INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE

SHRI G.S. PANNU, HON'BLE PRESIDENT

AND

MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 1742/Del/2023
Asstt. Year: 2020-21

Amadeus IT Group SA Vaish Associates, 1st Floor, Mohan Dev Building, 13, Tolstoy Marg, New Delhi-110 001 PAN AAOCA4539P	Vs.	ACIT, Circle 1(1)(1), Intt. Taxation Civic Center, New Delhi.
(Appellant)		(Respondent)

Assessee by:	Sh. Neeraj Jain & Shri Tavish Verma, Advocates
Department by:	Shri Vizay B. Vasanta, CIT-DR
Date of Hearing:	19.07.2023
Date of pronouncement:	16.10.2023

O R D E R

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order dated 30.05.2023 passed by the Ld. Asstt. Commissioner of Income Tax, Circle Int. Tax-1(1)(1), Delhi **("AO")** under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 **(the "Act")** pertaining to Assessment Year **("AY")** 2020-21.

2. The assessee has raised the following grounds of appeal:

"1. That the assessing officer erred on facts and in law in computing the income of the appellant for the relevant assessment year at Rs. 758,13,93,137 as against 'Nil' income returned by the appellant.

2. That the assessing officer erred on facts and in law in alleging that the appellant avoided furnishing specific information called for in the assessment, particularly the various agreements with the airlines.

Re: CRS income-Permanent establishment

3. That the Dispute Resolution Panel (DRP) assessing officer erred on facts and in law in holding the appellant to be liable to tax in India in respect of receipts from airlines, etc. relating to segments booked from India through the appellant's computer reservation system following the orders of earlier years, not appreciating that no income accrued or arose to the appellant in India.

4. That the DRP/ assessing officer erred on facts and in law in holding that computers, electronic hardware/software, and the connectivity provided by the appellant to the travel agents through SITA/ third party nodes located in India, collectively, constituted PE of the appellant in India under Article 5 of the Indo-Spain DTAA ("the Treaty") and the income arising to the appellant from the airlines, etc. was attributable to the activities of the alleged PE in India.

4.1 That the DRP/ assessing officer erred on facts and in law in holding that as the website of the appellant shows that it has various offices in India for performing functions like training, product development, technical support, etc., such office premises constitute fixed place PE of the appellant in India.

5. That the DRP/ assessing officer erred on facts and in law in alleging that Amadeus India (P.) Ltd. (AIPL) constituted dependent agent permanent establishment (PE) of the appellant in India and the income arising to the appellant from the airlines, etc., was attributable to the activities of the alleged PE in India.

5.1 That the DRP/ assessing officer erred on facts and in law in alleging that the appellant was not making any payment to AIPL towards the activities of marketing the appellant's CRS and providing the hardware support to the travel agent and therefore, the distribution fee paid to AIPL was not at arm's length and consequently, AIPL constituted dependent agent PE of the appellant.

5.2 That the DRP/ assessing officer erred on facts and in law in alleging that the appellant exercised control over the subscribers/ travel agents through AIPL.

5.3 That the DRP/ assessing officer erred on facts and in law in holding that AIPL constituted PE of the appellant under Article 5(4) of the Treaty on the ground that AIPL was carrying out negotiations with the subscribers/ travel agents without appreciating that in terms of the said Article, PE is constituted only when such enterprise has and habitually exercises authority to conclude contracts on behalf of the foreign enterprise.

6. That the DRP/ assessing officer erred on facts and in law in holding that the offices of AIPL constitute PE of the appellant in India without even specifying under which paragraph of Article 5 of the Treaty such offices of Amadeus constitute PE of the appellant.

Re: Attribution of Income

Without prejudice

7. That the DRP/ assessing officer erred on facts and in law in computing the profits attributable to the alleged PE of the appellant in India at Rs. 394,97,47,919/-

8. That the DRP/ assessing officer erred on facts and in law in not appreciating that even if it is assumed that AIPL or the computers, electronic hardware provided to the travel agents etc., constituted PE of the appellant in India, the income derived from such PE was completely consumed by distribution and other expenses attributable thereto and that no income survives for taxation.

9. That the DRP/ assessing officer erred on facts and in law in not following the order of the Supreme Court for assessment years 1996-97 to 2005-06 wherein the Supreme Court had attributed 15% of the revenues relating to the bookings made from India as attributable to the appellant's PE in India and held that no income is taxable as the payment made to dependent agent was more than the revenues so attributed, and in following the rate of attribution of 75% adopted in the order for assessment years 2007- 08 to 2019-20.

10. That the DRP/ assessing officer erred on facts and in law in following the order for assessment year 2007-08 to allege that no remuneration was paid by the appellant to AIPL for main activity of marketing the CRS and providing the hardware support to travel agents and, therefore, profits from such functions were required to be attributed to the appellant's dependent agency PE in India.

