

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT  
AND  
SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER**

ITA Nos.1408, 1409 & 1410/Del/2023  
Assessment Years: 2017-18, 2018-19 & 2019-20

DCIT, Circle-3(1)(1), Intl. Taxation, New Delhi	<b>Vs.</b>	Ricardo UK Ltd., C/o- Bhatia & Bhatia CAs, 81, Hemkunt Colony, Opp. Nehru Place, New Delhi
<b>PAN :AAECR4867R</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	Sh. Anant Bhatia, CA; Ms. Palak Agnihotri, CA & Ms. Shrishti Jain, CA
Department by	Shri Ashwini S., Sr. DR

Date of hearing	16.05.2024
Date of pronouncement	30.05.2024

**ORDER**

**PER BENCH:**

Captioned appeals by the Revenue concerning a single assessee arise out of three separate orders of learned Commissioner of Income Tax (Appeals)-43, New Delhi, pertaining to assessment years 2017-18, 2018-19 and 2019-20.

2. Though, various grounds have been raised by the Revenue in the memorandum of appeal, however, the solitary issue arising

for consideration is in relation to taxability of amount received for provision of testing services to clients/customers in India.

3. Briefly, the facts common in all the assessment years are, the assessee is a non-resident corporate entity incorporated in United Kingdom (UK) and is a tax resident of UK. As observed by the Assessing Officer, the assessee is a global, world class, multi-industry, engineering and technology programmes provider to automotive, transportation, defense and energy industries. He has observed that the assessee was established in 1915 and currently it employs large number of people globally focused on high efficiency, low emission, class-leading product innovation and enabling client to employ the most viable transmission system. He has further observed that assessee's client list includes world's major transportation, Original Equipment Manufacturers (OEM), supply chain organizations, energy companies, financial institutions and governments. As observed by the Assessing Officer, in the assessment year under consideration, the assessee provided testing services to its clients and customers in India by conducting feasibility analysis of its transmission systems designed for automobiles. The company tested prototypes

designed by Indian automobile clients, their viability and feasibility under various conditions. Such testing simulation was carried out by the company at its technical centre in UK. Some of the key customers of the assessee during the year in India are, Mahindra & Mahindra Limited, Ashok Leyland Limited, Tata Motors Limited, Greaves Cotton Limited, Ford India Private Limited, etc.

4. The Assessing Officer observed that, though, the assessee had received substantial amounts while providing testing services, however, it has not offered them to tax claiming that such receipts are not taxable in India. On verification of records, the Assessing Officer found that in assessments years 2011-12 to 2016-17, the Assessing Officer has held that the assessee had business connection as well as Permanent Establishment (PE) in India in the form of its domestic subsidiary, M/s. Ricardo India Pvt. Ltd. Accordingly, in those assessment years, the Assessing Officer has computed income of the assessee applying Rule 10 of Income Tax Rules, 1962 by adopting global net profit ratio and attributing 50% of the same to the PE in India. Based on the approach adopted in the past assessment years, the Assessing

Officer issued a show-cause notice to the assessee seeking an explanation, as to why M/s. Ricardo India Pvt. Ltd. should not be considered as a PE in India and the profit attributable to such PE should not be computed based on net global profit ratio and 50% thereon should not be attributed to the PE. In response to said show-cause notice, the assessee submitted that the entire testing/simulating services were carried out by the company at its technical centre in UK. No services were referred to the customers from the Indian office of the PE. It was submitted that the PE, if at all, was nowhere involved in the services rendered.

5. Without prejudice, the assessee submitted that since the Indian PE has been remunerated on an arm's length basis, no further profit can be attributed to the PE. In support of such contention, the assessee relied upon the decision of the Hon'ble Supreme Court in case of DIT Vs. M/s. Morgan Stanley & Co., (2007) 292 ITR 416. The Assessing Officer, however, was not convinced with the submissions of the assessee. Holding that the factual matrix relating to the issue in the impugned assessment year is identical to the past assessment years, he followed the decisions of learned Commissioner (Appeals) passed in the past

assessment years and held that Ricardo India Pvt. Ltd. constitutes PE of the assessee in India. Accordingly, he attributed 50% of global net profit ratio to the PE in India. Against the assessment orders so passed, the assessee preferred appeals before learned first appellate authority.

