IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH,
MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

Assessment year 2000 – 01
ITA 5228/M/2004 [By AO]
ITA 5092/M/2004 [By Assessee]

Assessment year 2001 – 02
ITA 8348/M/2004 [by assessee]
ITA 8463/M/2004 [by AO]

Assessment year 2002 – 03
ITA 3366/M/2006 [by AO]
ITA 3422/M/2006 [by assessee]

Assessment Year 2003-04
ITA 1708/M/2008 [By Assessee]
ITA 1978/M/2008[By AO]

AY 2004-05
ITA 1979/M/2008 [by AO]
ITA 1709/M/2008 [by assessee]
ITA 1287/M/2009 [by assessee]

Assessment year 2005 – 06
ITA 5182/M/2009 [By Assessee]
ITA 5155/M/2009 [by AO]

Assessment year 2006 – 07
ITA 3617/M/2010 [By Assessee]
ITA 4575/M/2010 [By AO]
ITA 4550/M/2013 [by AO]

Refinitive (Reuters) Limited
C/o Deloittee Touche Tohmatsu
India LLp
Inidabulls Finance Centre,
tower 3, 27th-32nd Floor
Senapati Bapat Marg,

Vs.

DDIT (IT)-2
Scindia House, Ballard Estate
Mumbai 400001

Elphinstone Road (W),
Mumbai-400001
(Appellant) (Respondent)
PAN No. AABCR7557B

ITA No. 8464/Mum/2004
(Assessment Year: 2001-02)

ITA No. 5379/Mum/2005

(Assessment Year: 2002-03)

DDIT (IT)- 4(1)(1) R. No. 1712, 17th Floor, Air India building, Nariman Point, Mumbai 400021	Vs.	Refinitive SA (formally known as Reuters Online SE) C/o Rajashreee Sabnavis and Associates, 704, the summit Business Bay, Off andheri Kurla, Andheri (E), Mumbai 400093
(Appellant)		(Respondent)

PAN No. AABCR9777R

Assessee by	:	Shri Niraj D Sheth, Advocate
Revenue by	:	Shri Sunil Umap, DR

Date of hearing: 12/04/2023
Date of pronouncement : 28/06/2023

O R D E R

PER BENCH:-

1. For All these appeals for respective Assessment years, assessee has filed revised memorandum of appeal in accordance with rule 9A of The Income Tax (Appellant Tribunal) Rules, 1963 reinstating the name of Reuters Limited with Refinitive Limited and Reuters Online SA with Reifinitive SA.

2. We deal with the various appeals, which involves the common issue that whether the income arising in the hands of the foreign non-

resident assessee is 'Royalty' income as per the Double Taxation Avoidance Agreement between India and United Kingdom or not. In assessee's own case for all these years, the coordinate bench has categorically held that the income is not chargeable to tax in the hands of the assessee as Royalty Income.

3. The second issue that arises in this appeal is whether it is required to be examined necessarily whether the assessee has a permanent establishment in India in the form of dependent agent permanent establishment or service permanent establishment, where the agent or Indian entity has been remunerated at arm's-length price. The coordinate bench in assessee's own case has held that it is merely an academic exercise to examine whether the assessee has a permanent establishment in India or not when agent and Indian entity is remunerated at arm's-length price.

4. Thus Both the above issues involved in all these appeals are covered by the decision of coordinate bench in assessee's own case.

Assessment Year 2003-04

ITA 1708/M/2008 [Assessee]

ITA 1978/M/2008[By AO]

5. For assessment year 2003 – 04 cross appeals filed by Refinitiv Ltd (earlier known as Reuters Ltd) and The Deputy Commissioner Of Income Tax (International taxation) range – 2 (1) Mumbai (the learned A O) against the appellate order passed by The Commissioner Of Income Tax (Appeals) XXX-57, Mumbai (The Learned CIT – A) dated 24/4/2006.

6. In ITA 1708/M/2008 the assessee has raised following grounds of appeal:-

i. In confirming the contention of The Deputy Director Of Income Tax (International Taxation) – 2 (1) , Mumbai that the appellant had a service permanent establishment in India by virtue of article 5 (2) (a) of the Double Taxation Avoidance Agreement between India and UK

ii. in confirming the contention of the learned assessing officer that the appellant had an agency permanent establishment in India by virtue of article 5 (4) of the DTAA

iii. in holding that the payment received by the appellant from Reuters India private limited under the distribution agreement and also received from ANI media should be taxed as business profit in accordance with rule 10 of the income tax rules, 1962

7. In ITA 1978/M/2008 the learned AO has raised following grounds of appeal:-

i. on the facts and in the circumstances of the case and in law, the learned CIT (A) erred in holding that the payments received by Reuters India private limited under distribution agreement (TA) does not constitute royalty but it is than in the nature of the business income under article 7 of India and United Kingdom DTAA

ii. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in not appreciating the fact that the license agreement (LA), distribution agreement (DA) and production distribution agreement (PDA) are inextricably

connected and accordingly ordered in deciding the issue in favour of the assessee.

iii. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in not holding that the payments received by the assessee from ANI media under SA are not in the nature of royalty)

iv. on the facts and circumstances of the case and in law, the learned CIT (A) order in holding that the assessee being a non-resident and the entire income of the assessee subject to tax deduction at source under section 195 of the act, no liability arises under section 234B of the act

8. Brief fact shows that the assessee, Reuters Ltd, is a company Incorporated under the laws of England and is a tax resident of the United Kingdom. The appellant is in the worldwide business of providing news and financial information products. The news and financial information products are compiled and distributed by the appellant through the Reuters global network. The Reuters global network is a vast global communication network consisting of data storage facilities in three locations i.e. London, New York and Singapore linked by satellite links and terrestrial lines. It is one of the largest privately owned electronic network of its kind. The appellant uses this network to receive information, meet information and provide access to subscribers of the Reuters products. Assessee provides Reuters products to its Indian subsidiary, Reuters India private limited that then distributes the Reuters products to Indian subscribers independently in its own name. Reuters India private limited has its own equipment to receive and distribute the Reuters

products within the territory of India. The subscription fees received from the Indian subscribers are reported to tax by Reuters India private limited as its business income. The assessee has entered into three different agreements with Reuters India private limited. It enters in to a distribution agreement wherein the assessee has entered into information and dealing products – local vendor agreement i.e. distribution agreement on 26 March 2003 with Reuters India private limited under which, Reuters India private limited has been appointed as the distributor to sell Reuters Products to subscribers in India. Under the distribution agreement, the assessee provides Reuters India private limited access to the Reuters global network thus making the Reuters products are available to Reuters India private limited. Reuters India private limited then distributes the Reuters products to various subscribers in India using its one equipment and local network, by entering into subscriber agreements on principal-to-principal basis. In consideration from the same Reuters India private limited pace to the assessee are distribution fee computed as per the clause of the distribution agreement. The second agreement is a product distribution agreement executive between the assessee for software products – local vendor agreement on 26th of March 2003 with Reuters India private limited for distribution of some of the assessee specific products. Under the product distribution agreement Reuters India private limited pace the appellant in respect of each software product distributed a product distribution fee computed as per the clause of the agreement. Assessee has also entered into a license agreement (information and dealing products – license agreement)

with Reuters India private limited on 26 March 2003 by the assessee has granted Reuters India private limited and non-exclusive license to use the trademark Reuters is a word in dotted logo form as well as any incidental copyright that may subsist in the Reuters products. In consideration of the same, Reuters India private limited pace the assessee license fee amounting to 1% of its total subscription revenue received from its subscribers in India. Assessee has also entered into a contractual agreement with ANI media private limited titled as a service agreement on 25th of June 1999. Under the service agreement, assessee provides designated media service products to ANI media and it then markets and distributes these products to subscribers within the territory of India. For providing this designated media service products to ANI media the appellant receives a distribution fee equal to specified percentage of gross revenue earned by ANI media from distribution of this products which Indian subscribers.

9. Assessee filed its return of income on 28/11/3 declaring a total income of ₹ 114,652,070/–. As the assessee is a tax resident of United Kingdom it has opted to be taxed under the provisions of the Double Taxation Avoidance Agreement. In the return of income product distribution fees and license fees received from Reuters India private limited under the product distribution agreement and license agreement respectively were stated to be qualified as royalty under article 13 of the India United Kingdom treaty and is therefore liable to tax at the rate of 15% on gross basis. The entire tax liability on the product distribution fees and the license fees was discharged by way of tax deduction at source by the Reuters India private

limited. With respect to the distribution fee of ₹ 635,624,021 under the distribution agreement the assessee in its return of income is contended that this revenue are not in the nature of royalty under article 13 as they are in the nature of business profit. As per article 7 of the treaty business profit of United Kingdom tax resident company are liable to be taxed in India only if it has a permanent establishment in India and in such a case only the extent of profits attributable to the permanent establishment in India is chargeable to tax. The assessee has claimed that did not have any permanent establishment in India as contemplated by article 5 of the India UK treaty. Therefore in the return of income they assessee claimed that the distribution fee was not liable to tax in India as per the India United Kingdom treaty. With respect to the income earned of Rs 1,93,56,225 and from ANI media is not in the nature of royalty and under article 13 it is in the nature of business profit. Further, since the assessee claimed that it does not have any permanent establishment in India the distribution fee received from ANI media was also not liable to tax in India.

10. The return of income of the assessee was picked up for the scrutiny. The assessee supported its return of income by submission of the various agreements as well as the statement that the appellant cannot be construed to have a permanent establishment in India.

11. The learned assessing officer passed an order under section 143 (3) of the act on 23rd of March 2006. The learned assessing officer was of the view that all these three agreements license agreement, distribution agreement and product distribution agreement are intricately connected and the payment under the said agreements all

related to one single product i.e. the use of, or the right to use the copyright, patent, trademark, design or model, plant, secret formula or process, or the use, or the right to use any industrial, commercial or scientific equipment. The AO has adopted a position that the revenues earned by the appellant in respect of the agreements with the Reuters s India private limited are in the nature of royalty under article 13 of the India United Kingdom treaty. He also held that Reuter India private limited is a permanent establishment of the assessee in India as per article 5 of the Double Taxation Avoidance Treaty. Therefore, he applying the provisions of article 7 and article 13 (6) of India United Kingdom treaty, held that the royalty income earned by the assessee from Reuters s India private limited in India would be taxable as per section 44D of the act. He accordingly tax the revenues of the assessee received from routers India private limited in the form of distribution fee, product distribution fee and license fee on gross basis at 30% up the provisions of section 115A of the act. With respect to the revenue on front the agreement with ANI media, he held that the service agreement revenue on by the assessee is similar to the distribution agreement between the assessee and future India private limited and is taxable as royalty under article 13 of the India UK tax treaty taxable at the rate of 15% on gross basis. The learned AO relied upon several judicial precedents. However the learned AO has not taken into cognizance the order of the Commissioner of income tax appeals passed in case of assessee in its own case for assessment year 1997 – 1998 up to assessment year 2001 – 02. Accordingly the total income of the assessee from all these contracts are determined at ₹ 76,96,32,319/-

. The assessee also has received an interest of ₹ 494,524/– by way of interest on refund of income tax under section 2 4 4A of the act during the subject assessment year. According to the AO same is taxable in India in accordance with the provisions of section 9 (1) (v) (a) of the act, however the assessee has not offered the same for tax for the reason that it has not been finally determined and the issues are pending before the coordinate bench. The learned AO rejected the same and tax that at the rate of 15% as per article 12 of the Double Taxation Avoidance Agreement. Consequently, total income of the assessee was determined at ₹ 770,126,843/– by order dated 23/3/2006.

12. Assessee aggrieved with the above assessment order preferred an appeal before the learned CIT – A, who passed an appellate order on 28/12/2007 partly allowing the appeal of the assessee. The learned AO was of the view that assessee has a permanent establishment in India by virtue of article 5 (2) (a) of the Double Taxation Avoidance Agreement as well as a permanent establishment by virtue of article 5 (4) of the Double Taxation Avoidance Agreement. He further held that the service revenue received by the assessee from Reuters India private limited under the distribution agreement and from ANI media should be taxed as business profit in accordance with rule 10 of the income tax rules 1962. Consequently, he held that that the payment received by the assessee under distribution agreement, under license agreement and production distribution agreement are not inextricably connected and does not constitute royalty but it is a business income. He further held that the provisions of section 234B of the act does not apply to the assessee as on the total income of

the assessee tax is required to be deducted at source under section 195 of the act. Therefore, both the parties are in appeal before us.

13. At the time of hearing the learned authorized representative submitted that that identical issue arose in case of assessee for assessment year 98 – 99 and 99 – 2000 in ITA 5024 and 5025/M/2000 for decided on 5/7/2022. According to that decision, the coordinate bench following the decision of the coordinate bench dated 12 January 2006 in the case of Indian subsidiary of assessee Reuters India private limited that the amount received under the distribution agreement and product distribution agreement cannot be taxed as royalty under the India UK tax treaty. He specifically referred that the coordinate bench has held that in respect of remittance of the same revenue for the same assessee and for the same year, the coordinate bench comes to conclusion that these revenues cannot be taxed in India as royalty or fees for technical services, it is not open to hold otherwise in case of recipient of the income. Therefore the decision of the learned CIT – A was approved in this case holding that the impugned receipts are not royalty. Therefore, the above sum is not taxable as royalty as decided by the coordinate bench in assessee's own case. With respect to whether the assessee has a dependent agent permanent establishment in India or not and whether the profits attributable to such permanent establishment is a chargeable to tax in India or not, the coordinate bench has categorically held that that the payment of an arm's-length remuneration to the agent is not in dispute. Accordingly it held that in case of ACIT versus A Asia today Limited (2021) 124 taxmann.com 1, that the payment of arm's-length remuneration to

the alleged dependent agent is not even in dispute, therefore the issue regarding existence of the dependent agent permanent establishment is merely academic and does not call for any adjudication. He therefore submitted that even in those cases, the dependent agent is adequately remunerated and there is no indication or finding that the functions performed by the dependent agent are more than what is accepted by the transfer pricing officer, no further profit is attributable. In view of the above submission, he stated that that the impugned transaction does not result into royalty income in the hands of the assessee, for the purpose of taxation of the same income as business income, the fact whether the assessee has a permanent establishment with respect to the agency PE or service PE is immaterial because the Indian entity is remunerated at arm's-length, further the learned AO has not alleged any further function, risk or assets related to the above agreement which have not been considered in the hands of Indian entity, nothing further can be attributed. He further stated that coordinate bench in case of the assessee has decided this issue for assessment year 98 – 99 and 1999 – 2000, the above finding remains undisturbed, therefore, as a matter of judicial discipline, the above decision must be accepted and followed for these years. He therefore submitted that the issue is squarely covered by the decision of the coordinate bench in assessee's own case.

14. The learned departmental representative vehemently supported the order of the lower authorities. He submitted that merely because the agent is remunerated at arm's-length, the coordinate bench has grossly erred in stating that the existence of the permanent

establishment is not at all required to be tested. He submitted that the existence of the permanent establishment is the first step, which is required to be examined by the tribunal; the profit attribution is the second step. He further extensively referred to the Double Taxation Avoidance Agreement and stated that it nowhere mentions that when arm's-length price remuneration is paid to Indian entity, one should not look at whether the foreign entity has a permanent establishment in India or not. He vehemently stated that that is not the mandate of the double taxation avoidance agreement and the Tribunal has not considered the same. He specifically referred to article 5 (5) of the India United States of America Double Taxation Avoidance Treaty and submitted that it cannot be read into India UK to the and therefore the coordinate bench has wrongly held so. As the tribunal has straight away accepted the profit attribution in the hands of the agent, did not decide the existence of the permanent establishment. Therefore, the above decision of the coordinate bench suffers from infirmity.

15. It was specifically enquired the learned departmental representative that whether the above decision of the coordinate bench has been accepted by the revenue or is further challenged before the higher forum, the learned departmental representative could not give a definite answer.

16. We have carefully considered the rival contention and perused the orders of the lower authorities. We find that the issue is squarely covered by the decision of the coordinate bench in assessee's own case for assessment year 1998 – 1999 and 1999 – 2000 in ITA 5024 and 5025/M/2000 for dated 5/7/2022 wherein it has been held that

the impugned income is not chargeable to tax as royalty in India as per the provisions of Double Taxation Avoidance Agreement. The appeal of the learned assessing officer as per ground number 1 – 3 of the appeal are on this ground only that the impugned income is chargeable to tax as royalty and not business income. We find that this issue is squarely covered by the decision of the coordinate bench in assessee's own case for earlier years, therefore in absence of any change in the facts and circumstances of the case or in the agreement, we are bound by the judicial precedent and therefore we hold that the impugned receipt on by the assessee from the license agreement, distribution agreement, product distribution agreement with India associated enterprises of the assessee Reuters India private limited is not taxable as royalty as per the Double Taxation Avoidance Agreement. Similarly, with respect to the income earned by the assessee as per service agreement from ANI media is also not chargeable to tax as royalty in the hands of the foreign appellant assessee. In view of this, we dismiss all the ground 1 – 3 of the appeal of the learned assessing officer.

17. With respect to the appeal of the assessee wherein the only challenges that whether the assessee has a service permanent establishment or agency permanent establishment in India by virtue of article 5 (2) (K) of the Double Taxation Avoidance Agreement and article 5 (4) of the Double Taxation Avoidance Agreement between India and United Kingdom, we find that the coordinate bench has dealt with this issue holding that when the Indian entity is remunerated at arm's-length, the issue of whether it has permanent establishment or not becomes merely an academic exercise, as the

decision of the coordinate bench binds us, we respectfully following the same, hold that the issue of whether the assessee has a permanent establishment in India or not becomes merely academic for the reason that Indian entity has been assessed at arm's-length.

18. The Coordinate bench dealt the whole issue as under :-

> "4. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position.
>
> 5. So far as the grievance of the Assessing Officer is concerned, we find that a coordinate bench of this Tribunal, vide order dated 12thJanuary 2006 in the case of the Indian subsidiary of the assessee- namely Reuters India Pvt Ltd and for the same assessment years as before us, has held that the amounts received under the DA and the PDA cannot be taxed as royalty of as fees for technical services under the Indo UK tax treaty. While doing so, the coordinate bench has, inter alia, observed as follows:
>
> > 39. With the above background, the question before us is whether the payment of distribution fees falls under Royalty in sharing of business revenue. First let us analyse the nature of business and impact of the 3 agreements entered by the assessee with RI. RL is the holding company and service provider.
> >
> > 40. RL is the provider of the news and financial information products through the use of sophisticated technological devices. These products are compiled and distributed by RL through the Reuters Global Network. This is a global communication network consisting of data storage facilities in three locations linked by satellite links and terrestrial links. RL uses network to receive and transmit news and financial information.

41. In simple terms, RL is the service provider provides the information utilizing its own central equipment and subscriber equipments. Central Equipments transmits the financial data/information and the subscriber equipments receives these information. RL transmits or shares the information with the ultimate users. The data or information consists of real time spot and future rates of foreign currencies. These information are current and changes on real time basis depending upon the financial market worldwide. These informations are akin to the financial markets and the participants in those financial markets. The ultimate beneficiaries of the data are the users of the information

42. The user has to install in their place of work the hardwares of subscriber equipments such as VSAT Dish, Decoder, Server and computer terminal. Without these instruments, the users cannot receive the information transmitted by RL. These equipments in particular VAT

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Dish and Decoder are supplied by the Reuters and 99% of the case, owned by the users or subscribers.

43. The assessee is the facilitator and connector for the transmission of information from RL and the subscribers by entering into subscription agreement with the subscribers by involving in the marketing and after sales services. The assessee is the business partner with the RL to expand their business by marketing and distributing their subscription among the Indian financial information users. The assessee has entered into distribution agreements with RL on the revenue sharing basis of 65:35 ratio.

44. The above remittance or revenue cannot he treated as 'Royalty' because the assessee never used the information or never has the right to use the information transmitted through the central equipment of RL. The assessee plays only the role of facilitator to distribute financial information. The assessee only collects the subscription fees and remits the distribution fees on the basis of Distribution Agreement. These remittance can only be treated as remittance for the business of Transmission or Distribution of financial news or information to the subscribers.

