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

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI YOGESH KUMAR US, JUDICIAL MEMBER

ITA No.4582/Del./2010
(ASSESSMENT YEAR : 2004-05)

ITA No.4583/Del./2010
(ASSESSMENT YEAR : 2005-06)

ITA No.4584/Del./2010
(ASSESSMENT YEAR : 2006-07)

ITA No.6090/Del./2010
(ASSESSMENT YEAR : 2007-08)

ITA No.3923/Del./2012
(ASSESSMENT YEAR : 2008-09)

ITA No.1538/Del./2013
(ASSESSMENT YEAR : 2009-10)

ITA No.1469/Del./2015
(ASSESSMENT YEAR : 2010-11)

ITA No.1470/Del./2015
(ASSESSMENT YEAR : 2011-12)

Ariba Inc., C/o Price Waterhouse Coopers, Sucheta Bhawan, 11A, Vishnu Digamber Marg, New Delhi. **(PAN : AAACD5883D)**	vs.	DDIT, International Taxation, Circle 1 (1), New Delhi.
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Himanshu Sinha, Advocate
Shri Yash Varmani, Advocate
REVENUE BY : Shri Sanjay Kumar, Sr. DR

Date of Hearing : 08.08.2022
Date of Order : 17.10.2022

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

These are eight appeals by the assessee involving common issues regarding existence of Dependent Agent Permanent Establishment (DAPE) of the assessee and without prejudice a ground that since the income of the AE has been remunerated at arm's length, no further attribution is required for the alleged PE.

2. Another issue in this appeal is receipt of the assessee being taxed as royalty under Articles 5 (4) and 12(3)(b) of the India-USA Double Taxation Avoidance Agreement 9DTAA).

3. For the sake of reference, we are referring to grounds of appeal in ITA No.4582/Del/2010 for AY 2004-05 :-

> "1. On the facts and in the circumstances of the case and in law, the order passed by the Ld. Commissioner of Income Tax (Appeals) [CIT (Appeals)], to the extent confirming Assessing Officer's action, is bad in law and void ab-initio.
>
> 2. On the facts and in law, the Ld. CIT(Appeals) grossly erred in upholding the order of the Assessing Officer that Ariba India constitutes a PE of the Appellant in India under Article 5 of the Indo-US Double Taxation Avoidance Agreement (hereinafter referred to as 'DTAA').

2.1 On the facts and in law, the Ld. CIT (Appeals) grossly erred in concluding that Ariba India is an agent of the Appellant in India in terms of section 182 of the Indian Contract Act, 1872.

2.2 On the facts and in law, the Ld. CIT (Appeals) grossly erred in holding that Ariba India cannot be treated as an agent of independent status in view of Article 5(5) of DTAA.

2.3 Without prejudice to the above grounds, on the facts of the case and in law, even if Ariba India is construed to be agent of the Appellant then also the transaction between the Appellant and Ariba India is at arm's length and there cannot be any further attribution in the hands of the Appellant in India.

3. On the facts and in law, the Ld. CIT (Appeals) grossly erred in concluding that the payment received by the Appellant was for the use of commercial and scientific equipment and so would be in the nature of royalty within the meaning of Article 12(3) (b) of the DTAA and also under section 9(1) (vi) Explanation 2(iva) of the Act.

3.1 On the facts and in law, the Ld. CIT (Appeals) grossly erred in concluding that the case of the Appellant would come within the purview of equipment royalty on the basis of the ruling of Advance Authority in the case of Cargo Community Network (P) Ltd.

4. On the facts and in law, the Ld. CIT (Appeals) grossly erred in applying the provisions of section 44D read with section 115A of the Act in the case of the Appellant without appreciating that the true intent of the provisions of Article 7 is to tax the receipts as a business income on net basis of taxation.

4.1 On the facts and in law, without prejudice the Ld. CIT (Appeals) failed to appreciate that in case it is held that the Appellant is having a PE in India and is liable to be taxed under Article 7 of the DTAA, then as per Article 7(3) the Appellant would be entitled to the deductions as per the provisions of section 28 to 43 C of the Act.

> 4.2 On the facts and in law, the Ld. CIT (Appeals) erred in not appreciating that in the assessment order the expenses were estimated to be 50% of the receipts from India and accordingly a view taxing the whole of the receipts in the garb of section 44D read with 115A of the Act is erroneous.
>
> 4.3 On the facts and in law, the Ld. CIT (Appeals) grossly erred in applying the tax rate of 20% invoking the provisions of section 44D read with 115A suomoto, without giving the Appellant any opportunity of being heard.
>
> 5. On the facts and in law, the Ld. CIT (Appeals) ought to have deleted the interest levied under section 234B of the Act."