6. Noticing that while deciding assessee's appeals in the past assessment years, the Tribunal has decided identical issue in favour of the assessee, learned first appellate authority deleted the additions by holding that when Indian PE has been remunerated at arm's length, no further profit can be attributed to the PE.

7. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon. The short issue arising for our consideration is on the taxability of the amounts received by the assessee from Indian clients/customers towards testing/simulation. A perusal of the assessment orders would make it clear that the issue in dispute is a legacy issue continuing from past assessment years. In fact, based on the decisions taken by the Assessing Officer in assessment years 2011-12 to 2016-17,

he has proceeded to frame assessments for the impugned assessment years. To conclude that there is parity of facts on the disputed issue between the earlier assessment years and the assessment years under dispute, the following observations of the Assessing Officer would suffice:

*“9. The reply of the assessee is duly considered. The contents of the reply filed by the assessee show that it has nothing to say new in this regard. Ld. CIT(A) has already confirmed the following:*

- (a) Existence of PE in India;*
- (b) Application of Global Net Profit Ratio;*
- (c) Attribution of net profits @ 50%, applicable to Indian income.*

*It is a matter of fact that the revenue has accepted the order of CIT(A) on merits in earlier assessment years. In the present year, the assessee has not been able to establish the fact the factual matrix of the current year is different from earlier assessment years. Hence, it is duty bound by the said directions as per Principle of Judicial Discipline in cases where the facts and circumstances in the present year are same with that of earlier assessment years. Further, undersigned has to maintain the consistency, on a year on year basis on the same factual matrix of the case, unless by an order of superior authorities there is any variation in the same. Hence, the contention of the assessee is not acceptable. Therefore, the undersigned has to accordingly proceed further for completion of assessment proceedings.*

*9.2 As a first step, the global net profit ratio has to be computed. The Global net profit ratio is computed as under (from the global audited financials of the assessee):*

Amount (in pounds'000) for F.Y. 2016-17

<i>Revenue (A)</i>	<i>1,86,931</i>
<i>Other Income (B)</i>	<i>8,736</i>
<i>Total receipts/Income as per books</i>	<i>1,95,767</i>
<i>Profit on ordinary activates before taxation (C)</i>	<i>27,759</i>
<i>Net Profit Ratio %</i>	<i>14.18%</i>

9.3 Second step is to compute the business income arising from India. The same is computed as under:

Indian Revenue X Global Net Profit Ratio = Net Profit on Indian revenue.

Rs.42,80,64,623 X 14.18% = Rs.6,06,99,564/-

9.4 Last step is to assess the profits attributable to India on the Indian revenue earned during the year. Since, it did not maintain any India specific books of A/s or Audited A/c, therefore, the global net profit has been considered following the provisions of Rule 10 of the I.T. Rules, 1962. Considering the fact and circumstances and nature of business conducted by the assessee, the 50% of the above business profit is considered to be fair attribution to Indian operations, i.e. Rs.6,06,99,564/- \* 50% = Rs.3,03,49,782/-, which is the taxable business income of the assessee in India. The same will be taxed @ 40% plus applicable surcharge and education cess.

8. Further finding parity of facts between the earlier assessment years and the impugned assessment years, learned first appellate authority has decided the issue in favour of the assessee, observing as under:

*“5.4 Further placing reliance on the Article 7 of DTAA, Amadeus Global Travel Distribution S.A. Vs. DCIT 113 TTJ 767 (Del.) by the coordinate Bench of the Tribunal which has been affirmed by the Hon’ble Delhi High Court in ITA 689/2011 & 795-797/2011 by relying upon the decision held in case of DIT Vs. Galileo International Inc. 224 CTR 251 (Del.) wherein it is held as under:*

*“it is to be noted that even in the first assessment framed by the Assessing Officer, the entire expenses in the form of remuneration paid to AIPL was held as allowable deduction and was reduced while computing the income of appellant if that be the case, the income attributable to PE in India being less than the remuneration paid to the dependent agent, it extinguishes the assessment and requires no further exercise for computation of income.”*

*There is no change in the fact of the case and the operations of the appellant in India as well as globally. Hence, I agree with fact that the case of the Appellant covers within the order of the Honorable*

*Bench of ITAT, Delhi (ITA Nos.3967, 3968 & 3969/Del/2017 ITA Nos.4909, 4910 & 4911/Del/2018 ITA No. 4756/Del./2019 ITA No.416/Del/2020), dated 17.02.2021 and there is no point disagreeing with the directions followed by the Hon'ble ITAT in appellant's case.*