45. Whether these transaction can be brought under FTS. No doubt the information are available on real time basis and these information are manipulated and processed with the help of experts across the Globe. These financial information are transmitted on real-time basis and used by the financial users across the Globe. In India, it is transmitted through the central equipments kept in three sectors worldwide and received and utilised by the subscribers in India. The transmitter is the RL and receiver are the subscribers. The assessee is only the distributor and the ultimate users are the individual subscribers. The actual transaction is between users and the RL through the business partner i.e. RIPL. RIPL is the independent company even though it is subsidiary of RL. Therefore, the payments cannot be brought under FTS also.

46. The next question is, whether the payment to RL can be brought to tax in India. We have already noticed that transmission of RL is falls ünder Article 7 of Indo UK treaty. Since, they do not have service PE in India as per the Coordinate Bench decision in RL case (ITA

No: 7895/Mum/2011 - Reuters Ltd. dated 28.08.2015).

47. In our view, the RL is only transmitting the financial news and information and we are in agreement with Ld. AR that it is only transmission of information and assessee shares the distribution fees with RL. The assessee is acting as a distributor/ intermediary between RL and subscribers. In this scenario, the distributor does not get the user right to any intellectual property. Therefore, as held in the case of MSM: satellite (supra) that assessee would receive a part of subscription charges paid by a large number of customers through different agencies. The paid subscription charges would enable the customers to view channels operated by such assessee. Thus, the assessee was not parting with any copyrights for which payment can be considered as royalty payment. Even in this case, RL is not parting with any copyright or industrial know how to the assessee in order to treat the sharing of distribution fees as Royalty.

48. To treat the sharing of distribution fees as Royalty in FTS are far-fetched and the subscription fees were received from subscribers for the information received by them and these charges for the transmission of financial information from RL and the assessee collects the subscription charges and shares 65% of the subscription fees as the distribution charges with the RL based on the distribution agreement. This can only be treated as business transaction and business remittance.

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49. Coming to the case law relied by Ld. DR i.e. in the case of Reuters Transaction Service(supra), the facts and business

> model M/s Reuters Transaction Services are different. In that case, the software is utilised to effect deals in spot foreign exchange with other foreign exchange dealers like banks and the forex dealers. But in the given case, it is only transmitting the financial information and information about currency spot rates /future rates. This is equal to distribution or transmission of financial information only. Therefore, it is distinguishable on facts.
>
> 50. Considering the above discussion, the payment to RL based on the distribution agreement is not Royalty and there is no need to withhold any tax under section 195 of the Act, as the payment is towards the transmission of financial information from outside India and it is chargeable to tax outside India as Business Income. Since the payment is towards sharing of subscription charges and payment towards distribution of Financial information through the medium of electronic can only be treated as business income chargeable outside India. Any income chargeable outside India is out of the provision of withholding tax u/s 195 of the Act. The Co-ordinate Bench has already adjudicated in the case of RL that the income is not chargeable to tax as they do not have any PE in India. Therefore, we are inclined to accept the submission of the assessee and accordingly, ground nos. 1, 2 & 3 raised by assessee are allowed.

6. We find that there is also no dispute that the assessee, being a tax resident of the UK, is entitled to the benefits of the applicable Indo-UK tax treaty, and that, in terms of the said treaty provisions, unless the assessee has a permanent establishment in India, its business profits can not be taxed in India, and the taxability of these receipts as „royalties" and „fees for technical services" will also be governed by the respective treaty provisions under article 13 therein. The

coordinate bench, after an elaborate discussion on the relevant treaty provisions, has held that the amounts are not so taxable in India. We are in respectful agreement with the views so expressed by the coordinate bench. In any event, when a coordinate bench, in respect of remittances of the same revenues as are impugned in this appeal for the same assessee and for the same year, comes to a conclusion that these revenues cannot be taxed in India as royalties or as fees for technical services, it cannot be open to us to hold otherwise. Respectfully following the views of the coordinate bench, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter. In any event, we have also noted that in the assessment year 1997-98, the Assessing Officer accepted the findings of the CIT(A) to the effect that these revenues cannot be treated as fees for technical services under the Indo-UK tax treaty, by not challenging these findings in appeal before the Tribunal. Once the Assessing Officer accepts these findings of the CIT(A) for one assessment year, it cannot be open to him to challenge the same findings for another year. For this reason also, the Assessing Officer"s challenge to the CIT(A)"s finding that the amounts in question cannot be accepted as the fees for technical services under the Indo- UK tax treaty.

7. We have also taken note of the learned Departmental Representative"s vehement reliance on the order of a coordinate bench in the case of Reuters Transaction Services Pvt Ltd Vs DDIT [(2014) 151 ITD 510 (Mum)], but that was a case in which the assessee had provided its clients its system and application programming interface, including interactive features and use of equipment. In the present case, however, as the agreement specifically provides in Article 8, at page 8 of the agreement, „all equipment necessary for reception and distribution of Reuter services" is to be acquired by the Indian entity at its own expense. The very foundation of the said decision thus does not apply to the facts of this case.

8. In view of the above discussions, as also bearing in mind the entirety of the case, we uphold the conclusions arrived at by the learned CIT(A), so far as non-taxation of impugned amounts as „royalties" and „fees for technical services" is concerned, and decline to interfere on this count. To that extent, conclusions arrived at by the learned CIT(A) are approved.

9. As regards the grievance of the assessee, with respect to the learned CIT(A)"s findings to the effect that the assessee had a DAPE in India, and, accordingly, the profits attributable to such a DAPE are liable to be taxed in India, we are of the considered view that this issue, as on now, is wholly academic inasmuch as it is not in dispute that the assessee had paid arm"s length remuneration consideration for the services rendered by the Indian subsidiary, and, as such, no further amounts can be brought to tax, even if the assessee indeed has a DAPE. There is a categorical finding to that effect in a coordinate bench order, and the payment of an arm"s length remuneration is not thus even in dispute. While on this issue of tax neutrality of the DAPE, we may refer to the following observations made by a coordinate bench of this Tribunal, in the case of ADIT Vs Asia Today Ltd [(2021) 124 taxmann.com 1 (Mum)]:

> 11. The case of the Revenue is thus clearly confined to the existence of DAPE on the facts of this case. The question thus arises as to what are the tax implications of the existence of a dependent agent permanent establishment (DAPE) under Article 5(4). The DAPE is, after all, a type of permanent establishment, and the very concept of permanent establishment is a compromise between source rule and residence rule inasmuch as it provides justification to trigger source jurisdiction taxation over business activities of a foreign enterprise. Unless there is a PE in the source jurisdiction, there cannot be taxation of business profits of the foreign enterprise in the source jurisdiction, and when there is a

PE in the source jurisdiction, only so much of profits of the foreign enterprise, as are attributable to a PE, can be taxed in the source jurisdiction- as is the unambiguous mandate of Article 7(1). It is in this context one has to examine the tax implications of DAPE, and that tax implication is that the profits attributable to the DAPE are brought to tax in the source jurisdiction. The next logical point, therefore, as to how to compute profits attributable to a DAPE, and it is this aspect of the matter which has been a subject matter of academic debates and controversies. There are two approaches to it i.e., to borrow the terminology employed by International Tax Law Reports (see 2007, Volume 9; Part 5; at pages 963-964), first- a "single taxpayer" or "zero-sum approach", and, second-

"two taxpayers" or "non zero-sum approach". While Philip Banker, a well known international tax lawyer, has all along advocated zero-sum approach, late Klaus Vogel touched a different chord, in his column 'Tax Treaty Monitor' in the 'Bulletin for International Taxation (November 2007 at page 475) and given his approval for "two taxpayers approach". The latter is also in consonance with Authorised OECD Approach of the OECD. On materially similar facts of dependent agency permanent establishment for a similarly placed foreign telecasting company as in this case, in the case of Dy. DIT (IT) v. Set Satellite (Singapore) Pte. Ltd. [2007] 106 ITD 175 (Mum), a coordinate bench, speaking through one of us, (i.e. the Vice President), had upheld the "two taxpayer approach", in computation of DAPE profits, and observed as follows:

11. The particular difficulty in the case of a dependent agent permanent establishment is that DAPE itself is hypothetical because there is no establishment - permanent or transient- of the GE in the PE state. The hypothetical PE, therefore, must be visualized on the basis of presence of the GE

as projected through the PE, which in turn depends on functions performed, assets used and risks assumed by the GE in respect of the business carried on through the PE. The DAPE and DA has to be, therefore, be treated as two distinct taxable units. The former is a hypothetical establishment, taxability of

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which is on the basis of revenues of the activities of the GE attributable to the PE, in turn based on the FAR analysis of the DAPE, minus the payments attributable in respect of such activities. In simple words, whatever are the revenues generated on account of functional analysis of the DAPE are to be taken into account as hypothetical income of the said DAPE, and deduction is to be provided in respect of all the expenses incurred by the GE to earn such revenues, including, of course, the remuneration paid to the DA. The second taxable unit in this transaction is the DA itself, but this taxability is in respect of the remuneration of the DA. The provisions of the tax treaty are silent on this issue, and rightly so, because the taxability of the DA is quite distinct of the taxability of the enterprise of the contracting state which is in respect of PE of such an enterprise. At the cost of repetition, it is not the DA who constitutes PE of the GE, but it is by the virtue of a DA that the GE is deemed to have a PE, a DAPE though, in the other contracting state. We are of the considered view that in addition of the taxability of the DA in respect of remuneration earned by him, which is in accordance with the domestic law and which has nothing to do with the taxability of the foreign enterprise of which he is dependent agent, the foreign enterprise is also taxable in India, in terms of the provisions of Article 7 of the tax treaty, in respect of the profits attributable to the dependent agent permanent establishment. As we have elaborated earlier in this order, a dependent agent permanent establishment is distinct from the dependent agent. While

computing the profits of this dependent agent permanent establishment, a deduction is to be allowed for the remuneration paid to the dependent agent as that is cost of operation of the dependent agent permanent establishment and as it has been incurred for generating the revenues attributable to such hypothetical permanent establishment. Let us take a very simple example to understand the mechanism of this approach. Let us assume that there is an electronic equipment distributor by the name of Sing Co. based in Singapore. He sources the electronic equipment from all over the globe and sells the same to its customers in India. Instead of having a regular office in India, and instead of carrying out the marketing activity in India, he projects his business in India through an Indian Co. by the name of Ind. Co. There is no dispute that Ind. Co. is a dependent agent of the Sing Co. In consideration of the services rendered by Ind. Co., Sing Co. pays Ind. Co. commission @ 30 per cent on sales plus reimbursement of expenses. Sing Co., however, procures the electronic equipment from China, shipped directly to India and sells it in India after a mark up of 200 per cent. We further assume that the reasonable handling costs of Sing Co. for souring the merchandise is 60 per cent on cost. In a particular year, Sing Co. sells goods worth $ 3 million in India. Let us further assume that expenses incurred by Ind. Co., to earn the agency remuneration, is $ 8,99,000. The profits taxable in India, in such a case and based on the treaty provisions before us, should be as follows :