4. Brief facts of the case are that the assessee is a company incorporated in the United States of America, having its office at 210, Sixth A venue, Pittsburgh, PA 15222, USA. The assessee is engaged in the business of conducting Competitive Bidding Events i.e. On-line global auctions. It provides online auction services from its Global Market Operations Centres ('GMOC') located outside India. In India, the assessee provides such services to Ariba India Pvt. Ltd. (earlier known as Freemarkets Services Pvt. Ltd. hereinafter referred to as 'Ariba India') a wholly-owned subsidiary of the assessee.

5. For the A.Y. 2004-05, the assessee earned an amount of Rs.3,90,17,222/- from Ariba India. According to the assessee, the receipts from Ariba India were in the nature of business profits and it did not

qualify as 'royalty or fees for technical services' in terms of Article 12 of the Indo-US Double Tax Avoidance Agreement ('DTAA'). Accordingly, in the absence or a permanent establishment, the assessee offered Nil income in its return of income. In the assessment order for this year, the AO held that Ariba India was a dependent agent PE of the assessee in India and that the income arising to the assessee is taxable as business income under Article 5 read with Article 7 of the DTAA. The AO estimated the expenses incurred by the assessee for maintaining requisite infrastructure for conduct of online auction at 50% of gross receipts and accordingly, the balance 50% of the gross receipts were deemed to be income of assessee. The assessment was completed at an income of Rs.1,95,08,611/- against the Nil income returned by the assessee. Initially the AO taxed this income at the rate of 15% but subsequently through an order u/s 154 of the Act taxed the same at the rate of 41%. Alternatively, the payments received by the assessee from Ariba India were held as royalty income under Article 12 of the DTAA.

6. For the A.Y. 2005-06 and 2006-07, the assessee received an amount of Rs.1,25,82,496/- and Rs.53,77,834/- respectively from Ariba India but filed its return of income at Nil income In the assessment order passed for these years, the AO held the receipts of the assessee from

Ariba India to be in the nature of royalty income and taxed the same at the rate of 15%. Moreover, the AO assessed the assessee at an income of Rs.7,12,21,675/- against the actual receipts of Rs.1,25,82,496/- for A.Y. 2005-06 and at Rs.8,83,60,840/- against the actual receipts of Rs.53,77,834/- for the A.Y. 2006-07. This was done by the AO on the basis of the agreement between the assessee and Ariba India according to which Ariba India was to pay to the assessee 45% of its receipts for the online auction services provided to it by the assessee whereas it actually paid only 7.95% of its earning to the assessee amounting to Rs.1,25,82,496/- in A.Y. 2005-06 and about 3% of its earnings amounting to Rs.53,77,834/- in A.Y. 2006-07. The AO further held that the Ariba India was assessee's DAPE in India and alternatively the payments received by the assessee from Ariba India were in the nature of business income.

7. Proceedings before the CIT (A) for AYs 2004-05 to 2006-07

The CIT(A), vide consolidated order dated 14th July 2010 passed for AYs 2004-05 to 2006-07 (Impugned Order for AYs 2004-05 to 2006-07), held that the receipts of the Assessee are taxable as royalty under Article 12(3)(b) and also that it has a DAPE in India in term of Article 5(4)(a) and Article 5(4)(c) of the DTAA. Further. the royalty income is

attributable to the DAPE of the Assessee and should be taxed at the rate of 20% under section 440 read with section 115A(I)(b) of the Income Tax Act. 1961 (ITA). However, for AY 2005-06 and 2006-07, the CIT(A) held that that only the actual income can be taxed and not the notional income (15% of the gross receipts of Ariba India that were taxed by the AO).

8. Proceedings before the AO for AY 2007-08

Similar to AY 2004-05 to 2006-07, the AO passed an assessment order for A Y 2007-08 wherein Ariba India was held to be a DAPE of the Assessee. The AO assessed the income of the Assessee at Rs.8,96.33.340 (i.e. -15% of the gross payments of Rs.19,91,85,203) received by Ariba India and the same was held to be Assessee's notional income. Out or the notional income assessed in Assessee's case. 50% of the notional income was held to be royalty under paragraphs 3 and 4 of Article 12 of the India-US DTAA and accordingly taxed at the rate of 15%. Further. the balance 50% of the income was held to be taxable at 20% under section 44D (since the Amended Agreement was disregarded and section 44D was held to be applicable) read with section 115A of the Act as income attributable to assessee's DAPE (i.e. Ariba India).

9. Objections filed in the Dispute Resolution Panel (DRP) for A Y 2007-08

Aggrieved by the Assessment Order for AY 2007-08, the Assessee filed its objections before the DRP. The objections were disposed of by vide directions dated 29.09.2010 in which no relief was given by the DRP to the Assessee.

10. Proceedings before the AO for AYs 2008-09 to 2011-12:

The AO, while finalizing the assessments for AYs 2008-09 to 2011-12, held that notional income (45% of the gross receipts of Ariba India) of Rs.9,88,89,755, Rs.9,31,81,374, Rs.6,01,77,190 and Rs.6,25,53,075 was taxable in each of these years respectively.

11. Proceedings before the CIT (A) for AYs 2008-09 to 2011-12

Aggrieved by the Assessment Order for A Y 2008-09 to AY 2011-12, the Assessee filed appeals before the C]T(A). The appeals were disposed of by CIT(A) vide separate orders from AYs 2008-09 to 2011-12 (collectively referred to as Impugned Orders for AY 2008-09 to 2011-12). The CIT (A), following the earlier year's approach. held that the amounts received from Ariba India during the A Ys were taxable as royalty under Article 12(3)(b). Further, it was held that the Assessee has a DAPE in India in terms of Article 5(4)(a) and Article 5(4)(c) of the DTAA.

12. As in prior years. the CIT (A) held that 50% of the amounts received from Ariba India was royalty attributable to the Assessee's DAPE. Further, there was no difference between the terms of the Original and the Amended Agreement and the only difference was with respect to the rate of payment and that the Amended Agreement was subject to the laws of California instead of the laws of India. Thus, the CIT (A) held that the Original Agreement was applicable. The CIT (A) directed the AO to tax 50% of the royalty income (which was held to be attributable to the DAPE of the Assessee) at the rate of 20% under section 44D read with section 115A(1)(b) of the ITA. The balance amount of the royalty (which was held to be not attributable to the DAPE) was to be taxed at 15% under Article 12 of the India-US DTAA. However, the CIT (A) granted relief on the additions made by the AO in these AYs on account of notional income and held that only the actual income can be taxed.

13. Against the above order, assessee has filed the appeal before us. We have heard both the parties and perused the record.

14. Qua the issue of existence of DAPE of the assessee, assessee's submission in this regard read as under :-

> "It is submitted that Ariba India is not an agent of the Assessee as it is not acting on behalf of the latter or representing the latter in any manner. It is carrying on its own business as an independent entity. Ariba India is neither under the control of the Assessee nor

it receives any detailed instructions from the Assessee to conduct its business activities. Thus, it cannot be held to be a dependent agent of the Assessee.

10. The CIT (A) erroneously observed that Ariba India has been holding itself out as an agent of the Assessee to the clients of the former (i.e. the Indian clients). In this regard, it is submitted that Section 237 of the Indian Contract Act provides that an agency by holding out is created only if the principal, by words or conduct, induced third persons to believe that acts done and obligations incurred by an agent were within the scope of the agent's authority. In the present case, no material/ evidence has been brought on record by the CIT(A) to show that the Assessee (i.e. the alleged principal) has induced third parties (i.e. the clients of Ariba India) to believe that Ariba India is its agent and it will be bound by the acts done and obligations incurred by Ariba India.

11. Further, the relationship between Ariba India and the Assessee has to be determined by relying on the express terms of the agreement between the parties. In this case, the relationship between the Assessee and Ariba India is on principal-to-principal basis which can be understood from bare reading of clause 8.1 of the Original Agreement.

12. A perusal of Limited Liability clause shows that the Assessee was bound only to Ariba India for non-performance of its obligations. In any case, the Assessee was not bound to the ultimate client of Ariba India. Further, the loss to the Assessee was limited to what has been received from Ariba India, whereas Ariba India is liable to the end customer for much more and on its own behalf.

13. In view of the above, it is apparent that Ariba India is providing services to the third parties on its own and not on behalf of the Assessee. Thus, Ariba India cannot constitute a DAPE of the Assessee.

14. Further, in the present case, none of the conditions laid down in Article 5(4) of the DTAA are met as discussed below:

> • Ariba India is not authorized to enter into contracts for or on behalf of the Assessee. Moreover, the Assessee is not even a party to the contracts entered into by Ariba India. Ariba India bears all the risks and responsibilities in connection with the contracts entered into with its clients.
>
> • Ariba India does not enter into the contracts or secures orders for or on behalf of the Assessee. It enters into contracts with the clients in its own right and secures orders for itself and not for the Assessee.
>
> 15. Also, it is now a settled legal position that wholly-owned subsidiary does not constitute a PE by itself. [CIT vs. E-Funds 399 ITR 34 (SC)]. In view of the above, it is submitted that Ariba India is economically independent from the Assessee and cannot be treated as DAPE of the Assessee."

15. Without prejudice to the above, assessee has raised a ground that vide ground no.2.3 for AYs 2004-05 to 2006-07, Ground No.6 for AY 2007-08 and Ground No.4 for AY 2008-09 to 2011-12, when the transaction between the assessee and Ariba India is at arm's length there cannot be any further attribution in the hands of the assessee in India. In this regard, ld. Counsel of the assessee has referred to CIT (A)'s order pages 43 & 44 for AYs 2004-05 to 2006-07 for the following observation:-

> "Further, the assessments made for Ariba India for the AYs in question, the transfer pricing adjustment made in AY 2004-05 was deleted by the TPO pursuant to directions in this regard by the ITAT. No transfer pricing adjustments were for AYs 2005-06 to 2009-10. Further, for AYs 2010-11 to 2011-12, the matter was remanded back to the TPO by the ITAT with such

> directions which will result in deletion of the transfer pricing adjustment."

16. Accordingly, it is the submission of the assessee that when the transaction between the assessee and Ariba India is at arm's length there cannot be any further attribution in the hands of the assessee in India. In this regard, ld. Counsel of the assessee placed reliance on the ruling pronounced by the Authority of Advance Ruling (AAR) in the case of Morgan Stanley and Co. vs. DIT (International Taxation) (152 Taxman 1) which has been affirmed by the Hon'ble Apex Court in the case of DIT vs. Morgan Stanley and Co. Inc., 292 ITR 416. Similar findings have also been affirmed in the cases of Galileo International Inc. 224 CTR 251; B4U International Holdings Ltd. 137 ITD 346 (2012); and BBC Worldwide Ltd. 203 Taxman 554 (Delhi HC), SET Satellite (Singapore) vs. DDIT (International Taxation) 307 ITR 205 (Bom. HC).

17. Further, assessee's counsel submitted that there is no base erosion in this case. Submissions in this regard are as under :-

> "It is submitted that since Ariba India has retained majority of the revenues earned from the clients (around 88% to 97% from AY 2004-05 to AY 2011-12) and offered the same to tax in India in it income tax returns for each of these years, only a miniscule percentage of the revenues (around 3% to 12.50%) have been paid to Ariba Inc. This clearly shows that there has been no base erosion in terms of taxes to be paid in India by the relevant parties. Therefore, there is no base erosion on account of non-taxability of the Assessee."

18. Vide ground no.3.1 for AYs 2004-05 to 2006-07 and Ground No.2 for AYs 2007-08 to 2011-12, the authorities below have treated the payments received by the assessee as taxable as royalty. In this regard, it is the submission of the ld. Counsel of the assessee that this payment is not received by the assessee for any use of commercial or scientific equipment, hence it cannot be in the nature of royalty under Article 12(3)(b) of the DTAA and Explanation 2 (iva) to section 9(1)(vi) of the Income-tax Act, 1961 (for short 'the Act'). The detailed submissions of the assessee's counsel in this regard read as under :-

> "23. The CIT(A) held that payments received by the Assessee from Ariba India is in the nature of royalty since the Assessee has granted right to use its scientific equipment to Ariba India and it Indian customers. It is submitted that the Assessee is merely providing services to Ariba India and in the course of providing these online auction services, it provides access to the online auction platform. Such access does not entail providing a right to use the equipment owned by the Assessee on which the online auction platform is maintained.
>
> 24. This debate between 'service' versus 'use of equipment' has been examined by the courts in several cases and the courts have consistently held that if the contract is primarily for rendering service, the consideration thereof cannot constitute royalty merely for the reason that the services are being provided through the use of equipment.
>
> 25. Reliance in this respect is placed on Asia Satellite Telecommunications Co. Ltd. v. DIT: 332 ITR 340 (Delhi HC) wherein the Delhi High Court held that consideration paid to a

satellite company for uplinking and down linking of TV signals will not be royalty for use of transponders inside the satellite.

26. Subsequently, the AAR adopted the position laid down in Asia Satellite (supra) in the case of ISRO Satellite Centre (ISAC), in re (2008) 307 ITR 59, wherein, it was held that for equipment royalty to arise, the payer needs to have control over the equipment. If the payer merely receives a service without control or possession of the equipment, no royalty can arise.

27. To the same effect are the following decisions:

- Director of Income-tax v. New Skies Satellite BY (2016) 382 ITR 114 (Del HC)
- Yahoo India (P.) Ltd. v. DCIT 140 TTJ 195 (Mumbai)

28. It is submitted that at no point of time the control of equipment is exclusively granted to Ariba India or its clients. The observations of the CIT(A) @ para 49 of the Impugned Order for AYs 2004-05 to 2006-07) regarding control of the equipment by grant of access through userid and password is wholly erroneous.

29. Right to use would mean that the payee himself can put the equipment into service or can himself employ the equipment for the desired purpose. The payee must have control over the equipment and shall be able to put the equipment to use for any desired purpose. Reliance in this regard is placed on the decision of Mumbai ITAT in the case of Standard Chartered Bank v. DDIT [11 ITR (Trib.) 721].

30. As it can be perused from the agreement and the factual position, there is no parting of any exclusive right by the assessee in favour of the customer (Refer clause 9 of Original Agreement). It is mere provision of service by the assessee to Ariba India. The customer only avails a service and pays for it. The assessee has merely conducted online auction on its platform and at all times the control on process and information etc. remains with the assessee. In other words, at no point of time the control of anything is transferred to Ariba India or its

clients and therefore, there is no reason it can be said that the consideration is paid for the use or right to use has been granted to Ariba India / its clients.

