

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH “D”: NEW DELHI**

**BEFORE**

**SHRI G.S. PANNU, HON’BLE PRESIDENT  
AND  
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 913/Del/2023  
Asstt. Year: 2020-21

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|---|-----|---|
| Adobe Systems Software<br>Ireland Limited,<br>4-6, Riverwalk,<br>Citywest Business Campus<br>Saggart,<br>Dublin 24, Ireland.<br>PAN AAHCA7203M<br>(Appellant) | Vs. | ACIT<br>Circle-1(1)(1)<br>(International<br>Taxation)<br>New Delhi.<br><br>(Respondent) |
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|---------------------------|--|
| Assessee by:              | Shri Ravi Sharma, Advocate<br>Shri Rishab Malhotra, AR |
| Department by:            | Shri Vizay B. Vasanta, CIT-DR                          |
| Date of Hearing:          | 19.07.2023   |
| Date of<br>pronouncement: | 12.10.2023   |

**ORDER**

**PER ASTHA CHANDRA, JM**

The appeal filed by the assessee is directed against the order dated 30.01.2023 of the Ld. Assistant Commissioner of Income Tax, Circle Int. Tax-1(1)(1), Delhi (**“AO”**) passed under section 143(3) r.w. section 144C(13) of the Income Tax Act, 1961 (**the “Act”**) pertaining to Assessment Year (**“AY”**) 2020-21.

2. The assessee has taken the following grounds of appeal:-

- “1.1 *That on the facts and circumstance of the case and in law, the Ld. Assistant Commissioner of Income-tax, Circle 1(1)(1), International Taxation, New Delhi ("Ld. AO") as well as the Hon'ble Dispute Resolution Panel-1, New Delhi ("DRP") erred in holding that the Appellant has a dependent agent permanent establishment ("PE") in India in terms of Article 5(6) of the Double Taxation Avoidance Agreement between India and Ireland.*
- 1.2 *That the Ld. AO and Hon'ble DRP grossly erred in completely disregarding the fact that Adobe Systems India Private Limited ("Adobe India") is not an agent of the Appellant and is a legally and economically independent entity.*
- 1.3 *That the Ld. AO and Hon'ble DRP grossly erred on the facts by concluding that Adobe India is a Dependent Agent PE of the Appellant and the agent is actively involved in sales and supply of software distributed by the Appellant, without appreciating that the sales and supply of software were done by independent third-party distributors.*
- 1.4 *That the Ld. AO and Hon'ble DRP erred in law in holding Adobe India to be a Dependent Agent PE of the Appellant without bringing any cogent documentary evidence on record to substantiate the above statement.*
- 1.5 *That the Ld. AO erred in law by not acting in accordance with the directions of the Hon'ble DRP wherein it had directed the Ld. AO to pass the final assessment order after considering the orders passed by the Hon'ble Income Tax Appellate Tribunal ("ITAT") in the Appellant's own cases for earlier years, wherein based on similar facts, it has been held that the Appellant does not have a Dependent Agent PE in India.*
- 2.1 *That on the facts and circumstances of the case and in law, the Ld. AO erred in attributing a sum of INR 1,74.64.31,465/- as business profits to the alleged Dependent Agent PE of the Appellant in India.*
- 2.2 *Without prejudice to the above grounds, the Ld. AO and Hon'ble DRP failed to appreciate that attribution of profits to the alleged PE is a transfer pricing issue and grossly erred on facts and in law in disregarding established judicial pronouncements in India, including the orders of the Hon'ble ITAT in the Appellant's own cases for earlier years, on the issue that once the associated enterprise, that also allegedly constitutes a PE, (Adobe India in the present case) has been remunerated on an arm's length basis after taking into account its functions, assets and risk ("FAR") profile, nothing further can be attributed to the said PE.*
- 2.3 *Without prejudice to the above grounds, the Ld. AO and Hon'ble DRP grossly erred by disregarding the fact that the transaction between the Appellant and Adobe India has been undertaken at an arm's length, as confirmed in the transfer pricing study and transfer pricing report of Adobe India, and by the fact that the case of the Appellant was not referred to the transfer pricing officer. Therefore, the Ld. AO and Hon'ble DRP erred in further attributing profits to the Appellant's alleged PE in India, without bringing any material on record to suggest that the alleged PE had been carrying out any other activity on behalf of the Appellant, apart from marketing support services.*
- 2.4 *Without prejudice to the above grounds, the Ld. AO and Hon'ble DRP failed to appreciate that even if any profits for additional functions were required to be attributed, then the same should have been done in the hands of Adobe India.*

- 2.5 *Without prejudice to the above grounds, the Ld. AO and Hon'ble DRP grossly erred in attributing revenue (instead of profits) to the alleged AE and thereby, erroneously arriving at a profitability of 78.09% whilst Appellant's global profit during the year under consideration were 2.91% as corroborated by global audited accounts furnished by the Appellant.*
- 3- *On the facts and circumstances of the case & in law, the Ld. AO grossly erred in levying tax on interest on the income-tax refund received by the Appellant during the year under consideration @40% (plus applicable surcharge and cess), as per the provisions of the Act, as opposed to applying the beneficial tax rate of 10% provided under Article 11 of the India-Ireland Double Taxation Avoidance Agreement ("DTAA" or "Tax treaty").*
4. *That on the facts and in circumstances in law, the Ld. AO erred in not allowing credit of taxes deducted at source ("TDS") amounting to INR 2,48,86,907/- whilst computing the tax liability of the Appellant for the year under consideration.*
5. *That on the facts and in circumstances of the case and in law, the Ld. AO has grossly erred in levying an additional tax of INR 4,58,03.533/- on 'Special Income Other Than Section 115BBE' whilst computing the tax liability of the Appellate for the year under consideration.*
6. *That on the facts and in circumstances in law, the Ld. AO erred in mechanically initiating proceedings under section 270A of the Act."*

3. Briefly stated, the assessee is a company incorporated under the laws of Ireland and is a tax resident of Ireland in accordance with the Double Taxation Avoidance Agreement between India and Ireland (**"India-Ireland DTAA"**). It is therefore entitled to the beneficial provisions of the India-Ireland DTAA. The assessee is engaged in licensing of software in India through distributors to the end user. It filed its return of income for AY 2020-21 on 12.02.2021 declaring total income of Rs. 45,80,35,330/- to be taxed at special rate. The assessee's case was selected for scrutiny under CASS. Statutory notice(s) under section 143(2) and 142(1) of the Act were issued to the assessee on various dates. In response thereto, the assessee submitted details of revenue received by it during the relevant AY from various sources which comprised of revenue from software supply amounting to Rs.4,95,66,61,188/-; revenue from automated services amounting to Rs.1,03,25,44,333/-; training services involving human intervention amounting to Rs. 40,04,32,117/- and interest on income tax refunds amounting to Rs. 5,76,03,211/-. Out of the above the assessee offered to tax the amount of Rs. 40,04,32,117/- pertaining to 'provision of services involving human intervention' and Rs. 5,76,03,211/- pertaining to

‘income from income tax interest’ in its return of income aggregating to total amount of Rs. 45,80,35,328/-. Other receipts viz. receipts from software supply and automated services are claimed non-taxable in India by the assessee. The case of the assessee was not referred to the Ld. Transfer Pricing Officer (**“TPO”**) by the Ld. AO in view of the fact that the transaction entered by the assessee with Adobe Systems India Pvt. Ltd. (**“Adobe India”**) has always been accepted at Arm’s Length Price (**“ALP”**) by the preceding TPO(s).

3.1 During the course of assessment proceedings the Ld. AO issued show cause notice (**“SCN”**) to the assessee asking the assessee to show cause as to why the assessment may not be completed on similar lines as earlier years holding that the assessee has a Permanent Establishment (**“PE”**) in India. In response to the said SCN, the assessee submitted its reply which was disregarded by the Ld. AO. The Ld. AO proceeded to pass a draft assessment order on 22.03.2022 under section 144C of the Act holding that the assessee has a Dependent Agent PE in India (**“DAPE”**) in the form of Adobe India. The Ld. AO also held that the premises of Adobe India form a fixed place PE for the assessee in India. In view of this finding, the Ld. AO attributed 35% of revenue earned by the assessee from India to its PE in India (after allowing deduction for payments made by the assessee to Adobe India on account of obtaining marketing support services) amounting to Rs. 1,74,64,31,465/-. Further, the Ld. AO brought to tax interest on income tax refund amounting to Rs. 5,76,03,211/- as per the normal rates described under the provisions of the Act as opposed to the beneficial tax rate of 10% provided under Article 11 of the India-Ireland DTAA that was applied by the assessee in its return of income.

4. Aggrieved, the assessee filed objections before the Ld. Dispute Resolution Panel (**“DRP”**) against the draft assessment order passed by the Ld. AO wherein the Ld. AO proposed to assess the income of the assessee at Rs. 1,80,40,34,676/- (Rs. 1,74,64,31,465/- + Rs. 5,76,03,211/-) as against

the returned income of Rs. 45,80,35,330/- of the assessee. Vide its order dated 02.12.2022, the Ld. DRP issued the following directions to the Ld. AO:

*"4.4 Ground no. 3 & 5- These relate to issue of attributing a sum of Rs. 1,74,64,31,465/- as business profits to the alleged PE of the Assessee in India.*

*4.4.1 The AO has discussed about this issue in detail in his order from page no 3 to 12. Crux of the AO's findings are re-produced below-*

- *As per para 8 of the order, AO has discussed about the Article no 7 of India Ireland DTAA pertaining to charging of business profits. It has also mentioned about Article 5 of the DTAA defining scope of the PE.*
- ❖ *AO is of the view that the Agency PE of a foreign enterprise in India will be attracting only if the agent in India is a dependent agent. The various judicial pronouncements provides certain guidelines to test the dependency i.e. 'binding test and 'dependency test'*
- ❖ **Binding Test**-*If the action of the agent legally binds the foreign enterprise to perform the contract in India and the final decision to perform or not do not lie with the principal than agent can be considered to be a PE of the foreign enterprise in India. The concept of conclusion of contracts would have to be seen from the point of view of performing all the actions necessary for the conclusion of contracts, though the actual signing of the contract may be performed by the foreign enterprise outside India.*
- ❖ **Dependency test**-*The dependency Test is to corroborate whether the agent is dependent for the conduct of business-a. Legally b. Economically \**
- ❖ **Legal dependence**- *The legal dependence is reflected by the facts of arrangement or agreement between the foreign enterprise and the agent. If the risk and return of the business done by the agent fully accrue to the agent, then the agent can be deemed to be an independent agent.*
- ❖ **Economic dependence** *The agent if earns a reasonable portion income from other than the relevant foreign enterprise, it would cement the fact that, the agent does not act wholly and exclusively on behalf of the foreign enterprise'. Economic independence signify the business relationship with its principal (here the foreign enterprise) and the consequent dependency for the functioning of business of the agent. i.e. if the foreign enterprise is the only customer the agent serves as part of its agency business, then it would be deemed that the agent is economically dependent on the foreign enterprise. If the agent's activities are not wholly or exclusively devoted to the foreign enterprise and the agent's services are being remunerated at arm's length, then the agent would be considered as an independent agent.*

**4.4.2 All the facts above have been analyzed in light of provisions of India-Ireland DTAA by the AO and the view thereon is recorded as under-**

*"Adobe India is working for Adobe Ireland as an agent. Though the detailed agreement is framed in a manner that it wants to show case as if the action conducted by Adobe India shall not be a binding on Adobe Ireland, in actuality Adobe India is the sole representative of Assessee Company in India. All the actions performed by Adobe India in the garb of marketing support activities are nothing but pure marketing and promotion of the Adobe software in India. Adobe India in the*

capacity of DAPE is the only touch point of Adobe Ireland in India and performing functions to secure orders from customers and distributors. From the perusal of the Group structure, it is seen that Adobe USA is the ultimate holding company of the assessee as well as Adobe India. Hence, Adobe India, which is found to be an agent of the assessee is legally and economically dependent on Adobe USA as well as the assessee in question. To substantiate this fact, if Adobe USA or the assessee closes its manufacturing and distribution functions abroad, Adobe India would not survive. Therefore, it cannot be said that Adobe India has an independent status."

4.4.3 The AO has recorded his observation in respect of Adobe India having being performed core business activity for assessee at page no 7-11 of the order. Crux is reproduced below-

❖ It is extremely important for any organization to have good support services to succeed in their business. Support services are important for the immediate relief of the customers and the clients. Support services are not just limited to phone calls nowadays email, chat, web forms, and social communications, as well as self-service support sites. It is also used to provide information on how to use a particular project. The business has to offer support on multiple channels to improve their association with the stakeholders. So it is must for a business to be ubiquitous in today's changing environment. Also, the need of the hour is to listen and respond to all the queries in a timely manner. The customer's behavior very much depends on the after sales support services. Therefore, market support services go a long way to secure orders for business.

❖ AO has also listed about the benefits in view of above discussion which is not mentioned here for the sake of brevity.

❖ AO is of the view that the market support services in present times have become one of the core business process since it includes-

- The market-sensing process-Meaning all activities in gathering marketing intelligence and acting on the information.
- The new-offering realization process-Covering all activities in research, development and launching new quality offerings quickly and within budget.
- The customer acquisition process- all the activities defining the target market and prospecting for new customers
- The customer relationship management process-all the activities covering building deeper understanding, relationships and offerings to individual customers.
- The fulfillment management process- all the activities in delivery of orders.

4.4.4 AO has referred to the **Apex Court's decision in case of Morgan Stanley Co. Inc. 292 ITR 416** that in order to decide whether a PE stood constituted, one had to undertake a functional and factual analysis of each of the activities to be undertaken by the enterprise. The OECD commentaries have established criteria for a PE constituting business activity of being, a "core business activity", as opposed to an "auxiliary or preparatory activity". The decisive aspect for the commentaries is whether the activity forms an essential and significant part of the activity of the enterprise as a whole. All business activities which contribute to the business earnings of the enterprise are core business activities.

4.4.5 In view of above discussion, AO has proposed to attribute 35% of the revenues to India @ Rs. 1,74,64,31,465/- as per Rule 10 D by allowing payments made to Adobe India for marketing support services @ Rs. 1,39,98,33 453/-

***DRP's Direction*** In the instant case, Dependent Agency Permanent Establishment DAPE is performing core business function which has direct impact on revenues from sales/services of the assessee. If a person residing in India represents or acts on behalf of a foreign enterprise, his presence in India may be construed as the foreign enterprise's presence in India, triggering the establishment of a PE in India.

PE is the most crucial concept to understand for any enterprise that operates across borders. This is the principal means through which an enterprise may be exposed to corporate income tax, value-added tax, filing tax returns, and compliance with a range of other obligations in the country of source. Even without a fixed place of business in a treaty country, an enterprise may have a permanent establishment in a treaty country to the extent that an agent in that country conducts activities on behalf of the enterprise. An agent in one country may be considered a permanent establishment of an enterprise of another country if:

- The agent is a dependent agent
- The agent has and continues to habitually exercise an authority to conclude contracts in the agent's country that are binding to the enterprise.

Under model treaty language, to avoid being a dependent agent there are two conditions that must be satisfied:

- The agent must be both legally and economically independent of the enterprise
- The agent must be acting in the ordinary course of its business in carrying out activities on behalf of the enterprise

**Reliance is placed on Ngc Network Asia Llc, Mumbai vs Dcit (It) Rg 3(3)(1), Mumbai on 11 May, 2021- wherein it is held-**

**"agent that the foreign enterprise is 'deemed to have' a permanent establishment in the country in which dependent agent is situated.**

**" In view of the facts narrated by the AO and findings by the Panel as above, the DRP is of the view that AO has rightly hold that the assessee has a dependent agent PE in India in the form of Adobe India and the agent is actively involved in the sales and supply of software distributed by the assessee and specially during promotion of the application and products of the assessee. This issue came up before the Panel for AY 2017-18, 2018-19 & 2019-20 also wherein the Panel upheld the AO's action in this regard. The factual matrix of the case continues to be same. Accordingly, without deviating from its earlier directions, the Panel rejects the assessee's objections in this regard for AY 2020-21 also.**

**A copy of impugned order of the Hon'ble ITAT has been filed by the assessee along with the synopsis dated 22.08.2022. Perusal of the order reveals that the Hon'ble Tribunal has passed a combined order in the following assessment years:**

- **ITA Nos 5024 to 5029/Del/2017 [Assessment Years: 2004-05 to 2006-07 & 2010-11 to 2012-13]**
- **ITA Nos 3079 & 3080/Del/2019 [Assessment Years: 2007-08 & 2013-14]**
- **ITA Nos 7922/Del/2019 [Assessment Year: 2015-16]**
- **ITA Nos 4921 to 4923/Del/2017 [Assessment Years: 2010-11 to 2012-13]**
- **ITA Nos 1978 & 1979/Del/2019 (Assessment Year: 2007-08 & 2013-14)**
- **ITA no. 55 & 7460/Del/2019 [Assessment Year: 2014-15 & 2015-16]**

**However, AO is directed to complete the assessment after considering the Tribunal's order as to whether the same is acceptable or otherwise to the revenue."**

5. Consequent to the above directions of the Ld. DRP, the Ld. AO passed the final assessment order dated 30.01.2023 holding as under:

"12. Consequently, the assessee was asked the following vide Notice u/s 142(1) dated 9/03/2022:

*As per your earlier submission, there is no change in the factual matrix as compared to earlier years. In the previous years, it has been held that Adobe India is a dependent agent PE and Fixed Place PE of the assessee in India. Hence you are requested to explain as to why the assessment may not be completed on the similar lines with regards to PE of the assessee in India, as was completed for earlier years. You are also given an opportunity to furnish any documentary evidences that you wish to present in the support of your explanations.*

*The reply of the assessee dated 21/03/2022 in reply to the above has been perused and not found tenable. The issue was examined in detail in AYs-2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16, 2017-18, 2018-19 and 2019-20 and it was found that Adobe India has no independent sources of income except providing market support services to the assessee and software development services to Adobe USA. Keeping in view the facts and the circumstances and the discussions as above hold that the assessee has a Dependent Agent PE in India in the form of Adobe India and the agent is actively involved in the sales and supply of software distributed by the assessee and especially doing promotion of the application products of the assessee. Further, following assessment orders for AYs-2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16, 2017-18, 2018-19 and 2019-20, it is held that the premises of Adobe India form a Fixed Place PE for the assessee company.*

**Attribution of Income and the profits:**

13. *In this respect, given the nature of activities carried out by the assessee in India, it is reasonable to attribute 35% of the revenues to India as per rule 100. In absence of profits earned by the assessee, profits margin is taken after giving deduction of payment made to Adobe India as expenses incurred for India activities. Accordingly, Income chargeable to tax as attributable to PE is computed as under.*

**Computation of Income and the profit-**

14. In view of the above, the total income of the assessee is computed as under-

(Amount in INR)

|   |   |                       |
|---|---|-----------------------|
| 1 | Revenue from Software sale  | 4,95,66,61,188        |
| 2 | Revenue from Automated Services                                   | 1,03,25,44,333        |
| 3 | Revenue from training services with human intervention            | 40,04,32,117          |
|   | <b>Total</b>  | <b>6,38,96,37,638</b> |
|   | Less- Payments made to Adobe India for marketing support services | 1,39,98,33,453        |
|   | Balance amount  | 4,98,98,04,185        |
|   | Income attributable to PE @35%                                    | 1,74,64,31,465        |

5.1 The Ld. AO therefore made the assessment on the total income of the assessee at Rs.1,80,40,34,676/- which includes business income of Rs. 1,74,64,31,465/- to be taxed @ 40% plus surcharge and taxes as per the Act and income tax refund of 5,76,03,211/- offered by the assessee to tax in its return of income to be taxed at normal rates and credit for pre-paid taxes to be allowed after due verification.

6. Dissatisfied, the assessee is in appeal before the Tribunal and all the grounds of appeal relate thereto.

**Ground Nos. 1 to 2.5**

7. With respect to existence of a DAPE in form of Adobe India and further attribution to the alleged PE, the Ld. AR at the outset of the hearing submitted that the Ld. AO/DRP have relied upon their own orders/directions for previous years i.e. for AY 2010-11 to AY 2019-20 and held that there is no change in the facts of the instant case. He further submitted that the impugned issue is squarely covered by the decision of the Delhi Tribunal in assessee's own case for earlier AYs. The Tribunal vide its order dated July 27, 2022 in ITA Nos. 4921 to 4923/Del/2017, ITA No.

1978 and 1979/Del/2019 and ITA No. 55 and 7460/Del/2019 has deleted the additions made by the Ld. AO for AY 2010-11 to AY 2015-16. It has been held that no addition had been proposed by the Ld. TPO in the case of Adobe India with respect to marketing support services. In such circumstances, further attribution of profits to the alleged PE i.e. Adobe India will be contrary to the settled position of law as laid down by the Hon'ble Supreme Court in the case of DIT vs. Morgan Stanley & Co. Inc. (2007) 292 ITR 416 and ADIT vs. E-Funds IT Solution Inc. (2017) 399 ITR 34 (SC). The Tribunal has also held that the very finding regarding the existence of a PE of the assessee in India is without any cogent basis. The decision of the Tribunal (supra) has also been followed by the Co-ordinate Bench for succeeding AYs in ITA No. 774/Del/2022 for AY 2017-18 and ITA No. 1929 and 1930/Del/2022 for AY 2018-19 and 2019-20 wherein the Tribunal has deleted the similar additions made by the Ld. AO on similar facts.

8. The Ld. DR did not controvert the above submissions of the Ld. AR. However, he submitted that the Revenue is in appeal before the Hon'ble Delhi High Court against the orders (supra) of the Tribunal.

9. We have considered the submissions of the representatives of the parties and perused the material on record. We find that the Co-ordinate Bench of this Tribunal has decided the impugned issue in favour of the assessee for earlier years in ITA No. 4921 to 4923/Del/2017 for AY 2010-11 to 2012-13, ITA Nos. 1978 and 1979/Del/2019 for AY 2007-08 and 2013-14 and ITA No. 55 and 7460/Del/2019 for AY 2014-15 and 2015-16 by recording its observations and findings in para 12, 13, 16 and 17 of its order as under:-

**ITA Nos. 4921 to 4923/Del/2017 for AY 2010-11 to 2012-13**

*"12. We find the above view of the Ld. CIT(A) is not sustainable in the light of the decision of Hon'ble Supreme Court as above in the case of DIT vs Morgan Stanley & Co. (supra). To the same effect is the order of the ADIT v. E-Funds IT Solution Inc. [2017] 399 ITR 34(SC), Honda Motor Co. Ltd vs. ADIT (301 CTR 601)(SC) and of the Hon'ble Delhi High Court in the case of Adobe Systems Inc. v.*

*ADIT [WP(C)2384, 2385, 2390 of 2013] and DIT v. BBC Worldwide Ltd [2011] 203 Taxman 554 (Delhi), once a transfer pricing analysis has been undertaken in respect of the Indian AE, nothing further would be left to be attributed to it as the alleged PE of Adobe Ireland and that, accordingly, would automatically extinguish the need for attribution of any additional profits to the alleged PE.*

*13. In all these cases, it has found that the transactions have been found to be at Arm's Length by the Transfer Pricing Officer in the Transfer pricing order of the AE ie. Adobe India. This is not disputed by the Revenue. In such a situation, the decision of the Hon'ble Apex Court as above applies on all fours in these cases. The Revenue has tried to distinguish the order of the Hon'ble Supreme Court decision by firstly referring by submitting that the Adobe India is performing functions which are wider in scope of the agreement entered with the assessee and in the TP study report of Adobe India. For this purpose, reliance has been placed on the order of the Ld. CIT(A) in this case for AY 2010-11. We find that the above submission by no stretch of imagination can be said to be distinguishing the decision of the Hon'ble Apex Court from being applicable from the facts of the present case. Very well understanding this proposition, the Revenue itself urged that without prejudice to the above, the judicial decision of the attribution of profit by applying FAR analysis has not been accepted by the Indian Government and the profit has to be determined by apply of provisions of DTAA rws. 10A of the Income Tax Rules, 1962. In view of the above, we are of the opinion that the decision of the Hon'ble Apex Court as above squarely applies in this case. Hence holding that since the transactions between the assessee and its Indian AE has been found to be at Arm's Length in the transfer pricing adjustment, no further attribution can be made to the PE of the appellant as claimed. Hence, this issue needs to be decided in favour of the assessee."*

