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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 1833/DEL/2009 [A.Y 2001-02]
ITA No. 1834/DEL/2009 [A.Y 2002-03]
ITA No. 1835/DEL/2009 [A.Y 2003-04]
ITA No. 1836/DEL/2009 [A.Y 2004-05]
ITA No. 3313/DEL/2013 [A.Y 2005-06]

Oracle Systems Corporation Formerly known as Oracle Corporation C/o Pricewaterhouse Coopers Pvt Ltd Sucheta Bhawan, Gate No. 2 2nd Floor, 11-A, Vishnu Digamber Marg New Delhi	Vs.	The A.D.I.T Circle -2(1) International Taxation New Delhi

PAN :

(Applicant) (Respondent)

Assessee By	:	Shri G.C. Srivastava, Adv Shri AtishayJain, Adv Shri Kalrav Mehrotra, Adv Shri O.P. Mehra, Sr. Consultant Shri Naveen Dhamija, CA
Department By	:	Shri Indruj Sngh Rai, Spl. Counsel Shri Sanjeev Menon, JSC Shri Gaurav Kumar, Adv

Date of Hearing	**:**	**13.10.2025**
Date of Pronouncement	**:**	**02.01.2025**

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

The above captioned bunch of 5 separate appeals by the assessee are preferred against the order of the ld. CIT(A)-XXIX, New Delhi dated 20.01.2009 pertaining to Assessment Year 2001-02 to 2004-05 and order dated 12.03.2013 for A.Y 2005-06.

2. Representatives of both the sides were heard at length. Case records carefully perused. Relevant documentary evidence brought on record duly considered in light of Rule 18(6) of the ITAT Rules.

3. Both the parties before us fairly agreed that ITA No. 1833/DEL/2009 be taken as the lead case and the decision rendered thereon would apply with equal force in all other appeals in view of identical facts, except with variance in figures. Accordingly, we proceed to take up the appeal in ITA No. 1833/DEL/2009.

ITA No. 1833/DEL/2009 [A.Y. 2001-02]

4. Grounds raised by the assessee in this A.Y read as under:

"1.1. That on facts and in law the Commissioner of Income Tax (Appeals) (herein after referred to as 'CIT(A)'] erred in holding that compensation for services under Software Support Services Agreement dated 01st June 1999 to Oracle India Private Limited (hereinafter referred to as "OIPL"} from another group entity constituted Royalty payable to the assessee and such alleged royalty was chargeable to tax as such u/s 9(1)(vi) of the Act and/or under Article 12 of the Double Tax Avoidance Agreement (DTAA) between Indian and USA.

1.2 That on facts and in law the CIT(A) erred in assuming jurisdiction to enhance the alleged royalty income allegedly due to the assessee u/s 250(1)(a) of the Act and in enhancing the same from estimated 30% of alleged revenue transferred to 100% thereof under the said agreement.

2. That on facts and in law the CIT(A) erred in upholding that OIPL constituted a Permanent Establishment (PE) of the assessee in India.

2.1 That on facts and in law the CIT(A) erred in upholding that OIPL constituted a:

> *(a) Fixed Place PE (under Article 5(1) of the DTAA) allegedly through which the business of the assessee is partly carried out.*
>
> *(b) Service PE (under Article 5(2)(ii) of the DTAA) for allegedly rendering supervisory services.*
>
> *(c) Agency PE (under Article 5(4) read with Article 5(5) of the DTAA) for allegedly being a depended agent and not being an independent agent.*

3. That on facts and in law the CIT(A) erred in upholding the action of AO in attributing the profits to the alleged Permanent Establishment of the assessee in India.

3.1 That on facts and in law the CIT(A) erred in holding that

- *OIPL transferred intangibles to the assessee in course of performing Software Development Services.*
- *All the risk taking functions of the Assessee in India are not fully represented by the remuneration paid to the alleged PE*

in India and warrants further profits attribution in the hands of the assessee.

- *Cost Plus Method does not give correct arm's length price in transactions of intangibles and that the correct method is 'Profit Split Method".*
- *Partial force of attraction is operable and is applicable*

3.2 That on facts and in law the CIT(A) erred in upholding the quantum attributed by AO to the alleged PE at Rs 4.96 crores

4. That on facts and in law the reassessment orders passed by the AO and upheld by the CIT(A) are void ab-initio, bad in law, arbitrary inter alia for non applicability of judicious and objective mind and in complete violation of the rules of natural justice

5. That on facts and in law the CIT(A) erred in upholding the levy of interest u/s 234A and 234B of the Act.

The assessee craves leave to add, alter, amend, modify or withdraw any one of the Grounds of Appeal herein and submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

5. Facts of the case are that the assessee is a company incorporated in USA and is a tax resident of United States as per Article 4 of the Double Taxation Avoidance Agreement ('DTAA' or Treaty') between India and USA. The assessee filed its return of income declaring income of Rs 47,56,83,190/- on 04.01.2002.