31. The Assessee further relies on the following rulings of Bharat Sanchar Nigam Ltd. v. UOI (AIR 2006 SC 1383); Rackspace US Inc v. DCIT (International Taxation) [2020] 113 taxmann.com 382 (Mumbai - Trib.) - Para 5; Akamai Technologies Inc., In re [2018] 93 taxnutnn.com 471 (AAR - New Delhi) - Para 13; The Income Tax Officer (IT) TDS-4, Mumbai vs. People Interactive (I) P Ltd ITA No.2180/Mum/2009 - (para 8.2 of the order); Pinstorm Technologies Pvt. Ltd. v. ITO (154 TTJ 173) - Para 6; ITO v. Right Florist (P.) Ltd. (154 TTJ 142) - Para 21.

32. The assessee in this regard would like to place reliance on the recent ruling in the case of Salesforce.com Singapore Pte vs The Dy DIT Circle 2(2) International Taxation, Delhi TS-222-ITAT-2022(DEL) wherein the Hon'ble ITAT held that by granting access to the information forming part of the database, the Assessee neither shares its own experience, technique or methodology employed in evolving databases with the users, nor imparts any information relating to them, thus the income earned by the Assessee cannot be taxed as royalty as per section 9(1)(vi) as well as Article 12C' of the DTAA.

33. Basis above, it cannot be said that the receipts of the Assessee from Ariba India can come within the purview of "royalty" as defined under Article 12(3) of the DTAA. The Assessee is merely providing services of conducting online auctions to Ariba India and no exclusive right to use the equipment / process has been granted in favour of either Ariba India or its customers in India.

Services provided by the Assessee are standardized/ common services which cannot he characterized as fee for technical/ included services

34. Further, the CIT (A) grossly erred in observing at Para 54 of the Impugned Order for AYs 2004-05 to 2006-07 that the

appellant provided certain technical/ helpdesk services for smooth conduct of online auction market through technical and other personnel. The CIT (A) concluded that such service fall within the category of technical services/ included services (FTS) under section 9(1)(vii) of the Act and under Article 12 (4) (a) of the India-US DTAA.

35. It is submitted that the services provided by the Assessee are standardized/ common services which cannot be regarded as FTS under the Act. [Refer CIT v. Kotak Securities Ltd. [20I6] 383 ITR 1 (SC) (para 9]

36. Further, for FTS to arise under Article 12(4)(a) of the India-US DTAA, the Assessee has to make available technical know-how, skills or experience etc. to Ariba India. In order to satisfy the requirement of the "make available clause", the Hon'ble Karnataka High Court in the case of CIT v. De Beers India Minerals (P.) Ltd. [2012] 346 ITR 467 observed that technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. Similar observations were also made by this Hon'ble Tribunal in the case of Guy Carpenter & Co. Ltd. v. ADIT [2012] 18 ITR (T) 333 which was confirmed by the Hon'ble High Court in the case of DIT v. Guy Carpenter & Co. Ltd. [2012] 20 taxmann.com 807 (Delhi).

37. In the present case, the CIT (A) made bald observations that services provided by the Assessee qualify as FTS without giving any reasons as to how services provided by the Assessee satisfy the 'make available' clause in Article 12(4)(a) of the India-US DTAA. The CIT (A) grossly erred in not appreciating that no technical knowledge, know-how and the like were transferred by the Assessee to Ariba India or its customers in India which rendering the online auction services. Accordingly, it is humbly submitted that the services provided by the

Assessee cannot be characterized as FTS under the India-US DTAA."

19. Further, ld. Counsel of the assessee had suggested that he shall not be pressing certain grounds and the certain grounds are academic in nature. The submissions of the ld. Counsel of the assessee in this regard can gainfully be referred as under :-

"38. Ground No. 4.1 to 4.3 for AYs 2004-05 to 2006-07; Ground No, 4.1 for AY 2007-08; Ground No. 5.1 for AYs 2008-09 to 2011-12: Not pressed.

39. Ground No.5 for AYs 2004-05 to 2006-07; Ground No.7 for AY 2007-08: Consequential in nature.

Other grounds taken by the assessee which are not specified above:

40. It is submitted that if the Hon'ble Tribunal allows the Ground of Appeal Nos. 2 and 3 (discussed in detail above), the following remaining grounds will become academic in nature.

Ground No.4 for A Y 2007-08: Notional income cannot be taxed in the hands of the Assessee:

41. For AY 2007-08, the assessee has received Rs.2,61,04,811 as per the Amended Agreement. However. the AO assessed notional income equal to Rs.8,96,33,341 (i.e. 45% of the gross payments (Rs.19,91,85,203) received by Ariba India) in the hands of the Assessee. The AO also disregarded the Amended Agreement citing that in substance, the business model and terms of the Amended Agreement and Original Agreement remained the same.

