

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI****(DELHI BENCH 'D' NEW DELHI)****BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER****AND****SH. YOGESH KUMAR U.S., JUDICIAL MEMBER****ITA No. 514/Del/2021, (A.Y. 2017-18)**

AB Sciex Pte Ltd. Block 33, 46 Marsiling Industrial Estate, Singapore. 739256 <b>PAN: AANCA1192P</b>	Vs.	ACIT Circle International Taxation 1(1)(1) New Delhi
<b>Appellant</b>		<b>Respondent</b>

**ITA No. 1968/Del/2022, (A.Y. 2018-19)**

AB Sciex Pte Ltd. Block 33, 46 Marsiling Industrial Estate, Singapore. 739256 <b>PAN: AANCA1192P</b>	Vs.	ACIT Circle International Taxation 1(1)(1) New Delhi
<b>Appellant</b>		<b>Respondent</b>

**ITA No. 1969/Del/2022, (A.Y. 2019-20)**

AB Sciex Pte Ltd. Block 33, 46 Marsiling Industrial Estate, Singapore. 739256 <b>PAN: AANCA1192P</b>	Vs.	ACIT Circle International Taxation 1(1)(1) New Delhi
<b>Appellant</b>		<b>Respondent</b>

Assessee by	Shri Ajay Vohra, Sr. Adv & Ms. Sucheta Kanodia, CA
Revenue by	Shri vizay B. Vasanta, CITDR

Date of Hearing	18/03/2024
Date of Pronouncement	21/03/2024

**ORDER****PER YOGESH KUMAR, U.S. J M:**

The above three Appeals are filed by the assessee assailing the orders of CIT(A) for Assessment Year 2017-18, 2018-19 and 2019-20. In the earlier occasion, the captioned appeals have been heard by the Coordinate Bench of the Tribunal, vide order dated 29/04/2022 (A.Y 2017-18) and vide order dated 26/12/2022 (A.Y 2018-19 and A.Y 2019-20), partly allowed the Appeals of the assessee. There were two issues arose for consideration at that point of time before the Bench, first whether the assessee had Permanent Establishment ('PE' for short) in India and the second whether the subject transaction was at an Arm's Length and if so whether any profit could be attributed to the assessee. The coordinate Bench of the Tribunal has decided only on the issue of existence of PE, but not adjudicated the part of attribution of profit as the same was academic.

2. As against the orders of the Tribunal dated 26/12/2022 and 29/04/2022 for A.Y 2017-18 to 2019-20, the Department of Revenue approached Hon'ble High Court of Delhi in ITA No. 800/2023 & CM APPL No. 66565/2023, ITA No. 801/2023 & CM APPL No. 66672/2023 and ITA No. 803/2023 and CM Appeal No. 66727/2023. The Hon'ble High Court, vide order dated 21/12/2023 noted that the Tribunal has dealt only with first issue and concluded that the assessee neither fixed place (PE) nor a dependent PE in India as the Tribunal reached the said conclusion, observed that the other issues was academic. Further observed that as the assessee had raised an alternative plea concerning the second issues, without disturbing the orders of the Tribunal and with the consent of the parties, remitted the matter to the Tribunal for rendering a decision with regard to second issue i.e. attribution of profit. The Relevant portion of the order of the Hon'ble High Court is reproduced as under:-

*7. The record shows that two issues arose for consideration before the Tribunal. First, whether the respondent/assessee had a Permanent Establishment (PE) in India. Second, whether the subject transaction was at Arm's Length and, if it was so, whether any profit could be attributed to the respondent/assessee.*

8. *The Tribunal has dealt only with the first issue and concluded that the respondent/assessee neither a fixed place PE nor a dependent agent PE in India. Because the Tribunal reached this conclusion, it observed that the other issue was academic.*

9. *The record discloses that the respondent/assessee had raised an alternative plea concerning the second issue.*

10. *In our opinion, it would save time and costs if the Tribunal were to render a view with regard to the second issue as well, which is broadly referred to hereinabove.*

11. *Therefore, without disturbing the impugned orders passed by the Tribunal, with the consent of counsel for the parties, the above-captioned matters are remitted to the Tribunal for rendering a decision with regard to the second issue.*

12. *It is made clear that whichever party is aggrieved by the impugned order, as well as the order passed upon remand by the Tribunal, will have liberty to approach the court by way of a statutory appeal.*

13. *Furthermore, since the instant appeal concerned the impugned orders passed by the Tribunal as and when the appellant/revenue files an appeal, the period spanning between the date when the above-captioned appeals were instituted in this court and the date when the Tribunal passes the order post remand, will not be factored in while calculating the period of limitation.*

14. *The appeals are disposed of in the aforesaid terms.*

15. *The Tribunal is requested to dispose of the matter at the earliest, though not later than three (3) months from today.*

16. *Parties will act based on the digitally signed copies of the order.”*

3. Now, the only issue to be decided by the Bench is regarding attribution of profit to the PE. The assessee has raised the said ground in Ground No. 5, 6 & 7 in the Appeal Memo which reads as under:-

*“Grounds with respect to attribution of profits to the alleged PE  
Ground 5: The Ld. AO and the Hon'ble DRP grossly erred in law, in attributing profits to the alleged PE on an unrealistic and ad-hoc basis which are in complete violation of the various legal principles, applicable provisions of DTAA (Double tax Avoidance Agreement) and international guidance set out in this regard.*

*Ground 6: The Ld. AO and the Hon'ble DRP grossly erred in law in ignoring the jurisprudence of the Hon'ble Supreme Court in the case of DIT vs. Morgan Stanley [2007] 7 SCC 1 holding that once the AE is remunerated on arm's length basis, there should be no further attribution.*

*Ground 7: On the facts and circumstances of the case, the Ld. AO/ Hon'ble DRP erred in attributing excessive profits to the alleged PE on an ad-hoc and arbitrary basis, by not considering commercial and economic factors governing the business of the Appellant and completely ignoring all submissions of the Appellant in this regard. In doing so, the Ld. AO erred in:*

*7.1 Applying an ad-hoc methodology to attribute unreasonable profits to the alleged PE. In this regard, the AO erred in benchmarking the profits attributable to the alleged PE with the resale discounts agreed by the Appellant with its AE, DHR India, under a buy-sell distribution arrangement, which is a controlled transaction;*

*7.2 Ignoring the significantly higher level of functions performed, assets employed and risks assumed by DHR India under the distribution arrangement versus those alleged to have been performed by the PE, leading to excessive and unreasonable profits attribution.”*

4. The Ld. Counsel for the assessee filed a written submission by finding error in the approach adopted by the Ld. A.O. with respect to profit attribution which is reproduced as under:-

*“Use of resale discount of 46% provided to DHR India under Buy-Sell segment as the starting point of attribution is not correct*

*DHR India does not make 46% gross profit in the buy sell segment as owing to the following, DHR India bears custom duties on imports in the buy sell segment- the cost of which has not been considered by the Assessing Officer, DHR India bears the warehousing cost in the buy sell segment - the cost of which has not been considered by the Assessing Officer ,Certain amount of discount received by DHR India is also pushed down to ultimate customers which enables sales which has been completely ignored by the Assessing Officer , DHR India bears the risk / cost of holding working capital which has gone unconsidered, under AO's methodology*

*It is humbly submitted that the comparison made by AO between the buy sell segment and commission segment tantamount to comparison between two controlled transactions which is extremely incorrect*

- Impractical to equate the global profitability of AB Sciex which performs various functions like manufacturing, R&D with the profitability that alleged PE which at the most helps in sales should earn for very limited functions.*
- Reliance placed by Ld. AO on Hon'ble Delhi ITAT order in the case of Rolls Royce Plc. v. DDIT (2008) 113 TIJ 446 is*

*fallacious, misplaced and cannot be accepted in the present case*

<i>In the case of Rolls Royce Plc. v. DDIT (2008) 113 TIJ 446</i>	<i>Present case</i>
<i>Rolls Royce Plc. had a PE in India and the same was upheld by the Hon'ble ITAT</i>	<i>The Appellant does not have a PE in India (As Held by Hon'ble Tribunal and such findings were not disturbed by Hon'ble High Court)</i>
<i>As per para 24.1 of the order of Delhi ITAT, in case of a PE, total profits of the enterprise should be apportioned on the basis of two factors: (i) Identification of activities carried on through the PE (using the functional and factual analysis) (ii) the remuneration of any such dealing with reference to the functions performed, assets used and risk assumed by the enterprise through the PE.</i>	<i>Since in the present case the functional analysis carried out in step 1 by the Hon'ble Tribunal was already answered in negative that the India entity did not perform any additional functions that would lead to creation of a PE in India, the remuneration for the same would ideally be NIL Thus, the amount of profits already offered to taxes by the Indian entity should be considered to be at arm's length and no further attribution is required.</i>

Owing to the following:

*Methodical benchmarking analysis submitted by the Appellant on a without prejudice basis*

*DHR India has received the following remuneration from AB Sciex w.r.t. provision of services which were alleged to create a PE in India:*

- *DHR India has received the following remuneration from AB Sciex w.r.t. provision of services which were alleged to create a PE in India:*
  - (i) *Commission of 9% under the Sales Commission Agreement*
  - (ii) *Cost-plus arm's length markup(10%) under the Marketing Support Service Agreement*

*DHR India offered the above incomes to tax in India, which ought to be the maximum remuneration/ attribution for the functions performed by it, since the Appellant does not have a PE in India.*

- *Based on the functional, assets, and risk analysis of the alleged PE, the Appellant has undertaken a methodological search on public databases to identify independent distributors in India engaged in sale of similar products.*
- *The Gross Profit Margin ('GPM') earned by independent distributors were adjusted to bring their GPM comparable to the commission earning entities considering the alleged PE was not performing the functions w.r.t.: (i) Inventory; (ii) Credit holding; and (iii) Custom duty. Results are provided below:*

<i>Assessment Years</i>	<i>Adjusted Average GPM independent companies</i>
<i>2017-18</i>	<i>13.64%</i>
<i>2018-19</i>	<i>11.80%</i>
<i>2019-20</i>	<i>15.50%</i>

*The effective commission rate (using commission and cost-plus arm's length markup) earned by DHR India being 17% is falling above the arm's length average margin earned by comparable companies. Since the AE has already been remunerated at arm's length, no further profits ought to be attributed.”*

5. The Ld. Counsel for the Assessee has also relied on the Judgment of Hon'ble Supreme Court in the case of Director of Income Tax (International Taxation Vs. Morgan Stanley & Company (2007) 162 Taxman 165 Supreme Court. Further submitted that, during the TP assessment proceedings of the assessee for Assessment Year 2018-19, the Ld. TPO did not draw any adverse inference with respect to the international transaction of inter alia sale of goods, business support services and distribution and marketing service. The Ld. Counsel has also relied on Judgment of Hon'ble Supreme Court in the case of ACIT Vs. eFunds IT Solution and ors: 399 ITR 34 and also the Judgment of Jurisdictional High Court in the case of Adobe Systems Incorporated Vs. ADIT 292 CTR 407 (Del). The Ld. Counsel has also submitted that for the Assessment Year 2015-16 and 2018-19, the Revenue has accepted the Arm's Length nature of the functions of non-resident assessee and has not attributed any income to the alleged PE of the assessee in non-resident, therefore, sought for deciding the issue in favour of the assessee.

6. Per contra, the Ld. Departmental Representative has filed a written submission which is reproduced as under:-

*“11. In this regard as seen from the above assessment order, the transactions between the assessee and its AE are reported to be at arm's length with respect to the reported transactions as per the Transfer Pricing documentation. The functions/activities as performed by the assessee's AE, DHR India as PE of the assessee are additional functions/services such as DHR India acting as an Indian representative of the assessee company, maintains inventory warehouse in its premises, habitually exercised a predominant role in negotiating and concluding of contracts, for which no attribution has been made by the assessee since the assessee all along held that it does not have any PE in India. In view of the above, once it is held that the assessee has a PE in India, there is requirement for attribution of profits to the PE of the assessee, namely DHR India for the additional functions/activities and services (as PE) performed by it.*

*12. Regarding the rate of attribution, the assessing officer has taken support from decision of Hon'ble Delhi ITAT in the case of Rolls Royce P/c. v. DDIT (2008) 113 TIJ 446, wherein it was held that 35% of profits on sale of equipment supplies can be attributed to the PE. Accordingly, the AO rightly attributed 29% of the total profits earned from supplies as profit of the AE considering the global net profit rate of 9.5% as provided by the assessee.”*

The Ld. Departmental Representative relying on the findings of the A.O. sought for dismissal of the Grounds of the assessee.

7. We have heard both the parties and perused the material available on record. It is seen from the record the assessee has raised alternative plea before the A.O. without prejudice to the claim of the assessee that the assessee had no permanent Establishment (PE) in India the submission of the assessee before A.O. is as under:-

*"1. without prejudice, no further profits would be attributable to the alleged PE in India if DHR India is remunerated at arm's length price. Without prejudice to the Appellant's plea to the point that DHR India cannot be construed as its PE in India, it is respectfully submitted that DHR India is regularly assessed to tax in India and complying with the transfer pricing reporting, which Inter-alia includes reporting of transactions with the Appellant. Arm's length nature of DHR India's transactions with the Appellant has not been disputed so far in case of PHR India's transfer pricing assessment. Since arm's length nature of transactions between the Appellant and DHR India has not been disputed, no further profits would be attributable even if it is alleged that DHR India constitutes PE of the Appellant. This position has been settled by the decision of Hon'ble Supreme Court in the case of DIT vs. Morgan Stanley [2007] 7 SCC1."*

8. The said plea of the assessee has been rejected by the A.O. in following manners:-

*"(v) The next contention of the assessee is that since arm's length of nature of transactions between the assessee and DHR India is not disputed, no further profits would be attributable even if it is alleged that DHR India constitutes PE of the assessee/ The assessee quoted*

*Supreme Court decision in the case of Morgan Stanley that there is no justification to attribute any further profits to such PE it has supposedly remunerated DHR India at Arm's Length.*

*However from a conjoint reading of the discussions in preceding paragraphs along with the terms of the Contracts between the assessee and DHR India it is clearly established that DHR India was undertaking activities/ functions that were beyond the scope of the said commission agreement. Hence, it cannot be said that DHR India has been adequately compensated at arm's length. Further, even if no adverse inference is drawn by the Transfer Pricing officer in the case of DHR India on the arms length nature of the commission transaction between the assessee and DHR India, it was not possible for the TPO to comment on the additional functions carried out by DHR India in the capacity of the dependent agent PE of the assessee in India. Furthermore, the additional functions performed by DHR India would also not have been reported by DHR India in its Form 3CEB and TP study. Hence, the arm's length transaction and no further attribution argument of Morgan Stanley Case cannot be relied upon by the assessee in the present case.*

*It is pertinent to mention here that the case of neither the assessee company nor its PE, DHR India has been referred to the TPO.*

*(vi) Lastly the assessee contended that employees referred to in the Statement recorded u/s 131 viz Himanshu Tyagi and Chhaya Warang are employees of DHR India.*

*The undersigned also maintains that the above mentioned employees are employees of DHR India, and since DHR India is acting as PE of the assessee in India, the employees are working for AB Sciex only.*

Finally the Undersigned would want to reiterate the fact that PRINCIPLE OF NATURAL JUSTICE has been steadfastly adhered to by the undersigned by giving multiple opportunities to the assessee to raise its grounds. The excerpts of the Statement u/s 131 recorded has also been submitted to the assessee on which any objection raised by the assessee has been raised and disposed herein.

### **Attribution of profits to the PE**

10. The assessee company submitted that DHR India has been remunerated for the activities in the following way:

<i>Nature of services rendered by DHR India</i>	<i>Amount (Rs.)</i>
<i>Business Support Services</i>	<i>12,81,84,679</i>
<i>Distribution and Marketing Services</i>	<i>14,09,47,255</i>
<i>Total</i>	<i>26,91,31,943</i>

Apart from aforesaid transactions, during the year ended 31st March 2017, DHR India made payment towards certain expenses amounting to Rs.6,52,57,904/- on behalf of the assessee company. The said expenses were recovered by DHR India from the assessee.

11. The above activities are very limited in scope and are solely related to providing services to Indian Customers and acting as a communication channel. But this order has described that DHR India was performing many activities beyond the mandate referred to in the services mentioned above. For such activities DHR India has not been remunerated and such activities have led to the creation of a PE of the assessee company in India and such PE is required to be attributed a profit. The assessee company has submitted in its submission dated 17.12.2019 that even in Direct Sales of Equipment to Indian Parties, DHR Holding India Pvt. Ltd provide services to the customers

*such as sales support, after sales support, warranty services and post warranty services.*

*In view of the above, the profit is required to be attribute to the deemed PE of the assessee as held in this order on basis of assets, risks and functions performed by DHR India (dependent Agent).*

9. During the relevant Assessment Years under consideration, the Ld. A.O. observed that the DHR India constitutes a fixed place PE and also a dependent agent PE of the Assessee in India. The Ld. A.O. attributed profits to the alleged PE of the Assessee i.e. DHR India by using the following methodology.

#	<i>Particulars</i>
1	<i>Direct sales made by the Company to India customers including AMC income as provided by the Assessee was considered</i>
2	<ul style="list-style-type: none"> <li data-bbox="467 1159 1433 1327">➤ <i>Resale discount of 46% provided to DHR India under Buy-Sell segment was considered as the gross profit earned by the alleged PE for the commission segment</i></li> <li data-bbox="467 1333 1433 1501">➤ <i>Total remuneration on sales earned by DHR India through provision of support service (i.e. commission of 9% and cost-plus 10% mark up) was converted to an equivalent return on sales of 17%.</i></li> <li data-bbox="467 1507 1433 1537">➤ <i>Net attribution was worked out to 46%-17%=29%.</i></li> </ul>
3	<i>Global profitability rate (9.5%) was applied to the effective remuneration expected to be earned in step 3 above.</i>

10. It is the claim of the Assessee that the aforesaid approach adopted by the Ld. A.O. for attribution of profit to the alleged PE of the Assessee is flawed due to the following reasons:-

*“DHR India does not make 46% gross profit in the buy sell segment as owing to the following,*

*DHR India bears custom duties on imports in the buy sell segment- the cost of which has not been considered by the Assessing Officer,*

*DHR India bears the warehousing cost in the buy sell segment - the cost of which has not been considered by the Assessing Officer,*

*Certain amount of discount received by DHR India is also pushed down to ultimate customers which enables sales which has been completely ignored by the Assessing Officer,*

*DHR India bears the risk / cost of holding working capital which has gone unconsidered, under AO's methodology.*

11. The Ld. A.O. while making the addition relied on the decision of the Delhi ITAT in the case of Rolls Royce Plc. (supra), in our humble opinion the approach of the A.O. was misplaced. In the case of Rolls Royce Plc (supra), the Rolls Royce Plc. had a PE in India and the same was upheld by the Co-ordinate Bench of the Tribunal. Further, in the said order of the Tribunal as per para 24.1, in case of a PE, total profits of the enterprise should be apportioned on the basis of two factors: (i) Identification of

activities carried on through the PE (using the functional and factual analysis) (ii) the remuneration of any such dealing with reference to the functions performed, assets used and risk assumed by the enterprise through the PE. Where as in the present case at hand the Assessee does not have a PE in India (as held by Tribunal and such findings were not yet disturbed by Hon'ble High Court. Since in the present case, the functional analysis carried out in step 1 by the Tribunal was already answered in negative that the India entity did not perform any additional functions that would lead to creation of a PE in India, the remuneration for the same would ideally be NIL. Thus, the amount of profits already offered to taxes by the Indian entity should be considered to be at arm's length and no further attribution is required.

12. Apart from the above it is also to be noted that the effective commission rate (using commission and cost + arm's length mark up) earned by the DHR India is as 17% as claimed by the Assessee which is falling above the arms length average margin earned by comparable companies. The Assessee has also contended that,

- DHR India has received the following remuneration from AB Sciex w.r.t provision of service which were alleged to create a PE in India:
  - (i) Commission of 9% under the Sales Commission Agreement
  - (ii) Cost-plus arm's length mark up (10%) under the Marketing Support Service Agreement

DHR India offered the above incomes to tax in India, which ought to be the maximum remuneration/attribution for the functions performed by it, since the Assessee does not have a PE in India.

- Based on the functional, assets and risk analysis of the alleged PE, the Assessee has undertaken a methodological search on public databases to identify independent distributors in India engaged in sale of similar products.
- The Gross Profit Margin ('GPM') earned by independent distributors were adjusted to bring their GPM comparable to the commission earning entities considering the alleged PE was not performing the functions w.r.t. (i) Inventory; (ii) Credit holding; and (iii) Custom duty Results are provided below:

Assessment Years	Adjusted Average GPM independent companies
2017-18	13.64%
2018-19	11.80%
2019-20	15.50%

13. In view of this matter, since the AE has already been remunerated at arm's length, no further profit ought to be attributed to the alleged PE of the Assessee in India, this view is supported by the decision of the Hon'ble Supreme Court in the case of Director of Income Tax (International Taxation Vs. Morgan Stanly and Company (2007) 162 Taxman 165 Hon'ble Supreme Court, wherein it is held as under:-

*“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 I.T. Act. All provisions of I.T. 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 I.T. Act (for example: Sections 44BB, 44BBA etc.). Under the impugned ruling delivered by the AAR, remuneration to MSAS was justified by a transfer pricing analysis and. therefore, no further income could be attributed to the PE (MSAS). In other words, the said ruling equates an arm's length analysis (ALA) with attribution of*

*profits. It holds that once a transfer pricing analysis is undertaken; there is no further need to attribute profits to a PE. The impugned ruling is correct in principle insofar as an associated enterprise, that also constitutes a PE, has been remunerated on an arm's length basis taking into account all the risk-taking functions of the enterprise. In such cases nothing further would be left to be attributed to the PE. The situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a situation, there would be a need to attribute profits to the PE for those functions/risks that have not been considered. Therefore, in each case the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case. Lastly, it may be added that taxing corporates on the basis of the concept of Economic Nexus is an important feature of Attributable Profits (profits attributable to the PE)."*

14. The Judgment of Morgan Stanly (supra) has been followed and reiterated in the subsequent decisions rendered in eFunds IT Solution and ors 399 ITR 34 and Honda Motor Co. Ltd. Japan Vs. ADIT order dated 14/03/2018 in Civil Appeal No. 2833/2018.

15. The Hon'ble Delhi High Court in the case of Adobe Systems Incorporated Vs. ADIT: 292 CTR 407(Del) held that in situation where the dependent agent has not been remunerated at arm's length, adjustment can only be made in the transfer pricing

assessment of the dependent agent and there could be no addition in the hands of the non-resident (which is held to have a PE in India in the form of the dependent agent). The relevant observations are reproduced hereunder:-

*25. We may also mentioned that according to the A.O, the profits attributable to the activities carried out by Adobe India area to be ascertained by PSM as, according to him the Cost Plus method used by Adobe India for determining the ALP doe s not fairly capture the profits which could legitimately be taxed under the Act. In our view, the question as to which is the correct method of determining the ALP can only be debated in proceedings relating to the assessment of Adobe India. 26. The fact that the A.O. has not succeeded in persuading the DRP to accept his point of view, cannot possibly provide him a reason to now try and assess profits calculated on PSM in the hands of the Assessee.”*

16. Considering the above facts and legal position, we hold that no business profits are attributable to the alleged PE of the Assessee in India. In the result, the second issue which was remanded by the Hon'ble High Court of Delhi is decided in favour of the Assessee.

17. In the result, the Appeals filed by the Assessee are allowed.

**Order pronounced in the open court on 21<sup>st</sup> March, 2024**

Sd/-

**(SHAMIM YAHYA)**  
**ACCOUNTANT MEMBER**

Date:- 21.03.2024

Sd/-

**(YOGESH KUMAR U.S.)**  
**JUDICIAL MEMBER**

**\*R.N, SR.P.S\***

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ITAT, NEW DELHI