5.5 Further, if I examine in the light of the profits attributed to PE and commission/remuneration paid on arm's length basis, commission/remuneration paid in all the cases is more than profit attributed to the PE:

<b>Profit Attributed to India PE</b>	<b>Commission/remuneration paid on arm's length basis</b>
3,03,49,782	5,23,37,973

*Hence, I am accepting the directions given by the Hon'ble ITAT i.e. when RIPL, a domestic subsidiary company, has already been remunerated at arm's length, no further attribution of profit to PE would be warranted. Even otherwise, when I deduct the remuneration/commission paid to RIPL from the amounts of profit attributed to the PE, no taxable income is left in the hands of the PE. Consequently, additions made by the AO are ordered to be deleted.”*

9. As could be seen from the aforesaid observations of learned first appellate authority, he has deleted the additions made by the Assessing Officer following the ratio laid down by the Tribunal in assessee's own case, to the effect that, when the payments made to the AEs have been found to be at arm's length, no further profit can be attributed to the PE. Pertinently, while deciding identical issue in past assessment years, the Coordinate Bench in ITA No. 4909/Del./2018 & Ors., dated 17.02.2021 has held as under:

*“13. Hon'ble Supreme Court in case of DIT vs. Morgan Stanley and Co. Inc. (supra) upheld the order passed by the ld. AAR reached the conclusion that when transaction between two parties, PE on the*

*one hand and domestic subsidiary company on the other hand, as in the present case, is remunerated on arm's length basis taking into account all the risk taking functions of multi-national enterprise, nothing would be left to attribute to the PE. Relevant part of the judgment is extracted for ready perusal as under :-*

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

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

*"Article : Attribution of Business Profits*

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

*1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; (b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.*

*2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly or*

*independently with the enterprise of which it is a permanent establishment.*

*3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise by way of interest on moneys lent to the head office of the enterprise or any of its other offices.*

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

*5. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year-by-year unless there is good and sufficient reason to the contrary.*

*6. Where profits include items of income which are dealt with separately in other articles of this Convention, then the*

*provisions of those articles shall not be affected by the provisions of this article.*

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

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

*32. The object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India. Under Article 7(2) not all profits of MSCo would be taxable in India but only those which have economic nexus with PE in India. A foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the PE in India. The quantum of taxable income is to be determined in accordance with the provisions of Income-tax Act. All provisions of Income-tax Act are applicable, including provisions relating to depreciation, investment losses, deductible expenses, carry forward and set-off losses etc. However, deviations are made by DTAA in cases of royalty, interest etc. Such deviations are also made under the Income-tax Act (for example: Sections 44BB, 44BBA etc.). Under the impugned ruling delivered by the AAR, remuneration to MSAS was justified by a transfer pricing analysis and, therefore, no further income could be attributed to the PE (MSAS). In other words, the said ruling equates an arm's length analysis (ALA) with attribution of profits. It holds that once a transfer pricing analysis is undertaken; there is no further need to attribute profits to a PE. The impugned ruling is correct in principle insofar as an associated enterprise, that also constitutes a PE, has been remunerated on an arm's length basis taking into account all the risk-taking functions of the enterprise. In such cases nothing further would be left to be attributed to the PE. The*

*situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a situation, there would be a need to attribute profits to the PE for those functions/risks that have not been considered. Therefore, in each case the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case. Lastly, it may be added that taxing corporates on the basis of the concept of Economic Nexus is an important feature of Attributable Profits (profits attributable to the PE)*

#### *Conclusion*

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

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

*relying upon the decision held in case of DIT vs. Galileo International Inc. 224 CTR 251 (Del.) wherein it is held as under :-*

*“Reading the above Article 7 of the Treaty it is clear that the profit of an enterprise will be taxable only to the extent as is attributable to that permanent establishment. This is in pari materia with clause (a) of Explanation 1 to section 9(1)(i) of the Income-tax Act. Thus where the entire activity of an enterprise are not carried out in a Contracting State where the PE is situated, than only so much of the profit as is attributable to the functions carried through the PE can be taxable in such source State. While dealing with the. question as to what is such part of income as is reasonably attributable to the operations carried out in India, we have held that only 15% of the revenue generated from the bookings made within India is taxable in India. The same proportion has to be adopted here while computing profit attributable to the PE. We have also held that since the payment to the agent in India is more than what is the income attributable to the PE in India, it extinguish the assessment as no further income is taxable in India., It is to be noted that even in the first assessment framed by the Assessing Officer, the entire expenses in the form of remuneration paid to AIPL was held as allowable deduction and was reduced while computing the income of appellant If that be the case, the income attributable to PE in India being less than the remuneration paid to the dependent agent, it extinguishes the assessment and requires no further exercise for computation of income. We accordingly hold so and in view of the same the income of the appellant for assessment years 1997-98 and 1998-99 will be 'Nil'.”*

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

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

*17. In view of what has been discussed above, we are of the considered view that when RIPL, a domestic subsidiary company,*

*has already been remunerated at arm's length, no further attribution of profit to PE would be warranted. Even otherwise, by following the order passed by the coordinate Bench of the Tribunal in assessee's own case for AY 2007-08 (supra), when we deduct the remuneration/commission paid to RIPL from the amounts of profit attributed to the PE as detailed in para 11 of this order, no taxable income left in the hands of the PE. Consequently, additions made by the AO and confirmed by ld. CIT (A) are ordered to be deleted being not sustainable in the eyes of law. Consequently, all the appeals filed by the assessee are hereby allowed."*

10. It will be worthwhile to note, against the decision of the Tribunal in assessment year 2016-17, the Revenue went in appeal before the Hon'ble Jurisdictional High Court. While deciding the appeal of the Revenue, being ITA No. 681/2023, the Hon'ble Jurisdictional High Court in judgment dated 04.12.2023 has held as under:

*"12. As far as the second issue is concerned, the Tribunal made note of the following information furnished on behalf of the respondent/assessee with regard to the profits attributed to the PE in the AY in issue and those that preceded the same and the commission/remuneration paid to it on Arm's Length basis:*

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

13. *The record shows that the Tribunal has returned a finding of fact that the respondent/assessee does not dispute that it had a fixed place PE in India in the form of Ricardo India.*

14. *Inter alia, what persuaded the Tribunal to rule in favour of the respondent/assessee is the other aspect which was that if the*

*commission/remuneration paid to Ricardo India was reduced from the profit attributed to the PE, then no further attribution could have been made.*

*14.1 In this regard, the following finding of fact returned by the Tribunal being apposite is extracted hereafter:*

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

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

*17. In view of what has been discussed above, we are of the considered view that when RIPL, a domestic subsidiary company, has already been remunerated at arm’s length no further attribution of profit to PE would be warranted. Even otherwise by following the order passed by the coordinate Bench of the Tribunal in assessee’s own case for AY 2007-08 (supra), when we deduct the remuneration/commission paid to RIPL from the amounts of profit attributed to the PE as detailed in para 11 of this order, no taxable income left in the hands of the PE. Consequently, addition made by the AO and confirmed by Ld. CIT(A) are ordered to be deleted being not sustainable in the eyes of law. Consequently, all the appeals filed by the assessee are hereby allowed.*

*15. Given the finding of fact returned by the Tribunal that no further profit could be attributed if commission/remuneration paid to Ricardo India is adjusted against the profit attributed to the PE, we are not inclined to interfere with the impugned order.*

*16. According to us, no substantial question of law arises for our consideration.”*

11. Thus, the principle which emerges from the decision of the Coordinate Bench as well as Hon’ble Jurisdictional High Court in assessee’s own case, is to the effect that if the Indian AE has been

remunerated at arm's length, no further profit can be attributed to the PE. In the facts of the present appeal, learned first appellate authority has recorded a factual finding that the Indian PE has been remunerated at arm's length. The aforesaid factual finding recorded by learned first appellate authority has not been controverted by the Revenue.

12. That being the factual position emerging on record, respectfully following the decision of the Coordinate Bench and Hon'ble Jurisdictional High Court in assessee's own case, as discussed above, we uphold the decision of learned first appellate authority by dismissing the grounds raised.

13. In the result, the appeals are dismissed.

***Order pronounced in the open court on 30<sup>th</sup> May, 2024***

**Sd/-  
(BRAJESH KUMAR SINGH)  
ACCOUNTANT MEMBER**

**Sd/-  
(SAKTIJIT DEY)  
VICE-PRESIDENT**

Dated: 30<sup>th</sup> May, 2024.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi