

**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.4909/Del./2018  
(ASSESSMENT YEAR : 2009-10)**

**ITA No.4910/Del./2018  
(ASSESSMENT YEAR : 2010-11)**

**ITA No.3967/Del./2017  
(ASSESSMENT YEAR : 2011-12)**

**ITA No.3968/Del./2017  
(ASSESSMENT YEAR : 2012-13)**

**ITA No.3969/Del./2017  
(ASSESSMENT YEAR : 2013-14)**

**ITA No.4911/Del./2018  
(ASSESSMENT YEAR : 2014-15)**

**ITA No.4756/Del./2019  
(ASSESSMENT YEAR : 2015-16)**

**ITA No.416/Del./2020  
(ASSESSMENT YEAR : 2016-17)**

M/s. Ricardo UK Limited,  
C/o Bhatia & Bhatia, CAs  
First Floor, 81, Hemkunt Colony,  
New Delhi – 110 048.

**(PAN : AAECR4867R)**

**(APPELLANT)**

vs. DCIT,  
(International Taxation),  
Circle 3(1)(1),  
New Delhi.

**(RESPONDENT)**

**ASSESSEE BY : Shri Ajay Vohra, Senior Advocate  
REVENUE BY : Shri Sanjay Kumar, Senior DR**

**Date of Hearing : 21.01.2021**  
**Date of Order : 17.02.2021**

## **ORDER**

### **PER BENCH :**

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, Ricardo UK Limited (hereinafter referred to as 'the assessee') by filing the present appeals sought to set aside the impugned orders dated 28.02.2018, 28.02.2018, 04.05.2016, 09.06.2016, 06.04.2017, 28.02.2018, 04.03.2019 & 27.11.2019 passed by the Commissioner of Income-tax (Appeals)-43, New Delhi in appeals challenging the orders passed by the Id. Assessing Officer under section 147/143(3) read with section 144C(3) of the Income-tax Act, 1961 (for short 'the Act') qua the Assessment Years 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16 & 2016-17 respectively on the identical grounds inter alia that :-

**"1. That on the facts and circumstances of the case, the order passed by the Id. Commissioner of Income Tax (Appeals)-43, New Delhi ("Id. CIT(A)") is bad in law.**

**2. That the Id. CIT(A) has grossly erred in law and on facts of the case in upholding the erroneous order passed by the Id AO assessing the total income of the Appellant at INR**

**14,624,822 as against the returned income of Nil without any proper basis and appreciation of the facts of the case.**

**3. That the Id CIT (A) has disregarded the provisions contained in Section 9(1) (i) of the Act read with the relevant explanation that a foreign entity having a permanent establishment in India shall be liable to income tax only to the extent as is reasonably attributable to the operations carried out in India.**

**4. That in attributing the business profits to the Indian operations, the Id CIT (A), without appreciating the functional profile of the Appellant and its Indian PE, has inexplicably held that an exorbitantly high proportion of 50% of India's centric profits would be attributable to the Indian PE of the Appellant.**

**5. That the Id. CIT (A) has completely failed to appreciate the principle laid down by the Hon'ble Apex Court in the case of Morgan Stanley and Co. Inc. [(292 ITR 416) (SC)] and Set Satellite (Singapore) [(307 ITR 205) (Bom)], that in case the commission paid to Indian agent can be established to be at arm's length from an Indian transfer pricing perspective, no further profits shall be deemed to be attributable to the Indian agent.**

**6. That the Id. CIT (A) has completely disregarded the principle laid down by the Hon'ble Delhi High Court in the case of Rolls Royce Singapore Pte Limited (2011) and has completely relied upon the erroneous decision laid down by his predecessor by commenting that "However my predecessor CIT(A) had considered the attribution of 50% to be more appropriate. The appeal order for AY 2012-13 indicated that there was a very low component of the profit being shown in India thereby justifying proper attribution"**

**7. That the Ld. CIT (A) has erred on the facts and in the circumstances of the case and in law by concluding that "no prior exercise seems to have done to remunerate the Indian subsidiary at arm's length".**

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Ricardo UK Limited, the assessee is a company incorporated under the laws of the United Kingdom (UK) and is a tax resident of the United Kingdom as per Article 4

of the India and UK Double Taxation Avoidance Agreement (DTAA). The assessee is into providing testing, services to its clients and providing assistance to its Indian customers in conducting the feasibility analysis of its transmission systems designed for automobiles from its technical centers in UK. The assessee is into this business since 1915 and has currently employed over 2700 engineers, scientists and consultants around the world having high efficiency, low emission and class leading product innovation enabling the clients to employ the most viable transmission system. Assessee's clientele includes the world's major transportation, Original Equipment Manufacturers (OEM), supply chain organizations, energy companies, financial institutions and governments. The assessee is having profound technical experience required for the services provided.

4. During the year under consideration, the taxpayer had filed return of income declaring "NIL" income claiming that the income earned by the assessee was not taxable in India. Assessing Officer (AO) proceeded to held that the taxpayer has a Permanent Establishment (PE) in India in the form of domestic subsidiary company, namely, Ricardo India Pvt. Ltd. (RIPL) and thereby computed the income of the taxpayer by adopting the global profit

ratio and applying the same to India-centric revenues to allegedly impute the India-centric profitability. AO proceeded to attribute 50% of the business profit i.e. Rs.1,46,24,821/-, Rs.38,97,594/-, Rs.63,30,619/-, Rs.1,00,91,845/-, Rs.1,21,89,053/-, Rs.91,24,923/-, Rs.90,02,297/- & Rs.4,50,38,195/- for AYs 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16 & 2016-17 respectively to Indian PE and considered the same as taxable income of the assessee in India to be taxed @ 40% plus applicable surcharge and education cess.

5. The assessee carried the matter before the Id. CIT (A) by way of filing the appeals who has upheld the assessment framed by the AO by dismissing the appeals. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeals.

6. We have heard the Id. 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. Undisputedly, the assessee has accepted the existence of PE in India in all the aforesaid appeals. It is also not in dispute that in the transfer pricing report, profits attributed to the PE and amounts

of commission/remuneration already paid to assessee benchmarked and held to be at arm's length and thereby no adjustment has been made. It is also not in dispute that in all the aforesaid appeals commission/remuneration paid on arm's length basis is more than the profits attributed to the PE. However, assessee challenged the attribution of 50% of India-centre profit being highly unreasonable and excessive.

8. In the backdrop of the aforesaid facts and circumstances of the case, ld. AR for the assessee while keeping this challenge/issues/grounds qua attribution of India-centric profit at 50% being highly unreasonable and excessive open, contended that since assessee is adequately remunerated at arm's length basis and commission/remuneration paid to the assessee shall be reduced from the profits attributed to the PE, no further attribution to the PE is sustainable in view of the law laid down by **Hon'ble Apex Court in DIT vs. Morgan Stanley and Co. Inc. 292 ITR 416 (SC), E-Funds IT Solution Inc. vs. DIT 399 ITR 34 (SC), DIT vs. Honda Motors Co. Ltd. 255 taxman 72 (SC) and the decisions in Set Satellite (Singapore) 307 ITR 205 (Bom), Amadeus IT Group SA vs. DCIT ITA No.4906/Del/2010 (De. Trib) dated 26.10.2020, DIT vs. Galileo International Inc. 224**

**CTR 251 (De.), Galileo Nederland BV vs. ADIT 367 ITR 319  
(Del.).**

9. Ld. DR for the Revenue, on the other hand, relied upon the order passed by the ld. CIT (A) and termed the arguments addressed by the ld. AR for the assessee not sustainable.

10. To canvass the issue in controversy, the ld. AR for the assessee contended that the assessee has merely received marketing assistance from its Indian subsidiary, RIPL, which does not own any technical know-how or facilities nor employed any technical personnel required for the execution of the business/projects of the assessee and the scale of operation of RIPL is insignificant as compared to the size of operation of the assessee because RIPL has a miniscule set up of 5 - 7 employees (including administration and other support staff) and has been operating out of a small premises in Delhi. It is further contended by the ld. AR for the assessee that for the marketing services received from the Indian subsidiary, RIPL, it has been adequately remunerated inasmuch as commission/remuneration has been paid to RIPL on an arm's length basis. It is further contended by the ld. AR for the assessee that transfer pricing analysis showing transaction between assessee and RIPL at arm's length has not been disputed by the AO/CIT(A).

11. Aforesaid contentions raised by the Id. AR for the assessee when examined in the light of the profits attributed to PE and commission/remuneration paid on arm's length basis, commission/remuneration paid in all the cases is more than profit attributed to the PE, which is extracted from the synopsis filed by the Id. AR for the assessee for ready perusal as under :-

Assessment Year	Profits attributed to PE (A)	Commission/ remuneration paid on arm's length basis (B)
2009-10	1,46,24,821/-	3,31,16,923
2010-11	38,97,594/-	3,36,21,632
2011-12	63,30,619/-	4,00,05,437
2012-13	1,00,91,845/-	4,09,81,100
2013-14	1,21,89,053/-	4,10,77,874
2014-15	91,24,923/-	4,28,58,978
2015-16	90,02,297/-	5,69,29,447
2016-17	4,50,38,195/-	6,80,06,297

12. In the backdrop of the aforesaid facts and circumstances of the case, the sole contention raised by the Id. AR for the assessee that :-

*“Whether when RIPL has already been remunerated at arm's length, no further attribution to PE would be warranted?”*

and relied upon the law of the land laid down by Hon'ble Supreme Court in cases of **DIT vs. Morgan Stanley and Co. Inc., E-Funds IT Solution Inc., DIT vs. Honda Motors Co. Ltd.** (supra) and the

**decisions in Set Satellite (Singapore) and Amadeus IT Group SA vs. DCIT (supra).**

13. Hon'ble Supreme Court in case of **DIT vs. Morgan Stanley and Co. Inc.** (supra) upheld the order passed by the Id. AAR reached the conclusion that when transaction between two parties, PE on the one hand and domestic subsidiary company on the other hand, as in the present case, is remunerated on arm's length basis taking into account all the risk taking functions of multi-national enterprise, nothing would be left to attribute to the PE. Relevant part of the judgment is extracted for ready perusal as under :-

*“29. As regards determination of profits attributable to a PE in India (MSAS) is concerned on the basis of arm's length principle we have quoted Article 7(2) of the DTAA. According to the AAR where there is an international transaction under which a non-resident compensates a PE at arm's length price, no further profits would be attributable in India. In this connection, the AAR has relied upon Circular No.23 of 1969 issued by CBDT as well as Circular No. 5 of 2004 also issued by CBDT. This is the key question which arises for determination in these civil appeals.*

30. To answer the above question we quote Article 7 of the U.N. Model Convention which reads as under :

*"Article : Attribution of Business Profits*

*Article 7 of the UN Model Convention states as under business profits :*

1. *The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent*

*establishment; (b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.*

2. *Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting 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 or independently with the enterprise of which it is a permanent establishment.*

3. *In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business 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. 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 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 head office of the enterprise or any of its other offices.*

4. *Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a*

*permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this article.*

*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.*

*Note: The question of whether profits should be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods and merchandise for the enterprise was not resolved. It should therefore be settled in bilateral negotiations."*

*31. Article 7 of the U.N. Model Convention inter alia provides that only that portion of business profits is taxable in the source country which is attributable to the PE. It specifies how such business profits should be ascertained. Under the said Article, a PE is treated as if it is an independent enterprise (profit centre) carries the head office and which deals with the head office at arm's length. Therefore, its profits are determined on the basis as if it is an independent enterprise. The profits of the PE are determined on the basis of what an independent enterprise under similar circumstances might be expected to derive on its own. Article 7(2) of the U.N. Model Convention advocates the arm's length approach for attribution of profits to a PE.*

*32. The object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India. Under Article 7(2) not all profits of MSCO would be taxable in India but only those which have economic nexus with PE in India. A foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the PE in India. The quantum of taxable income is to be determined in accordance with the provisions of Income-tax Act. All provisions of Income-tax Act are applicable, including provisions relating to depreciation, investment losses, deductible expenses, carry forward and set-off losses etc. However, deviations are made by DTAA in cases of*

*royalty, interest etc. Such deviations are also made under the Income-tax Act (for example: Sections 44BB, 44BBA etc.). Under the impugned ruling delivered by the AAR, remuneration to MSAS was justified by a transfer pricing analysis and, therefore, no further income could be attributed to the PE (MSAS). In other words, the said ruling equates an arm's length analysis (ALA) with attribution of profits. It holds that once a transfer pricing analysis is undertaken; there is no further need to attribute profits to a PE. The impugned ruling is correct in principle insofar as an associated enterprise, that also constitutes a PE, has been remunerated on an arm's length basis taking into account all the risk-taking functions of the enterprise. In such cases nothing further would be left to be attributed to the PE. The situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a situation, there would be a need to attribute profits to the PE for those functions/risks that have not been considered. Therefore, in each case the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case. Lastly, it may be added that taxing corporates on the basis of the concept of Economic Nexus is an important feature of Attributable Profits (profits attributable to the PE)*

### **Conclusion**

*33. To conclude, we hold that the AAR was right in ruling that MSAS would be a Service PE in India under Article 5(2)(1), though only on account of the services to be performed by the deputationists deployed by MSCo and not on account of stewardship activities. As regards income attributable to the PE (MSAS) we hold that the Transactional Net Margin Method was the appropriate method for determination of the arm's length price in respect of transaction between MSCo and MSAS. We accept as correct the computation of the remuneration based on cost plus mark-up worked out at 29% on the operating costs of MSAS. This position is also accepted by the Assessing Officer in his order dated 29.12.06 (after the impugned ruling) and also by the transfer pricing officer vide order dated 22-9-2006. As regards attribution of further profits to the PE of MSCo where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE.....”*

14. Even otherwise, when we examine this proposition alternatively by reducing the commission/remuneration paid to RIPL from the profits attributed to the PE, detailed in the table extracted in preceding para 11 of the order, nothing more will be left to attribute to the PE. This proposition has been held in case of **Amadeus Global Travel Distribution S.A. vs. DCIT 113 TTJ 767 (Del.)** by the coordinate Bench of the Tribunal which has been affirmed by the **Hon'ble Delhi High Court in ITA 689/2011 & 795-797/2011** by relying upon the decision held in case of **DIT vs. Galileo International Inc. 224 CTR 251 (Del.)** wherein it is held as under :-

*“Reading the above Article 7 of the Treaty it is clear that the profit of an enterprise will be taxable only to the extent as is attributable to that permanent establishment. This is in pari materia with clause (a) of Explanation 1 to section 9(1)(i) of the Income-tax Act. Thus where the entire activity of an enterprise are not carried out in a Contracting State where the PE is situated, than only so much of the profit as is attributable to the functions carried through the PE can be taxable in such source State. While dealing with the question as to what is such part of income as is reasonably attributable to the operations carried out in India, we have held that only 15% of the revenue generated from the bookings made within India is taxable in India. The same proportion has to be adopted here while computing profit attributable to the PE. We have also held that since the payment to the agent in India is more than what is the income attributable to the PE in India, it extinguish the assessment as no further income is taxable in India., It is to be noted that even in the first assessment framed by the Assessing Officer, the entire expenses in the form of remuneration paid to AIPL was held as allowable deduction and was reduced while computing the income of appellant If that be the case, the income attributable to PE in India being less than the remuneration paid to the dependent agent, it extinguishes the assessment and requires no further exercise for computation of income. We accordingly hold so*

*and in view of the same the income of the appellant for assessment years 1997-98 and 1998-99 will be 'Nil'."*

15. So, we are of the considered view that when we deduct commission/remuneration from the RIPL from the profits attributed to the PE, no taxable income left in the hands of PE. Consequently, addition made by the AO/CIT (A) is not sustainable in the eyes of law.

16. Decision rendered by the coordinate Bench of the Tribunal in case of **Amadeus Global Travel Distribution S.A.** (supra), affirmed by the Hon'ble Delhi High Court, by relying upon the decision in case of **DIT vs. Galileo International Inc.** (supra) has been further followed by the coordinate Bench of the Tribunal in **assessee's own case bearing ITA No.4906/Del/2010 for AY 2007-08 vide order dated 26.10.2020.**

17. In view of what has been discussed above, we are of the considered view that when RIPL, a domestic subsidiary company, has already been remunerated at arm's length, no further attribution of profit to PE would be warranted. Even otherwise, by following the order passed by the coordinate Bench of the Tribunal in **assessee's own case for AY 2007-08** (supra), when we deduct the remuneration/commission paid to RIPL from the amounts of profit attributed to the PE as detailed in para 11 of this order, no taxable

income left in the hands of the PE. Consequently, additions made by the AO and confirmed by ld. CIT (A) are ordered to be deleted being not sustainable in the eyes of law. Consequently, all the appeals filed by the assessee are hereby allowed.

**Order pronounced in open court on this 17<sup>th</sup> day of February, 2021.**

**Sd/-  
(ANIL CHATURVEDI)  
ACCOUNTANT MEMBER**

**sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

**Dated the 17<sup>th</sup> day of February, 2021  
TS**

Copy forwarded to:

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

**AR, ITAT  
NEW DELHI.**