A. Commission earned by Ind. Co. $ 9,00,000

Less : Deductible expenses of Ind. Co $ 8,99,000

Taxable in the hands of the Ind. Co. $ 1,000

B. Profits attributable to Sing Co.'s DAPE in India Sales consideration

30,00,000

Less : Commission paid to Ind. Co. 9,00,000(-) : Cost of purchases 10,00,000(-) : Sing Co.'s handling charges 6,00,000(-) Profit of the DAPE or, in other words, 25,00,000 profits Attribute to India operations of the Sing Co. $ 5,00,000

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As far as 'A' in the above example is concerned, it does not have anything to do with the income of the foreign company. This taxability is in the hands of the domestic dependent agent and is on net basis after taking into account the expenses incurred by the agent for earning of remuneration whether or not the same relates to the business of the foreign company or not. As regards 'B' above, it represents the earnings of the foreign company attributable to the dependent agent permanent establishment, on account of its having a dependent agent in source country. This income is taxable in the hands of the foreign company in the source country and the tax credit in respect of such taxability will be available to the foreign company in residence country. If, in this example, we are to assume that the income of the PE is only the remuneration earned by the agent on net basis, we will end up in a situation that while profits of Sing Co. attributable to India operations will be $ 5,00,000, the taxability of the profits will be confined to only $ 1,000. What is to be taxed under Article 7 is income of the foreign enterprise attributable to the permanent establishment in the host country. The income attributable to the permanent establishment in the host country is the income attributable to foreign company's operations in the host country, which, in turn, implies the income attributable to the activities carried on the foreign enterprise in the host country. That income, as shown in 'B' above is the income arrived at by taking

into account revenues generated by the PE and deducting therefrom the expenditure incurred by the foreign enterprise to earn those revenues. However, it is open to the foreign enterprise to claim appropriate adjustment for the foreign enterprise's overheads and even a reasonable charge, on account of activities of the foreign enterprise carried on outside the host country, by treating the foreign enterprises as a fictionally separate entity.

12. Learned counsel, however, contends that since the profit attributable to the PE are the profits which the PE "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", the taxable profits of the foreign enterprise cannot extend beyond the profit earned by the dependent commission agent. The line of reasoning adopted by the learned counsel is that PE is nothing but the dependent agent, and, the taxability of PE can only, therefore, be in respect of the earnings of the agent. Learned counsel has, with his inimitable oration, erudition and legal skills, woven a complex web of arguments to support this legal proposition. However, as it sometimes happens, the quality of arguments in support of a legal proposition is inversely proportional, proportional if it is, to the merits of the proposition sought to be advanced. This is one such occasion. Let us set out the reasons why we think so, and, in the process, deal with various arguments of the learned counsel one by one.

13. At the outset, we must reiterate that a dependent agent (DA) and a dependent agent permanent establishment (DAPE), in our humble understanding, are two distinct things. As we have stated earlier, it is as a result of existence of a dependent agent that the foreign enterprise is 'deemed to have' a

permanent establishment in the country in which dependent agent is situated.

14. Under Article 7 of the treaty, the taxability is of the foreign company. What is taxable under Article 7 is profit earned by the foreign enterprise, as it Article 7(i) provides that "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". Agency remuneration paid by the foreign enterprise is not an income of the foreign enterprise but an expenditure of the foreign enterprise. The taxability of any profit under Article 7 has to be in the

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hands of the foreign company and not the host company of which dependent agent is resident. Therefore, in it is patently erroneous to suggest that by payment of tax liability by the dependent agent, tax liability of the foreign principal is discharged. So far as Article 7 is concerned, it deals with the taxability of the foreign company.

15. Under the scheme of the Act, the taxable unit is the foreign company, though the quantum of income taxable is such income as may be held to be attributable to the permanent establishment of the foreign company in India. The tax liability of the foreign company and not the Indian dependent agent. However, in case we are to uphold the stand of the learned counsel, we will end up in a situation that taxability of Indian company is to be allowed to extinguish tax liability of the foreign principal.

16. Learned counsel has relied upon the commentaries of various authors including Phillip Baker, Prof. Roy Rohtagi and Prof. David R. Davies. It is contended that according to these distinguished authors,

payment of arms length remuneration by a foreign company to its agent extinguishes tax liability of the foreign principal. With respect, and for the reasons we have set out above, we are of the considered view that in the dependent agency permanent establishment situation, this proposition does not hold good. In any event, this approach proceeds on the assumption, which turns out to be fallacious assumption on the facts of the present case, that dependent agent and dependent agent permanent establishment are one and the same thing.

17. Learned counsel has then relied upon the order of this Tribunal in the case of Dy. CIT v. Roxon OY [2006] 103 TTJ 891 (Mum.) which was authored by one of us. This decision, however, did not deal with the peculiarities of a dependent agent permanent establishment. This decision dealt with the taxability of the installation PE, and, the principles dealing with computation of profits of installation PE, in our considered view, do not have any bearing on the computation of profits of the dependent agency PE. We are, therefore, not persuaded by this reasoning either.

12. Late Prof Klaus Vogel, one of the very eminent international tax scholars of our times, had favoured the path adopted by the coordinate bench. In his last in Tax Treaty Monitor (Bulletin for International Taxation, November 2007, page 475), referring to the above coordinate bench decision, he had this to say: "One can understand that many have problems imagining how profits should arise to a permanent establishment which, as the Tribunal itself repeatedly stated, does not exist in reality and is a non-entity "wholly hypothetical and fictional". Such sceptics should consider, however, that the parent enterprise as a rule will aim to realize receipts from the contracts concluded by the dependent agent which, in addition to compensating the agent's fee, include a surplus profit, for otherwise the parent would

lack any commercial reason for employing the agent. This surplus is not- or only secondarily- attributable to activities in the parent's residence country. Rather, it is a profit that the parent obtains through employing the agent in the country in which the profits arise. Fairness ("inter-nations equity") requires that the surplus profit be taxed in that state. If the drafters of a treaty or model treaty want to provide this, they must notionally attribute it to a contact in that state. This does not mean that they must attribute it to a person or an object in the real world. In the world of law, a legal concept, a figure of thought, will do. The agency permanent establishment is such a figure of thought which makes it technically possible to connect the surplus profit to the agent's state. Thus, it is not only possible, but it is the rule that a profit exceeding the agent's compensation will be submitted to the agent's state". Philip Baker, another eminent international tax expert whose work in referred to, with approval and respect, in many of the judicial precedents from Hon'ble Courts above, did not agree with this approach. In his editorial comments in the International Tax Law Reports, he has favoured the other alternative approach to this issue, i.e., the single taxpayer approach. He observed

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that, "One view (to which editor of these law reports subscribes) is that if the dependent agent is being remunerated on a correct arm's length price for the function he performs, risks he assumes, and the assets he employs in his agency, there is no basis for attributing any further profits to the DAPE over and above the arm's length remuneration to the agent", and reasoned the same by observing that "As soon as one abandons the single taxpayer approach, one needs to start attributing the DAPE functions that were not performed by the agent, assets that were not employed by it and the risks

that were not assumed by it. In other words, the two taxpayer approach requires an abandonment of reality and entirely hypothetical attribution which, in arm's length world which must have some basis in reality, is simply a licence for arbitrary allocation of profits. Ultimately, that's what Tribunal did here". There is thus a cleavage of academic opinion on the approach to the DAPE profit attribution and that is a highly contentious issue on the first principles. When the matter travelled before Hon'ble High Court, however, these views of the coordinate bench did not find favour with Their Lordships. Rejecting the theory about separate profit attribution for the dependent agency permanent establishment vis-à-vis the dependent agent, Their Lordships have, in the judgment reported as Set Satellite (Singapore) Pte. Ltd. (supra), observed as follows:

10. From a reading of Article 7(1) of the DTAA it is clear that 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. The profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment. In para 2 while determining the profits attributable to the permanent establishment the expression used is "estimated on a reasonable basis". The DTAA does not refer to arm's length payment. The principles contained in the matter of income from international transaction on an arm's length price are contained in section 92 of the Income-tax Act. The principles have been clarified by the Finance Act, 2001 as also Finance Act, 2002. From the order of the CIT, which has been accepted it is clear that the Appellant herein has paid to its PE on arm's length principle. It recorded a finding of fact that the Appellant had paid service fees at the rate of 15 per cent of gross ad

revenue to its agent, SET India, for procuring advertisements during the period April 1998 to October, 1998. The fact that 15 per cent service fee is an arm's length remuneration is supported by Circular No. 742 which recognizes that the Indian agents of foreign telecasting companies generally retain 15 per cent of the ad revenues as service charges. Effective November 1998, a revised arrangement was entered into between the parties whereby the aforesaid amount was reduced to 12.5 per cent of net ad revenue (i.e., gross ad revenues less agency commission). Simultaneously, the Appellant also entered into an arrangement entitling SET India to enter into agreements, collect and retain all subscription revenues. Considering all these aspects and the fact that the agent has a good profitability record, it held that the Appellant has remunerated the agent on an arm's length basis. This finding of the Tribunal has not been disputed by the Revenue. The entire contention of the Revenue is that the advertisement revenue pertaining to its own channel and AXN Channel are also taxable in India.

11. We may firstly point out that CIT has dealt with the issue as to why the advertisements received by the Appellant were not liable for being taxed in India based on the CBDT Circular No. 23, dated 23-7-1969 which clearly sets out that where a non-resident's sales to Indian customers are secured through the services of an agent in India, the assessment in India of the income arising out of the transaction will be limited to the amount of profit which is attributable to the agent's services, provided that (i) the non-resident principal's business activities in India are wholly channelled

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through his agent; (ii) the contracts to sell are made outside India; and (iii) the sales are made on a principal-to-principal basis.

The CIT(A) had recorded a specific finding in favour of the Appellant in the affirmative on all three counts. It is in these circumstances that it was held that the advertisement revenue received by the Appellant may be from the customers in India is not liable for tax in India. That CBDT Circulars are binding needs no repetition. If authorities need be cited. We may now refer to the judgment of the Supreme Court in Uco Bank, Calcutta v. Commissioner Of Income Tax, W.B . [1999] 237 ITR 889. In that judgment the issue was whether Circular of 9-10-1984 was inconsistent or whether there was contradiction in the circular and Section 145 of the Income-tax Act. The Supreme Court observed that :—

"... In fact, the circular clarifies the way in which these amounts are to be treated under the accounting practice followed by the lender. The circular, therefore, cannot be treated as contrary to section 145 of the Income-tax Act or illegal in any form. It is meant for a uniform administration of law by all the income-tax authorities in a specific situation and, therefore, validly issued under section 119 of the Income-tax Act. As such, the circular would be binding on the department." (p. 901) See also CIT v. Hero Cycles (P.) Ltd. [1997] 228 ITR 463 (SC). It would thus be clear that the Circular No. 23 would be binding on the Assessing Officer and had to be considered while assessing the tax liability of an assessee. The Tribunal in its judgment has not considered the effect of the finding recorded by the CIT (Appeals) based on the Circular and which circular was relevant for the purpose of deciding the controversy in issue. This circular read with Article 7(1) of the DTAA would result in holding that the income from advertisement if neither directly nor indirectly attributable to that of the permanent establishment, would not be taxable in India. The Tribunal in fact in para 10 has recorded a finding that Article 7(2) provides that the arm's length price is the criterion for computation of these

hypothetical profits. In our opinion the entire rational or reasoning given by the Tribunal has to be set aside. In matters of tax what has to be considered and more so in international transactions if there be a treaty, the provisions of the treaty and if the provisions of the treaty are more advantageous to an assessee, then the construction will have to be given which is advantageous to the assessee. At this stage we may note that on behalf of the assessee learned Counsel has produced an order passed by the Additional CIT (Transfer Pricing-II), Mumbai in the matter of determination of arm's length price with reference to all the transactions reported in Form No. 3CEB filed by the assessee. The assessee is SET India, the depending agent. The order records that the assessee is engaged in the business of providing audio-visual television content and also acts as an advertising agent of Set Satellite Singapore Pvt. Ltd. The assessee distributes these channels to the Indian cable operators and that the assessee has applied the TNM method to determine the arm's length price for its international transaction. It, however, clarified that the order is in respect of reference received for assessment year 2002-03 and not for subsequent assessment years.

12. We may now consider the judgment in Morgan Stanley & Co. Inc's case (supra). The Appeals dealt with the Double Tax Avoidance Agreement (DTAA) between India and United States. That treaty advocated application of the arm's length principle or provided a mechanism for avoiding double taxation on income. The issue involved, Morgan Stanley and Company (for short, "MSCo.") and one of the group companies of Morgan Stanley, Morgan Stanley Advantages Services Pvt. Ltd. (for short

"MSAS"). An agreement was entered into for providing certain support services to MSCo.

MSCo. outsourced some of its activities to MSAS. MSAS was set up to support

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the main office functions in equity and fixed income research, account reconciliation and providing IT enabled services such as back office operations, data processing and support centre to MSCo. On 5-5-2005 MSCo. filed its advance ruling application . The basic question related to the transaction between the MSCo. and MSAS. The advance ruling was sought on two counts (i) whether the applicant was having PE in India under Article 5(1) of the DTAA on account of the services rendered by MSAS under the services agreement dated 14-4-2005 and if so (ii) the amount of income attributable to such PE. It was ruled that MSAS should be regarded as constituting a service PE under Article 5(2)(1). On the second question the AAR ruled that the transactional net margin method (TNMM) was the most appropriate method for the determination of the Arm's Length Price (ALP) in respect of the service agreement dated 14-4-2005 and it meets the test of arm's length as prescribed under section 92C of the 1961 Act and no further income was attributable in the hands of MSAS in India. The said ruling of AAR on the question of income attributable to the PE was the subject-matter of challenge by the Department. Insofar as the issue of PE is concerned the Supreme Court was pleased to hold that it agreed with the Ruling of the AAR that stewardship activities would fall under Article 5(2)(1). Dealing with the question of deputation, the Court held that on the facts that there is a service PE under Article 5(2)(1) and as such held that the Department was right in its contention that there exists a PE in India. Considering Article 7 of that treaty the Court observed that what is to be taxed under Article 7 is income of the MNE attributable to the PE in India and what is taxable under Article 7 is profits earned by the MNE. Under the Income-tax Act the

taxable unit is the foreign company, though the quantum of income taxable is income attributable to the PE of the said foreign company in India. The Court observed that the important question which arises for determination is whether the AAR is right in its ruling when it says that once the transfer pricing analysis is undertaken there is no further need to attribute profits to a PE. The Court further noted that the computation of income arising from international transactions has to be done keeping in mind the principle of arm's length price. The Court further reiterated that the main point for determination is whether the AAR was right in ruling that as long as MSAS was remunerated for its services at arm's length, there should be no additional profits attributable to the applicant or to MSAS in India. After considering the various methods by which arm's length price can be determined the Court observed as under :—

"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 the Central Board of Direct Taxes. This is the key question which arises for determination in these civil appeals."

After discussing the various issues the Court in its conclusion held as under :—

"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. The situation would be different if the transfer of pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the PE for those functions/risks

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that have not been considered. The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represent the value of the profit attributable to his service. In this connection, the Department has also to examine whether the PE has obtained services from the multinational enterprise at lower than the arm's length cost." In our opinion considering the judgment, if the correct arm's length price is applied and paid then nothing further would be left to be taxed in the hands of the Foreign Enterprise.

13. Considering the above principle as may be discerned from the judgment in DIT (International Taxation) 292 ITR 416 (supra) it would be clear that—

(1) Considering the CBDT Circular No. 742 it would be fair and reasonable that the taxable income is computed at 10 per cent of the gross profits. In the instant case insofar as marketing services are concerned by the arm's length principle what has been paid is more than 10 per cent as can be seen from the order of CIT(A). This was not disputed by the revenue in its Appeal before the

ITAT.

(2) The only contention advanced and which found favour with the Tribunal was that the advertisement revenue received by the assessee was also income liable to tax in India. The CIT(A) relied upon Circular No. 23

of 1969. That Circular read with Article 7(1) would result in holding that advertisement revenue received by the appellant are not taxable in India as long as the treaty and the Circular stands.

14. In the light of the above Appeal filed by the Appellant herein is allowed and the order of the ITAT is set aside. Merely because tax on income was paid for some assessment years would not stop the assessee from contending that its income is not liable to tax. The order of CIT is restored except to the extent that it has said that it cannot interfere because the Appellant had paid the tax. That part is set aside.

13. In the light of Hon'ble jurisdictional High Court's judgment in the case of Set Satellite (supra), so far as profit attribution of a DAPE is concerned, the legal position is that as long as an agent is paid an arm's length remuneration for the services rendered, nothing survives for taxation in the hands of the dependent agency permanent establishment. Viewed thus, the existence of a dependent agency permanent establishment is wholly tax neutral.

14. An interesting offshoot of this legal position is that, as on now, the existence of dependent agency permanent establishment is of no tax consequence. Whether there is a DAPE or not, the taxation is only of the agent's remuneration, which is taxed anyway dehors the existence of a DAPE. Such an approach may sound somewhat incongruous from an academic point of view inasmuch as what was considered to be a threshold limit for source taxation ceases to have any relevance for source taxation, and as, on a conceptual note, PE, whether a fixed base PE, DAPE or any other type of PE, provides for threshold limits to trigger taxation in the source state, but then if as a result of a DAPE, no additional profits, other than agent's remuneration in the source country - which is taxable in the source state anyway

dehors the existence of PE, become taxable in the source state, the very approach to the DAPE profit attribution may seem incompatible with the underlying scheme of taxation of cross border business profits under the tax treaties. These aspects, however, cannot come in the way of the binding force of judicial precedents from Hon'ble Courts above. The SLP against this decision is said to pending before Hon'ble Supreme Court, but that does not, in any way, dilute the binding nature of this binding judicial precedent. In all fairness to the learned Departmental

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Representative, however, we may take refer to observations in another coordinate bench decision in the case of Delmas France v. Asstt. DIT (IT) [2012] 17 taxmann.com 91/49 SOT 719 (Mum), to the effect, "Similarly, before accepting DAPE profit neutrality theory, we will still have to deal with learned Departmental Representative's plea that as per the law laid down by Hon'ble Supreme Court in the case of DIT (IT) v. Morgan Stanley & Co Inc. [2007] 162 Taxman 165 (SC), the arm's length remuneration paid to the PE must take into account 'all the risks of the foreign enterprise as assumed by the PE', but then in an agency PE situation, unlike a service PE situation which was the case before the Hon'ble Supreme Court, a DAPE assumes the entrepreneurship risk in respect of which agent can never be compensated because even as DAPE inherently assumes the entrepreneurship risk, an agent cannot assume that entrepreneurship risk. To this extent, there may clearly be a subtle line of demarcation between the dependent agent and the dependent agency permanent establishment. The tax neutrality theory, on account of existence of DAPE, may not indeed be wholly unqualified- at least on a conceptual note". However, these issues are wholly academic before this forum because

Hon'ble jurisdictional High Court has taken a specific call on the issue to the effect that the Morgan Stanley decision of Hon'ble Supreme Court covers the DAPE situations as well. In a series of decisions of the coordinate benches, the same view is reiterated. The successive coordinate benches in assessee's own case for different assessment years have upheld the contentions of the assessee and held that once an arm's length remuneration is paid to the agent, nothing further survives for taxation in the hands of the DAPE which, at best, can be brought to tax in the hands of the assessee. In any event, whatever be the academic justification for an alternative approach to the issue, the law laid down by Hon'ble Courts above is to be deeply respected and loyally followed. Respectfully following the law laid down by Hon'ble Courts above and consistent with the stand of the coordinate bench decisions, we uphold the plea of the assessee for the present years as well. We, therefore, hold that even if there is held to be a dependent agency permanent establishment on the facts of this case, as at best the case of the Assessing Officer is, it is wholly tax-neutral inasmuch as the Indian agents have been paid arm's length remuneration, and nothing further can, therefore, be taxed in the hands of the assessee.

15. It has not been the case of the revenue authorities at any stage that the remuneration paid to the Indian agent is not an arm's length remuneration for the services rendered by the agents concerned, yet a prayer is now made that the matter should be sent back to the assessment stage for detailed findings in this regard. In a written note filed by the learned Departmental Representative, it has been submitted that, " it is humbly submitted that in the case of DIT v. Morgan Stanley & Co. [2007] 292 ITR 416 (SC). The Hon'ble Apex Court in para 32 of its order (page 124 of PB II) has carved out an exception. It has held that '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 corporates on the basis of the concept of Economic Nexus is an important feature of Attributable Profits (profits attributable to the PE)'. Taking into considering the above and applying to the facts of the case, it is humbly submitted that all the international transactions entered into by assessee have not been examined by the authorities below". There is no material whatsoever before us to show, or even indicate, that the remuneration paid to the agents is not arm's length remuneration. In any case, the agent has been paid a remuneration at the rate of ten percent of the related revenues which is accepted as an arm's length price, in similar circumstances, in a large number of cases- including assessee's own cases for the assessment years, other than the assessment years in which this aspect of the matter is requested to be sent back for specific adjudication. Learned Departmental Representative himself submits that so far reliance of the assessment on the coordinate bench decisions for

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the assessment years 2006-07 to 2012-13 are concerned, "in the other cases relied upon by the assessee, the transfer pricing adjudication was made while in the present case, no such adjudication was made, and hence the decisions are not applicable as distinguishable on facts". We have also noted that the matter has come up for specific consideration of the Assessing Officer, and yet he has not found any deficiencies on the

specific issue of adequacy of arm's length remuneration. It is not that this aspect was not examined. It was examined but the Assessing Officer did not find specific fault in the agent's remuneration not being in accordance with the FAR analysis. He has rather proceeded to, in a way, disregard the foreign entity altogether by suggesting that no business risk is assumed by the foreign company, i.e. the assessee, as the content is provided by the Indian agent and the viewership is Indian, and, for that reason, the viewership is linked to the Indian PE. We have noticed that the Assessing Officer has specifically picked up the aspect of "functions and risk taken by the PE" under that heading and title of the paragraph 5.3.4, in the assessment year 2002-03 for example at page 31 of the assessment order, noted that "there is no reason as to why the assessee should assume risk after having acquired the content in a working state from the content provider", that "all risks for up linking and finally relaying the signals in India is borne by the transponder company and not the assessee", and, therefore, concluded that "in view of the above discussions, it can be seen that major part of the risk in terms of market risk and technology risks are borne by the ZTL/El Zee" and that "almost 85% to 90% revenues from advertisement and subscription of the assessee comes through Indian viewership which is undoubtedly linked with the PE i.e., ZTL/El Zee". This is not the Indian viewership which is relevant in this context. What was relevant was the role played by the agent in India and whether the remuneration paid by the assessee company, for the services of the agent, was a fair and arm's length remuneration vis-à-vis the functions performed, assets employed and risks assumed by the Indian agent. No issues are raised on the inadequacy of agent's remuneration by the Assessing Officer, and now a fresh inning is sought to find these inadequacies and improve the case of the revenue. That is impermissible. In his analysis, while the Assessing Officer has

proceeded on sweeping generalizations about the risks assumed by the PE but there is no specific FAR analysis which could support that the agent's remuneration not being an arm's length remuneration, and the Assessing Officer has proceeded on the basis that all the business risks of the assessee (i.e. the foreign company) are borne by the PE as PE is the content provider and responsible for up linking activity. That's too sweeping a generalization to meet any judicial approval, and, on the same set of findings, the coordinate benches have disapproved the stand of the Assessing Officer. Under these circumstances, we see no reasons to remit the matter to the file of the Assessing Officer for a fresh round of ALP ascertainment proceedings, as prayed by the learned Departmental Representative. The plea of the assessee, as raised in the cross-objections, therefore, merits acceptance. Whether there is a DAPE or not, there are no additional profits to be brought to tax as a result of the existence of the DAPE, and, therefore, the question about the existence of a DAPE on the facts of this case is wholly academic.

16. Once we hold, as we have held above, that in the light of the present legal position, existence of dependent agency permanent establishment in wholly tax-neutral, unless it is shown that the agent has not been paid an arm's length remuneration, and when it is not the case of the Assessing Officer, as we have noted earlier, that the agents have not been paid an arm's length remuneration, the question regarding the existence of dependent agency permanent establishment, i.e., under article 5(4), is a wholly academic question. We humbly bow to the law laid down by Hon'ble Courts above. The limited argument before us is that here is a case of dependent agency permanent establishment, and the existence of a DAPE, in the light of these discussions, is wholly tax-neutral-particularly in the light of the legal position regarding profit attribution to the DAPE. We

need not, therefore, deal with the question about the existence of a DAPE, as it is an academic exercise with no tax effect involved. The related grounds of appeal are thus infructuous.

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10. In view of the above, and respectfully following the views so expressed by the co-ordinate bench- and particularly having regard to the fact that the payment of arm"s length remuneration to the alleged dependent agent is not even in dispute, we are of the considered view that the grievances raised by the assessee are to be upheld in the limited manner indicated above so far as profit attribution to the DAPE is concerned. Given this finding, the issue regarding existence of the DAPE is wholly academic and does not call for any adjudication.

11. The appeal of the Assessing Officer is thus dismissed, and the appeal of the assessee is thus allowed in the terms indicated above.

12. We will now take up the cross-appeals for the assessment year 1998-99. These appeals are directed against the order dated 23rdFebruary 2004, passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 1999-2000.

13. Grievances raised by the parties are as follows:

Grievances of the assessee (ITA No. 4996/Mum/2004)

1. In holding that the Appellant had a permanent establishment in India by virtue of Article 5(2)(k) of the India-UK Double Taxation Avoidance Agreement ('DTAA).

2. In holding that by virtue of Article 5(4) of the DTAA the Appellant would be regarded to have an agency permanent establishment in India.

3. Having confirmed that the Appellant had a permanent establishment in India, in directing that the profits attributable to such permanent establishment should be determined as provided in Rule 10 of the Income-tax Rules.

Grievances of the Assessing Officer (ITA No. 5024/Mum/2004)

1. On the facts & circumstances of the case & in law, the Ld. CIT(A) erred in holding that payments received by Reuters Ltd from Reuters India Ltd under DA does not constitute royalty but it is in the nature of business income ignoring the fact that the payments received by Reuters Ltd from Reuters India Ltd for the 'Reuter Products' is for allowing access to the processed data, thus the payments qualifying for the definition of royalty as per Article 13 of the DTAA between India and UK. The Ld.CIT(A) has erred in appreciating the fact that Distribution fees under DA, Production Distribution fee under PDA and License fee under LA are basically inextricably connected.

2. On the facts & circumstances of the case & in law, the Ld. CIT(A) erred in directing the AO as not to treat the receipts of the assessee under distribution agreement as royalty / FTS while taxing the income as business income under Article 7 of the treaty ignoring;

i. When income is assessed under Article 7 of the treaty, provisions of domestic law would apply;

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ii. Under the domestic law, the definition of royalty and fee for technical services should be as per the section 9(1) (vi) and 9(1)(vi) respectively instead of Article 13 of the treaty;

iii. The definition of royalty / FTS U/s 9 of the Act is much wider than the definition under the treaty;

iv. The conclusion has been reached by the CIT(A) only by reference to the provisions of the

DTAA and not with reference to section 9(1) (vi) and 9(1) (vii) of the Act.

3. On the facts and in the circumstances of the case and in law, the CIT(A) erred in holding that the assessee being a non resident and the entire income of the assessee is subject to TDS u/s 195 of the I.T. Act, 1961, no liability u/s 234B and 234C arise, ignoring the fact:

(i) that since the tax deducted at source was not adequate to meet the entire tax liability, it was obligation on the part of the assessee to make the deficit good by making the payments towards the advance tax;

(ii) that since the assessee failed to pay the advance tax, the Assessing Officer was right in charging interest u/s. 234B and 234C of the I.T Act 1961.

14. When these appeals came up for hearing, learned representatives fairly agreed that whatever we decide for the assessment year 1998-99 will equally apply to the present appeals as well.

15. Vide our order above, we have dismissed the plea of the Assessing Officer, so far as taxability of the impugned amounts as „royalties" or „fees for technical services" is concerned, and we have upheld the plea of the assessee so far as profit attribution to the DAPE is concerned, relegating the issue with respect to the existence of the DAPE to irrelevance as at present.

16. We see no reasons to take any other view of the matter than the view so taken by us in the immediately preceding assessment year. Respectfully following the views so taken, which will apply mutatis mutandis in this assessment year as well, we dismiss the grievance raised by the Assessing Officer, and uphold the plea of the assessee in the terms indicated above.

19. Accordingly, respectfully following decision of coordinate bench , ground number 1 – 3 of the appeal of the assessee becomes merely academic. Therefore, we direct the learned assessing officer follow the decision of the coordinate bench in assessee's own case for assessment year 1998 – 1999 and 1999 – 2000 dated 5/7/2022 in ITA 5024 and 5025/M/2004.

20. Accordingly, appeal of the learned assessing officer is dismissed and appeal of the assessee is allowed with above direction.

AY 2004-05

ITA 1979/M/2008 [by AO]

ITA 1709/M/2008 [by assessee]

Appeals of Assessee against Appeal effect order

ITA 1287/M/2009 [by assessee]

21. Now we come to the cross appeals of both the parties for assessment year 2004 – 05. ITA 1979/M/2008 is filed by the learned assessing officer in ITA 1709/M/2008 is filed by the assessee. The facts are identical to the facts of the assessment year 2003 – 04 as stated above. The assessee is aggrieved by the order of the learned CIT – A

dated 28/12/2007 holding that assessee has a permanent establishment in India and profit is required to be as limited and the learned assessing officer is aggrieved by the order of the learned CIT – A holding that the income arising in the hands of the assessee is not chargeable to tax as royalty income as per the double taxation avoidance agreement.

22. ITA 1287/M/2009 is also filed by the assessee against the appellate order passed by the CIT appeal- XXXI, Mumbai dated 4/12/2008 wherein the learned assessing officer passed an order under section 250 of the act giving an appeal effect to the order of the learned CIT – A wherein the learned CIT – A directed the learned assessing officer to determine the profit attributable to the permanent establishment under article 7 of the Double Taxation Avoidance Agreement including the application of rule 10 of the income tax rules 1962 wherein the learned assessing officer determined the business income at ₹ 36,797,954/– being 5.86% of the total revenue receipt of the assessee amounting to ₹ 627,951,431/– based on the global accounts of the assessee, the learned CIT – A upheld the order of the learned assessing officer. The assessee is aggrieved and has preferred appeal against the same.

23. As the facts are similar, both the parties relied upon their arguments made earlier, on careful consideration, we find that the issue squarely covered by the decision of the coordinate bench in assessee's own case for earlier year which we have followed for assessment year 2003 – 04 holding that the income is not chargeable to tax in the hands of the assessee as royalty income as per the Double Taxation Avoidance Agreement and further as the

Indian entity associated enterprises of the assessee in India is remunerated at arm's-length, there is no requirement of establishing that there is a permanent establishment in India as it becomes merely an academic exercise. Accordingly, we dismiss ground number 1 – 3 of the appeal of the AO. Ground number four with respect to the chargeability of interest under section 234B of the act merely an academic hence also dismissed. The appeal of the learned assessing officer is dismissed and appeal of the assessee is allowed, as there cannot be any further attribution of profit as held by the coordinate bench in assessee's own case for earlier year, which remains unchallenged.

24. Accordingly, appeal of the AO is dismissed and appeal of the assessee in ITA number 1709 and 1287 are allowed.

Assessment year 2005 – 06

ITA 5182/M/2009 [By Assessee]

ITA 5155/M/2009 [by AO]

25. ITA number 5182/M/2009 is filed by the assessee and ITA number 5155/M/2009 is filed by the assessing officer against the appellate order passed by the learned CIT – A dated 30/6/2009 for assessment year 2005 – 06. The learned assessing officer is aggrieved that the impugned income of the assessee is not held by the learned CIT – A chargeable to tax as royalty income as per the Double Taxation Avoidance Agreement and further even in case of business income, it is held that no additional profits can be attributed to the permanent establishment if the associated enterprise has been remunerated at arm's-length price. The assessee is aggrieved with the appellate

order wherein it has been held that assessee has a permanent establishment in India despite the fact that sale of the product by the assessee to an Indian entity is on principal to principal basis. Therefore, both the parties are in appeal before us.

26. As the facts before us similar to the facts in case of the assessee for assessment year 2003 – 04 wherein following the decision of the coordinate bench in assessee's own case, we have held that the income of the assessee with respect to the various agreements entered into with Indian entity as well as with third-party does not constitute royalty as per the Double Taxation Avoidance Agreement between India and United Kingdom and further as the associated enterprise has been remunerated at arm's-length, no further profit is required to be attributable to the income of the assessee, as judicial precedent binds us, we also hold that the income of the assessee is not chargeable to tax in India as royalty income and further, as no further profit can be attributed to the permanent establishment which is remunerated at arm's-length, the exercise of determining the existence of permanent establishment with respect to the various agreement is merely an academic exercise, we dismiss the appeal of the learned assessing officer and allow the appeal of the assessee.

Assessment year 2006 – 07

ITA number 3617/M/2010 [By Assessee]

ITA number 4575/M/2010 [By AO]

Penalty under section 271 (1) (C)

ITA 4550/M/2013 [By AO]

27. For assessment year 2006 – 07 in ITA number 3617/M/2010 the assessee has preferred an appeal against the order of the learned Commissioner of income tax appeals dated 22/3/2010 and the learned assessing officer is aggrieved in ITA number 4575/M/2010. The assessee is aggrieved wherein the learned CIT – A as held that the assessee has a permanent establishment in India and therefore despite the assessee being remunerated to its Indian entity on principal to principal basis the profit is required to be attributed in the hands of the assessee and further confirming the levy of interest under section 234D of the income tax act in the hands of the assessee. The learned assessing officer is aggrieved wherein the learned CIT – A has held that the income is not chargeable to tax in the hands of the assessee as royalty income as per the Double Taxation Avoidance Agreement.

28. The learned assessing officer in ITA 4550/M/2013 is further aggrieved by the order of the learned CIT – A – 11, Mumbai dated 5/3/2013 wherein, he deleted the penalty levied by the learned assessing officer under section 271 (1) (c) of the act by penalty order dated 30/3/2012 and living a penalty of ₹ 4,127,444/– on the assessee holding that that the assessee cannot be penalized for furnishing inaccurate particulars of income in respect of taxability of the income arising with respect to the various agreements as royalty income or business income because the issue is having different opinions on the same set of fact and it cannot be said that assessee has furnished inaccurate particular of income or has concealed any income. The learned assessing officer is aggrieved and is in appeal before us.

29. As the facts before us similar to the facts in case of the assessee for assessment year 2003 – 04 wherein following the decision of the coordinate bench in assessee's own case, we have held that the income of the assessee with respect to the various agreements entered into with Indian entity as well as with third-party does not constitute royalty as per the Double Taxation Avoidance Agreement between India and United Kingdom and further as the associated enterprise has been remunerated at arm's-length, no further profit is required to be attributable to the income of the assessee, as judicial precedent binds us, we also hold that the income of the assessee is not chargeable to tax in India as royalty income and further, as no further profit can be attributed to the permanent establishment which is remunerated at arm's-length, the exercise of determining the existence of permanent establishment with respect to the various agreement is merely an academic exercise, we dismiss the appeal of the learned assessing officer and allow the appeal of the assessee.

30. As on the merits of the case, we have already allowed the appeal of the assessee stating that when the assessee remunerated its associated enterprise at arm's-length, there is no further income attributable in the hands of the assessee. In view of this the appeal of the learned assessing officer against the deletion of the penalty by the learned CIT – A under section 271 (1) (c) of the act also becomes infructuous and hence dismissed.

31. Accordingly, both the appeals filed by the learned assessing officer on the quantum as well as on the penalty are dismissed and appeal of the assessee is allowed.

Assessment year 2002 – 03

ITA 3366/M/2006 (by AO)

ITA 3422/M/2006 (by assessee)

32. ITA number 3366/M/2006 is filed by the learned assessing officer against the appellate order passed by the Commissioner of income tax (appeals) – V, Mumbai for assessment year 2002 – 03 dated 27/3/2006 wherein it is held that that the income earned by the assessee, foreign entity from various agreement entered into with Reuters India Ltd and ANI media Ltd under the distribution agreement and service agreement does not constitute royalty but it is in the nature of the business income. It was further held that several agreements entered into by the assessee with the Indian entity are not inextricably connected. The learned CIT – A further held that income is chargeable to tax as business income under article 7 of the treaty.

33. ITA 3422/M/2006 is filed by the assessee challenging the finding of the learned CIT – A that assessee has a permanent establishment in India and therefore the profit should be attributed in the hands of the permanent establishment following the rule 10 of the income tax rules 1962.

34. We find that the facts are identical to the assessment year 2003 – 04 for which we have already discussed and respectfully following the decision of the coordinate bench in assessee's own case for earlier year wherein it has been held that the income is not chargeable to tax in the hands of the assessee as royalty income, we hold that, respectfully following the decision of the coordinate bench, that

income is not chargeable to tax in the hands of the assessee as royalty income. Accordingly all the grounds of appeal filed by the learned assessing officer in ITA 3366/M/2006 fails, appeal of the AO is dismissed.

35. Similarly, wherein the coordinate bench in assessee's own case in earlier years has categorically held that whether the assessee has a permanent establishment in India or not is merely an academic issue when the associated enterprises remunerated at arm's-length price, no further profit can be attributed in the hands of the assessee. Respectfully following the decision of the coordinate bench, we also hold that there is no finding given by the lower authorities before us that the assessee has not remunerated its associated enterprises at arm's-length price, and therefore the appeal of the assessee succeeds. Accordingly, appeal of the assessee in ITA 3422/M/2006 is allowed.

36. Accordingly, appeal filed by the learned assessing officer in ITA 3366/M/2006 is dismissed and appeal of the assessee in ITA 3422/M/2006 is allowed.

Assessment year 2000 – 01

ITA 5228/M/2004 [AO]

ITA 5092/M/2004 (Assessee)

37. we find that ITA 5228//M/2004 is filed by the learned assessing officer against the order of the learned CIT – A dated 23 February 2004 for assessment year 2000 – 01 wherein the learned CIT – A held that the income in the hence of the assessee arising out of the various contracts entered into with the Reuters India private limited and ANI media is not chargeable to tax as royalty in the

hands of the assessee as per the provisions of Double Taxation Avoidance Agreement but is chargeable to tax as business income.

38. ITA 5092/M/2004 is filed by the assessee challenging the order of the learned CIT – A wherein it has been held that the assessee has a permanent establishment in India and directed the learned assessing officer to compute the income of the assessee for deciding the profit attribution according to rule 10 of the income tax rules.

39. Assessee has also raised an additional ground with respect to profit attribution stating that when the assessee is remunerated its associated enterprise at arm's-length further profit can be attributed in the hands of the assessee.

40. Identical issue arose in the case of the assessee for assessment year 2003 – 04 wherein following the decision of the coordinate bench in assessee's own case we have categorically held that the income is not chargeable to tax in the hands of the assessee as royalty income. Accordingly, ITA 5228/M/2000 for filed by the assessing officer is dismissed. Further, for assessment year 2003 – 04 we have categorically held that when the associated Enterprises are remunerated by the assessee at arm's-length, the issue of examination of existence of permanent establishment merely becomes academic. This finding is following the decision of the coordinate bench in assessee's own case. In absence of any material change to the facts and circumstances of the case for this year, we respectfully following the decision of the coordinate bench allowed the appeal of the assessee.

41. In view of our above finding in the appeal of the assessee, the additional ground raised by the assessee merely becomes academic and therefore not admitted.

42. Accordingly, appeal of the learned assessing officer is dismissed and the appeal of assessee is allowed.

Assessment year 2001 – 02

ITA 8348/M/2004 (by assessee)

ITA 8463/M/2004 [by the AO]

43. ITA 8348/M/2004 is filed by the assessee against the appellate order passed by the learned CIT – A – XXXI, Mumbai dated 10 August 2004 for assessment year 2001 – 02 wherein the appeal filed by the assessee against the assessment order passed under section 143 (3) of the act dated 12/1/2004th passed by the deputy director of income tax (International taxation) – 2 (1), Mumbai (the learned assessing officer holding that assessee foreign company deriving income from the various agreements entered into with its associated enterprises in India and as well as with ANI media is chargeable to tax in the hence of the assessee as royalty income, the learned CIT – A categorically held that such income is not liable to be taxed under the act royalty as per the Double Taxation Avoidance Agreement but is a business income of the assessee chargeable to tax as assessee has a permanent establishment in India and the profit is required to be attributable in the hands of the assessee in terms of rule 10 of the income tax rules. The assessee is aggrieved with the direction of the learned CIT – A holding that there is a permanent establishment in India of the assessee and the profit is required to be chargeable to

tax in the hands of the assessee in India according to the rule 10 of the income tax rules 1962.

44. The learned assessing officer is aggrieved in ITA 8463/M/2004 by the order of the learned CIT – A holding that the income is not chargeable to tax in the hands of the assessee has royalty income.

45. For assessment year 2003 – 04 we have categorically held that when the associated enterprise is remunerated at arm's-length, the issue of whether the assessee has a permanent establishment in India such as agency permanent establishment or service permanent establishment merely becomes academic exercise, respectfully following the decision of the coordinate bench, therefore, in absence of any finding of the learned assessing officer that the associated enterprise is not been remunerated at arm's-length price, we allow the appeal of the assessee for statistical purposes. Accordingly, ITA 8348/M/2004 for assessment year 2001 – 02 is allowed.

46. As we have categorically held that for assessment year 2003 – 04 the income is not chargeable to tax in the hence of the associated enterprise as royalty income following the decision of the coordinate bench in assessee's own case, we do not find any reason to deviate from the same and therefore, respectfully following the decision of the coordinate bench in assessee's own case for earlier years, we also hold that for this impugned assessment year also the impugned income is not chargeable to tax as royalty income under the Double Taxation Avoidance Agreement. Accordingly, appeal of the learned assessing officer in ITA 8463/M/2004 is dismissed.

AY 2001-02

Reuters Online- SA [Refinitive SA]

ITA 8464/M/2004 [By A O]

47. ITA 8464/M/2004 is filed by the assessing officer against the appellate order passed by the CIT – A XXXI , Mumbai dated 2/9/2004 for assessment year 2001 – 02 in case of Reuters online SA now as per revised memorandum of appeal REFINITIVE SA wherein the appeal filed by the assessee against the assessment order passed under section 143 (3) of the act dated 28/mum/2004th passed by the Deputy Director of income tax (International taxation) – 2 (1), Mumbai (the AO) was partly allowed. Therefore the assessing officer is aggrieved by appellate order has learned CIT – A has held that the receipts in the hence of the assessee is in the nature of business income and not royalty.

48. Fact shows that Reuters online SA is a company Incorporated under the laws of Switzerland and is a tax resident of that country. It is in the business of providing Reuters investors services worldwide over the Internet. It includes predefined data sets of financial information including taxed, data and graphics specifically meant for private investors. It was for online delayed or real-time snap quotes. It is important to note that the information made available by the assessee is merely a compilation of publicly available information. It supports HTML format information or XML format to consolidate online data into custom-built templates. The customers who not need to install any hardware or software applications. The clients who were taxes, requests, receive processes and display data from

Reuters investor's services via the Internet. The assessee intercede to earning meant with various customers in India which includes banks, brokers, media company et cetera whereby they are appointed as the distributor of you to investors services. As per the arrangement, the distributors are granted a non-exclusive right to market and distribute Reuter's investor's services to their customers. Assessee has claimed that provisions of Double Taxation Avoidance Agreement between India and Switzerland apply to it. The assessee filed its return of income on 28/3/2002 at Rs. Nil, though assessee has disclosed the income of ₹ 54,680,949 on from its customers in India. The appellant in the note disclosed the sum and stated that these revenues are in the nature of its business profits. As per article 7 of the India Switzerland treaty the business profits of Switzerland tax resident company are taxable in India only if it has a permanent establishment in India and in such a case only to the extent of the profits attributable to such PE in India. The assessee claimed that it did not have any permanent establishment in India as per article 5 of India Switzerland treaty. Therefore in the return of income they assessee disclosed Rs. nil as its income stating that it is chargeable to tax only in Switzerland.

49. Learned assessing officer during the course of scrutiny assessment raised certain enquiries. Based on that he passed an assessment order on 28/1/2004 wherein he held that that the income received by the assessee from its customers in India is liable to tax in India as royalty under article 12 (3) of the India Switzerland Double Taxation Avoidance Agreement. He was further of the view that the income derived by the assessee from its customers in India is also qualifies

as royalty as per section 9 (1) (vi) of the income tax act. The learned AO further held that the ratio of the advance ruling P no. 30 of 1999 reported in 238 ITR 296 applies to the case of the assessee. Accordingly the learned assessing officer treated the income of ₹ 54,680,949 has royalty income as per article 12 (3) of the DTAA and charged 15% tax thereon has for assessment order dated 28/1/2004th passed under section 143 (3) of the act.

50. Assessee aggrieved with the assessment order preferred an appeal before the learned CIT – A. The learned CIT – A followed his own order for assessment year 2000 – 2001 wherein he held that the income earned by the assessee is in the nature of business profits and not royalty and further the assessee does not have any permanent establishment in India and therefore nothing is chargeable to tax as business income in the hands of the assessee. The appellate order was passed on 2/9/2004, by which the learned AO is aggrieved and is in appeal before us.

51. The learned departmental representative submitted that that the various clauses of the agreement entered into with the distributor show that the distributor is getting a non-exclusive, nontransferable, non-sublicense right to access the Reuters services and the distributor is using the hardware and software of the assessee company for processing the information. Therefore, the learned CIT – A has grossly erred in not holding it as royalty.

52. The learned authorized representative referred to the article 12 (3) of the India Switzerland treaty and also referred to the nature of products distributed by the assessee and submitted that it is receiving fees not towards the use of foreign to use any comprised of

a literary, artistic, scientific work has contemplated in the definition of the term royalty under article 12 (3) of the DTAA. Assessee only distributes to customer contained in the form of stock of course, Forex on money market rates and other financial information relevant to the financial company. The content provided by assessee is as such publicly available data and not copyrighted work. The payments received by the assessee are not consideration for the use of all the right to use the copyright order like proprietary right that may subsist in the services. Therefore, the payments received by the assessee are not for the use of or the right to use a corporate. It was further stated that product distributed by assessee do not entail any license for the use of trademark patented et cetera. It also do not require its customers to install any hardware or software application the clients who have accesses , requests, receives, purchase and display data from Reuters investor via the Internet. Therefore, the same is not royalty. It is business income, which is chargeable to tax as per article 7 of the DTAA but in absence of any permanent establishment no income is chargeable to tax in India.

53. We have carefully considered the rival contention and perused the order of the lower authorities. We find that this issue has been considered in the case of Reuters Ltd and the facts are identical. Therefore, respectfully following the decision of the coordinate bench in case of Reuters Ltd, we confirm the order of the learned CIT – A and hold that the recipients income is not chargeable to tax in the hence of the assessee has royalty as per article 12 (3) of India Switzerland treaty for the reason that the data displayed by the assessee is merely a publicly available information which is

transmitted to the customers. There is no copyright or copyrighted article involved nor is any right to use for use of patented article provided. Further, in assessee's own case for assessment year 2000-2001, this was held to be business income and the revenue could not show that whether such order has been disputed before the higher forum. Accordingly, we dismiss the solitary ground of appeal of AO.

54. ITA 8464/M/2004 is dismissed.

Assessment year 2002 – 03

ITA 5379/ M/ 2005

55. ITA 5379/M/2005 is filed by the learned Assessing Officer against the Appellate Order passed by the learned CIT – A dated 16/05/2005 for Assessment Year 2002 – 03 wherein on identical facts and circumstances the learned Assessing Officer held that the income received by the assessee is Royalty chargeable to tax as per Article 12 (3) of the Double Taxation Avoidance Agreement, the learned CIT – A following his own order for assessment year 2000- 2001 has held that same is not chargeable to tax as Royalty as per article 12 (3) of the Double Taxation Avoidance Agreement but is chargeable as business profit under article 7 of the DTAA. However, in absence of any permanent establishment as per article 5 of DTAA, no income is chargeable to tax in India. The learned assessing officer is aggrieved with that order.

56. After careful consideration of the rival contention and the order of the lower authorities as well as our decision for Assessment Year 2001 – 02 in case of the assessee, we confirm the order of the learned CIT – A and dismiss the appeal of the AO for the same reasons.

57. Accordingly, ITA 5379/M/2005 filed by the learned AO is dismissed.

58. Accordingly all these 18 appeals are disposed off

Order pronounced in the open court on 28/06/2023.

Sd/-	Sd/-
(SANDEEP SINGH KARAHAIL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 28.06.2023

Dragon

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai