IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D': NEW DELHI
(Through Video Conferencing)

BEFORE,
SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

I.T.A No.1882/Del/2017
(ASSESSMENT YEAR 2013-14)

Net App B.V. C/o Mr. Vshal Pandey SRBC & Associates LLP. India Glycos Pvt. Ltd., 4th & 5th Floor, Commercial Complex Building, Plot No.2B, Tower-2, Gautam Buddha Nagar, Sector-126, Near Lotus Valley School, Noida Express-201 304. PAN–AADCN 2178C	Vs.	Dy. CIT, Circle-2(2)(2), International Tax, New Delhi.
(Appellant)		**(Respondent)**

Appellant By	**Sh. G.C. Srivastava, Sr. Adv.** **Sh. Mayank Patawari, CA**
Respondent by	**Dr. Prabhakant, CIT-DR**
Date of Hearing	**01.07.2021**
Date of Pronouncement	**20.09.2021**

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal has been preferred by the assessee against the final assessment order dated 31.01.2017 passed u/s 143(3)

read with section 144C of the Income Tax Act, 1961 (hereinafter called as 'the Act') and pertains to Assessment Year 2013-14.

2.0 The brief facts of the case are that the assessee is a non-resident company registered in Netherlands and is also a tax resident of Netherlands. The assessee company is engaged in the business of selling storage equipment and products and is also rendering certain services in the Asia-Pacific region. The company sells NetApp B.V. products and services in India through third party distributors appointed on a non-exclusive basis. During the year under consideration, the Assessing Officer (AO), on the basis of the view taken while framing assessments for Assessment Years 2008-09, 2010-11 and 2012-13, held that the assessee has Permanent Establishment ("PE") in India. The Assessing Officer, vide para 10 of the final assessment order, has held that the business premises of NetApp India constituted Permanent Establishment of the assessee company in terms of Article 5 of the Double Taxation Avoidance Agreement (DTAA). The Assessing Officer further held that M/s NetApp India was an agency of the assessee company in India and attribution of income/loss was done

as per para 16 of the draft assessment order. In addition to this, the Assessing Officer also held that the receipt from sale of embedded software in the nature of royalty and taxed an amount of Rs.14,99,39,032/- as business income under Article 7 of DTAA. On similar lines, the service levy charged by the assessee was brought to tax as Fees for Technical Services (FTS) effectively connected to the PE.

2.1 The assessee company filed objections before the Ld. Dispute Resolution Panel (DRP) in terms of section 144C of the Act, but the objections of the assessee were dismissed by the Ld. DRP and, thereafter, the impugned final assessment was passed.

2.2. Aggrieved by the final assessment order, the assessee company has now approached this Tribunal and has raised the following grounds of appeal:-

> *"1. The learned AO has erred, in law, by holding that on account of the activities of NetApp India Private Limited ("NetApp India"), a permanent establishment ("PE") is constituted for NetApp B.V. in India under the India-Netherlands Treaty ("Treaty").*

2. The learned AO has erred, in law and in facts, by artificially splitting income from storage products into the hardware component and software, and taxing these income streams separately under the provisions of the Act read with the applicable provisions of the Treaty.

3. The learned AO has erred, in fact and law, by holding that the income from the sale of software is royalty income under Article12(3) of the Treaty and consequently liable to tax in India.

4. The learned AO has erred, in fact and law, by holding that the income from the sale of subscriptions is royalty income under Article 12(3) of the Treaty and consequently liable to tax in India.

5. The learned AO has erred, in law and in facts, by holding that the income from the provision of the services is royalty income and fees for technical services ("FTS") under Article 12(4) of the Treaty and consequently liable tax in India.

6. The learned AO has erred, in law, by holding that despite payment of an arm's length price to NetApp India (the alleged PE of the Appellant in India) for the marketing and sales support services, additional income relating to supply of storage products, subscriptions and services is attributable to the alleged PE and taxable in India.

7. The learned AO has erred, in law, by holding that income from the supply of storage products is taxable in India in the absence of a PE in India and attributing 90% of the gross profits of NetApp B.V.from the sale of storage

products, to the PE in India, while disregarding the income attribution principles under Article 7 of the Treaty, read together with the Protocol to the Treaty("Protocol") and well established judicial precedents in the matter.

8. The learned AO has erred, in law, by invoking the provisions of section 44DA to tax the income from the sale of software, subscriptions and services in India without allowing for any expenditure incurred by the Appellant outside India and by considering 100% of such receipts as being attributable to the alleged PE in India.

9. The learned AO has erred, in law and in facts, by holding that the sale consideration received by the Appellant from the sale of NetApp B.V. products to NetApp India Marketing is the business income of the appellant and consequently liable to tax in India.

10. The learned AO has erred in law and in fact, in levying interest under section 234B of the Act, amounting to INR 7,53,38,064 disregarding the fact that the entire income of Net App B.V., which has been held to be taxable, was subject to withholding of taxes in India owing to which advance tax was not liable to be paid.

11. The learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act, since the Appellant is not liable to the alleged PE in India."

3.0 At the outset, the Ld. Authorized Representative (AR) submitted that the issues raised by the assessee before this Tribunal are squarely covered in favour of the assessee by order of

the ITAT in assessee's own case for Assessment Years 2008-09 and 2010-11. It was submitted that there was no change in facts in the present year and that even the Assessing Officer has relied upon the assessment orders for Assessment Years 2008-09 and 2010-11 while making the impugned addition. The Ld. AR drew our attention to the relevant paragraphs of the consolidated order of this Tribunal for Assessment Years 2008-09 & 2010-11 and the findings recorded therein vis-a-vis grounds raised in the present appeal.

4.0 Per contra, the Ld. CIT-DR did not dispute the factual position and relied upon the assessment order.

5.0 We have considered the facts of the case and gone though the order passed by the Co-ordinate Bench of this Tribunal for Assessment Years 2008-09 and 2010-11. We note that ground Nos.1,2,6,7 & 8 in the captioned appeal related to the issue of Permanent Establishment and attribution of profits. It is seen that the Assessing Officer, while holding that the assessee company has Permanent Established in India, has primarily relied upon and followed the finding recorded in Assessment orders for Assessment

Years 2008-09 and 2010-11. Since, the appeals of the assessee against the said assessment orders for Assessment Years 2008-09 and 2010-11 have been decided by a Co-ordinate Bench of this Tribunal in the favor of the assessee in ITA Nos.4781/Del/2013 and 634/Del/2014 vide order dated 16.01.2017 by holding that the assessee company does not have Permanent Establishment in India in terms of Article 5 of the India-Netherlands Double Taxation Avoidance Agreement (DTAA), we are respectfully following the same on identical facts and identical reasoning. The relevant observations of the Co-ordinate Bench of the Tribunal are reproduced herein under for a ready reference:-

> *"42. Now we proceed to examine whether the assessee has a Permanent establishment in India with respect to article 5 (1) of the double taxation avoidance agreement. The fact remains that appellant neither has any employees in Indian nor does its personal or employees visit or is seconded to India. The only reason why it has been held by the Ld. assessing officer that assessee has a fixed place permanent establishment in India is merely because the existence of a subsidiary in India which is carrying on its own business as commission agent of the appellant. We are of the view that there needs to be a clear-cut distinction between the business of the appellant as well as the business carried on by the Indian company itself for its own purposes. The Indian company is merely a service provider to the appellant and it would not be appropriate here to say that*

where a person opt in service in relation to his business from another person. Then the service provider carries on the business of the services recipient. As it is stated that there is an agreement between appellant and the Indian company for provision of certain services which are listed in paragraph 3 of the commission agent agreement dated27/04/2002. According to that agreement the Indian company shall in form appellant of all the orders placed by the customers immediately upon receipt and such order shall be accepted or rejected at the sole discretion of the appellant. It is further submitted in the agreement itself that Indian company shall not have any authority whatsoever to bind appellant with respect to any of the orders received. It was also the obligation of the Indian company that it will maintain a competent and fully trained organization of itself. It will provide a monthly sales forecast to the appellant. As assessee is engaged in sale of such products and the Indian entity is a commission agent of the appellant the Indian company shall maintain a representative set of products for demonstration purposes only. The Indian company is also responsible to maintain a response mechanism probably to all the enquiries and request by the customer or potential customers relating to the sale of products by the appellant. For the services the Indian company will be remunerated a service fee as stated in paragraph No. 5 of that agreement. Therefore, on reading of the agreement it is apparent that Indian company is a service provider to the appellant and it does not have any authority to conclude any contracts on behalf of the appellant. The Indian company is a separate legal entity undeniably, which has its own Board of Directors premises employees contracts etc. and the employees of Indian company work under the control and supervision of Indian company only and not the appellant for provision of its services to the appellant. The Ld. assessing officer has stated that the services provided by the

Indian company to the appellant's Central and core activities to hold that Indian entity is a permanent establishment of the appellant. The Ld. assessing officer has also not put forth any evidence which leads to the fact that it is not the business of the Indian company that is being carried out in India, but it is the business of the appellant being carried out in India through the Indian entity such as deployment of the staff by appellant to the Indian company and working in tandem with the employees of the Indian entity for effecting sales in India. Further the Indian company is also remunerated by the appellant on cost plus basis. Identical issue has been decided by the Hon'ble Delhi High Court in case of Adobe Systems Inc. Versus ADIT (2016) (69 Taxmann.com 228)(Delhi), wherein it was also alleged by revenue that the Indian company is functioning core activities of Adobe Systems incorporation, Indian company is remunerated on cost plus basis and transaction is under takenat arm's length, it has been held as under:-

> *"32. Para (1) of Article 5 defines a PE to mean a fixed place of business through which the business of an enterprise is wholly or partly carried on. The term 'fixed place of business' includes premises, facilities, offices which are used by an enterprise for carrying on its business. The fixed place must be at the disposal of an enterprise through which it carries on its business wholly or partly. Although, the word 'through' has been interpreted liberally but the very least, it indicates that the particular location should be at the disposal of an Assessee for it to carry on its business through it. These attributes of a PE under Article 5(1) of the Indo-US DTAA were elucidated by the Supreme Court in Morgan Stanley & Co. Ltd. (supra). In a recent decision, a Division Bench of this Court in DIT v. E-Funds IT Solution [2014]364 ITR 256/226 Taxman 44/42*

taxmann.com 50 (Delhi) reiterated the above-stated attributes; after quoting from various authors, this Court held that "The term 'through' postulates that the taxpayer should have the power or liberty to control the place and, hence, the right to determine the conditions according to its needs". In the present case, there is no allegation that the Assessee has any Branch Office or any other office or establishment through which it is carrying on any business other than simply stating that Adobe India's constitutes the Assessee's PE. There is no evidence that the Assessee has any right to use the premises or any fixed place at its disposal. The AO has simply proceeded on the basis that the R&D services performed by Adobe India are an integral part of the business of the Assessee and therefore, the offices of Adobe India represent the Assessee's fixed place of business. Thus, clearly the right to use test or the disposal test is not satisfied for holding that the Assessee has a PE in India in terms of Article5(1) of the Indo-US DTAA.

33. In E-Funds IT Solution (supra), this Court had expressly negated that an assignment or a sub-contract of any work to a subsidiary in India could be a factor for determining the applicability of Article 5(1) of the Indo-US DTAA. The Court had further expressly held that:

"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 permanent establishment. 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 permanent

establishment exists. Reference to core of auxiliary or preliminary activity is relevant when we apply paragraph 3 of Article 5 or when sub-clause (a) to paragraph 4 to Article 5 is under consideration. The fact that the subsidiary company was carrying on core activities as performed by the foreign assessee does not create a fixed place permanent establishment."

34. Thus, the AO's view that Adobe India constituted the Assessee's PE in terms of paragraph 1 of Article 5 of the Indo-US DTAA is palpably erroneous and not sustainable on the basis of the facts as recorded by him."

In the present case, it is been alleged that the transfer pricing officer of the Indian entity had made an adjustment to the marketing and sales support function and appeal of the Indian entity by the 1st appellate authority has decided against the Indian entity. Therefore it was contended that the transaction between the Indian entity and the appellant are not at arm's length. The contention of the Ld. authorized representative was that notwithstanding the fact that the Ld. 1st appellate authority has held that the payments made to Net app India are not at arm's length, they are liable to be resolved in proceedings of the Indian entity and not in the proceedings of the appellant. He therefore relied on the decision of the Hon'ble Delhi High Court in case of Adobe Systems Inc (Supra) wherein it has been held that even if there is a dispute in relation to this, it is liable to be resolved in proceedings relating to the Indian entity. We are of the opinion that transfer-pricing dispute in the assessment proceedings of the Indian entity does not have any bearing on determination of permanent establishment

of appellant in India. Indeed, it is a matter of dispute between Indian revenue authorities and the Indian entity only. Therefore, respectfully following the decision of the Hon'ble Delhi High Court in Adobe System Incorporated (Supra), we reject the contention of the revenue that there is a permanent establishment of the appellant in terms of article 5 (1) of the double taxation avoidance agreement.

43. Now we come to the agency PE and other aspects of permanent establishment of the appellant. The main allegation of the Ld. Assessing officer is that Indian entity has the authority to conclude contracts by virtue of common directors who are eligible to sign contracts on behalf of foreign company as well as Indian agent. On these facts, it was also contended by revenue that it constitutes a place of management for the appellant. It is further contended that Indian entity has local sales offices in India. Further, the website of the net Group mentions the Indian entity sales representative in the sections which mentions the offices of Indian entity. It is further contended that net app India is not providing mere back-office support services, but it is engaged in the capacity building of the group and appellant. We are of the opinion that common directors of the appellant and net app India. They are not engaged in the day-to-day activities of the appellant renegotiation of any contracts or performing any marketing functions in India on behalf of the appellant. Merely because there are common directors is not determinative factor whether the net app India as an authority to conclude contracts on behalf of appellant. There reliance is aptly placed on the decision of the coordinate bench in ITO versus Pubmatic India (P.) Ltd. (158 TTJ 398) (MUM) wherein it has been held that merely because one of the directors is common in both the companies does not constitute the assessee as PE. Even

otherwise the common director and holding of the company by itself does not constitute either company as a Permanent Establishment of the other as per Para 6 of Article 5 of Indo-US DTAA. We also do not see any such provision in the double taxation avoidance agreement applicable in this case. Therefore, we reject that contention of the revenue. There is no evidence found by the Ld. assessing officer during the year that Indian company has concluded any contracts on behalf of appellant. For holding permanent establishment in terms of article 5 (5) of the double taxation avoidance agreement, it is imperative that the agent has and is habitually exercising that authority to conclude contracts on behalf of appellant. According to us, Revenue has failed to establish with credible evidence that such authority is vested in Indian company and Indian company habitually exercises that authority. The contract placed before us emphatically denies any such authority with the agent and further in absence of any evidence placed before us by revenue, this argument of revenue does not find support from us. Therefore we are of the opinion that according to article 5 (5) of double taxation avoidance agreement, assessee does not have permanent establishment in India. Regarding reference to the website of the net app group the references with respect to how to buy and contact us section which are very common looking to the services that has been rendered by Indian entity to its potential customers to reach out to the Indian entity to discuss product features information and response to the Canaries as part of the marketing support function only. It is pertinent to note here that the website pages under this section also referred to the list of the addresses of other resellers and service providers were the parties who conducted sales process and perform sales in India. Therefore this argument of the revenue also does not find favour with us. On the contention of that Indian entity constitutes a place of management for appellant is

devoid of any merit as the Ld. and assessing officer has not led to any evidence to establish that the appellant does take significant and strategic decisions relating to its global business in India. In fact it was contended that the board meetings of the appellant company is held outside India and, therefore, there cannot be any fixed place of permanent establishment in India. The support for this contention has been correctly drawn by the assessee from the commentary of Prof Klaus Vogel and paragraph No. 12 of the OECD commentary on article 5 of double taxation avoidance agreement. The allegation of revenue that the local sales offices in India of Indian entity are being used by the appellant and therefore there are sales outlets in India which falls under the article 5 (2)(h) has permanent establishment. The term sales outlet is not defined in any legislation. However, the general meaning of the term is a place of business for retailing of the goods and Tom outlet in particular is generally defined as a store that sells the goods of a particular manufacturer or wholesaler. Therefore Sales outlets are generally understood as a place of business for retailing of the goods, from where the goods are sold and delivered to the customers. No doubt the Indian entity has several local offices in India but these offices as stated by the Ld. authorized representative are with regard to the marketing support function that net app India is required to provide under the terms of the commission agent agreement with the appellant. According to him the distributors undertakes the sales to the customers, in the local offices of the Indian entity are only providing marketing support function and not making sales of the net app products. In the website of the group also these are the contact us places therefore they are only contact points for the customers for enquiring about the goods of appellant. Therefore, the activities of Indian entity are only part of its marketing support services and are for the business of the Indian entity and cannot be said

that they are made for sales in India by the appellant through Indian entity. With reference to the storage of the goods for the purpose of demonstration article 5 (4) (a) clearly excludes that use of facilities solely for the purpose of storage display of goods or merchandise belonging to the enterprise shall not constitute as permanent establishment. Therefore storing of the goods falls into the exclusionary clause of permanent establishment. Even otherwise, we did not find any instances brought to our notice by the Ld. departmental representative or in the orders of the lower authority when sales has taken place from these outlets. In view of this we do not agree with the views of the revenue that the local offices of the assessee ares ales outlet constituting permanent establishment of the appellant. With respect to the allegation that Indian entity is not providing mere backup office support services, but engaged in the capacity building of the net app India group, we are of the opinion that Indian entity is carrying on its own business as a service provider and not the business of the appellant is being carried out by the Indian entity. Merely because there are certain transactions between the Indian subsidiary and the foreign parent, group it does not mean that the Indian subsidiary constitutes a permanent establishment for the foreign parent in India. This has been conclusively held by the Hon'ble Delhi High Court in DIT versus E funds IT solutions (supra).

44. With respect to the agency PE, It is alleged by revenue that activities of Indian entity are not on principle-to-principle basis as it is also doing financial and administrative functions, also reports of expenditure incurred to the appellant according to the terms of the commission agreement. However, we do not find any evidence on record to support the above contention as no

evidence has been drawn to our attention that these functions are with respect to the sale of products or services of the appellant. According to the agreement, these functions are with respect to the marketing and support sales function carried on by the Indian entity. Further, the Hon'ble Delhi High Court in case of Adobe System Incorporation (Supra) has also held that a permanent establishment cannot be constituted in India only on account of the fact that appellant has a right to ask for the expenditure and income in terms of the agreement between the parties. There may be reasons for doing so because of the commercial aspect for the provision of specifications, assistance, and supervision etc however it cannot lead to an inference that the appellant by exercising the above rights creates its permanent establishment in India. For an agent to be of an independent status, (1) the agent must be legally independent of the principal, (2) the agent must be economically independent of the principal; and (3) the agent must represent the principal in the ordinary course of business. Legal Independence of the agent must be tested on the line of agent's obligation. In the present case, the appellant has not brought it on record that the activities of the agents are subject to detailed instructions or comprehensive control. The only reason is that the company is managed by common directors. Further mere persuasive control is not enough. This sole fact in absence of other vital facts, which may depend on the facts of the each case, revenue should establish the comprehensive control over the entity. Further the income stream of the ICO itself suggests that its revenue is not wholly or substantially derived from the activities of the appellant but from other AEs also. It was submitted that85% to 90 % of the revenue for the year of ICO is from IT/ ITEs services and not from marketing support services. Further the risk matrix of the ICO is also not brought on record by the Ld AO. Further, it is not the case of the revenue that ICO is

performing wholly and exclusively for the assessee. Therefore, in absence of any evidence of economic and legal dependence of the agent the argument of revenue cannot be sustained. The Indian entity is legally and economically independent and is compensated at arm's-length basis by the appellant in terms of the agreement entered into between them. It was submitted before us that the85% of the revenue of the Indian entity is derived from IT, ITES services, and not the marketing and sales support services. Therefore, it was contended that Indian entity is not solely reliant on the appellant in relation to its operation and it is an independent agent and therefore it would not create an agency PE in India of the appellant. These facts remain uncontroverted. Furthermore, merely because the Indian entity provides services to the net app group including the appellant, it cannot be said that permanent establishment of the appellant is in India because the permanent establishment is required to be established with respect to the appellant and not to the group. Ld. departmental representative could not draw our attention to any such provision in double taxation avoidance agreement. Further, the contention of the revenue that Indian entity Discusses all terms with the distributors, discount to resellers are negotiated by net app India, decision on sales are also taken by Indian entity in India, the Indian entity obtains orders from customers, purchase orders are rooted through Indian entity, customers do not make any distinction between Indian entity and the appellant and further that all functions of the Indian entity are not captured in transfer pricing documentation prepared by Indian entity which did not include assets given free of cost to the Indian entity. It is further contended that the agreement with the resellers are signed after 40 days and net app India has incurred expenses on freight, shipping and transportation of the goods and therefore it is engaged in delivery of goods and performing functions of sale on behalf of

appellant. It is further alleged that storage systems sold by the appellant on being replacement warranty the parts are replaced in merely 4 hours. Therefore, the inventory is maintained by appellant in India and Indian entity is performing functions of maintaining stock of such goods for sale. It was further alleged by revenue that Indian entity has the right to use the trademarks etc of the appellant and therefore is paying royalty and hence it makes sales in India. We have carefully analyzed all the contentions of the Ld. departmental representative made before us, however, we do not agree with any of them as no evidence has been laid before us which even remotely suggest that Indian entity discusses all terms with the distributors, negotiates discounts to there sellers and decision on sale is taken by the Indian entity in India. With respect to the purchase orders the Indian entity do not solicit or accept purchase orders on behalf of the appellant but the purchase orders raised on the appellant are through distributors. The receipt of the purchase orders by the Indian entity is only for facilitation for onward transmission to the appellant. In this aspect, the revenue has totally ignored the functions performed for getting purchase orders by the distributors. Even otherwise this function alone do not constitute permanent establishment under the provisions of the double taxation avoidance agreement. With respect to the allegation that all the functions of Indian entity are not captured in the transfer pricing documentation and assets given free of cost are not recorded therein, we are of the opinion that this issue is squarely covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in case of E funds IT solutions (supra) wherein it has been held that even if the software or intangible data was provided free of cost or otherwise by the appellant to an Indian entity, it does not automatically result in the Indian entity constituting a permanent establishment of the appellant in India. Therefore,

we reject the contention of the revenue on this count. With respect to the incurring of the freight and transportation cost incurred by the Indian entity. It was submitted that these costs are incurred by Indian entity for the purpose of transportation of demo products and samples and other assets of net app India only and further the transportation cost of Rs. 12 lakhs pertains to travelling and conveyance expenditure. This fact has not been controverted by the revenue before us and even otherwise; this aspect on standalone basis does not give any indication that the appellant has a permanent establishment in India. No evidence has been brought on record by revenue to suggest that this expenditure is incurred on import of goods, which are sold by the appellant. With respect to the allegation that the parts are replaced in 4 hours and therefore inventory is maintained by Indian entity for the purpose of sale. It was submitted that s required for performing certain services in India are warehoused by third-party warehousing service provider in India and Indian entity does not deliver spares on behalf of appellant. It was further submitted that such third party service provider are not at the disposal of Indian entity or of the appellant and are independent parties and therefore this fact cannot lead to any indication of the permanent establishment of the appellant. We do not find any such provision in the double taxation avoidance agreement except where the premises are used as sales outlet. In any case, no evidences or instances have been led that the Indian entity is maintaining any stock of goods of the appellant for delivery on behalf of the appellant. With respect to the allegation that Indian entity has a call Centre, It was submitted that the net app group operated call centers in four locations across the world including India and the post sales support services are provided through its call centre to the customers throughout the world .Income from such call Centre operations are part of ITES segment and are considered in the transfer

pricing documentation of the Indian entity. It was further contended that with respect to the services provided by the employees of Indian entity that such services are also provided by other third-party service providers in India, which are also listed on the website of the net app group. It was further stated that net app India provide such services to the appellant's customers in India as part of its own business functions in the course of carrying on its own business in India and for this, the Indian entity is remunerated for such services which are already been captured in the transfer pricing documentation. It was also vehemently contended that the allegation of the revenue about deputation of two employees for rendering technical support services is devoid of any merit as this fact was denied in the assessment proceedings where enquiries were conducted under section 133 (6)of the income tax act. The Ld DR also could not substantiate the allegation of deputation of any employees for rendering Technical support services, in view of this we do not agree with the revenue that services are rendered in India by deputation of employees in India by the appellant. With respect to the payment of royalty, It was submitted that Indian entity from time to time participates in various trade fairs and disseminate information about the products and engaged in promotional activity and for this purpose, it has right to use the trademark which is not held by the appellant but different entity. As this transaction is not between the appellant and the Indian entity where it is undisputed that the trademarks are not owned by the appellant but by different entity, these facts does not lead to creation of a permanent establishment in India of appellant."

5.1 It remains undisputed that the facts in the present year are identical to the facts as in Assessment Years 2008-09 and 2010-11 and, therefore, in absence of any distinguishing feature and respectfully following the orders of the Co-ordinate Bench as reproduced above, we hold that the assessee company does not have any Permanent Establishment in India. Since, the question regarding Permanent Establishment is being answered in favour of the assessee, the issue of attribution of income in the hands of such Permanent Establishment becomes infrutuous. Accordingly, the grounds raised by the assessee are allowed.

6.0 Ground Nos.3 & 4 are directed against the treatment of software and sale of subscription receipts as the royalty income under Article 12(3) of the India-Netherlands DTAA. The Assessing Officer, vide para 12 of the impugned final assessment order, has considered the subscription revenue of Rs.16,43,90,916/- in the nature of royalty and made addition to the extent of Rs.14,99,39,032/- in terms of Article 7 read with Article 12 of the DTAA. The Ld. AR submitted that the Assessing Officer has

considered the addition on the basis of the view taken in the assessment order for Assessment Year 2008-09 and 2010-11. It was further submitted by the Ld. AR that identical issue had come up for consideration before this Tribunal in Assessment Years 2008-09 and 2010-11 wherein the issue was restored to the file of the Assessing Officer with the direction to verify whether the facts of the case were identical to those as decided by the Hon'ble Delhi High Court in the case of Infrasoft Ltd. reported in 264 CTR 329 (Delhi). It was accordingly submitted that this issue also may be similarly restored as per the order of the Co-ordinate Bench in Assessment Year 2008-09 and 2010-11.

7.0 Per contra, the Ld. CIT-DR relied upon the assessment order.

8.0 Having heard the rival submissions and after having perused the final assessment order, we fully agree with the contentions of the Ld. AR that the addition of software income is wholly based on the assessment order passed for Assessment Year 2008-09. This assessment order was the subject matter of appeal

before the Co-ordinate Bench in ITA No. 4871/Del/2013, wherein after noting the parity of facts between the case of the assessee and facts involved in the case decided by the Hon'ble Delhi High Court in the case of Infrasoft Ltd. (supra), the matter was restored to the Assessing Officer for verification. The relevant observations of this Tribunal are being reproduced herein under:

> *"48. Ground No. 3 and 4 of the appeal of the assessee are against the order of the Ld. assessing officer in holding that income from sale of software and income from sale of subscriptions is royalty income under article 12 (3) of the treaty and consequently liable to tax in India. Ld. Assessing Officer has discussed the whole gamut of the taxation of the software taxable as royalty in paragraph No. 6 of his order. Before us, Ld. Authorized Representative submitted that now the issue is squarely covered in favour of the assessee in view of the decision of the Hon'ble Delhi High Court in case of Director of income tax versus Infrasoft Ltd 264 CTR 329 (Delhi).He also submitted a chart during the course of hearing that compares the software considered by Hon'ble Delhi High Court and the features of the software licensing agreement in the present case. He has demonstrated that the issue involved is similar*

stating various aspects of software licensing agreement as under:

soft Limited	Assessee
• Clause 2(a) of the Infrasoft License Agreement: *"(a) Infrasoft grants Licensee a non-exclusive, non-transferable license to use the software in accordance with this Agreement and the Infrasoft License Schedule."* • Clause 2(d) of the Infrasoft License Agreement: *"(d) Licensee may make one copy of the software and associated support information for backup purposes, provided that the copy shall include Infrasoft's copyright and other proprietarynotices. All copies of the Software shall be the exclusive property of Infrasoft"* • Clause 2(h) of Infrasoft license agreement: *"(h) Licensee may not copy, decompile, disassemble or reverse-engineer the Software without Infrasoft's written consent. The Licensee's rights shall not be restricted by this Clause 2(h) to the extent that local law grants Licensee a right to do so for the purpose of achieving interoperability with other software and in addition thereto Infrasoft undertakes to make information relating to interoperability available to Licensee subject to such reasonable conditions as Infrasoft may from time to time impose including a reasonable fee for doing so. To ensure Licensee receives the appropriate information, Licensee must first give Infrasoft sufficient details of its objectives and the other software concerned. Requests for the appropriate information should be*	• Clause 1 of Software License: *"Supplier grants to Buyer a non-exclusive license to use the accompanying software in machine-readable form ("Software"), together with the accompanying documentation."* • Clause 2 of End User Software License: *"NetApp shall retain title to the Software and the accompanying documentation and all copies and any derivative works thereof. Customer shall not make any copies of the Software except as reasonably required for backup purposes."* • Clause 2 of Software License: *"Buyer must not make any copies of the Software except as reasonably necessary for backups. Neither Buyer nor any third party may: (a) reverse engineer or try to reconstruct or discover any source code or underlying ideas used in the Software; or (b) remove or conceal any product identification or proprietary notices contained in or on the Software or products; or (c) except as allowed in Supplier's user documentation, modify or create a derivative work of any part of the Software.*

directed to the Vice president Technical of Infrasoft." • Clause 2(f) of the Infrasoft license agreement is quoted as below: *"(f) The Software shall be used only for Licensee's own business as defined within the InfrasoftLicence Schedule and shall not, without prior written consent from Infrasoft:* *(i) be loaned, rented, sold, sublicensed or transferred to any third party* *(ii) used by any parent, subsidiary or affiliated entity of Licensee* *(iii) Used for the operation of a service bureau or for data processing."*	*Buyer must not publish or provide any results of benchmark tests run on the Software to a third party without Supplier's prior written consent.* *The Software is Supplier's confidential property and is protected by copyrights and by one or more U.S. patents issued or pending. Buyer must take adequate steps to protect the Software from unauthorized use or disclosure."* • Clause 2 of End User Software License: *"Customer shall not, nor shall Customer allow any third party to: (i)decompile, disassemble, decrypt, extract, or otherwise reverse engineer or attempt to reconstruct or discover any source code or underlying ideas, algorithms, or file formats of, or of any components used in the Software by any means whatever; or (ii)remove or conceal any product identification, copyright, patent or other notices contained in or on the Software or accompanying documents; or (iii) modify the Software, incorporate it into or with another Software, or create a derivative work of any part of the Software. Customer must not publish or provide any results of benchmark tests run on the Software to a third party without NetApp's prior written consent."* • Clause 7 of End User Software License: *"THIS LICENSE IS PERSONAL TO CUSTOMER. CUSTOMER SHALL NOT ASSIGN, SUBLICENSE OR TRANSFER THE LICENSE OR AGREEMENT WITHOUT NETAPP'S PRIOR WRITTEN APPROVAL; ANY ATTEMPT TO DO SO SHALL BE VOID."*

49. The revenue is also not seriously disputed before us that the issue is not covered by the decision of the Hon'ble Delhi High Court. However the issue needs to be verified by the Ld. assessing officer whether the licensing agreement involved in the present appeal is similar to the issue decided by the Hon'ble Delhi High Court. Therefore we set aside ground3 and 4 of the appeal of the assessee back to the file of the Ld. assessing officer to decide the issue afresh considering the decision of the Hon'ble Delhi High Court. In the result ground No. 3 and 4 of the appeal of the assessee allowed with above direction."

8.1 It is also pertinent to note that the issue of software royalty was recently adjudicated by the Hon'ble Apex Court in the case of Engineering Analysis Center of Excellence Pvt. Ltd. vs. CIT (2021) 432 ITR 471 (SC). The Hon'ble Apex Court, in its detailed judgment, has analyzed various aspects of the issue taking into consideration end user license, Copy Right Act, and provisions contained in DTAA and the Income Tax Act and has laid down the parameters to test whether the receipt from sale of software would tantamount to royalty or not. Therefore, in view of the above, the Assessing Officer is directed to carry out the necessary exercise in accordance with the directions issued by the Co-ordinate Bench in Assessment Year 2008-09 duly keeping in mind the ratio laid down by the Hon'ble Apex Court in the case of Engineering Analysis Center of Excellence Pvt. Ltd. vs. CIT (supra) and adjudicate the issue accordingly after giving due and proper opportunity to the assessee to present its case. Thus, ground Nos. 3 & 4 are allowed for statistical purposes.

9.0 Ground No.5 is against the taxing of income from provisions of service by treating the same as Fee for Technical Services. The assessee has received payment to the extent or

Rs.28,05,48,505/- in lieu of services rendered to Indian customers. The services so provided are in the nature of installation services, warranty services, or professional services such as data migration, disaster management etc. These services were rendered to Third Party service providers in India and NetApp in India. The Assessing Officer, on the basis of view taken in Assessment Years 2008-09 and 2010-11, held that the services rendered by the assessee were in the nature of Royalty /FTS and were, therefore, taxable in India. The receipts to the tune of Rs.38,34,85,588/- were brought to tax u/s 44 DA of the Act.

9.1 The Ld. AR assailed the addition made and relied upon the order of the Tribunal in Assessment Year 2008-09 wherein under identical set of facts, the action of the Assessing Officer in bringing to tax, the receipts from services rendered in India was rejected.

10.0 Per contra, the Ld. CIT-DR did not dispute the fact that identical issue had been decided by the Tribunal in the Assessment Year 2008-09. He further placed reliance on the assessment order.

11.0 We have heard the rival contentions and have also gone through the facts of the case as well as the impugned assessment order. It is undisputed that the impugned addition in the year under consideration is solely based on the reasoning recorded in assessment orders for Assessment Years 2008-09 and 2010-11. Since, the findings of the Assessing Officer with regard to this issue in 2008-09 & 2010-11 are no longer valid as having been disproved by the Co-ordinate Bench of this Tribunal, we find no reason to uphold the action of the Assessing Officer in taxing the impugned receipts in India. The relevant observations of the Tribunal are being reproduced herein under:-

> *"52. We have carefully considered the rival contentions. The company provides installation, integration and training assistance to the Indian customer in relation to the products sold by it. The company also provides warranty services for the products purchased by the customers in India. For a period of 3 years and the warranties undertaken without any additional cost to the customer as the prize of the warranties already included in the sale prices. The company also offers supplementary or and hence warranty packages for a separate charge. The warranties also extendable payment of appellate judges by the customers. Over and above this, it also provides professional services to the customers who can avail such*

services such as data migration, integration, disaster recovery or backup configuration etc. For rendition of the services. The company has entered into technical support services arrangement with third-party service providers in India and has similar technical support arrangement with Indian company through the sales support agreement. The Ld. Assessing Officer has held that the services are predominately-technical services in the nature and has concluded that it is ancillary to the royalty and hence royalty as defined in the act as well as the double taxation avoidance agreement and therefore it is chargeable to tax in India. The Ld. assessing officer has further held that as the assessee is rendering service through qualified personnel of net app India or third-party service providers it is being made available to the Indian customers. We also carefully considered the decision of the Hon'ble Delhi High Court in case of DIT versus Guy Carpenter 346 ITR 504 (Delhi), wherein the Hon'ble Delhi High Court has dealt with the concept of —make available' as mentioned in the double taxation avoidance agreement. As the services rendered by the assessee are installation services, warranty services and professional services. It cannot be said that they are made available to the customers using Net app BV products. In fact, the warranty service is taken by the buyer of the product to keep the goods purchased in good condition for its lifespan. We simply failed to understand that how the installation and warranty services at least can be said to be make available to the buyer. In view of this we reject the argument of the revenue that such services fees are chargeable to tax as fees for technical services. In the result ground No.5 of the appeal of the assessee is allowed."

11.1 Thus, the Co-ordinate Bench of the Tribunal has specifically held that services performed by the assessee company cannot be taxed in India in absence of satisfaction of make available clause. In absence of change in facts and keeping in view the uniformity in the nature of services, we find no justification in the action of the Assessing Officer in bringing to tax service receipts as FTS and the addition so made is directed to be deleted. Accordingly, Ground No.5 stands allowed.

12.0 Vide Ground No.9, the assessee company is aggrieved by addition of Rs.40,09,832/- made on account of sale of products by the assessee company to M/s NetApp India. The Assessing Officer, in para 17 of the impugned order, has observed that the assessee failed to explain why the amount so received is not taxable in India and that no agreement, evidence or documents were produced before him to demonstrate the nature of transactions and goods sold.

12.1 The Ld. AR argued that the transaction in dispute is sale of computer equipment to M/s Net App which were used for the

purpose of demonstration of the assessee company's products, who were Indian customers. It was submitted that the sale of equipment took place off-shore and that there was no case of any income accruing or arising in India for the purpose of taxation.

13.0 Per contra, the Ld. CIT-DR argued that the assessee had failed to substantiate the nature of transaction before the Assessing Officer and, therefore, the addition had been rightly made.

14.0 We have heard the rival submissions on the issue and have also gone through the facts of the case. The Assessing Officer has considered the income from the sale of equipment as business income taxable in India. However, it is worthwhile to know that as per Article 7 of the India-Netherland DTAA, the business income earned by a resident of a state from business carried in another State is taxable only in the resident state unless such business is carried in other State through PE. In the present case, we have already held that the assessee company does not have a Permanent Establishment in India and as such the business income so arising on sale of equipment cannot be taxed in India as per the express

provision of Article 7 of DTAA. Accordingly, the Assessing Officer is directed to delete the addition made on account of business income. This ground is accordingly allowed.

15.0 Ground No.10 is regarding charging to interest u/s 234B of the Act. This issue of chargeability of interest is set aside to the file of the Assessing Officer with a direction that in case the assessee has any income chargeable to tax in India and if the same is subject to withholding to tax, no interest u/s 234B should be charged. Ground No.10 accordingly is allowed.

16.0 Ground No.11 is against the initiation of penalty proceedings u/s 271(c) of the Act. The same is dismissed as premature.

17.0 In the final result, the appeal of the assessee stands partly allowed.

Order pronounced on 20th September, 2021.

Sd/-	Sd/-
(N. K. BILLAIYA)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 20/09/2021
PK/Ps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT DEHRADUN