*16. As regards the risk recoverable from distributors, the hypothesis that the risk is borne by Adobe India has also no basis. The documents clearly show that the collection from the customers is managed by the team Adobe Ireland. Thus, from the above, it is apparent that only on hypothesis and guess work and assigning of all sorts of imaginary motives by a few e-mails, the Ld. CIT(A) and therefore the Revenue is contending that the functions performed by Adobe India are much wider than the that as per the agreement and the transfer pricing analysis. We find that as discussed by us hereinabove these submissions are not at all cogent enough to warrant a view that the transfer pricing analysing done in the case of Adobe India does not adequately reflects functions performed and the risk assumed by the enterprise. In such a situation as held by Hon'ble Apex Court as above, there is no need to attribute any further profit as all functions and risk have been considered in the computation of Arm's Length Price in the case of Adobe India*

*17. As such, it follows that the finding of PE is also without cogent basis. Be that as it may issue of PE becomes academic and we are not engaging further into it. We have already found that functions performed by Adobe India are actually not different than the agreement and transfer pricing documentation."*

10. We further observe that the order (supra) of the Tribunal has been followed by the Co-ordinate Bench for AY 2017-18 in ITA No. 774/Del/2022. In its recent order dated 28.02.2023 for AY 2018-19 and 2010-20, the Tribunal whilst placing reliance on the order of the Co-ordinate Bench for AY 2017-18 held as under:-

**ITA Nos. 1929 and 1930/Del/2022 for AY 2018-19 and 2019-20**

“9. In the aforesaid scenario, the issue which arises for consideration is, in a case where the transaction between the assessee and its AE in India has been found to be at arm’s length, whether further profit can be attributed to the dependent agent PE in India, if at all, such a PE exists in India. In the facts of the present appeal, in assessment year 2018-19, though, the TPO has proposed transfer pricing adjustment in relation to the international transactions between the assessee and its Indian AE, however, learned DRP has deleted such adjustment. In other words, the transaction between the assessee and its Indian AE has been found to be at arm’s length. In assessment year 2019- 20, no reference was made to the TPO, which effectively means, the Assessing Officer himself accepted the transactions between the assessee and the AE to be at arm’s length.

10. Keeping in view the aforesaid factual scenario, if we examine the issue at hand, it can be seen that while deciding identical issue in assessment years 2004-05, 2006-07 and 2010-11 to 2015-16, the Tribunal in ITA Nos. 5024/Del/2017 and Ors., dated 27.07.2022 has held that when the transaction between the assessee and its Indian AE is found to be at arm’s length, no further attribution of profit can be made to the dependent agent PE in India. While considering identical issue in assessee’s own case for assessment year 2017-18, the Tribunal in ITA No.774/Del/222, dated 21.10.2022 followed its earlier decision and held as under:

“9. Undisputedly, in the transfer pricing proceedings, the TPO, in order dated 18.02.2022, has observed that the international transaction between the assessee and the Indian AE are at arm’s length and has not proposed any further adjustment, in so far as, it relates to transaction of business support services. Therefore, the question which arises for consideration is, whether in such a scenario, still, profit can be attributed to the PE in India. As we find, while deciding identical issue in assessee’s own case in preceding assessment years, the Tribunal in the order, referred to above, has held as under:

“10. Upon careful consideration, we find that the issue of attribution to profit when the transaction has been found to at Arm's Length between foreign party and the Indian AE, then no further attribution is required has already been decided by the decision of the Hon'ble Supreme Court in the case of DIT v. Morgan Stanley & Co. Inc [2007] 292 ITR 416 (SC). This aspect was very much before the Ld. CIT(A) and he has dealt with the same as under:-

"As regards determination of profits attributable to a PE in India (MSAS) is concerned on the basis of arm's length principle Article 7(2) is relevant. According to the AAR where there is an international transaction under which a non- resident compensates a PE at arm's length price, no further profits would be attributable in India. In this connection, the AAR has relied upon Circular No. 23 of 1969 issued by CBDT as well as Circular No. 5 of 2004 also issued by CBDT. [Para 29] Article 7 of the U.N. Model Convention inter alia provides that only that portion of business profits is taxable in the source country which is attributable to the PE. It specifies how such business profits should be ascertained. Under the said Article, a PE is treated as if it is an independent enterprise (profit centre) de hors the head office and which deals with the head office at arm's length. Therefore, its profits are determined on the basis as if it is an independent enterprise. The profits of the PE are determined on the basis of what an independent enterprise under

*similar circumstances might be expected to derive on its own. Article 7(2) of the U.N. Model Convention advocates the arm's length approach for attribution of profits to a PE. [Para 31] The object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India. Under article 7(2) not all profits of MSCO would be taxable in India but only those which have economic nexus with PE in India. A foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the PE in India. The quantum of taxable income is to be determined in accordance with the provisions of Act. All provisions of Act are applicable, including provisions relating to depreciation, investment losses, deductible expenses, carry forward and set-off losses, etc. However, deviations are made by DTAA in cases of royalty, interest etc. Such deviations are also made under the Act for example: Sections 44BB, 44BBA etc.). Under the impugned ruling delivered by the AAR, remuneration to MSAS was justified by a transfer pricing analysis and, therefore, no further income could be attributed to the PE (MSAS). In other words, the said ruling equates an arm's length analysis (ALA) with attribution of profits. It holds that once a transfer pricing analysis is undertaken; there is no further need to attribute profits to a PE. The impugned ruling is correct in principle insofar as an associated enterprise, that also constitutes a PE, has been remunerated on an arm's length basis taking into account all the risk-taking functions of the enterprise. In such cases nothing further would be left to be attributed to the PE. The situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a situation, there would be a need to attribute profits to the PE for those functions/risks that have not been considered. Therefore, in each case the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case."*

*11. The Ld. CIT(A) in this regard held that the argument of the appellant is that if the international transactions between the parent entity (HO) and associated entity (AE) stand accepted at an Arm's length based on FAR analysis, in that case, the question of appropriation of profit to DAPE does not arise. That his argument sans the concept of separate entity approach as provided in article 7 of India Ireland DTAA to distinguish between PE and parent entity (HO). That if the international transactions between India AE and HO have been accepted at an arm's length by TPO, it does not automatically mean that FAR of DAPE stands subsumed in the same. That it is important to distinguish between the benchmarking analysis for the transactions between HO and associated enterprise (AE) vis-avis that of HO and its PE. That it may be important to make a distinction between the FAR of the parent entity (Head Office (HO) in Ireland) and AR of the DAPE (India). Further, it is also important to note that FAR of the DAPE is distinct from FAR of the associate enterprise (AE) in India. That so, practically, it is a interplay of FAR amongst three entities i.e. parent entity (HO) in Ireland, DAPE in India and Associated Entity (AE) in India. 12. We find the above view of the Ld. CIT(A) is not sustainable in the light of the decision of the Hon'ble Supreme Court as above in the case of DIT vs Morgain Stanley & Co.(supra). To the same effect is the order of the ADIT v. EFunds IT Solution Inc.[2017] 399 ITR 34(SC), Honda Motor Co. Ltd vs. ADIT (301 CTR 601)(SC) and of the Hon'ble Delhi High Court in the case of Adobe Systems Inc. v. ADIT [WP(C)2384, 2385, 2390 of*

2013] and DIT v.BBC Worldwide Ltd.[2011] 203 Taxman 554(Delhi), once a transfer pricing analysis has been undertaken in respect of the Indian AE, nothing further would be left to be attributed to it as the alleged PE of Adobe Ireland and that, accordingly, would automatically extinguish the need for attribution of any additional profits to the alleged PE.

13. In all these cases, it has found that the transactions have been found to be at Arm's Length by the Transfer Pricing Officer in the Transfer pricing order of the AE i.e. Adobe India. This is not disputed by the Revenue. In such a situation, the decision of the Hon'ble Apex Court as above applies on all fours in these cases. The Revenue has tried to distinguish the order of the Hon'ble Supreme Court decision by firstly referring by submitting that the Adobe India is performing functions which are wider in scope of the agreement entered with the assessee and in the TP study report of Adobe India. For this purpose, reliance has been placed on the order of the Ld. CIT(A) in this case for AY 2010-11. We find that the above submission by no stretch of imagination can be said to be distinguishing the decision of the Hon'ble Apex Court from being applicable from the facts of the present case. Very well understanding this proposition, the Revenue itself urged that without prejudice to the above, the judicial decision of the attribution of profit by applying FAR analysis has not been accepted by the Indian Government and the profit has to be determined by apply of provisions of DTAA r.w.s.10A of the Income Tax Rules, 1962. In view of the above, we are of the opinion that the decision of the Hon'ble Apex Court as above squarely applies in this case. Hence holding that since the transactions between the assessee and its Indian AE has been found to be at Arm's Length in the transfer pricing adjustment, no further attribution can be made to the PE of the appellant as claimed. Hence, this issue needs to be decided in favour of the assessee.

14. We further find the above view of the Ld. CIT(A) is not sustainable in the light of the Hon'ble Supreme Court decision as above. The Ld. CIT(A) has opined that Adobe India while discharging the functions as assigned by Adobe Ireland has the right to use the intangible asset in the form of "brand, trademark and logo" but there is cost paid for the same to the assessee. Further he observed that there is persistent risk of violation of copyright of software product and unauthorized use of copies of the software product in Indian market. In this regard, he has referred to case against the particular person filed by Adobe Systems, Inc. & Ors. The Ld. CIT(A) hypothesized that Adobe Systems, Inc. & Ors. would come to know about the instances of infringement of copyright only through the local presence of Adobe India Resources. The Ld.CIT(A) further opined that the function of the India AE of identification of potential customers and continuous engagement of registered customers goes into development of market of intangibles and no compensation has been made to the Indian AE for all such functions to develop market intangible asset. From this, the Ld. CIT(A) opines that Adobe India is responsible for protecting, development & maintenance of the intangible assets (copyright, brand, patent & confidential data of customers) of Adobe group in India. Further, the Ld. CIT(A) opined that risk of receivables from distributors also exist in India but there is no compensation made for such functions. Keeping the above in view, the Ld. CIT(A) held that Adobe India is dependent PE of the assessee company and in order to compensate for the FAR assigned to DAPE, he has no reason to defer from the view of the Assessing Officer to attribute 35% of the total Revenue pertaining to India for this year.