11. That the DRP/ assessing officer erred on facts and in law in disallowing expenditure of Euro 45,917,375/- incurred by the appellant under the head 'Distribution fee', while computing the income attributable to the alleged PE, following the assessment order for assessment year 2007-08.

11.1 That the DRP/ assessing officer erred on facts and in law in not appreciating that the appellant was engaged in the business of providing CRS services and the expenses incurred in connection with product development function carried out outside India were required to be excluded while computing the income of the alleged PE of the appellant in India.

12. That the DRP/ assessing officer erred on facts and in law in disallowing expenditure of Euro 17,757,948/- incurred by the appellant under the head Development fees', while computing the income attributable to the alleged PE, following the assessment order for assessment year 2007-08.

13. That the DRP/ assessing officer erred on facts and in law in disallowing expenditure of Euro 13,459.711/- incurred by the appellant under the heads Marketing cost and 'Central operating cost', while computing the income attributable to the alleged PE, on the ground

that the appellant has not been able to establish that the aforesaid expenditure has been incurred specifically for the Indian distribution activity and the justification of incurring such expenditure.

13.1 That the DRP/ assessing officer erred on facts and in law in holding that allocation of cost, particularly marketing costs, on the basis of number of bookings generated will always result in over allocation of cost to a fully grown up market like India and consequently, erred in not accepting the cost allocation method adopted by the appellant.

13.2 That the DRP/ assessing officer erred on facts and in law in not appreciating that the aforesaid costs have a direct nexus with the booking fees received from bookings made from India and, therefore, the same were required to be taken into consideration while computing the income attributable to the alleged PE.

13.3 That the DRP/ assessing officer erred on facts and in law in, alternatively, disallowing the aforesaid expenses by invoking provisions of section 40(a)(i) of the Act.

13.4 That the DRP/ assessing officer erred on facts and in law in holding that part of the allocated expenses has already been included in the expenses incurred in India resulting in duplication of deduction.

13.5 That the DRP/ assessing officer erred on facts and in law in alleging that the aforesaid expenses were in the nature of 'head office' expenses and allowed deduction @5% of adjusted income under section 44C of the Act.

14. That without prejudice the DRP/ assessing officer erred in facts and in law in erroneously computing the income of the alleged PE of the appellant.

Re: CRS income- Royalty

15. That the DRP/ assessing officer erred on facts and in law in, alternatively, holding that booking fee of Euro 102,026,836/- received by the appellant was taxable in India as "royalty both under section 9(1)(vi) of the Act and Article 13(3) of the Treaty.

16. That without prejudice, the DRP/ assessing officer erred on facts and in not appreciating that the booking fee received from non-resident airlines was not sourced in India in terms of Article 13(6) of the Treaty and was not liable to tax in India as 'royalty'.

16.1 That the DRP/ assessing officer erred on facts and in law in holding that source of income accruing to the appellant was located in India by alleging that the most of the airlines from which revenues were received were resident in India, which is factually incorrect.

17. Without prejudice, that the DRP/ assessing officer, having held the appellant to have permanent establishment in India, erred on facts and in law in bringing to tax the alleged "royalty' income on gross basis, without appreciating that in terms of section 44DA of the Act and Article 13(5) of the Treaty, royalty income effectively connected with the PE of the non-resident is required to be taxed as business income on net basis.

Re: Altea system

18. That the DRP/ assessing officer erred on facts and in law in holding that payments received by the appellant from various airlines in relation to the alleged use of Altea system was taxable in India as 'royalty' both under section 9(1)(vi) of the Act and Article 13(3) of the Treaty.

19. That without prejudice, the DRP/ assessing officer erred on facts and in law in not appreciating that the payments received from various airlines in relation to the Altea System were not sourced in India in terms of Article 13(6) of the Treaty, therefore, were not liable to tax in India as 'royalty'.

20. Further without prejudice, the DRP/ assessing officer erred on facts and in law in holding on adhoc basis a sum of Euro 43.88 million as the income of the appellant liable to tax in India as 'royalty' for the alleged use of Altea system by various airlines, without affording an opportunity of being heard to the appellant, in gross violation of the principles of natural justice.

Re: Charge of interest

21. That the DRP/ assessing officer erred on facts and in law in levying interest under section 234A and section 234B of the Act."

3. Briefly stated, assessee is a tax resident of Spain. The assessee along with its affiliated companies has developed a fully automated computer information system, which enables display and dissemination of information supplied by various airlines, which in turn facilitates, inter alia, reservations, communications, ticketing and related functions on a worldwide basis (hereinafter referred to as **'CRS'**) for the travel industry. The CRS is for the facility of both travel agencies and airline offices worldwide. The assessee has entered into agreements with various airlines **('Participating Carrier Agreement')** by providing interconnectivity between the host computer of the individual airline and the Amadeus CRS created by the assessee at Erding, Germany. Amadeus also provides connectivity to its CRS to the travel agents. The Participating Carrier Agreement, inter alia, provides that the participating airline shall pay to the assessee the charges for display of airline information through Amadeus CRS, in the form of booking fee for each participant net booking made through the Amadeus system.

3.1 In order to ensure that the customers' needs in each national market/country are met, the assessee has entered into distribution agreements with various National Marketing Companies **("NMCs")**, incorporated in the respective national markets/countries for distribution/marketing of the aforesaid CRS. The NMCs are required to seek subscribers (normally travel agents) and enter into agreements with them whereby the NMCs provide the subscribers with appropriate access to the CRS host. The assessee has a distribution agreement with its NMC in India viz., Amadeus India Private Ltd. **('AIPL')** and ResBird Technologies Pvt. Ltd. **('ResBird')**. The travel agents in India, who intend to use the aforesaid CRS have entered into subscriber's agreement with the AIPL and ResBird.

3.2 The Airlines provide the information which they would like to be displayed in a neutral form on the CRS host terminal from where the information is disseminated worldwide to the travel agents who ask for being connected to the CRS host terminal. The business of the Airlines is promoted if the travel agent is facilitated to obtain the information easily and promptly, which facility is provided for the Airlines by the CRS.

4. Given the above business model, following issues arise in the case for consideration during the AY under consideration and accordingly, assessee was asked to furnish its explanation on each issue:-

(i) Whether the assessee has a PE in India?
(ii) If so, how much profits are attributable to the PE?
(iii) Whether the booking fee received by the assessee from CRS is in the nature of royalty income taxable in India?
(iv) Whether the receipts from Altea Reservation System are in the nature of royalty/FTS taxable in India?

5. For AY 2020-21, the assessee filed its return of income on 10.01.2021 declaring 'nil' income and claiming refund of Rs. 88,64,94,000/-. The assessee's case was selected for scrutiny and statutory notices along with

detailed questionnaire were issued to the assessee from time to time electronically through ITBA in response to which the assessee filed reply/submissions electronically which were duly analysed by the Ld. AO. The Ld. Dispute Resolution Panel **("DRP")** vide its order dated 05.04.2023 upheld the findings of the Ld. AO in respect of all the four issues mentioned in para 4 above. Consequent to the directions of the Ld. DRP, the Ld. AO passed the final assessment order on 30.5.2023 under section 143(3) r.w.s. 144C(13) computing the total income of the assessee as under:-

Computation of Income:

		(Amount in INR)
A.	**Computation of business income**	
1	Profit attributable to PE in India	394,97,47,919
2	Income from Altea Suite (royalty)	363,16,45,218
	Total Income	**758,13,93,137**
B.	**Alternative computation of income**	
1.	Income from royalty (from CRS systems)	844,47,61,215
2.	Income from royalty (from Altea Suite)	363,16,45,218
	Total income from royalty	**1207,64,06,433**

5.1 The Ld. AO therefore assessed total income of the assessee at Rs. 758,13,93,137/- and inter alia concluded that the profit attributable to PE is to be taxed at normal rate and the income from royalty is to be taxed at 10% as per provisions of Article 13 of India-Spain DTAA and interest under section 234A, 234B and 234C to be charged as per this final order.

6. Aggrieved, the assessee is in appeal before the Tribunal and all the grounds of appeal relate thereto. Ground no. 1 and 2 are general in nature.

Ground No. 3 to 6: CRS income-Permanent establishment

7. Let us first deal with the primary issue of existence of PE of the assessee in India. The Ld. AO following the orders passed in the earlier years (i.e. AY 1996-97 to 1998-99, 2001-2002 to 2005-06, 2007-08 to 2017-18) held that the computers provided to the travel agents through which sales are conducted constituted fixed place PE of the assessee in India under Article 5(1) of the India-Spain DTAA. Further, the Ld. AO held that AIPL constitute a dependent agency PE in terms of Article 5(4) of the India-Spain DTAA. The Ld. DRP following the orders passed by it for AYs 2007-08 to 2019-20 upheld the order passed by the Ld. AO.

8. The Ld. AR submitted that when the matter travelled to the Delhi Tribunal in earlier AYs, the Tribunal decided the impugned issue in favour of the Revenue in series of its orders starting from AY 1996-97 to 2019-20. On further appeal to the Hon'ble Delhi High Court by the assessee for the AYs 1996-97 to 2016-17, the Hon'ble Delhi High Court has upheld the order(s) of the Delhi Tribunal. The Ld. AR further submitted that recently the Hon'ble Supreme Court vide order dated 19.04.2023 has decided the issue of attribution of profit to the alleged PE of the assessee in India upholding the order of the Delhi High Court confirming that 15% of the revenue earned by the assessee is taxable in India. Since the issue on attribution has attained finality, the ground of existence of PE of the assessee in India has become academic in nature. The Ld. DR conceded to the submissions of the Ld. AR.

9. We have considered the submissions of the parties and perused the records. We find that the impugned issue is squarely covered in favour of the Revenue by series of Tribunal's order from AYs 1996-97 to 2019-20 in assessee's own case which has been affirmed by the Hon'ble Delhi High Court. We have also perused the order of the Hon'ble Supreme Court dated 19.4.2023 in Civil Appeal Nos. 6511-6518/2010 (placed at pages 346-363 of

Paper Book-I). The Hon'ble Supreme Court in para 21 of its decision (supra) has held as under:-

"21. Therefore, we are of the view that the impugned order(s) of the High Court do not call for interference. Insofar as the second issue, namely, the question of permanent establishment is concerned, we are not going into the same, as we have concurred with the High Court on the first issue."

10. In view of the above factual matrix of the case and in the light of the decisions (supra), we dismiss ground No. 3 to 6 of the assessee.

Ground No. 7 to 10: Re: Attribution of Income

11. As regards second issue pertaining to attribution of profit to the PE, the Ld. AO computed income from bookings made in India after adding back development costs, distribution fees and attributed 75% to the alleged PE. The Ld. DRP upheld the aforesaid findings of the Ld. AO.

12. The Ld. AR submitted that the Delhi Tribunal in the assessee's own case for the AY 1996-97 to 2019-20 after considering the extent of activities in India and abroad; the assets employed and risks assumed, held 15% of the revenues relating to the bookings made from India as attributable to the PE of the assessee in India. However, since the distribution fee was paid in those years @ 33% (approx.) of the booking fee per segment, no income was held to be liable to tax in India. The appeals filed by the Revenue against the aforesaid finding of the Tribunal for the AYs 1996-97 to 2016-17 have been dismissed by the Hon'ble Delhi High Court. The Ld. AR brought to our notice that on further appeal by the Revenue, the Hon'ble Supreme Court recently vide its order dated 19.04.2023 in Civil Appeal Nos. 6511-6518/2010 has dismissed the appeal(s) of the Revenue on impugned issue of attribution of profit to the PE of the assessee in India for the AYs 1996-97 to 2005-06. Accordingly, 'nil' return filed by the assessee has duly been accepted by the Hon'ble Supreme Court and thus the impugned issue has attained finality. The Ld. DR had no objection to the submission of the Ld. AR.

13. We have considered the submissions of the parties and perused the records. It is undisputed that the facts of the AY under consideration (i.e. AY 2020-21) and that of the earlier years are same. We find that the Hon'ble Supreme Court in its decision (supra) dated 19.04.2023 (copy placed at pages 346 to 345 of the Paper Book-I) has upheld the order(s) of the Hon'ble Delhi High Court that 15% of the revenue earned by the assessee is taxable in India and that since the assessee pays 33% of the booking fees to the distributors, no income is attributable to tax in India. The relevant observations and findings of the Hon'ble Supreme Court in its decision (supra) are reproduced below:

6. *There is no dispute on fact that the respondents earn an amount of USD 3/EURO 3 according as the case may be, per booking made in India. It is also not in dispute that out of the said earning, of USD 3/EURO 3, the respondents pay various amounts to the Indian entities, which range from USD/EURO 1 to USD/EURO 1.8. In other words, the amount paid by the respondents to their Indian entities, range from 33.33% to about 60% of their total earning.*

7. *The respective Assessing Officers in the original proceedings came to the conclusion that the entire income earned out of India by the respondents is taxable. This was on the basis that the income was earned through the hardware installed by the respondents in the premises of the travel agents and that therefore the total income of USD/EURO 3 is taxable.*

8. *The orders of assessment so passed, were upheld by the respective Commissioners of Income Tax (Appeals) by independent orders.*

9. *Appeals were filed by the respondents before the Tribunal and the Revenue also filed cross objections on a different aspect about which, we are not now concerned. The Tribunal held that the respondents herein constituted Permanent Establishment (PE) in two forms, namely, fixed place PE and dependent agent PE (DAPE). At the same time, the Tribunal also held that the Lion's share of activity was processed in the host computers in USA/Europe and that the activities in India were only minuscule in nature. Therefore, as regards attribution to the PE constituted in India, the Tribunal assessed it at 15% of the revenue and held, on the basis of the functions performed, assets used and risks undertaken (FAR) that this 15% of the total revenue was the income accruing or arising in India. This 15% worked out to 0.45 cents. But the payment made to the distribution agents was USD 1/EURO 1 in many cases and much more in some cases. Therefore, the Tribunal held that no further income was taxable in India.*

11. *Appeals were filed both by the Revenue and Assesses against the orders of the Tribunal before the Delhi High Court. The Delhi High Court dismissed the appeals filed by the Revenue on the ground that no question of law arose in these matters. The Delhi High Court held that insofar as attribution is concerned, the Tribunal had adopted a reasonable approach.*

15. *It is seen from the orders of the Tribunal that the Tribunal arrived at the quantum of revenue accruing to the respondent in respect of bookings in India which can be attributed to activities carried out in India, on the basis of FAR analysis (Functions performed, assets used*

and risks undertaken). The Commission paid to the distribution agents by the respondents was more than amount of attribution and this has already been taxed. Therefore, the Tribunal rightly concluded that the same extinguished the assessment.

16. *The question as to what proportion of profits arose or accrued in India is essentially one of facts. Therefore, we do not think that the concurrent orders of the Tribunal and the High Court call for any interference.*

17. *Explanation 1(a) under clause (1) of Sub-Section (1) of Section 9 of the Income Tax Act, reads as follows:*

> *9. Income deemed to accrue or arise in India. (1) The following incomes shall be deemed to accrue or arise in India:*
>
> *(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.*
>
> *Explanation 1-For the purposes of this clause-*
> *(a) in the case of a business other than the business having business connection in India on account of significant economic presence of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India."*

18. *Under Explanation 1(a). what is reasonably attributable to the operations carried out in India alone can be taken to be the income of the business deemed to arise or accrue in India. What portion of the income can be reasonably attributed to the operations carried out in India is obviously a question of fact. On this question of fact, the Tribunal has taken into account relevant factors.*

19. *However, learned Additional Solicitor General referred to Article 7 of the 'Convention between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income' which is called in popular parlance as 'Double Taxation Avoidance Agreement. This Article 7 reads as follows:*

> *"Article 7*
> *<u>Business Profits</u>*
>
> *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 the 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 the other State of the same or similar kind as those effected through that permanent establishment."

20. The above Article may not really go to the rescue of the Revenue for the reason that in the contracting state, the entire income derived by the respondents, namely, USD/EURO 3 will be taxable. This is why Section 9(1) confines the taxable income to that proportion which is attributable to the operations carried out in India.

21. Therefore, we are of the view that the impugned order(s) of the High Court do not call for interference."

14. Accordingly, we deem it fit to remit this issue to the file of the Ld. AO to decide it afresh in light of the decision (supra) of the Hon'ble Supreme Court.

Ground No. 11 to 14: Disallowance of expenses

15. The next issue raised by the assessee in Ground No. 11 to 14 relates to disallowance of certain expenses incurred by the assessee while computing the income attributable to the PE. The Ld. AO disallowed the expenditure of Euro 45,917,375/- claimed by the assessee under the head "Distribution fee" following the assessment order for AY 2007-08. The said disallowance has been made on the ground that as per the invoices raised by AIPL, the description of services is "Export of Processed Data/ software" and not 'Distribution fee'. Further, the Ld. AO also disallowed "development fee" amounting to Euro 17,757,948/- and "marketing cost/ Central Operating Cost" amounting to Euro 13,459,711/- incurred for earning revenue from bookings made from India. The Ld. DRP upheld the order of the Ld. AO. Aggrieved, the assessee is in appeal before the Tribunal challenging the aforesaid disallowance of expenses by the Ld. AO/ DRP.

16. The Ld. AR submitted that similar expenditure has been allowed since inception i.e. AYs 1996-97 to 2006-07 and in view of there being no change in facts or law, no disallowance is warranted in the present year too. He submitted that the aforesaid position has been recently upheld by the Tribunal in assessee's own case for AYs 20017-18 to 2019-20. He further

submitted that the Revenue has accepted the said decision of the Delhi Tribunal and did not challenge the same before the Delhi High Court. (pages 365-367 of the Paper Book-II referred). The Ld. DR conceded with the submissions of the Ld. AR.

17. We have considered the submissions of the parties and perused the records. It is not in dispute that facts of the present case and business model of the assessee and its PE in India are identical to the earlier years. We find that Tribunal has consistently decided the impugned issue in favour of the assessee in series of its orders for AYs 2007-08 to 2019-20 against which Revenue has not preferred any appeal before the Higher Forum. It can very well be inferred that the Revenue has accepted the said decision of the Delhi Tribunal which is evident from the fact that the Revenue has not challenged the impugned issue before the Delhi High Court in its appeals for earlier AYs 2007-08 till 2016-17 (placed at pages 365-367 of the Paper Book-II). We may gainfully refer to the consolidated order of the Delhi Tribunal in ITA No. 2/Del/2021 for AY 2017-18, ITA No. 1465/Del/2022 for AY 2018-19 and ITA No. 1466/ Del/2022 for AY 2019-20 wherein the Tribunal following the order(s) of the Coordinate Bench for earlier AYs held as under:

"20. The very same issue has also been decided in favour of the taxpayer by the Tribunal vide order dated 26.10.2020 for AYs 2007-08 to 2012-13. It is also not in dispute that facts of the present case and business model of the taxpayer and its PE in India are identical to the earlier years. We have perused the order passed by the Tribunal in taxpayer's own case which is held as under:-

> *"16. The Assessing Officer has disallowed the claim of the assessee on account of the distribution expenses. The ld. DRP upheld the addition on the grounds that no documents have been filed in support of the distribution activity.*
>
> *17. We have gone through the history of such expenditure and find that the addition is being made owing to confusion in the description of the services as "export of processed data/software" or "distribution fee"*
>
> *18. This expenditure has been allowed by the Co-ordinate Bench of the Tribunal from the assessment years 1996-97 to 2006-07. Since, the facts have not been disputed, in the absence of any material change, we hereby allow the claim of distribution expenses."*

21. By following the principle of consistency, we follow the order passed by the coordinate Bench of the Tribunal in Assessee's own case vide order (supra), The Grounds No. 11, 12, 13 & 14 of 1.T.A. No.

2/DEL/2021(A.Y 2017-18), I.T.A. No. 1465/DEL/2022 A.Y 2018-19) and I.T.A. No. 1466/DEL/2022 (A.Y 2019-20)respectively are allowed. "

18. In view of the above facts and circumstances of the case and following the decision (supra) of the Coordinate Bench of the Delhi Tribunal, we hereby allow ground No. 11 to 14 of the assessee.

Ground No. 15 to 17: CRS income- Royalty

19. Ground No. 15, 16 and 17 relates to taxability in India of booking fee amounting to Euro 102,026,836/- received by the assessee as 'royalty' both under section 9(i)(vi) of the Act as well as under Article 13(3) of the India-Spain DTAA. The Ld. AO, on an alternate basis, held that booking fee received by the assessee is taxable as royalty both under section 9(1)(vi) of the Act and Article 13 of the India-Spain DTAA on the ground that the 'booking fee' received by the assessee from various airlines is payment for use of process and scientific equipment. The Ld. DRP upheld the order of the Ld. AO.

20. The Ld. AR argued that in terms of section 44DA of the Act and Article 13(5) of the India-Spain DTAA payment in the nature of royalty which is effectively connected with the PE of the non-resident is required to be taxed as business income. Such income is required to be computed on net basis, i.e., considering the expenses incurred to earn the income. The said income cannot be brought to tax in India on gross basis. He relied on the decision of the Hon'ble Delhi High Court in the case of DIT vs. Rio Tinto Technical Services 340 ITR 507 (Del.). He also referred to the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd. vs. CIT 432 ITR 471 (SC) wherein it has been held that payment for use of software is not in the nature of royalty under the DTAA. Referring to the history and factual matrix of the present case, the Ld. AR submitted that in the assessment framed for AY 2006-07, the assessing officer had substantively brought to tax the booking fee as business income and protectively held the same to royalty since in that year the tax worked out in

treating the income as royalty was less than the tax worked out after attributing income to the alleged PE of the assessee in India.

20.1 The Ld. AR submitted that the impugned issue also stands covered in favour of the assessee by the Delhi Tribunal in assessee's own case for the AYs 2006-07 to 2019-20 which has recently been affirmed by the Delhi High Court for AYs 2006-07 to 2016-17. The Ld. DR did not controvert the submissions of the Ld. AR.

21. We have heard the Ld. Representative of the parties and perused the records. We find that the impugned issue is squarely covered by the decision of the Hon'ble Delhi High Court in assessee's favour wherein it has been held that the booking fee received by the assessee is taxable as 'business income' and not as 'royalty'. The Hon'ble Delhi High Court vide its order dated 04.05.2023 for AY 2013-14 to 2016-17, order dated 23.05.2023 for AY 2009-10 and order dated 30.05.2023 for AY 2012-13 (placed at pages 364 to 376 of the Paper Book-II) has dismissed the appeals filed by the Revenue by recording its common finding for all the AYs involved as under:

"7. Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the appellant/revenue, says that the following questions have been, broadly, proposed in support of the above-captioned appeals:

(a) ...

(b) Whether in the facts and in circumstances of the case, the Tribunal erred in law in holding that booking fee received by the appellant/assessee is taxable as business income, and not as royalty?

(c) ...

8.2 Insofar as the proposed question (b) is concerned, once again, Mr Bhatia confirms that the said question raised by the appellant/revenue is covered by a decision rendered by a coordinate bench on 08.02.2016, in ITA No.473/2012, titled Director of Income Tax vs. New Skies Satellite BV & Ors. Accordingly, this question also does not arise for our consideration, as it also stands covered by the aforesaid decision of the court.

10. Given this position, we are of the view that none of the questions of law, as proposed, arise for our consideration."

22. Respectfully following the decision(s) of the Hon'ble Delhi High Court (supra), we hereby allow ground No. 15 to 17 of the assessee.

Ground No. 18 to 20: Altea system

23. The assessee has also challenged the finding of the Ld. AO that he has on an ad hoc and arbitrary basis brought to tax payments received from various airlines in relation to the use of Altea System as "royalty" both under section 9(1)(vi) of the Act and Article 13(3) of the India-Spain DTAA on the ground that the payment received by the assessee is for use of process and scientific equipment. The Ld. AO observed that Altea system is not merely an inventory management and hosting system as claimed by the assessee but provides key operational services to various airlines like accepting payment and issuance of travel documents, performing credit card validation, maintaining data security, manage customer check ins, etc.

24. To refute the above finding / observation of the Ld. AO regarding Altea System, the Ld. AR submitted that the Ld. AO failed to appreciate that the Altea system is installed at the airports and is accessed only by the airlines and not by any of Amadeus's agents viz. Resbird, Amadeus India and that during the year the said system was only available to British Airways for the aforesaid purpose and that too, only at the airport counter. The said software was not available outside the Indian airport or to any of the agents of the assessee in India since the agents were booking the tickets only through the CRS of the assessee.

24.1 The Ld. AR further submitted that the Ld. AO failed to appreciate that the payment made by British Airways to the assessee in relation to Altea system, is for services rendered by Amadeus and not for use of any process, or equipment, etc. since the control to such inventory system is never transferred by Amadeus to British Airways. Further, the inventory hosting takes place outside India and payment is made by non-resident airlines to another non-resident outside India. The various services like accepting

payments, credit card validation, etc. are incidental to reservation, which services had not been subscribed to by British Airways during the relevant previous year.

24.2 The Ld. AR brought to our notice that the impugned issue is covered in favour of the assessee by the decision(s) of the Coordinate Bench in appellant's own case for the AYs 2007-08 to 2019-20 wherein it has been held that payment received by the assessee from the airlines for the use of Altea system cannot be characterized as "royalty" either under the Act or under the India-Spain DTAA. It was also brought to our notice that the Hon'ble Delhi High Court has not framed any question of law on the impugned issue in the appeal filed by the Revenue and hence this issue has attained finality. The Ld. DR has not brought on record any material to controvert the submissions of the Ld. AR.

25. We have heard the Ld. Representative of the parties and perused the records. The facts are not in dispute and remain same as that of earlier AYs. We find that the impugned issue is covered by various decisions of the Delhi Tribunal in assessee's own case in its favour which have not been challenged by the Revenue before the Hon'ble Delhi High Court. This is evident from the decisions placed before us. We may refer to the recent decision of the Coordinate Bench of the Delhi Tribunal in ITA No.2/Del/2021 for AY 2017-18, ITA No. 1465/Del/2022 for AY 2018-19 and ITA No. 1466/ Del/2022 for AY 2019-20 wherein the Tribunal following the order(s) of the Coordinate Bench for earlier AYs held as under:

> *"31. Following the order passed by the coordinate bench of the Tribunal in AYS 2007-08 to 2012-13, we are of the considered view that payment received by the taxpayer from British Airways in relation to alleged use of 'Altea system' cannot be characterized as 'royalty' either under the Act or under the Indo- Spain Treaty because Altea system was installed at the airport and was accessed only by the airlines and not by the Amadeus's agents viz. Resbird, Amadeus India and that during the year, the said system was available to British Airways for the aforesaid purpose and that too only at the airport counter and the said software was not available outside the Indian airport or to any of the agents of the taxpayer since the agents were booking the tickets only through the CRS of the taxpayer. Consequently, grounds No.*

18, 19 & 20 of 1.T.A. No. 2/DEL/2021(A.Y 2017-18), I.T.A. No. 1465/DEL/2022 A.Y 2018- 19) and I.T.A. No. 1466/DEL/2022 (A.Y 2019-20) respectively are decided in favour of the Assessee."

26. In view of the above facts and circumstances of the case and following the decisions (supra) of the Coordinate Bench of the Delhi Tribunal ground Nos. 18 to 20 of the assessee are allowed.

Ground No. 21: Charge of interest

27. The last ground No. 21 relates to the levy of interest under section 234A and 234B of the Act. As regards levy of interest under section 234A of the Act, the Ld. AR submitted that due date for filing the return of income for AY 2020-21 was extended till 15.02.2021 vide CBDT notification dated 30.12.2020. The assessee duly filed its return within the prescribed time i.e. on 10.01.2021 and hence interest under section 234A should not be levied. He placed a copy of the ITR acknowledgment for AY 2020-21 on record.

28. We have considered the submissions of the Ld. AR and perused the records. As regards levy of interest under section 234A of the Act, we observe that the Tribunal in its decision (supra) for AY 2017-18 to 2019-20 remitted the matter back to the file of Ld. AO for verification and decide the matter afresh in accordance with law. The relevant finding of the Tribunal is as under:

"32. The Ground No. 21 in ITA No. 1466/Del/2022 and 1465/Del/2022 is regarding levying of interest at Rs.2, 12,03,220/- and Rs. 2,01,63,856/- respectively by the A.O. under Section 234A of the Act. The Ld. Counsel for the assessee submitted that the A.O has fail to appreciate the return of assessee for the relevant Assessment Year was filed within the prescribed period. But the Ld. A.O has committed an error by levying interest u/s 234A of the Act. Therefore, submitted that, the Ground No. 21 deserves to be allowed.

33. The contention of the assessee Ld. Counsel for the assessee is that the return was filed well within the due date, if that is the fact, the question of levying interest u/s 234A does not arise. Therefore, we deem it fit to restore the said issue to the file of the A.O to verify the date of return and also the due date for filing the income tax return for the year under consideration and decide the matter afresh in accordance with law. Accordingly, we remand the issue involved in Ground No. 21 in ITA No. 1466/Del/2022 and 1465/Del/2022 to the file of the A.O for fresh consideration in accordance with

law. Thus, we allow the Assessee's Ground No. 21 in ITA No. 1466/Del/2022 and 1465/Del/2022 are allowed for statistical purpose."

29. Following the decision (supra) of the Coordinate Bench of Delhi Tribunal, we deem it fit and proper to restore this issue to the file of Ld. AO for verification as to the filing date of return viz-a viz the due date of filing of return for the year under consideration in the light of the CBDT Circular (supra) and decide it afresh in accordance with law.

30. So far as levy of interest under section 234B of the Act is concerned, the Ld. AR submitted that this issue is squarely covered by the decision of the Delhi Tribunal in assessee's own case for the AYs 2013-14 to 2019-20 which now stands affirmed by the Hon'ble Delhi High Court as well. He brought to our notice the relevant finding / observation of the Tribunal in its decision(s) (supra) and submitted that in the absence of any liability for payment of advance tax since tax is deductible at source on the income of the assessee held liable to tax in India, the levy of interest under section 234B of the Act is not warranted. Further, in the present case the income has been received by the assessee after deduction of tax at source.

31. We have perused the decision of the Co-ordinate Bench in ITA No. 2/Del/2021 for AY 2017-18, ITA No. 1465/Del/2022 for AY 2018-19 and ITA no. 1466/ Del/2022 for AY 2019-20 wherein the Tribunal relied upon the decision of the Coordinate Bench in assessee's own case for earlier AYs AY 2013-14 to 2016-17 and held that *"since the income has been received by the assessee after deduction of tax at source the proviso is not applicable to the case of the assessee. Accordingly, Ground No. 21 in ITA No. 2/Del/2022, Ground No. 22 in ITA No. 1466/Del/2022 and ITA No. 1465/Del/2022 are allowed"*.

32. We also observe that the impugned issue now stands settled in favour of the assessee by the Hon'ble Delhi High Court in the appeal filed by the Revenue against the above finding of the Delhi Tribunal for AYs 2009-10,

2012-13 and 2013-14 to 2016-17. The relevant extract of the Hon'ble Delhi High Court's decision (supra) for AY 2013-14 to 2016-17 is reproduced below:

"7. Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the appellant/revenue, says that the following questions have been, broadly, proposed in support of the above-captioned appeals:

(a) ...

(b) ...

(c) Whether in the facts and in circumstances of the case, the Tribunal is correct in law in holding that payments, which are subject to withholding tax under Section 195 of the Income Tax. Act, 1961 [in short, the "Act"] are not liable for interest under Section 234B of the Act?

8.3 Insofar as proposed question (c) is concerned, Mr Bhatia says that although on account of the amendment introduced via Finance Act, 2021, (with effect from 01.04.2012), the decision of the Supreme Court rendered in Director of Income Tax, New Delhi v. Mitsubishi Corporation, (2021) 130 Taxman.com 276 SC may not apply, but on facts, since the additions have not been sustained, the addition qua interest under Section 234B of the Act may not survive.

9. It cannot but be accepted by Mr. Bhatia that the following observations returned by the Tribunal would lead to the conclusion that addition vis-a-vis interest under Section 234B of the Act, could not have been made:

> *"33. Ld. AR for the tax payer contended that in the absence of any liability for payment of advance tax since tax is deductible at source of the income of the taxpayer held liable to tax in India, the levy of interest u/s 234B is not warranted.*
>
> *34. Provisions contained below section 209(1)(d) of the Act introduced by Finance Act, 2012 wef 01.04.2012 would apply only in a situation where persons responsible for tax has paid or credited such income without deduction of tax. In the instant case, since the income has been received by the taxpayer after deduction of tax at source, the proviso is not applicable as has been held by the coordinate Bench of the Tribunal in BG International Ltd. vs DCIT in ITA No.31/DDN/2020 order dated 31.12.2020, Even otherwise, when no addition sustains section 234B would not apply. So, ground no.21 of ITA Nos.2007/Del/2017, 3494/Del/2018 7970/Del/2018 & 7047/Del/2019 for Assessment Years 2013-14, AY 2014 15, AY 2015-16 & AY 2016-17 respectively is determined in favour of the taxpayer.*

10. Given this position, we are of the view that none of the questions of law, as proposed, arise for our consideration."

33. Respectfully following the decision of the Delhi Tribunal which is affirmed by the Hon'ble Delhi High Court, we hold that levy of interest under section 234B of the Act is not called for. Accordingly, interest levied under

section 234B of the Act is hereby deleted. Ground No. 21 is thus treated as partly allowed for statistical purposes.

34. In the result, for statistical purposes, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 16th October, 2023.

Sd/-	**sd/-**
(G.S. PANNU)	**(ASTHA CHANDRA)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 16/10/2023

Veena

Copy forwarded to -
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	