42. It is submitted that the CIT (A) for the other AYs (i.e. AYs 2005-06, 2006-07, 2008-09, 2009-10, 2010-11 and 2011-12) held that the AO was not justified to tax notional income in

the hands of the Assessee in absence of an adverse observations being made by the jurisdictional transfer pricing officer of Ariba India in this regard. The relevant part of the order of CIT (A) for AY s 2005-06 to 2006-07 wherein relief was granted to the Assessee is reproduced below for ready reference:

> "56. In the absence of adverse determination by the TPO, the AO was not justified in bringing to tax income over and-above what was actually paid. What can he taxed is the real income and not the notional income. Copy of the invoice and the copy of the ledger account of the assessee in the books of Ariba India was duly filed before the AO which reflected the payment actually made by Ariba India to the assessee. Therefore, it cannot be said that any amount over and above the actual payment accrued to the assessee. Therefore, only the actual payment was required to be taxed otherwise taxing the assessee on an amount over and above the actual payment would amount to double taxation of the same income i.e. once in the hands of Ariba India as already offered by it for taxation and secondly in the hands of the assessee on a notional basis.
>
> 57. Keeping in view the discussion made above, it is held that the amount of income to be taxed for AY 2005-06 & 2006-07 as royalty in the hands of the assessee should be the actual payment made by Ariba India to the assessee at Rs.125,82,496/- and Rs.53,77,831/- respectively. The AO is directed accordingly."

43. The Revenue has not preferred an appeal against the orders of the CIT (A) and thus, the decision of the CIT (A) has become final. Since the position of law on this point has been accepted by the Revenue in other AYs, it is humbly submitted that notional income cannot be taxed in the hands of the Assessee.

<u>Ground No.4 for AY 2007-08; Ground No.6 for AYs 2008-09 to 2011-12: The Amended Agreement between the Assessee</u>

and Ariba India cannot be held to be a mere extension of the Original Agreement

44. It is submitted that the Amended Agreement provided for 12.5% of the gross receipts to be paid to the Assessee by Ariba India for services provided. The said Agreement was effective from 1 April 2006.

45. However, the AO took notional receipts of the Assessee at 45% of the gross payments instead of 12.5% as stated in the Amended Agreement. In doing so, the AO disregarded the Amended Agreement entered between the Assessee and Ariba India citing that. in substance. the business model of the Assessee under Original Agreement and the Amended Agreement remained the same. Further, the terms and conditions of the Amended Agreement vis-a-vis the Original Agreement remained the same. The ORP upheld action of the AO in this regard.

46. It is submitted that clause 17 of the Amended Agreement unequivocally provides that it supersedes all prior agreements between the parties. Further, the Amended Agreement became effective from 1 April 2006. It is also submitted that the Amended Agreement cannot be regarded as an extension of the Original Agreement as it is an independent legally enforceable agreement. The parties involved (i.e. Ariba India and the Assessee) agreed to a new understanding which culminated into the Amended Agreement. Accordingly, the terms and conditions of the Amended Agreement would govern the rights and obligations of the parties. The Assessee can manage its affairs within the framework of the statute. It is a settled position of law that the revenue authorities cannot interfere in the business/ commercial decisions of a taxpayer.

47. Reliance in this regard is placed on the decision of the Hon'ble Pune ITAT in the case of GKN Holdings Plc v, DDIT [2015] 167 TTJ 408 (Pune - Trib.) wherein it was held that. unless an agreement is proved beyond doubt to be a colourable device. the Revenue cannot disregard such an agreement. Further, in the following decisions, it has been consistently held

that a new agreement which differently governs the rights and obligations of the parties vis-a-vis the preceding agreement cannot be held to be a mere extension of the previous agreement:

(a) Inspecting Assistant Commissioner vs General Electric Co. (32 ITO 538) (Mumbai ITAT):

(b) DCIT v. Sulzer Bros (46 ITD 546) (Madras ITAT):

(c) Leonhard Andra Und Partner. GmbH vs CIT (249 ITR 418) (Calcutta HC);

(d) Income Tax Officer vs Chloride India Ltd. (75 ITD 69) (ITAT Calcutta - Special Bench) affirmed by Chloride Group PLC vs CIT (253 ITR 514) (Calcutta HC)

48. Ground No.8 for AY 2007-08: The Assessee humbly submits that the credit of taxes withheld and deposited on behalf of the assessee should be granted to it while determining its tax liability during AY 2007-08."

20. Per contra ld. DR for the Revenue relied upon the orders of the authorities below.

21. Upon careful consideration, as pointed out by ld. Counsel of the assessee, we first address the issue of attribution made to the alleged PE of the assessee when the AE has been remunerated at arm's length. We find that it is undisputed that this ground is without prejudice to the ground that the AE is not a DAPE as held in all the appeals. It has been brought to our notice that in the assessments made for Ariba Inc. for all the AYs in question either no transfer pricing adjustments was done or

they were deleted by the TPO pursuant to the direction of ITAT in this regard. Hence considering the fact that no transfer pricing adjustment has been done/sustained in case of assessments of the AE, it is the assessee's plea that no further attribution is permissible on the touchstone of Hon'ble Apex Court decision pronounced in the case of DIT vs. Morgan Stanley and Co. Inc. 292 ITR 416. To the same effect is the order of the ADIT v. E-Funds IT Solution Inc. [2017] 399 ITR 34(SC), Honda Motor Co. Ltd vs. ADIT (301 CTR 601)(SC) and of the Hon'ble Delhi High Court in the case of Adobe Systems Inc. v. ADIT [WP(C)2384, 2385, 2390 of 2013] and DIT v.SSC Worldwide Ltd.[2011] 203 Taxman 554(Delhi), once a transfer pricing analysis has been undertaken in respect of the Indian AE, nothing further would be left to be attributed to it as the alleged PE of the assessee and that, accordingly, would automatically extinguish the need for attribution of any additional profits to the alleged PE.

21.1 In all these cases, it has been submitted by the assessee that the transactions have been found to be at Arm's Length by the Transfer Pricing Officer in the Transfer pricing order of the AE or the adjustment stood deleted pursuant to appellate order. This is not disputed by the

Revenue. In such a situation, the decision 0.r Hon'ble Apex Court as above applies on all fours in these cases.

22. In the background of the aforesaid discussion and the precedents, we hold that it is undisputed that in the assessment of the AE, the transfer pricing adjustments do not survive. Hence, attribution of income to the alleged PE is not sustainable. Hence, we decide this ground in favour of the assessee.

23. Since we have allowed without prejudice ground, the issue whether AE is DAPE is only of academic interest now, hence we are not engaging into the same.

24. Now, we refer to the issue whether receipt should be taxed as royalty within the meaning of Article 12(3)(b) of the India USA DTAA and also under Explanation 2(iva) to section 9(1)(vi).

25. The assessee's submission in this regard is that this payment was not received by the assessee for any use of commercial or scientific equipment, hence it cannot be in the nature of royalty under Article (12)(3)(b) of the DTAA and Explanation 2 (iva) of section 9(1)(vi) of the Act. Assessee's submission is that it is merely providing services to Ariba India and in the course of providing these online auction services, it provides access to the online auction platform. Hence, it is the plea of the

assessee that such access does not entail providing a right to use the equipment owned by the assessee on which the online auction platform is maintained. It is further amply made clear that Hon'ble Courts have consistently held that if the contract is primarily for rendering services, the consideration thereof cannot constitute royalty merely for the reason that the services are being provided through use of equipment. In this regard, assessee has placed reliance on the decision of Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd. (supra) wherein Hon'ble Delhi High Court held that consideration paid to a satellite company for uplinking and down linking of TV signals will not be royalty for use of transponders inside the satellite. In our considered opinion, this case law applies on the fours on the present case.

26. Further assessee placed reliance on the decision of ISRO Satellite Centre (ISAC) (supra), wherein, it was held that for equipment royalty to arise, the payer needs to have control over the equipment. If the payer merely receives a service without control or possession of the equipment, no royalty can arise. We find that it is nobody's case that on the platform that is being used by the AE, the AE has any such control over it. To the same effect, following decisions are cited :-

(i) Director of Income-tax v. New Skies Satellite BY (2016) 382 ITR 114 (Del HC)

(ii) Yahoo India (P.) Ltd. v. DCIT 140 TTJ 195 (Mumbai)

Hence, once it is clear that at no point of time the control of equipment is exclusively granted to AE i.e. Ariba India or its clients, the treatment of the receipt as royalty is not tenable and ld. CIT(A)'s observation that the grant of access through userid and password is giving control of the equipment is an erroneous proposition, which is not sustainable. It is absolutely absurd proposition granting access through userid and passwords for availing the facility would grant control over the equipments involved in the process.

27. Further the assessee's submission is cogent that a perusal of the agreement shows the factual position that there is no parting of any exclusive right by the assessee in favour of the customer and it is a mere provision of service by the assessee to Ariba India. The customer only avails a service and pays for it. The assessee has merely conducted online auction on its platform and at all times, the control on process and information etc. remains with the assessee. The other case laws referred by the ld. Counsel for the assessee hereinabove are also germane and support the case of the assessee. In this regard, we may also refer to the decision of Salesforce.com Singapore Pte vs The Dy DIT Circle 2(2) International Taxation,

Delhi TS-222-ITAT-2022(DEL) wherein ITAT held that by granting access to the information forming part of the database, the Assessee neither shares its own experience, technique or methodology employed in evolving databases with the users, nor imparts any information relating to them, thus the income earned by the Assessee cannot be taxed as royalty as per section 9(1)(vi) as well as Article 12C of the DTAA.

28. In the background of the aforesaid and following the precedents, we sustain the assessee's plea that it cannot be said that the receipts of the assessee from Ariba India can come within the purview of "royalty" as defined under Article 12(3) of the DTAA and the assessee has been merely providing services of conducting online auctions to Ariba India and no exclusive right to use the equipment / process has been granted in favour of either Ariba India or its customers in India to qualify as "royalty".

29. Further assessee has disputed the CIT (A)'s observation in the common order for AYs 2004-05 to 2006-07 that the assessee provided certain technical/ helpdesk services for smooth conduct of online auction market through technical and other personnel. In this regard, assessee's submission is that the services provided by the assessee are

standardized/ common services which cannot be regarded as FTS under the Act. In this regard, reliance has been placed upon Hon'ble Apex Court decision in the case of CIT v. Kotak Securities Ltd. [2016] 383 ITR 1 (SC). In our considered opinion, it duly supports the case of the assessee.

30. Further, assessee has contended that for FTS to arise under Article 12(4)(a) of the India-US DTAA, the Assessee has to make available technical know-how, skills or experience etc. to Ariba India. In this regard, reference has been made to Hon'ble Karnataka High Court in the case of CIT v. De Beers India Minerals (P.) Ltd. (supra) wherein it is observed that in order to satisfy the requirement of the "make available clause", technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like; that the service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. Admittedly, this is not the case here. Hence, we agree with the ld. Counsel of the assessee that ld. CIT (A) has erred in not appreciating that no technical knowledge, know-how

and the like were transferred by the assessee to Ariba India or its customers in India while rendering the online auction services. Hence, we agree that the services provided by the assessee cannot be characterized as FTS under the India-US DTAA.

31. Another point which goes to support the case of the assessee is the assessee's submission that there is no base erosion in this case. It has been submitted that Ariba India has retained majority of the revenues earned from the clients (around 88% to 97% from AY 2004-05 to AY 2011-12) and offered the same to tax in India in its income tax returns for each of these years, only a miniscule percentage of the revenues (around 3% to 12.50%) have been paid to Ariba Inc. This clearly shows that there has been no base erosion in terms of taxes to be paid in India by the relevant parties. Hence, we agree that there is no base erosion on account of non-taxability of the assessee.

32. Another point is the notional income confirmed by the ld. CIT (A) for AY 2007-08. For AY 2007-08, assessee has received Rs.2,61,04,811 as per the Amended Agreement. However, the AO assessed notional income equal to Rs.8,96,33,341 (i.e. 45% of the gross payments (Rs.19,91,85,203) received by Ariba India) in the hands of the assessee. The AO also disregarded the Amended

Agreement citing that in substance, the business model and terms of the Amended Agreement and Original Agreement remained the same. In this regard, the submission of the assessee is that the above is in contradiction to the order of ld. CIT (A) for AYs 2005-06, 2006-07, 2008-09, 2009-10, 2010-11 and 2011-12) wherein it was held that the AO was not justified to tax notional income in the hands of the assessee in absence of an adverse observations being made by the jurisdictional transfer pricing officer of Ariba India in this regard. In this regard, assessee has referred to the order of ld. CIT (A) for AYs 2005-06 to 2006-07 and relevant part has been reproduced at page 18 herein above. We note that Revenue has not preferred an appeal against such order of ld. CIT (A), hence ld. CIT (A)'s order in this regard is final. Since the position of law on this point has been accepted by the Revenue in other assessment years, we agree that the notional income cannot be taxed in the hands of the assessee.

33. Further to buttress the aforesaid point, reliance has been placed on the decision of ITAT Pune Bench in the case of GKN Holdings Plc. vs. DDIT (supra) for the proposition that unless an agreement is proved beyond doubt to be a colourable device, the Revenue cannot disregard such an agreement. Several ITAT Benches have also

consistently held this proposition that a new agreement which differently governs the rights and obligations of the parties vis-à-vis the preceding agreement cannot be held to be a mere extension of the previous agreement. Reference in this regard has been made to case laws as referred at page 20 herein above. In our considered opinion, it is duly applicable on the facts of the case and supports the case of the assessee.

34. Other grounds are either not pressed or not arising consequent upon our decision herein above. As regards assessee's plea of credit of taxes on behalf of the assessee, the same may be considered by the AO as per law.

35. In the result, all these appeals filed by the assessee stand partly allowed as above.

Order pronounced in the open court on this day 17TH of October, 2022.

SD/-	**SD/-**
(YOGESH KUMAR US)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 17TH day of October, 2022
TS

Copy forwarded to:

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

AR, ITAT
NEW DELHI.