15. Further, functions attributed to the Adobe India by the Revenue is also based upon the observations of the Ld. CIT(A) for Assessment Year 2010-11 primarily. The allegation of the Revenue is that the assessee was asked to produce dump of the emails correspondence between Adobe India and Adobe Ireland to deep dive to the activities so as to ascertain the clear cut facts to decide about PE. However, it was noted by the Ld. CIT(A) that after couple of months of gap, the assessee produced only sample certain e-mails. On the basis of these emails of few instances, the Ld. CIT(A) inferred that quotes offered by the distributors to channel partners are after discussion with Adobe India. The reasoning was that orders are delivered after seeking confirmation from Adobe India resources. Further, one of the emails is said to be demonstrating, the control and monitoring by Adobe India of distributors in meeting assigned targets. Basing upon such few e-mails, the Revenue has concluded that activities actually performed by Adobe India are wider in nature as against the activities pointed out in the contract and transfer pricing report. We find that the above observations have been cogently rebutted by the Id. counsel for the assessee. As regards the few e-mails that have been referred they are only also marked to the Adobe India personnel which has been said to be done only for the sake of keeping the Adobe India in the loop. In none of the e-mail referred Adobe India has actually provided guidance and directions regarding the quotes. This is a fiction of imagination by the Revenue. Hence, the functions attributed on the basis of these e-mails are not at all enlarging the scope of actual functions performed by the AE than as per the agreement and the transfer pricing report. The plea that the email dump has not been provided is a peculiar plea. In Adobe India T.P. adjustment no such issue has been recorded. It is common knowledge e-mail correspondence is a two way process. So when everything was found in order in Adobe India T.P. Adjustment, hence, it cannot be said that Revenue did not have complete access to all the e-mails between Adobe India and Adobe Ireland. The Ld. CIT(A) is also of view that the assets client list gives rise to in intangible assets has also no basis. No cogent case has been made out that Adobe India was provided with right to any intangible asset belonging to the assessee i.e. Adobe Ireland. The issue raised by the Ld.CIT(A) by relying upon legal dispute infringement of copy right in India being looked after by Adobe India/Adobe Ireland is also without any basis as it is Adobe USA, the IP owner which handles the legal matters relating to infringement of brand, copy right matters and other related actions to be undertaken in all jurisdiction in which the Adobe operates including India. Adobe USA is authorised in monitoring to Indian operations and their legal counsels handles the matters there from.

16. As regards the risk recoverable from distributors, the hypothesis that the risk is borne by Adobe India has also no basis. The documents clearly show that the collection from the customers is managed by the team Adobe Ireland. Thus, from the above, it is apparent that only on hypothesis and guess work and assigning of all sorts of imaginary motives by a few e-mails, the Ld. CIT(A) and therefore the Revenue is contending that the functions performed by Adobe India are much wider than the that as per the agreement and the transfer pricing analysis. We find that as discussed by us hereinabove these submissions are not at all cogent enough to warrant a view that the transfer pricing analysing done in the case of Adobe India does not adequately reflects functions performed and the risk assumed by the enterprise. In such a situation as held by Hon'ble Apex Court as above, there is no need to attribute any further profit as all functions and risk have been considered in the computation of Arm's Length Price in the case of Adobe India.

*17. As such, it follows that the finding of PE is also without cogent basis. Be that as it may issue of PE becomes academic and we are not engaging further into it. We have already found that functions performed by Adobe India are actually not different than the agreement and transfer pricing documentation.”*

*10. There is no gainsaying that factually the issue stands on identical footing in relation to preceding assessment years, as, both the Assessing Officer and learned DRP have decided the issue following their earlier decisions. That being the case, respectfully following the decision of the coordinate Bench, as referred to above, we hold that the amount received by the assessee from supply of software and automated services, are not taxable in India. The Assessing Officer is directed to delete the additions.*

*11. As discussed earlier, the factual position in the impugned assessment years are identical to past assessment years wherein the Tribunal has decided the issue. This is further evident from the fact that both the Assessing Officer and learned DRP have relied upon their earlier decisions while deciding the issue. That being the case, in our considered opinion, the issue relating to taxability of the Revenue earned from supply of software and automated services stands squarely covered in favour of the assessee by the earlier decisions of the Tribunal, referred to above.*

*12.....*

*13. Thus, respectfully following the decisions of the Coordinate Bench in assessee’s own case, as discussed above, as well as the ratio laid down by the Hon’ble Supreme Court in the decision cited before us, we delete the additions made in both the assessment years under dispute on the reasoning that the transactions between the assessee and its AE in Indian having been found to be at arm’s length, no further profit can be attributed to the PE. We make it clear, the issue relating to existence or otherwise of dependent agent PE has been left open.”*

11. For the relevant AY, the case of the assessee was not referred to the TPO by the Ld. AO and hence it can be concluded that the transaction between the assessee and Adobe India is found to be at ALP which is confirmed from the transfer pricing study and transfer pricing report of Adobe India. Considering the factual matrix of the case and respectfully following the decisions (supra) of the Co-ordinate Bench of the Tribunal for earlier AYs as well as decisions (supra) of the Hon’ble Supreme Court in Morgan Stanley & Co. Inc. and E-Funds IT Solution Inc., we are of the considered view that once transfer pricing analysis of Adobe India has been undertaken and the ALP has been determined which has been accepted by the Ld. AO, nothing further would be left to be attributed to Adobe India as the alleged PE of the assessee in India and that accordingly would extinguish the need for attribution of any additional profits to the alleged PE of the assessee. It is however to be noted that the issue relating to the

existence or otherwise of the DAPE of the assessee in the form of Adobe India is left open following the decision (supra) of the Co-ordinate Bench for AY 2018-19 and 2019-20. Accordingly, ground Nos. 1 to 2.5 of the assessee is allowed to the extent indicated above.

**Ground No. 3**

12. The next grievance of the assessee is with respect to higher rate of tax imposed on the interest income on the income tax refund. The facts of the impugned issue are that the Ld. AO levied tax on interest on the income tax refund received by the assessee during the relevant AY @ 40% (plus surcharge and cess) as per the provisions of the Act as opposed to beneficial rate of tax of 10% as per the provisions of Article 11 of the India-Ireland DTAA.

13. The Ld. AR submitted that the impugned issue now stands covered by the order of the Ld. Commissioner of Income Tax (Appeal) ("**CIT(A)**") in assessee's own case for the AY under consideration i.e. AY 2020-21 in the appeal filed by the assessee against the intimation passed under section 143(1) of the Act wherein the Ld. CIT(A) has upheld the applicability of the rate of 10% provided under Article 11 of the India-Ireland DTAA. The Ld. CIT(A), however has directed the Ld. AO to verify the claim of treaty benefit made by the assessee based on Tax Residency Certificate ("**TRC**") etc. and allow the said claim accordingly. The Ld. AR further submitted that even the Ld. DRP had directed the Ld. AO to invoke the extant rules and regulations related to the Act in this regard before completing the assessment. The Ld. AO, however, passed the final assessment order under section 143(3) of the Act in complete disregard to the directions of the Ld. DRP as well as Ld. CIT(A) taxing such income @ 40% as per the provisions of the Act. He brought to our notice that Revenue has not filed any appeal before the Tribunal against the order of the Ld. CIT(A) and hence the impugned issue has attained finality. The Ld. AR further submitted that the Ld. AO/ DRP has not disputed the applicability of the India-Ireland DTAA on the assessee

and hence prayed that the order of the Ld. AO should therefore be set aside and the impugned interest income should be brought to tax at the beneficial rate of 10% provided under the India-Ireland DTAA.

14. The Ld. DR had nothing to say against the above submission of the Ld. AR. He fairly conceded to the submissions of the Ld. AR.

15. It is an undisputed fact that the assessee is a tax resident of Ireland and hence can opt to be governed by the provisions of the India-Ireland DTAA, if more beneficial to it. The taxability of interest income earned by a tax resident of Ireland is dealt with by Article 11 of the India-Ireland DTAA which inter-alia, provides that interest arising in India and paid to a resident in Ireland maybe taxed in India, but the tax so charged shall not exceed 10% of the gross amount of the interest.

16. It is a well settled position of the law that the provision of the tax treaty shall take precedence over the Act to the extent they are more beneficial to the tax payer. By virtue of the provisions of section 90(2) of the Act, the provisions of the Act are sub-servient to the provisions of the tax treaty entered into by India with various countries. In the present case, the assessee is a tax resident of Ireland which fact has neither been disputed by the Ld. AO nor DRP. Nothing has been brought on record by the Revenue to disregard the claim of the assessee and hence in our view the assessee is rightly entitled to the beneficial rate of tax of 10% on interest as per the provisions of Article 11 of the India-Ireland DTAA. We have also perused the order of the Ld. CIT(A), Delhi – 42 for the present AY passed on 03.02.2023 in the appeal filed by the assessee before him against the intimation order of the Ld. AO passed under section 143(1) of the Act. The Ld. CIT(A) has concluded that the interest on income tax refund should be charged to tax at the beneficial rate of 10% provided under the India-Ireland DTAA subject to verification by the Ld. AO as to the entitlement of the assessee to claim DTAA benefits based on TRC etc. The relevant observations and findings of the Ld. CIT(A) are reproduced below:

*“10.5 Regarding taxability of interest on income-tax refunds under the India-Ireland tax treaty, it is submitted that taxability of interest income earned by a tax resident of Ireland is dealt with by Article 11 of the India-Ireland tax treaty which inter alia provides that interest arising in India and paid to a resident of Ireland may be taxed in India, but the tax so charged shall not exceed 10% of the gross amount of the interest.*

*10.6 The interest on income tax refund is covered under Article 11 as the term "interest" used in the said article has been defined in paragraph 4 as "income from debt claims of every kind. Hon'ble Supreme Court in the case of Union of India v. Tata Chemicals [2014] 363 ITR 658 (SC) has held that income-tax refund payable to the assessee is a 'debt owed and payable by the Government. Thus, prima-facie, the interest on income tax refund should be chargeable to tax at 10% under Article 11 of the India-Ireland tax treaty.*

*10.7 Moreover, it is observed that u/s 143(1) only an exhaustive list of adjustments has been prescribed in the Act. The said list only contains prima facie adjustments which can be made in respect of something obvious or deductible from the return of income for which there can be no doubt or debate. In the present case, it is observed that applying a different rate of taxation than what claimed by an assessee and denying the treaty benefit is not the adjustment which pertain to any arithmetical error, any incorrect claim, any disallowance of loss/ expenditure/ deduction. Accordingly, the adjustment i.e. subjecting the interest income at normal rate as against the treaty rate is not within the scope or purview of section 143(1) of the Act.*

*10.8 The AO is therefore, directed to verify the claim of treaty benefit made by the appellant and if the appellant is found to be eligible for treaty benefit, based on tax residency certificate etc., charge the returned FTS and interest income at the treaty rate as against the normal rate. This ground of appeal is partly allowed.”*

17. We are in agreement with the findings of the Ld. CIT(A). However, in our humble opinion, claim of the treaty benefit made by the assessee is not in dispute at all at this stage and hence no verification is required by the Ld. AO with respect to the same. In the light of the above legal position and factual matrix of the case, we set aside the order of the Ld. AO on the impugned issue and direct him to apply the tax rate of 10% on interest on income tax refund as per the provisions of Article 11 of the India-Ireland DTAA. Accordingly, ground No. 3 is decided in favour of the assessee.

#### **Ground No. 4**

18. This ground relates to grant of short credit of TDS by the Ld. AO amounting to Rs. 2,48,86,907/- whilst computing the tax liability of the assessee for the year under consideration. We direct the Ld. AO to verify the claim of the assessee and grant TDS credit accordingly as per the law.

**Ground No. 5**

19. In this ground the assessee has challenged the erroneous levy of an additional tax of Rs. 4,58,03,533/- by the Ld. AO on 'Special Income other than Section 115BBE' whilst computing the tax liability of the assessee for the year under consideration. The Ld. AR submitted that no such income exists and that no discussion regarding the same has been made in the assessment order. Perusal of the assessment order supports the contention of the assessee. Accordingly, we direct the Ld. AO to verify the said claim of the assessee and grant relief to the assessee subject to the outcome of his verification.

**Ground No. 6**

20. Lastly, the assessee has challenged the initiation of penalty proceedings by the Ld. AO under section 270A of the Act. This ground being premature need not be adjudicated.

21. In the result, the appeal of the assessee is treated as allowed for statistical purposes subject to the directions contained in para 11, 18 and 19 above.

**Order pronounced in the open court on 12<sup>th</sup> October, 2023.**

**sd/-**

**(G.S. PANNU)  
PRESIDENT**

**sd/-**

**(ASTHA CHANDRA)  
JUDICIAL MEMBER**

Dated: 12/10/2023

**Veena**

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2. Respondent
3. CIT
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ASSISTANT REGISTRAR

## ITAT, New Delhi

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| Date on which the typed draft is placed before the Other Member                       |  |
| Date on which the approved draft comes to the Sr. PS/PS                               |  |
| Date on which the fair order is placed before the Dictating Member for pronouncement  |  |
| Date on which the fair order comes back to the Sr. PS/PS                              |  |
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