6. The assessee has a wholly owned subsidiary in India - Oracle India Private Limited ('OIPL'). OIPL has two divisions- (i) Software Distribution Division where it is duplicating and distributing software to the

customers under a license obtained from the assessee under an agreement. The assessee receives Royalty at agreed percentage of software duplicated and distributed by OIPL to Indian customers; and (ii) Software Development Support Division under which the Indian company is doing support functions like translation, porting, customisation and localisation etc in the development of software which has been outsourced by the assessee to the OIPL under an agreement.

7. The assessee, Oracle Corp does not directly license software to customers in India. Oracle Corp grants to OIPL, the right and authority to duplicate and license oracle software owned by Oracle Corp pursuant to the Software Duplication and Distribution License Agreement (SDDLA) entered into between Oracle Corp and OIPL. OIPL in turn sub-license the duplicated software products to customers in India for a consideration. In consideration for the software duplication and distribution rights, granted by Oracle Corp to OIPL in India, as per the terms of Clause 4 of the said SDDLA, OIPL is required to pay royalty [of up to 30 percent of the Indian Published Price ('IPP')], which is the prescribed limit under Indian exchange Control Laws. This royalty has been accounted by Oracle Corp and offered to tax in India.

8. Apart from the above, there are instances where licenses have been granted by associate concerns of Oracle Corporation outside India and software is used in India by the associated concerns of MNCs who have obtained the licensees abroad. The revenues received from such activity is termed as revenue transfer from Global Deals to the Indian Company OIPL under Software Support Services Agreement (SSSA). OIPL includes these receipts as their revenue receipts and taxes are offered on their profits. OIPL however, pays no royalty to the assessee on the receipts received from such global deal. The AO however, has considered 30% of such revenue transferred to OPIL on Global Deals, which works at Rs 4,74,28,502/-, as royalty and taxed it at 15%. In appeal, the CIT(A), vide order dated 20.01.2009 passed for A.Ys 1997-98 to AY 2004-05 held that the rate of notional royalty under the SSSA cannot be restricted to rate prescribed under SDDLA (30%) as these are independent agreements. Accordingly, the CIT(A) enhanced the amount of notional royalty to 100% of revenue transfers received by OIPL in AY 2000-01 to AY 2003-04.

9. Apart from taxation of Royalty on Global Deal, the other issue relates to PE of assessee in India in respect of Software Development Support Division of OIPL by invoking all the relevant Articles of the DTAA

viz. Article 5(1) for Fixed Place PE; Article 5(2)(l) for Employee based PE; and Article 5(4) for Agency PE. Accordingly, the AO has considered Rs 4,96,00,000/- as revenue attributable to Indian PE i.e., Research and Development activity carried out at Hyderabad and Bangalore. The same has been confirmed by the CIT(A).

10. Aggrieved by the order of CIT(A), the assessee is in appeal before us. Thus there two key issues under appeal which pertain to:

(a) PE in India and the attribution of profits to such PE; and

(b) the taxation of royalty on global deals and the enhancement of its quantum by CIT(A).

11. Taking up the issue of PE in India first, the ld AR vehemently argued that there is no Fixed Place PE under Article 5(1) of INDIA-USA DTAA. It is submitted that the "Disposal Test", given in Article 5(1) is not met as the Assessee does not own, lease, or otherwise occupy any office premises in India. It is stated that the premises in Bangalore and Hyderabad are owned and operated by OIPL for its own business. The ld AR emphasized that the assessee does not have any right of access or control over these premises, and they are not at its disposal. As a matter of fact, this premises was never at the disposal of the assessee. Hence, the crucial "disposal test," as established by the Hon'ble Delhi High Court

in the ***Adobe Systems Incorporated*** (2017) 292 CTR 407(Del) case, is not satisfied.

12. The ld AR forcefully argued that the Business Activity Test is also not met for the reason that the assessee has not carried out any part of its business operations in India. The business of the OIPL, even if it relates to outsourced activity of the assessee, cannot be regarded as the business of assessee.

13. The ld AR further submitted that the subsidiary OIPL is a separate legal and functional entity assessed in India in its own rights. The ld AR stated that the AO proceeds on an erroneous assumption that whether an MNC operates in India through a branch or subsidiary, it makes no difference and the business of the subsidiary will be regarded as business of the principal.

14. The ld AR further submitted that there is no Service PE under Article 5(2)(l) as no Services has been furnished by the assessee in India. It is the say of the ld AR that the AO has failed to indicate the furnishing of any services by the assessee to the entity in India. No employees of the Assessee have visited India for furnishing of any services to any

entity. It is further submitted that no employees were hired in India, as alleged by the AO. The ld AR submitted that the allegation of the AO that the Assessee had employees in India, based on Form 10K filed by the Assessee before the SEC, USA, is fundamentally erroneous for the reason that the said Form depicts activities of the group as a whole and not of the Assessee. When the reference is made in that Form that employees were hired in India or China, it only indicates that the Indian or Chinese entities have employed local employees for cost-saving. It does not mean that the Assessee had any employee in India or furnished any services through them. The ld AR submitted that similar reasoning of Revenue in the case of ***E Funds IT Solutions Inc*** (2017 399 ITR 34(SC) stand rejected by the High Court and Supreme Court.

15. The ld AR further submitted that no AGENCY PE under Article 5(4) exists and that Article 5(4) does not apply to an Independent Agent determined under Article 5(5). An entity acting in the ordinary course of business will be regarded as dependent only if both the conditions- (i) it acts for and on behalf of a single principle; and (ii) not being remunerated at arm's length, are satisfied cumulatively. The ld AR elaborated that OIPL is neither a Dependent Agent nor the Assessee has appointed OIPL as agent. Even if, for the sake of argument, OIPL were

considered an agent, it would be an agent of independent status under Article 5(5). The ld AR further submitted that OIPL's transactions with the Assessee have been remunerated at arm's length, a fact confirmed by the TPO for AYs 2002-03 to 2005-06. For A.Y. 2001-02, the AO accepted the arms' length nature under the provisions contained in old Section 92.

16. The ld AR submitted that in the present case, OIPL may be acting for the group entities, yet it is being remunerated at arms' length. Therefore, its independent status cannot be questioned. Hence, Article 5(4) is not applicable. The ld AR stated that conditions of Dependent Agent under Article 5(4) is also not fulfilled. It is stated that assuming OIPL is not an independent agent, it still cannot be regarded as dependent agent for the reason that it does not have the authority to, and does not in practice, conclude contracts, bind assessee, secure orders, or maintain stock of products on behalf of the assessee. Thus, all key conditions under Article 5(4) for the creation of an Agency PE remain unsatisfied.

17. On the issue of profit attribution (without prejudice) [Ground No. 3 in AY 2001-02 to 2004-05 & Ground No. 5 in AY 2005-06], the ld AR

submitted that even if a PE were held to exist, no further profits can be attributed since OIPL has been renumerated at arm's length, as held by the TPO for AYs 2002-03 to 2005-06. For AY 2001-02, when current TP rules were not in effect, the old Section 92 also gave powers to AO to make adjustments if profits were not at arms' length. The AO has preferred not to make any adjustment in the case of OIPL. The Hon'ble Supreme Court in the landmark case of ***Morgan Stanley*** (2007) 292 ITR 416 (SC) concludes the issue on this matter.

18. On the issue of Royalty on global deals [Ground No. 1 in AY 2001-02 to 2004-05 & Ground No. 3 in AY 2005-06], the ld AR submitted that before June 1, 2003 (AY 2001-02 to 2003-04), as per the prevailing RBI Circular No. 6 dated March 10, 1993, royalty payments by an Indian entity for software were permissible only where the software was duplicated/reproduced in India. The said circular specifically permitted Indian Software producers to make royalty payments on software duplication/reproduction upto a maximum limit of 30% of the IPP, to overseas copyright holder/owner.

19. The ld AR submitted that for global deals, the software was supplied to multinational clients outside India, and no duplication was

carried out by OIPL. Under the agreement dated 01.06.2000, no royalty was thus payable on these deals. It is stated that Royalty can accrue only if the right to receive the same arises under a contractual arrangement. In the absence of such a clause in the agreement, no royalty accrued thereto. It is further stated that since RBI did not permit remittance of royalty without duplication, the royalty could not accrue or arise to the assessee. Thus, the AO's action to impute a notional royalty at 30% and the CIT(A)'s subsequent enhancement to 100% is arbitrary, without legal basis, and amounts to rewriting a commercial contract. The ld AR further argued that the entire revenue from global deals was already offered to tax in the hands of OIPL at the applicable corporate tax rates. Taxing a notional part of the same income again as royalty in assessee's hands is unjustified.

20. The ld AR submitted that the position from June 1, 2003 (AY 2004-05 onwards), with regard to Royalty was modified. The ld AR stated that OIPL sought and obtained specific approval from the DIPP (vide letters dated Dec 17, 2002 and Feb 21, 2003), which prospectively enabled it to pay royalty even where no duplication was undertaken in India. Pursuant to this regulatory approval, the inter-company agreements were amended effective June 1, 2003. OIPL started paying royalty at 56% to

assessee on all revenues, including those from global deals. The assessee duly offered this 56% royalty income to tax in its returns.

21. The ld counsel of the assessee further argued that the Assessee pays Cost plus 15% to OIPL as compensation for the activity of development of software which has been outsourced to the OIPL under an agreement. It is forcefully submitted that both the amount of Royalty paid by OIPL to the assessee and the amount of compensation paid by the Assessee to OIPL have been tested by TPO under TP provisions and found to be at Arm's length for A.Y.s 2002-03 to 2005-06. For A.Y. 2001-02 it was submitted that the old provisions of Section 92 gave similar powers of adjustment to the AO and the AO has made no addition for that year implying thereby that the transaction was at Arm's length.

22. On the issue of enhancement by CIT(A), the ld AR submitted that the CIT(A)'s action of enhancing the royalty from the actual 0%/56% (which was paid and offered to tax) to a notional 100% is entirely arbitrary and lacks any justification, especially when the TPO had accepted the underlying transactions with OIPL as being at arm's length for all these years. The payment of royalty under similar circumstances on receipts from domestic customers was also assessed at the rate of

30% or 56% as the case be which has not been disturbed by the CIT(A). The nature of activity being the same, there was absolutely no justification for adopting higher percentage of royalty in an arbitrary manner for global deals. For the same reasons, enhancement is not justified for A.Y.s 2001-02 to 2003-04.

23. With respect to the Revenue from training and consulting services, the ld AR submitted that it does not involve the use or grant of rights for any intellectual property (like patent, copyright, trademark etc.) and therefore does not fall within the definition of "royalty" under Article 12 of the DTAA.

24. On the issue of interest under section 234B [Ground No. 5 in A.Y. 2001-02 to 2004-05 & Ground No. 7 in A.Y. 2005-06], the ld AR stated that no interest u/s 234B of the Act is chargeable in case of the assessee for any shortfall in payment of advance tax up to A.Y. 2012-13, since income of the assessee was subject to TDS obligations in hands of Indian payers, as held by the Hon'ble Supreme Court in ***Mitsubishi Corporation***.

25. Per contra, the ld. DR relied on the orders of the authorities below and contended that the assessee is entitled to royalty from OIPL on revenue transfers made to India emanating from the global deals. Accordingly, Assessing Officer imputed notional royalty at the rate of 30% on the value of revenue transfers received by OIPL during impugned years. The ld. CIT(A) was right in enhancing the notional royalty to 100% of the revenue transfer received by OIPL under global deal. The ld DR relied on the decision of Supreme Court in ***Engineering Analysis Centre of Excellence P Ltd*** (2021) 125 taxmann.com 42(SC) and stated that the AO has not given a finding that Royalty is only for 'duplication' of software. With respect to the issue of PE, the ld DR stated that the premises of OIPL at Hyderabad and Bangalore is at the disposal of the assessee and relied on the decision of Supreme Court in the case of ***Hyatt International Southwest Asia Ltd*** (2025) 176 taxmann.com 783(SC) for the proposition that the assessee had a fixed place PE in India.

26. We have heard the rival submissions and perused the materials on record. On the issue of PE, the assessee having PE in India was first made by the AO in AY 2001-02 vide his order dated 31.03.2004 which continued in subsequent AYs. The CIT(A) has passed a combined appellate order

for AY 1997-98 to AY 2004-05 (dated January 20, 2009) and AY 2005-06 and AY 2006-07 (dated March 12, 2013) confirming the finding of AO on PE. The orders for AY 1997-98 to AY 2000-01 were passed under section 147 of the Act and the ITAT vide its order in ITA No. 1829 to 1812/Del/2009 dated 26.09.2022, has quashed these assessments on the grounds of improper assumption of jurisdiction u/s 147 which were affirmed by the Hon'ble High Court in ITA 414,416, 418 and 424/2024 vide dated 28 Oct 2024.

27. We find that the AO has held that OIPL constitutes PE of Oracle Corp in India in respect of its software development activities. In order to adjudicate the issue of PE, it would be apposite to refer the relevant provisions enumerated in the India-USA DTAA as under:

ARTICLE 5 - Permanent establishment –

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially :

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(l) the furnishing of services, other than included services as defined in Article 12 (Royalties and Fees for Included Services), within a Contracting State by an enterprise through employees or other personnel, but only if:

(i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve-month period ; or

(ii) the services are performed within that State for a related enterprise [within the meaning of paragraph 1 of Article 9 (Associated Enterprises)].

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4. Notwithstanding the provisions of paragraphs 1 and 2, where a person— other than an agent of an independent status to whom paragraph 5 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if :
(a) he has and habitually exercises in the first-mentioned State an authority to conclude on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph ;
(b) he has no such authority but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, and some additional activities conducted in the State on behalf of the enterprise have contributed to the sale of the goods or merchandise ; or
(c) he habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise.
5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent, or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise and the transactions between the agent and the enterprise are not made under arm's length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph.
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28. It is the AO's findings that the assessee has all 3 kinds of PEs in India as contemplated under the India-USA DTAA namely (i) Fixed Place PE under Article 5(1); (ii) Service PE under Article 5(2)(l); and iii) Agency PE under Article 5(4) of the India-USA DTAA, in the form of OIPL in respect of Software development activities. We will accordingly deal with each provision of DTAA regarding PE and its application in the facts of the instant case.

29. Firstly, the AO has held that OIPL constitutes 'a fixed place of business' under Article 5(1) of the DTAA as the premises of OIPL in Hyderabad and Bangalore and machinery/equipment installed therein are owned by the assessee. The AO however, has not substantiated the said assertion by any cogent evidence/materials. On the other hand, the assessee statement that the assessee does not own, lease, or otherwise occupy any office premises or establishment in India, remains uncontroverted. We find that the premises in Bangalore and Hyderabad are leased by OIPL and the machinery/equipment are owned and operated by OIPL for its own business and it is OIPL which claims depreciation u/s 32 of the Act on premises and equipment.

30. The issue of 'fixed place of business' and PE is no longer res-integra as held by the hon'ble Supreme Court in the case of Hyatt International (supra), referring to the decision of ***Formula One World Championship Ltd*** (2017) 80 taxmann.com 347(SC), which held that for a place to be a Permanent Establishment (PE), two essential conditions must be satisfied (i) the place must be at **'disposal'** of the enterprise and (ii) the business of the enterprise must be carried on through that place. Even on the aspect of 'disposal' test, the AO has not established with any cogent evidence/materials that the assessee has any **right of**

access or **control over these premises**, and that the premises are at the '**disposal**' of the assessee. Neither the AO nor the CIT(A) have demonstrated anywhere in their order that a particular space or part of the premises of OIPL at Bangalore or Hyderabad, was available/under control of the assessee for its business and that the employees of the assessee can walk into the said premise and occupy the space/table in its own right. We therefore, are in agreement with the assessee that the crucial "disposal test," as established by the Hon'ble Supreme Court in the case of ***Formula One World Championship Ltd*** (supra), and ***Hyatt International*** (supra) is not satisfied. We are therefore of the view that there is thus no fixed place PE under Article 5(1) of the India-USA DTAA.

31. We further find that the assessee has successfully shown that OIPL is a subsidiary of the assessee and is a separate, distinct legal and functional entity assessed in India in its own rights. The assessee has a separate and distinct SDDLA with OIPL dated 01.06.2000 whereby the assessee, as a Licensor, has granted OIPL, the Licensee, right and authority to duplicate software products and to sublicense the same in India. For such grant of right, OIPL pays a royalty of 30% of list price of the Licensed products. We further find that whereas the assessee conceptualizes, designs and specifies the software, OIPL provides

software development support services such as coding, testing and bug fixing from its premises at Hyderabad and Bangalore. It would thus be incorrect to assume, as the AO has done, that when an MNC operates in India through a branch or subsidiary, the business of the subsidiary (OIPL) will be regarded as business of the principal (OSC) as held by the hon'ble Supreme Court in the case of ***E-Funds*** (supra).

32. We are also of the considered view that the Business Activity Test is also not met for the reason that the AO has failed to show that the assessee has not carried out any part of its business operations in India. The AO's reliance on CBDT's Circular 1 of 2004 dated 02.01.2004 for contending that the OPIL software support activities constitute 'core' activity of the assessee, is considered as invalid as the said Circular was withdrawn immediately within eight months on 09.08.2004. We therefore, are in conformity with the assessee's submission that the business of the OIPL, even if it relates to outsourced activity of the assessee, cannot be regarded as the business of assessee. We find support from the hon'ble Delhi High Court and endorsed by the Supreme Court in ***E-funds***(supra) as under:

> ***12.*** Indian entity i.e. subsidiary company will not become location PE under Article 5(1) merely because there is interaction or cross transactions between the Indian subsidiary and the foreign Principal***

under Article 5(1). Even if the foreign entities have saved and reduced their expenditure by transferring business or back office operations to the Indian subsidiary, it would not by itself create a fixed place or location PE. The manner and mode of the payment of royalty or associated transactions is not a test which can be applied to determine, whether fixed place PE exists."

33. As far as the Service PE under Article 5(2)(l) of DTAA is concerned, the AO has to demonstrate that the assessee has 'furnished services' through its employees who had stayed in India for a period of 90 days or more within any twelve-month period. We find no evidence or material on record to support the view that the assessee 'furnished any service' in India or to any entity in India. Though the AO has mentioned hiring of employees, referring to Form10K filed by the Assessee before the SEC, USA, to assert that the assessee has employee based PE in India, we find that the AO has not presented any evidence that the assessee has hired any employees in India or any employees of the Assessee have visited India and remained in India for more than 90 days, for furnishing of any services to any entity. We agree with the assessee that the reference to Form 10K is flawed for the reason that the said Form depicts activities of the group as a whole worldwide and not specific of the Assessee in India and that when Form 10K shows employees were hired in India or China, it only indicates that the Indian or Chinese entities have

employed local employees for cost-saving, remained uncontroverted by the Revenue. We find that the hon'ble Supreme Court in ***E Funds*** (supra) has negated such assumption of Revenue. Further, we do not find any assertion of the AO that the assessee has deployed and posted its personnel in OIPL who were performing services for the OIPL, as was required by the Delhi High Court in the case of ***Progress Rail Locomotive Inc*** 466 ITR 76(Del). The hon'ble Delhi High Court in the case of ***Adobe System*** (supra) had held that when no material is available with AO to substantiate that Foreign Company's employees have rendered services in India, inference cannot be drawn that assessee has a PE in terms of Article 5(2)(l) of the India-USA DTAA. The Stewardship activities of the assessee, in terms of explaining new Oracle products and services, its marketing and aligning goals of OIPL with Oracle's worldwide business and vision, also do not constitute Service PE under Article 5(2)(l) of DTAA as ruled by the hon'ble Supreme Court in the case of ***Morgan Stanley*** (supra). We are thus of the considered view that the assessee does not have Service PE in India under Article 5(2)(l) of the India-USA DTAA.

34. With respect to Agency PE under Article 5(4) of the DTAA, we agree with the assessee that OIPL is neither a Dependent Agent nor the

Assessee has appointed OIPL as agent. Merely because OIPL is wholly and exclusively working for the assessee and does not develop software for any other entity, would not make OIPL as dependent agent of the assessee. We find that for considering OIPL as dependent agent of the assessee, it is essential for the Revenue to demonstrate that the conditions enumerated in the DTAA, available in Article 5(4), is met by OIPL. The AO is required to show that OIPL has the authority to habitually exercise authority to conclude contracts on behalf of the assessee under Article 5(4)(a) of the DTAA; or habitually maintains stock of products on behalf of the assessee under Article 5(4)(b) of the DTAA; or it habitually secures orders for the assessee under Article 5(4)(c) of the DTAA. We find that all the key conditions under Article 5(4) for the creation of an Agency PE remain unsatisfied.

35. We are also of the considered view that an entity acting in the ordinary course of business will be regarded as dependent under Article 5(5) of the DTAA only if both the conditions- (i) it acts for and on behalf of a single principle; and (ii) not being remunerated at arm's length, are satisfied cumulatively. As we have seen in the case of the assessee, OIPL does not act on behalf of the assessee and the OIPL's transactions with the Assessee have been remunerated at arm's length. The hon'ble

Supreme Court in its decision in the case of ***Morgan Stanley*** (supra) has negated further attribution of profits to the PE when a transfer pricing analysis has been undertaken and found to be in Arm's length.

36. We are of the opinion that even if OIPL is considered as an agent, it would be an agent of independent status under Article 5(5) of the DTAA and since Article 5(4) does not apply to an Independent Agent as determined under Article 5(5), OIPL cannot be held as Agency PE. In the instant case, the AO has neither established the dependent status of OIPL nor has shown that the conditions of Dependent Agent under Article 5(4) are fulfilled. We are therefore of the considered view that OIPL is an independent legal entity and the existence of OIPL cannot be considered as Permanent Establishment of the Assessee in India. Since we have held that there is no PE of the assessee exists in India, there is no question of attribution of profit to the PE. Accordingly, Ground no 2 and its sub-grounds are allowed while ground no 3 becomes infructuous.

37. With respect to the Revenue transfer received by OIPL from Global Deal, the details of Revenue transfer received by the OIPL and working of royalty by AO and the CIT(A) is as under:

A.Y	Revenue transfer received by OIPL for program, update & support	Royalty received by Assessee on Global deals	royalty computed by AO	Enhancement by CIT(A) (Amount in INR)
AY 2001-02	15,80,95,006	-	4,74,28.502	11,06,66,504
AY 2002-03	13,35,10,041	-	4,00,53,012	9,34,57,029
AY 2003-04	16,52,39,953	-	4,95,71,986	11,56,67,967

The issue to be adjudicated is whether the AO is correct in considering 30% of the revenue transfer from Global Deal as Royality to be paid by OIPL to the assessee which was enhanced by the CIT(A) to 100%.

38. Briefly, the facts for the AY 2001-02 to AY 2003-04 is that, in some cases, Oracle entities, outside India, enter transactions with (MNC), who have offices/subsidiaries in more than one country.Global Deals are global contracts in which Oracle group entities grant licenses of Oracle software to multinational customers (MNCs) for use in a number of countries. The licenses granted by the contracting regional/local Oracle entity are standard in nature without any customisation. Revenue from such global contracts are allocated to the Oracle entities as per agreed revenue sharing methodology or on basis of negotiated percentage of allocation by country. These allocations are then transferred to Oracle entities and such transfer is termed "revenue transfer".

39. Briefly, the OIPL's role/participation in Global Deals is to provide support service in India under a global deal agreement entered into by an overseas Oracle affiliate having users of Software in India, for which it receives a revenue transfer and pays tax on it in India. OIPL does not duplicate software in India in such global deals. The Software Support Services Agreement (SSSA), is an inter-company agreement between OIPL and the assessee, that is applicable to global deals which provides for revenue transfers within Oracle entities rendering support services under global arrangements.

39.1 The gross consideration for granting licenses of Oracle software is received from the Customer by the said contracting Oracle Entity and not by the Assessee. The gross consideration received includes fees to be paid to OIPL for rendering support services for software licenses to be utilised in India. The assessee, for sake of administrative convenience, processes the revenue transfers to OIPL under the Software Support Services Agreement (SSSA). Under the applicable SSSA for AY 2001-02 to AY 2003-04, the OIPL is not contractually obligated to pay royalty to the assessee on the revenue transfers received. Moreover, no royalty was paid by the contracting local regional Oracle entity on the revenue transfers received by OIPL.

40. The AO and the CIT(A) held that such revenue transfer on global deals, represents Royalty under section 9(1)(vi) of the Act and the Article 12(7)(b) of the DTAA. The AO held that since the assessee has earned Royalty income @ 30% under SDDLA in AY 2001-02 to 2003-04, a notional Royalty @ 30% on Revenue transfer on Global Deals, would similarly accrue to the assessee under SSSA. This notional Royalty of 30% on Global Deals was enhanced by the CIT(A) to 100% on the ground that it represents part of license consideration for installation and customization of the software in India.

41. We find that the CIT(A) has held that the assessee enters into global deals with the MNC GROUP [i.e. Honda Japan in the CIT(A)'s example] for licensing its software for a consideration [i.e. $100 in the CIT(A)'s example]. The entire consideration [i.e. $100 in the CIT(A)'s example] represents royalty of the assessee. The reasoning is that Global deal may require provision for software in India to the AE of the MNC GROUP [i.e. Honda India in the CIT(A)'s example]. Hence, the assessee makes a payment of a certain portion of the consideration received from the MNC GROUP [i.e. $ 30 out of $100 in the CIT(A)'s example) to OIPL for providing software and software related services to Indian AE of MNC GROUP (in respect of software which has been licensed by appellant to

Oracle Japan).Thereafter, Gross receipt received from MNC GROUP [i.e. $100 in the CIT(A)'s example] which has been received by the assessee, includes $ 30 which is on account of installation/customization done in India by OIPL under the Global deal. The payment is made by Revenue transfer out of amount of US $ 100 receivable from Honda Japan which is in the nature of Royalty for which installation and customization has been agreed to by Oracle Inc USA in India also.

42. The CIT(A) further held that Oracle Corporation is into business of providing database software for commercial use and the software have to be adopted for individual specific requirement of every licensee depending upon the business requirement and that the licenses are merely sale of a copy right article. According to the CIT(A), therefore, the receipt from sale of such License, is Royalty u/s 9(1)(vi) of the Act and Article 12(7)(b) of the DTAA. The assessee has countered the view of the CIT(A) by submitting that under global deals, the agreement for granting licenses of Oracle software with the MNC is entered by regional/local Oracle Entity for use in a number of countries and not by the assessee directly.

43. From the above factual matrix of the instant case, we find that there is no dispute on the entitlement of the assessee to receive royalty

@30%, under SDDLA, for duplication and sub-licensing of software by OIPL to its customers in India, which is offered for taxation by the assessee. The point of dispute raised is with respect to Royalty on Revenue transfer on global deals under Software Support Services Agreement (SSSA) dated 01.06.2000, governing Global Deals between the assessee and OIPL. To understand the applicability of section 9(1)(vi) of the Act and Article 12(7)(b), for treating the Revenue Transfer as Royalty, it would be prudent to refer the same as under:

> ***9(1)(vi) income by way of royalty payable by—***
> ***(a) the Government ; or***
> ***(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or***
> ***(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :***
>
> ***Article 12 of DTAA***
> ***3. The term "royalties" as used in this Article means :***
> ***(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright or a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of***

any such right or property which are contingent on the productivity, use, or disposition thereof ; and
(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.
(7) (a) *****
(b) Where under sub-paragraph (a) royalties or fees for included services do not arise in one of the Contracting States, and the royalties relate to the use of, or the right to use, the right or property, or the fees for included services relate to services performed, in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State.

44. We find that the Act stipulates that Royalty which are 'payable' can be considered as income. We further find that under SSSA which governs Revenue transfer on Global deals, there is no provision for payment of any royalty to the assessee on Global deals as OIPL does not carry out any duplication of software supplied to multinational clients outside India. It is also noteworthy that OIPL was not permitted to pay royalty to the assessee, in view of RBI Circular No, 6 dated March 10, 1993 which permitted payment of royalty only on software duplication/reproduction. Moreover, the AO/CIT(A) has not unearthed any evidence/materials on record regarding existence of any arrangements/agreement between the assessee and OIPL to show that

any royalty was 'payable' to the assessee, on revenue transfers to OIPL in India under global deals.

45. We are therefore, in agreement with the assessee's contention that Royalty can accrue u/s 9(1)(vi) of the Act only if the right to receive the same arises under a contractual arrangement and since there is no such clause in SSSA, there is no accrual/payable of royalty to the assessee. Furthermore, as RBI at the relevant point of time, permitted payment of royalty only when software is duplicated, there is hardly any scope to consider that royalty would accrue or arise to the assessee on Global deals since no duplication is carried out in Global deals. Furthermore, the licenses granted by the contracting regional/local Oracle entity are standard in nature without any customisation which has not been controverted by the CIT(A) with any cogent evidence. We are therefore of the view that considering 30% of the Revenue transfer on global deals as royalty u/s 9(1)(vi) of the Act and its subsequent enhancement by the CIT(A)'s to 100%, lacks any legal foundation and therefore is invalid.

46. In so far as Royalty under Article 12(3) r.w Article 12(7)(b) of the DTAA is concerned, the same would be attracted only if the payments

of any kind received as a consideration for the use of, or the right to use, any copyrighted material. Moreover, the issue of Royalty has been settled by the Hon'ble Supreme Court decision in ***Engineering Analysis Centre of Excellence (P.) Ltd.*** [2021] 125 taxmann.com 42 (SC), which held that use/copy/distribution of software would not constitute Royalty under DTAA as the end user gets only the right to use software and nothing more. In the facts of the instant case, the revenue transfer on global deal cannot be taxed as royalty under Article 12 of the India-USA since under the SSSA, OIPL is only granted license to use the software and provides support services.

47. We also agree with the assessee that as OIPL already has offered the entire Revenue from global deals as its income, and therefore addition of part of the same as Royalty in the hands of the assessee would tantamount to double addition and hence not justified. Further, once the Regulatory authority DIPP granted its approval for remittance of Royalty by OIPL, even where no duplication was undertaken in India, to the assessee from June 1, 2003 (AY 2004-05 onwards), the inter-company agreements were amended effective June 1, 2003 and OIPL started paying royalty at 56% to assessee on all revenues, including those

from global deals. And this 56% royalty received by the assessee has been duly offered to tax in its returns.

48. To summarise at the cost of repetition, during the impugned years, the Assessee only received royalty from OIPL on software duplication in India under the terms of the SDDLA, which is a separate contractual arrangement. No royalty is paid or payable by OIPL to the Assessee on revenue transfers received by OIPL from Global deals under SSSA, because OIPL does not duplicate software in India under such Global deals. Even otherwise, under the prevailing exchange control regulations, payment of any royalty on global deals was prohibited. Furthermore, the Assessee assertion that it has not received royalty from OIPL or any other group entities outside India on the amount of revenue transfers received by OIPL for global deals during the impugned years, has not been controverted. Hence, no royalty accrues/payable to the Assessee to trigger the provisions of section 9(1)(vI) of the Act. Since the assessee is neither entitled to receive nor has acquired any right to receive Royalty on Global deals, we hold that the AO's action of determining Royalty on global deals for the impugned years, has no legal basis. The same is therefore deleted. The ground 1 is accordingly allowed.

49. On the issue of interest under section 234B [Ground No. 5 in A.Y. 2001-02 to 2004-05 & Ground No. 7 in A.Y. 2005-06], the claim of the assessee is that its income was subject to TDS obligations in hands of Indian payers. The AO is directed to charge interest u/s 234B of the Act as per law keeping in mind the decision of the hon'ble Supreme Court in the case of ***Director of Income-tax, New Delhi v. Mitsubishi Corporation (2021) 130 taxmann.com 276 (SC)*** which has held that prior to the financial year 2012-13, the amount of income-tax which is deductible or collectible at source can be reduced by the assessee while calculating advance tax. The said ground is decided accordingly.

ITA No. 1834/DEL/2009 [A.Y 2002-03]
ITA No. 1835/DEL/2009 [A.Y 2003-04]
ITA No. 1836/DEL/2009 [A.Y 2004-05]
ITA No. 3313/DEL/2013 [A.Y 2005-06]

50. In the above appeals, the facts and grounds are identical to the facts of the case discussed herein above. The decision rendered in ITA 1833/D/2009 for AY 2001-02 is equally applicable mutatis mutandis to the facts in the appeal as above for AYs 2002-03 to 2005-06. Apart from the issue of PE and revenue from Global deal, the AO in AY 2005-06, has also imputed notional royalty on revenue transfers on account of training and consulting services in respect of global deals. The AO has however,

not substantiated the same with any evidence that there exist any contractual obligation to pay royalty on the same. Furthermore, we are of the view that the receipts in respect of training and consultancy will not give rise to royalty as there's no use or right to use any intellectual property including copyright. The appeal of the assessee on this ground is allowed.

51. In the result, assessee's appeals in :

ITA No. 1833/DEL/2009 [A.Y 2001-02] - Allowed
ITA No. 1834/DEL/2009 [A.Y 2002-03] - Allowed
ITA No. 1835/DEL/2009 [A.Y 2003-04] - Allowed
ITA No. 1836/DEL/2009 [A.Y 2004-05] - Allowed
ITA No. 3313/DEL/2013 [A.Y 2005-06] - Allowed

The order is pronounced in the open court on 02.01.2025.

Sd/-	**Sd/-**
[VIKAS AWASTHY]	**[NAVEEN CHANDRA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 02nd January, 2025.
VL/
Copy forwarded to:
1. Assessee
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi