent authority of that State shall notify the competent authority of the other State of the terms of the corresponding paragraph in the Convention with that third State immediately after the entry into force of that Convention and, if the competent authority of the other State or requests, the provisions of this sub-paragraph shall be amended by protocol to reflect such terms.

(b) However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards

reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use o f patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise, or any of its other offices.

4. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

5. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

6. `Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article."

29. Article 13 reads as under:

ARTICLE 13

ROYALT IES AND FEE S FOR TECHNICAL SERVICE S

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in

which they arise and according to the law of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services the tax so charged shall not exceed :

(i) in the case of royalties relating to the payments for the use of, or the right to use, industrial, commercial or scientific equipment, 10 per cent of the gross amount of the royalties;

(ii) in the case of fees for technical services and other royalties, 20 percent of the gross amount of fees for technical services or royalties.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of or the right to use, any copyright of literary, artistic or scientific work, including cinematographic films or films or tapes used for radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for the use of or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.

4. The term "fees for technical services" as used in t his Article means payments of any kind to any person other than payments to an employee of the person making the payments and to any individual for independent personal services mentioned in Article 15 (Independent Personal Services), in consideration for the services of a technical or consultancy nature, including the provision of services of technical or other personnel.

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees f or technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 15, as the case may be, shall apply.

6. Royalties and fees for technical services shall be deemed to arise in a Contracting State when the payer in that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or fixed base in connection with which the liability to pay the royalties or fees for technical services was incurred , and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for technical services paid, exceeds the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of t his Convention."

30. After going through the Article 13 and Article 7 and keeping in view the fact that the computer terminals are at Airport terminals and since the amounts have been received for utilization of ARS which is predominantly a reservation system, the same may be treated as "income from royalty". We upheld the action of the AO to this extent.

31. During the arguments, the ld. AR raised a point regarding the taxability of royalty income in the hands of the assessee as per DTAA. He argued that in the absence of corresponding change in the DTAA with regard to interpretation of royalty in the domestic law. He relied on the ratio law laid down by the Hon'ble Jurisdictional High Court in the case of Director of Income Tax vs New Skies Satellite Bv vide order dated 8 February, 2016. The ld. DR argued that the provisions of DTAA would have primacy over the domestic provisions.

32. The operative part of the said judgment is as under:

"54. Neither can an Act of Parliament supply or alter the boundaries of the definition under Article 12 of the DTAAs by supplying redundancy to any part of it. This

becomes especially important in the context of Explanation 6, which states that whether the 'process' is secret or not is immaterial, the income from the use of such process is taxable, nonetheless. Explanation 6 precipitated from confusion on the question of whether it was vital that the "process" used must be secret or not. This confusion was brought about by a difference in the punctuation of the definitions in the DTAAs and the domestic definition. For greater clarity and to illustrate this difference, we reproduce the definitions of royalty across both DTAAs and sub clause (iii) to Explanation 2 to 9(1)(vi).

Article 12(3), Indo Thai Double Tax Avoidance Agreement:

3. The term "royalties" as used in this article means payments of any kind received as a consideration for the alienation or the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, phonographic records and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience ." (emphasis supplied)

Article 12(4), Indo Netherlands Double Tax Avoidance Agreement

"4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright o f literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience." (emphasis supplied)

Section 9(1)(vi), Explanation 2, Income Tax Act, 1961

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property; (emphasis supplied)

55. The slight but apparently vital difference between the definitions under the DTAA and the domestic

definition is the presence of a comma following the word process in the former. In the initial determinations before various ITATs across the country, much discussion took place on the implications of the presence or absence of the "comma". A lot has been said about the relevance or otherwise of punctuation in the context of statutory construction. In spoken English, it would be unwise to argue against the importance of punctuation, where the placement of commas is notorious for diametrically opposite implications. However in the realm of statutory interpretation, courts are circumspect in allowing punctuation to dictate the meaning of provisions. Judge Caldwell once famously said "The words control the punctuation marks, and not the punctuation marks the words."

Holmes v. Pheonix Insurance Co.

47. It has been held in CGT v. Budur and Hindustan Const v. CIT that while punctuation may assist in arriving at the correct construction, yet it cannot control the clear meaning of a statutory provision. It is but, a minor element in the construction of a statute, Hindustan Const50.

56. The courts have however created an exception to the general rule that punctuation is not to be looked at to ascertain meaning. That exception operates wherever a statute is carefully punctuated. Only then should weight undoubtedly be given to punctuation; CIT v. Loyal Textile51; Sama Alana Abdulla vs. State of Gujarat52; Mohd Shabbir vs. State of Maharashtra53; Lewis Pugh Evans Pugh vs. Ashutosh Sen54; Ashwini Kumar Ghose v. Arbinda Bose55; Pope Alliance Corporation v. Spanish Rive r Pulp and Paper Mills Ltd.56. An illustration of the aid derived from punctuation may be furnished from the case of Mohd. Shabbir v. State of Maharashtra where Section 27 of the Drugs and Cosmetics Act, 1940 came up for construction. By this section whoever "manufactures for sale, sells, stocks or exhibits for sale or distributes" a drug without a license is liable for punishment. In holding that mere stocking shall not amount to an offence under the section, the Supreme Court pointed out the presence of comma 98 F 240 (1899) 103 ITR 189 208 ITR 291 supra note 46 231 ITR 573 AIR 1996 SC 569 AIR 1979 SC 564 AIR 1929 Privy Council 69 AIR 1952 SC 369 AIR 1929 PC 38 AIR 1979 SC 564 after "manufactures for sale" and "sells" and the absence of

any comma after "stocks" was indicative of the fact "stocks" was to be read along with "for sale" and not in a manner so as to be divorced from it, an interpretation which would have been sound had there been a comma after the word "stocks". It was therefore held that only stocking for the purpose of sale would amount to an offence but not mere stocking.

57. However, the question, which the n arises, is as follows. How is the court to decide whether a provision is carefully punctuated or not? The test- to decide whether a statute is carefully (read consciously) punctuated or not- would be to see what the consequence would be had the section been punctuated otherwise. Would there be any substantial difference in the import of the section if it were not punctuated the way it actually is? While this may not be conclusive evidence of a carefully punctuated provision, the repercussions go a long way to signify intent. If the inclusion or lack of a comma or a period gives rise to diametrically opposite consequences or large variations in taxing powers, as is in the present case, then the assumption must be that it was punctuated with a particular end in mind. The test therefore is not to see if it makes "grammatical sense" but to see if it takes on any "legal consequences".

58. Nevertheless, whether or not punctuation plays an important part in statute interpretation, the construction Parliament gives to such punctuation, or in this case, the irrelevancy that it imputes to it, cannot be carried over to an international instrument where such comma may or may not have been evidence of a deliberate inclusion to influence the reading of the section. There is sufficient evidence for us to conclude that the process referred to in Article 12 must in fact be a secret process and was always meant to be such.

In any event, the precincts of Indian law may not dictate such conclusion. That conclusion must be the result of an interpretation of the words employed in the law and the treatises, and discussions that are applicable and specially formulated for the purpose of that definition. The following extract from Asia Satellite58 takes note of the OECD Commentary and Klaus Vogel on Double Tax Conventions, to show that the process must in fact be secret and that specifically, income from data transmission services do not partake of the nature of royalty.

''74. Even when we look into the matter from the standpoint of Double Taxation Avoidance Agreement (DTAA), the case of the appellant gets boost. The Organisation of Economic Cooperation and Development (OECD) has framed a model of Double Taxation Avoidance Agreement (DTAA) entered into by India are based. Article 12 of the said model DTAA contains a definition of royalty which is in all material respects virtually the same as the definition of royalty contained in clause (iii) of Explanation 2 to Section 9(1) (vi) of the Act. This fact is also not in dispute. The learned counsel for the appellant had relied upon the commentary issued by the OECD on the aforesaid model DTAA and particularly, referred to the following amendment proposed by OECD to its commentary on Article 12, which reads as under:

'9.1 Satellite operators and their customers (including broadcasting and telecommunication enterprises) frequently enter into transponder leasing agreements under which the satellite operator allows the customer to utilize the capacity of a satellite transponder to transmit over large geographical areas. Payments made by customers under typical transponder leasing agreements are made for the use of the transponder transmitting capacity and will not constitute royalties under the definition of paragraph 2; these payments are not made in consideration for the use of, or right to use, property, or for information, that is referred supra note to in the definition (they cannot be viewed, for instance, as payments for information or for the use of, or right to use, a secret process since the satellite technology is not transferred to the customer). As regards treaties that include the leasing of industrial, commercial or scientific (ICS) equipment in the definition of royalties, the characterization of the payment will depend to a large extent on the relevant contractual arrangements. Whilst the relevant contracts often refer to the lease of a transponder, in most cases the customer does not acquire the physical possession of the transponder but simply its transmission capacity: the satellite is operated by the lessor and the lessee has no access to the transponder that has been assigned to it. In such cases, the payments made by the customers would therefore be in the nature of payments for services, to which Article 7 applies, rather than payments for the use, or right to use, ICS equipment. A different, but much less frequent, transaction would be where the owner of the satellite leases it to another party so that the latter may operate it and either use it for its

own purposes or offer its data transmission capacity to third parties. In such a case , the payment made by the satellite operator to the satellite owner could well be considered as a payment for the leasing of industrial, commercial or scientific equipment. Similar considerations apply to payments made to lease or purchase the capacity of cables for the transmission of electrical power or communities (e.g. through a contract granting an indefeasible right of use of such capacity) or pipelines (e.g. for the transportation of gas or oil).

75. Much reliance was placed upon the commentary written by Klaus Vo gel on Double Taxation Conventions (3 rd Edition)'. It is recorded therein:

'The use of a satellite is a service, not a rental (thus correctly, Rabe, A., 38 RIW 135 (1992), on Germany's DTC with Luxembourg); this would not be the case only in the event the entire direction and control over the satellite, such as its piloting or steering, etc. were transferred to the user.'

76. Klaus Vogel has also made a distinction between letting an asset and use of the asset by the owner for providing services as below:

'On the other hand, another distinction to be made is letting the proprietary right, experience , etc., on the one hand and use of it by the licensor himself, e.g., within the framework of an advisory activity. Within the range from services', viz. outright transfer of the asset involved (right, etc.) to the payer of the royalty. The other, just as clear-cut extreme is the exercise by the payee of activities in the service of the payer, activities for which the payee uses his own proprietary rights, know-how, etc., while not letting or transferring them to the payer.'

77. The Tribunal has discarded the aforesaid commentary of OECD as well as Klaus Vogel only on the ground that it is not safe to rely upon the same. However, what is ignored is that when the technical terms used in the DTAA are the same which appear in Section 9(1)(vi), for better understanding all these very terms, OECD commentary can always be relied upon. The Apex Court has emphasized so in number of judgments clearly holding that the well-settled internationally accepted meaning and interpretation placed on identical or similar terms employed in various DTAAs should be followed by

the Courts in India when it comes to construing similar terms occurring in the Indian Income Tax Act....

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78. There are judgments of other High Courts also to the same effect.

(a) Commissioner of Income Tax Vs. Ahmedabad Manufacturing and Calico Printing Co., [139 ITR 806 (Guj.)] at Pages 820-822.

(b) Commissioner of Income Tax Vs. Vishakhapatnam Port Trust [(1983) 144 ITR 146 (AP)] at pages 156-157.

(c) N.V. Philips Vs. Commissioner o f Income Tax [172 ITR 521] at pages 527 & 5 38-539."

59. On a final note, India's change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today. The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the State's discomfort at letting data broadcast revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAAs.

60. Consequently, since we have held that the Finance Act, 2012 will not affect Article 12 of the DTAAs, it would follow that the first determinative interpretation given to the word "royalty" in Asia Satellite, when the definitions were in fact pari materia (in the absence of any contouring explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said DTAAs are amended jointly by both parties to incorporate

> ***income from data transmission services as partaking of the nature of royalty, or amend the definition in a manner so supra note that such income automatically becomes royalty. It is reiterated that the Court has not returned a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no Double Tax Avoidance Agreement.***
>
> ***61. For the above reasons, it is held that the interpretation advanced by the Revenue cannot be accepted. The question of law framed is accordingly answered against the Revenue. The appeals fail and are dismissed, without any order as to costs."***
>
> ***32. In view of the law laid down, the revenue is here by directed not to tax the royalty in accordance with the judgment of the Hon'ble High Court."***

31. Following the order passed by the coordinate Bench of the Tribunal in AYs 2007-08 to 2012-13, we are of the considered view that payment received by the taxpayer from British Airways in relation to alleged use of 'Altea system' cannot be characterized as 'royalty' either under the Act or under the Indo-Spain Treaty because Altea system was installed at the airport and was accessed only by the airlines and not by the Amadeus's agents viz. Resbird, Amadeus India and that during the year, the said system was available to British Airways for the aforesaid purpose and that too only at the airport counter and the said software was not available outside the Indian airport or to any of the agents of the taxpayer since the agents were booking the tickets only through the CRS of the taxpayer. Consequently, grounds no.18, 19 & 20 of ITA

Nos.2007/Del./2017, 3494/Del./2018, 7970/Del./2018 & 7047/Del./2019 for Assessment Years 2013-14, AY 2014-15, AY 2015-16 & AY 2016-17 respectively are determined in favour of the taxpayer.

GROUND NO.21 OF
ITA No.2007/Del./2017 (AY 2013-14)
ITA No.3494/Del./2018 (AY 2014-15)
ITA No.7970/Del./2018 (AY 2015-16)
ITA No.7047/Del./2019 (AY 2016-17)

32. AO/DRP levied the interest u/s 234B of the Act.

33. Ld. AR for the taxpayer contended that in the absence of any liability for payment of advance tax since tax is deductible at source on the income of the taxpayer held liable to tax in India, the levy of interest u/s 234B is not warranted.

34. Provisions contained below section 209(1)(d) of the Act introduced by Finance Act, 2012 w.e.f 01.04.2012 would apply only in a situation where persons responsible for tax has paid or credited such income without deduction of tax. In the instant case, since the income has been received by the taxpayer after deduction of tax at source, the proviso is not applicable as has been held by the coordinate Bench of the Tribunal in **BG International Ltd. vs. DCIT in ITA No.31/DDN/2020 order dated 31.12.2020.** Even otherwise, when no addition sustains section 234B would not

apply. So, ground no.21 of ITA Nos.2007/Del./2017, 3494/Del./2018, 7970/Del./2018 & 7047/Del./2019 for Assessment Years 2013-14, AY 2014-15, AY 2015-16 & AY 2016-17 respectively is determined in favour of the taxpayer

35. Resultantly, all the appeals being ITA Nos.2007/Del./2017, 3494/Del./2018, 7970/Del./2018 & 7047/Del./2019 for Assessment Years 2013-14, AY 2014-15, AY 2015-16 & AY 2016-17 respectively are partly allowed.

Order pronounced in open court on this 29th day of January, 2021.

Sd/-	**sd/-**
(ANIL CHATURVEDI)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 29th day of January, 2021
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.DRP
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.