

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

**BEFORE SHRI G.S. PANNU, PRESIDENT
AND
SHRI SAKTIJIT DEY, VICE-PRESIDENT**

ITA No.2147/Del/2022
Assessment Year: 2018-19
With
ITA No.2148/Del/2022
Assessment Year: 2019-20.

Automation Anywhere Inc., 301-302, 10 Biz Park, Near Airport, Pune, Maharashtra	Vs.	DCIT, Circle-1(1)(1), International Taxation, New Delhi
PAN :AAMCA9481A		
(Appellant)		(Respondent)

Assessee by	Sh. Damodar Vaidya, Advocate Sh. Sandeep Sachdeva, Advocate
Department by	Sh. Gangadhar Panda, CIT(DR), Sh. Sanjay Kumar, Sr. DR

Date of hearing	26.05.2023
Date of pronouncement	24.08.2023

ORDER

Captioned appeals by the assessee are against the final assessment orders passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 pertaining to assessment years 2018-19 and 2019-20, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. Though, the assessee has raised multiple grounds, however, the common issue arising in both the appeal relates to existence or otherwise of Permanent Establishment (PE) in India and, in case, there is a PE, the profit attributable to the PE. The relevant facts relating to the aforesaid issues are, the assessee is a non-resident corporate entity incorporated under the laws of United States of America (USA) and is a tax resident of USA. As stated by the Assessing Officer, the assessee is a Developer, Marketer, seller of Robotic Process Automation (RPA) and related products and services. The assessee develops and sales RPA software and Digital Workforce Platform (DWP). The RPA services enable customers to automate business process through the use of configurable software bots.

3. In the assessment years under dispute, the assessee earned Revenue from two streams in India, i.e., fee from software license and fee from rendering of services. Fee from rendering of services was offered to tax in India by the assessee by treating it as Fee for Technical Services (FTS)/Fee for Included Services (FIS). Whereas, the receipt from sale of software licence was treated as business income and not offered to tax in India in absence of PE in terms of Article 7 of India – USA Double Taxation Avoidance Agreement

(DTAA). In course of assessment proceedings, the Assessing Officer called upon the assessee to furnish the details of all Associated Enterprises (AEs) in India and the international transactions entered with them in the relevant assessment years. He also called upon the assessee to furnish copy of Audit Report in Form 3CEB as well the agreements entered with the AEs in India. He also called upon the assessee to furnish details of employees visiting India for providing services in the relevant assessment years.

4. In response to the queries raised by the Assessing Officer, the assessee furnished the details called for. From the details furnished by the assessee, the Assessing Officer noticed that in the relevant assessment years, 30 employees of the assessee visited India for a period of 459 days and rendered services. Further, in course of assessment proceedings, the Assessing Officer in exercise of powers conferred under section 133(6) of the Act sought information from the assessee's AE in India, i.e., Automation Anywhere India Pvt. Ltd. On going through the information furnished by the AE, the Assessing Officer observed that various employees of the assessee are working for long duration at the office premises of the AE in India. The Assessing

Officer observed that the employees visited India for doing business and economic activities of the assessee. The visiting employees have free access to the premises of the Indian AE and, through such premises assessee's employees were carrying on business activities of the assessee.

5. Referring to Article 5(1) of India – USA DTAA, the Assessing Officer observed that the assessee has a fixed place PE in India. While coming to such conclusion, he observed that, since, assessee's employees have carried on operations through the office of the AE in India, the test of permanency and fixed place is satisfied. Further, since, the premises of Indian AE was put at the disposal of the employees of the assessee, the disposal test is satisfied. Further, since, the employees of the assessee were working at the premises of the Indian AE for long duration, the duration test is satisfied. Finally, the client visits or general office visits for such long duration for carrying out the business of the assessee, satisfies the functional test. Proceeding further, he observed, the visiting employees concluded sales contracts in India, developed software in India, transferred the licences in India and collected payments in India from the licensees. Thus, he concluded that the assessee had a fixed place PE in India, in

terms of Article 5(1) of the tax treaty. Having held so, the Assessing Officer attributed 25% of the revenue earned from sale of software licences as the profit attributable to the PE. Accordingly, he framed the draft assessment orders.

6. Against the draft assessment orders so framed, the assessee raised objections before learned DRP. However, the objections were rejected.

7. Before us, learned counsel appearing for the assessee submitted that while concluding that the assessee had a fixed place PE in India, the Assessing Officer has completely ignored the facts brought on record. He submitted, in course of assessment proceedings, the assessee had not only furnished the list of employees visiting India, but also furnished the purpose of their visit. He submitted, the purpose of visits can be classified into three categories. He submitted, there are 4 visits of employees for 41 days towards shareholders activities. 9 visits of employees for 126 days are for stewardship activities and 7 visits for 104 days are for marketing, events and activities, where the visiting employees did not access or visited the premises of the Indian AE. Rather, they were staying at hotels, where the meetings and conferences held. He submitted, 4 visits were for

108 days for imparting training. He submitted, 5 visits for 107 days were wrongly included in the list of visits by employees, as, one employee came to India for marriage and other visits were either cancelled or terminated. In this context, he drew our attention to the relevant documents/evidences placed in the paper-book. He submitted, on an average, each employees visited for less than 14 days in a year.

8. He submitted, the visiting employees were given temporary space for meeting with the employees of the Indian AE and they did not carry out any core business activities of the assessee in the premises of the AE. In this context, he drew our attention to the submissions made before the Assessing Officer. He submitted, the visiting employees had no legal rights or effective powers over the office of Indian AE. Nor they had any right to organize meetings in the premises of the AE. He submitted, the visiting higher officials of the assessee, such as, Chief Executive Officer (CEO), Chief Financial Officer (CFO), Chief Human Resource Officer (CHRO), Vice-President Digital, Vice-President Finance, Vice-President Products etc. were for meeting with officers of Indian AE for the sake of owners/shareholders interest in the subsidiary. He submitted, the technical staff visited Indian AE for

inculcating the quality culture to strengthen the relation. Thus, he submitted, visiting employees were only performing the stewardship activities or, at best, the activities may be called as preparatory or auxiliary.

9. He submitted, various submissions made and facts brought on record were ignored by the departmental authorities while concluding that the assessee had a fixed place PE in India. He submitted, though, the Assessing Officer observed that permanency test, disposal test, duration test and function test were satisfied, however, such conclusion was not supported with any evidence. He submitted, the conclusion drawn towards existence of fixed place PE is merely based on conjectures and surmises that the visiting employees had free access to the premises of the Indian AE with the right to use the premises at their will without any interference or restrictions. He submitted, the Assessing Officer presumed that the visiting employees had the right to allow the entry of any number of customers into the premises of the AE for business dealing. He submitted, the AO also presumed that visiting employees of the assessee had the right to use the premises of AE for developing RPA software, providing technical support to customers and distributing the

RPA software licences to the customers. He submitted, the Assessing Officer has not brought any material on record to establish that the visiting employees had free access to the premises of the Indian AE. Neither, he brought the evidence to prove that the premises were at the disposal of the visiting employees.

10. On the contrary, he submitted, the assessee furnished evidence to establish that the premises of India AE was not at the disposal of the visiting employees. He submitted, no material was brought on record by the Assessing Officer to prove that all the employees visiting India visited the office of the Indian AE. He further submitted, the AO has not brought on record any material to prove that the visiting employees have either developed or sold any licence for the RPO software from the premises of Indian AE. Rather, the assessee furnished evidence to demonstrate that RPA software licences were sold from outside India and payments were also made outside India. Thus, he submitted, enough evidences were furnished by the assessee to demonstrate that the conditions of Article 5(1) of India – USA DTAA are satisfied. He submitted, a fixed place of business would mean, where the entity is free to use the premises at any time of his own choice for work

relating to more than one customer and for his internal administrative and bureaucratic work. In this context, he drew our attention to the decision of the Hon'ble Supreme Court in case of *Formula 1 World Championship Ltd. Vs. CIT*, (2017) 394 ITR 80.

11. Proceeding further, he submitted, in case of *Asstt. DIT v. E-Funds IT Solutions Inc.* [2017] 399 ITR 34 (SC), the Hon'ble Supreme Court has held that the burden of proving that the foreign entity has a PE in India and must, therefore, suffer tax from the business generated from such PE, is initially on the Revenue. He submitted, the findings of the Assessing Officer with reference to fixed placed PE is based on preponderance of probability and guess work without being backed by any substantive evidence brought on record. Thus, he submitted, the initial burden on the Revenue to prove the existence of PE has not been fulfilled. In this regard, he further relied upon the following decisions:

- i. *CIT (Central), Ludhiana Vs. Jawahar Lal Oswal*, [2016] 67 taxmann.com 168 (Punjab & Haryana)
- ii. *R. Pratap Vs. ACIT* [2020] 117 taxmann.com 502 (Cochin – Trib.)
- iii. *CIT Vs. M/s. Sati Oil Udyog Ltd. & Anr.* [2015] 276 CTR 14

12. He further submitted, assessee's case is fully covered by the decision of the Hon'ble Supreme Court in case of *Ericsson Radio Systems AB Vs. DCIT, 2005 SCC Online ITAT1*. The parity between assessee's case and the case of *Ericsson Radio Systems AB Vs. DCIT* (supra) was demonstrated in the following tabular format:

Name	Citizenship	Education Qualification	Post held in the company	Details description of work done in India during the assessment year
Anthony Lopez	US	B.A.	VP, Global Talent Acquisition	Participated in certain hiring matter.
Anubhav Saxena	US	B.E	EVP, Partnerships, Strategy & Operations	Organising IMAGINE conference in India and sought participation of existing partners in India
Aymeric Ratel	US	M.S.	VP, Regional Sales	To receive sales training
Clyde Rasheed Hosein	US	M.S.	Chief Financial Officer	Meet and greet India employees
David Robert Keyes	US	M.S.	Director, Strategic Partnerships	Receive training in respect of sales and product support
Edmundo Costa	US	MBA	VP and GM (Latin America)	For the period in question, he was travelling to Europe to meet KPMG, De.loitte UK
Gerry Rice	US	B.S.	VP, Finance	Assess and standardize financial processes at India level
HaeWon Bunzel	US	B.S	Visual Designer	Provide guidance on technical standards
Jayaraman Balasubramanian	US	MBA	VP of Product Management in 2017; Is now SVP of Product Management	Assess and review documentation processes
Jon Stueve	US	M.S.	Manager, Automation Anywhere Training	Set-up training

Jonathan Malkin	US	B.S.	lead, Sales Engineering	Assist with setting-up sales engineering function at India level
Joseph Crowley	US	B.S.	Regional Sales Director	To receive sales training
Judy Tran	US	MBA	Director, Renewals	Streamline processes in respect of sales operations
Kajaai Bhatti	US	B.S.	Senior Marketing Manager (Events)	Organising IMAGINE. conference in India
Kathleen Holmgren	US	MBA	Member, Board of Directors	Meet employees and gain understanding of India operations
Manish Rai	US	MBA and MSEE	VP, Product Marketing	Assess marketing opportunities at India level
Mihir Shukla	US	B.S.	Chief Executive Officer	Meet employees and review organization
Nancy Householder Hauge	US	B.S.	Chief Human Resource Officer	Meet employees and review HR processes
Pankaj Kumar	US	B.Sc	Director, N. America Strategic Partnerships	Set-up partner service standards
Peter Meechan	US	Post Graduate	EVP, Corporate Development	Assess Business Development opportunities at India level
Pradeep Vhanshetti	US	B. Sc	Senior Solutions Architect – IQ BoT Services	Not applicable as such. lie was on a personal visit to India
Rajesh Radhakrishnan	US	M.S.	EVP, Digital Workforce Solutions	Provide guidance for standards related to digital workforce solutions
Ran Sandler	US	B.Sc	Senior Field Escalation Engineer	Assist with escalation processes and build team for India
Sathi Tadi	US	B.E.	Senior Director, Enterprise Engineering	Meeting with engineers regarding technical processes
Suan Alexander	US	B.A.	Executive Assistant - Office of the CEO	Provided assistance with issues around immigration

Sujai Vasudavan	US	M.S.	Senior Engineer, Development operations	To receive product training
Thomas Corcoran	US	B.E	Lead Machine Learning Engineer	Assist in conducting Demo at IMAGINE conference
Zulfikarali Barodawala	US	B. Sc and MCA	Senior Product Manager	Assess product issues and provide guidance

13. Without prejudice to the aforesaid submissions, learned counsel submitted that even assuming that the assessee had a fixed place PE, however, if such fixed place is used for auxiliary or preparatory work, it is excluded from being treated as a PE in terms of Article 5(3)(e) of the tax treaty. He submitted, since, the activities carried on by the visiting employees can at best be classified as auxiliary or preparatory, it has to be concluded that the assessee has no PE in India. He submitted, as per Article 5(2)(i) of the tax treaty, a fixed place used for included or technical services is excluded from being treated as PE. He submitted, the visiting employees, at best, provided technical services. Therefore, there cannot be a PE in terms of Article 5(2)(i) of the tax treaty. Without prejudice to the aforesaid submission, learned counsel submitted that the attribution of profit at 20% out of the entire 100% licence receipt is without any basis and purely on guess

work. He submitted, the Assessing Officer had no material on record to prove that the sale of any licence for the RPA software was concluded in India.

14. On the contrary, the assessee furnished evidence to demonstrate that licences were sold from outside India. He submitted, when there is no evidence to demonstrate that the entire licence fee received by the assessee was through the PE, 25% out of such licence fee cannot be attributed as profit of the PE. He submitted, the Assessing Officer committed error in applying Rule 10(i) instead of applying Rule 10(ii) for attribution of profit. He submitted, as per Article 7(1)(c) of the tax treaty, the profits of the foreign entity may be taxed in India only so much of on them as is attributable to other business activity carried on in India of the same or similar kinds, as those effected through the AE. In other words, attribution of profit to the PE should be in proportion to the revenue earned in India. He submitted, in course of assessment proceeding, the assessee had furnished extracts of the Audited Global Financial Statement. Therefore, by applying Rule 10(ii), profit will be (-)48% of the global revenue as the assessee has made loss globally. Therefore, the same ratio should be applied to the revenue attributable to the PE.

15. Strongly relying upon the observations of the Assessing Officer and learned DRP, learned Departmental Representative submitted, there was regular visit of employees of the assessee in India, including high officials for a long duration of 459 days. He submitted, the employees visiting India used the premises of the Indian AE where the principal point of contact with the clients in India. He submitted, as per the terms of the agreement, jurisdiction of courts for resolving the disputes is in India. He submitted, even if some of the work is outsourced to the Indian entity, however, overall responsibility is with the assessee. He submitted, the assessee withhold various information at assessment stage. Insofar as the attribution of profit to PE is concerned, learned Departmental Representative submitted, the Assessing Officer has given reason for not accepting the global account and applying Rule 10(i).

16. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. The dispute between the parties lies within a narrow compass, as to whether the assessee in the relevant assessment years had any fixed place PE in India in terms with Article 5(1) read with Article 5(2) of the India – USA DTAA. The Revenue has set up a case that

the employees of the assessee have visited India on regular basis for long duration and performed work from the premises of the Indian AE, AASPL. The Assessing Officer has alleged that all the tests of fixed place PE, viz., the tests of permanency, disposal, duration and functional test stand satisfied. Of course, learned DRP has agreed with the aforesaid view of the Assessing Officer.

17. Before we proceed to deal with this issue, it is necessary to state that the assessee developed RPA software platform based on Artificial Intelligence Technology. In addition to the products sold, the assessee also provides services, either itself or through outsourcing. For the purpose of supply of RPA software platform, the assessee had entered into an End User Licence Agreement (EULA) with ANZ Support Services India Pvt. Ltd., where under, the assessee provides right to use of its RPA software. Parties have also entered into a separate vendor service agreement, where under, the assessee renders services relating to RPA software for automating the process of ANZ Support Services India Pvt. Ltd. As per the scope of work under the Master Services Licences Agreement, all services relating to those that the parties agreed will be supplied by the assessee.

18. As per the terms of the agreement, the assessee grants ANZ, a limited non-exclusive, non-transferable enterprise wide Annual Subscription Licence to use the products only for ANZ internal use in connection with ANZ ordinary business operations. The agreement further stipulates that ANZ may (a) install the server software on each service cline owns or controls, and (b) reproduce and install the Client Software on Client Computers client owns or controls. Client may make copies of the products for backup, testing, disaster recovery or archival purposes and may make a reasonable number of copies of the product documentation for internal use, provided client also reproduces of such copies any copyright, trademark or other proprietary markings and notices contained in the products and product documentation and does not remove any such marks from the original. In addition to the sale of licenece, the assessee also provides services in relation to RPA software.

19. As could be seen from the facts on record, the receipts from services rendered were offered to tax in India as FTS. However, insofar as receipts from sale of licences are concerned, the assessee claimed that, since, the licences were supplied from outside India and payments were also received outside India, they

are not taxable in India. Whereas, the Assessing Officer has linked such payments to the activities performed by the assessee through the alleged PE in India. Undisputedly, the Assessing Officer has concluded the existence of PE with reference to the employees of the assessee visiting India and utilizing the office premises of the India AE, AASPL. However, it is necessary to examine whether the assessee has a fixed place PE in India under Article 5(1) read with Article 5(2) and whether the receipts from sale of licence are connected to activities undertaken by the alleged PE. In this context, the allegation of the Assessing Officer is that a number of employees of the assessee have visited India for long duration and performed the core business activities of the assessee from the premises of AASPL. Thus, in sum and substance, the Assessing Officer has alleged that the premises of AASPL constitutes fixed place PE of the assessee in India.

20. A reading of Article 5(1), which defines fixed placed PE, makes it clear that a fixed place of business through which the business of an enterprise is wholly or partly carried on, can be treated as fixed place of business or PE. Article 5(2) further clarifies that the term PE includes, furnishing of services other than the services relating to royalties and FIS within a contracting

state by an enterprise through employees or other personnel subject to conditions of clause (i) and clause (ii).

21. Keeping in perspective the provisions of Article 5(i) read with Article 5(2) of the tax treaty, we have to determine whether any part of the income earned from licence fee can be said to have been earned through the activity of the alleged PE. Undisputedly, the Assessing Officer has stated that in the assessment years under dispute, 30 employees of the assessee have visited India for a total period of 459 days and have utilized the premises of AASPL to carry out the business activities of the assessee. In this context, the Assessing Officer has referred to the email dump furnished by the assessee with reference to its employees. The details of which are as under:

Name	Citizenship	Education Qualification	Post held in The company	Details description of work done in India during the assessment year
Anthony Lopez	US	B.A.	VP, Global Talent Acquisition	Participated in certain hiring matter.
Anubhav Saxena	US	B.E	EVP, Partnerships, Strategy & Operations	Organising IMAGINE conference in India and sought participation of existing partners in India
Aymeric Ratel	US	M.S.	VP, Regional Sales	To receive sales training
Clyde Rasheed Hosein	US	M.S.	Chief Financial Officer	Meet and greet India employees
David Robert Keyes	US	M. S .	Director, Strategic Partnerships	Receive training in respect of sales and product support

Edmundo Costa	US	MBA	VP and GM (Latin - America)	For the period, in question, he was travelling to Europe to meet KPMG, Deloitte UK
Gerry Rice	US	B.S.	VP, Finance	Assess and standardize financial processes at India level
HaeWon Bunzel.	US	13.S	Visual Designer	Provide guidance on technical standards
Jayaraman. Balasubramanian	US	MBA	VP of Product Management in 2017; Is now SVP of Product Management	Assess and review documentation processes
Jon Stueve	US	M.S.	Manager. Automation Anywhere Training	Set-up training
Jonathan Malkin	US	B.S.	Lead, Sales Engineering	Assist with setting-up sales engineering function at India level
Joseph Crowley	US	B.S.	Regional Sales Director	To receive sales training
Judy Fran	US	MBA	Director, Renewals	Streamline processes in respect of sales operations
Kajaal 13hatti	US	B.S.	Senior Marketing Manager (Events)	Organising i: PVIAGINE conference in India
Kathleen Holmuen	US	MBA.	Member, Board of Directors	Meet employees and gain understanding of India operations
Manish Rai	US	MBA and MSEE	VP, Product Marketing	Assess marketing opportunities at India level
Mihir Shukla	US	B.S.	Chief Executive Officer	Meet employees and review organization
Nancy Householder Hauge	US	B.S.	Chief Human Resource Officer	Meet employees and review IIR processes
Pankaj Kumar	US	13.Se	Director, N. America Strategic Partnerships	Set-up partner service standards

Peter Meechan	US	Post Graduate	EVP, Corporate Development	Assess Business Development opportunities at India level
Pradeep Vhanshetti	US	B.Sc	Senior Solutions Architect - IQ BoT	Not applicable as such. He was on a personal visit to India
Rajesh Radhakrishnan	US	M.S.	EVP, Digital Workforce Solutions	Provide guidance for standards related to digital workforce solutions
Ran Sandler	US	13.Sc	Senior Field Escalation Engineer	Assist with escalation processes and build team for India
Sathi Tadi	US	B.E.	Senior Director, Enterprise Engineering	Meeting with engineers regarding technical processes
Suan Alexander	US	13.A.	Executive Assistant - Office of the CEO	Provided assistance with issues around immigration
Sujai Vasudavan	US	M.S.	Senior Engineer, Development operations	To receive product training
Thomas Corcoran	US	B.E	Lead Machine Learning Engineer	Assist in conducting Demo at IMAGINE conference
Zulfikarali Barodawala	US	13.Sc and MCA	Senior Product Manager	Assess product issues and provide guidance

22. From the details of employees visiting India, duration of stay and the purpose for which they visited as mentioned in the tabular chart given above, it is observed that none of the employees came for the purpose of either development or sale of or any activity related to development and sale of RPA software platform. From the materials on record, it does not appear that any of the employees visiting Indian were carrying on any activity with regard to sale of licence. Neither from the email dump, nor

any other material available on record, it is forthcoming that the employees visiting India were involved in the activity of sale of licence.

23. As could be seen from the details available, the purpose of visit are for shareholder's activity, stewardship activity, marketing events, for receiving training etc. Though, the Assessing Officer has referred to the information received under section 133(6) of the Act from the Indian AE, however, such information nowhere reveals that the assessee was carrying on any activity of sale of licence through its employees by utilizing the premises of AASPL in India. There is nothing on record that could even remotely suggest that assessee's employees were carrying out core business activities, either wholly or partly from the premises of AASPL.

24. On the contrary, from the assessment stage itself the assessee has clarified that its employees had access to AASPL premises only with prior permission. The assessee has further stated that visiting employees were given temporary space for meeting with employees of AASPL and cannot directly undertake client meeting in the premises of the AASPL. It appears that, even clients meetings are organized by the AASPL. The visiting of high

officials of the assessee, like, CEO, CFO, Chief HR etc. appears to be for meeting officers of AASPL for the sake of owners/shareholders' interests in the subsidiary. Some of the personnel visiting the premises of AASPL are for receiving training for stewardship activity. Though, the Assessing Officer has made allegation that the assessee has carried out its business activities, either wholly or partly through the premises of AASPL, however, such allegations are not backed by any supporting evidence. It is relevant to observe, the assessee has entered into a separate inter-company agreement with AASPL, through which, the assessee receives services from AASPL by remunerating the Indian AE at cost plus 18% mark-up. As per the terms of the agreement, the Indian AE provides RPA related software development and related services, which includes without limitation, coding, testing, financial modeling, customers support etc.

25. As could be seen from the aforesaid facts, even part of the services to be provided by the assessee under the master service agreement with ANZ is outsourced to the India AE. In any case of the matter, the assessee has offered the receipts from services as FTS income and it is a fact on record that the Assessing Officer

has accepted such income without assessing it as income attributable to the PE. Thus, as per the facts and material available on record, there is nothing to demonstrate that the assessee has carried out any activity, either wholly or partly in relation to sale of software licence through the alleged PE in India so as to satisfy the conditions of Article 5(1) read with Article 5(2) of the tax treaty. It is trite law that the burden of proving the existence of fixed place PE is on the Assessing Officer. In this context, we may refer to the decision of the Hon'ble Supreme Court in case of *ADIT Vs. E Funds IT Solutions Inc.* (supra). Further, in case of *Formula 1 World Championship Ltd. Vs. CIT* (supra), the Hon'ble Supreme Court has laid down certain tests for ascertaining a fixed place of business. The tests are the non-resident is free to use the place of business at any time of his own choice and has free access, it can carry on work relating to more than one customer, it can use the place of business for internal administrative and bureaucratic work. However, factually the Assessing officer has failed to satisfy any of the aforesaid tests.

26. Facts on record reveal that, though, many of the employees visited India, but there is no evidence to suggest that all of them used the premises of AASPL. Even assuming that all those

employees used the premises of AASPL but there is no evidence to suggest that they used the premises for the activity relating to the sale of software. Undisputedly, the receipts, which are sought to be attributed to the PE are from sale of software licence, however, as could be seen from the facts on record, the transfer of licence takes place, once, the licence key is generated and made available to the licensee after execution of the contract. Insofar as the receipts from provision of services, undisputedly, the assessee has offered them to tax. Though, learned Departmental Representative has alleged before us that the licence agreement was executed in India contrary to the claim of the assessee, however, no documentary evidences has been brought to establish such facts.

27. Thus, considering the totality of facts and circumstances of the case, we are of the view that the Revenue has failed to establish on record through credible evidence that the assessee has a fixed placed PE in India through which it has earned the income relating to sale of software licence. Therefore, in our considered opinion, no part of such income can be attributed to the PE. Grounds are disposed of accordingly.

28. In addition to the main grounds, vide letter dated 29.11.2022, the assessee has raised the following additional grounds:

A. First Additional Ground: Additional Claim

A.1 In riling the Income Tax Return for AY 2018-19, the Assessee erred in law in offering to tax the amount of INR 12,07,18,557, which are towards receipts for rendering "professional services" to Indian customers, under the head of "fee for technical or included services", as provided under Article 12(4)(a) of the Double Tax Avoidance Agreement (DTAA) signed between the USA and India. Instead, such receipts should have been treated as excluded from the scope of "fee for technical or included services" under Article 12(5)(a) of the DTAA.

A.2 Therefore, the Assessee prays the Hon'ble Bench to direct the ld. AO to delete the tax of INR 1,20,71,856 levied at Sr. No. 25(ii) of the computation sheet annexed to the assessment order passed by the Ld. AO on 26 July 2022.

B. Second Additional Ground:

B.1 Without prejudice to any other grounds, the Ld. AO erred in law and facts in NOT including the receipts for professional service as the revenue of the fixed place Permanent Establishment.

B.2 Therefore, the Assessee prays the Hon'ble Bench to direct the Ld. AO. to add the receipts of INR 12,07,18,557 to the receipts of the fixed place PE and attribute the profit on account of such receipts based on Rule 10(ii) of the Income Tax Rule, 1962.

29. As could be seen from the grounds raised, the assessee has disputed the taxability of amount offered by it towards FTS/FIS. Alternatively, the assessee has submitted that, if at all, the

receipts are held to be taxable, they have to be included as the income of the PE and taxed by applying rule 10(ii) of the Income Tax Rules.

30. Learned Representatives appearing for the parties were heard at length on the preliminary issue of admission of additional grounds. Our decision on the issue follows in the ensuing paragraphs.

31. Undisputedly, in the returns of income filed for the impugned assessment years, the assessee has *suo motu* offered the income received from the services rendered as FTS/FIS under Article 12(4) of India – USA DTAA. It is the claim of the assessee that the receipts cannot fall within the ambit of FIS in view of Article 12(5)(a) of the tax treaty. Admittedly, the aforesaid claim was not made by the assessee either before the Assessing Officer or even before learned DRP. Neither of the authorities have factually examined the nature and character of such receipts by investigating into the relevant facts. Therefore, entertaining assessee's claim at this stage, would require fresh investigation into the facts, which in our view, is not permissible. In our view, the issues raised in additional grounds do not fall in the category of pure legal issues, but are mixed question of fact and law. Since,

facts relating to the issues have not been examined at any stage,
we decline to entertain the additional grounds.

32. In the result, the appeals are partly allowed.

Order pronounced in the open court on 24th August, 2023

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
VICE PRESIDENT

Dated: 24th August, 2023.

RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi