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

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.7782/Del/2018
Assessment Year: 2014-15

DCIT, Circle-1(2)(1), Intl. Taxation, New Delhi	**Vs.**	M/s. Convergys Customer Management Group Inc., C/o- PricewaterhouseCoopers (P) Ltd., Sucheta Bhavan, Gate No. 2, 1st Floor, 11A, Vishnu Digambar Marg, New Delhi
		PAN :AACCC8989M
(Appellant)		**(Respondent)**

WITH

ITA No.7924/Del/2018
Assessment Year: 2014-15

M/s. Convergys Customer Management Group Inc., C/o-PricewaterhouseCoopers (P) Ltd., Sucheta Bhavan, Gate No.2, 1st Floor, 11-A, Vishnu Digambar Marg, New Delhi	**Vs.**	DCIT, Circle-1(2)(1), Intl. Taxation, New Delhi
PAN :AACCC8989M		
(Appellant)		**(Respondent)**

Assessee by	Sh. Ravi Sharma, Advocate Sh. Rishabh Malhotra, AR
Department by	Sh. Gangadhar Panda, CIT (DR)

Date of hearing	30.11.2022
Date of pronouncement	11.01.2023

ORDER

PER SAKTIJIT DEY, JM:

These cross appeals arise out of order dated 26.09.2018 of learned Commissioner of Income Tax (Appeals)-42, New Delhi, pertaining to assessment year 2014-15.

2. The common dispute arising in the corresponding appeals is on the issue, whether the assessee has any kind of Permanent Establishment (PE) in India under Article 5 of India – USA Double Taxation Avoidance Agreement (DTAA) and in case there is a PE, the issue of attribution of profit to the PE. Of course, there is an additional issue in the appeal of the Revenue as to whether the receipts from IPLC/link charges are taxable as royalty in India or not.

3. Briefly the facts relating to these issues are, the assessee is a non-resident corporate entity incorporated in the United States of America (USA) and a tax resident of USA. As stated, the assessee provides outsourced customer and marketing support services as well as comprehensive customer management services by utilizing its advance information system capabilities, human resources management skills and industrial experience. The

assessee has a subsidiary in India, viz., by Convergys India Service Pvt. Ltd. (CIS). In respect of some of the overseas customers of the assessee, namely, AT&T, Microsoft etc. the assessee procures Information Technology (IT) Enabled call centre/back office service from CIS. For this purpose, the assessee had entered into a sub-contract arrangement with CIS under which CIS is remunerated on cost plus markup of 14%. It is the say of the assessee that it undertakes certain functions, such as, client relationship, client account management, sales/marketing, technology and brand development, which are performed outside India. Whereas, CIS provides in-bound call services, out-bound call services, web based support, technical help desk, email customer care services and other miscellaneous services. During the year under consideration, the assessee entered into various transactions with CIS. In the return of income filed for the impugned assessment year, the assessee offered income of Rs.2,16,69,539/-. However, the assessee did not offer the amount received towards reimbursement by CIS, such as, link charges salary reimbursement etc., on the plea that they are not subject to tax in India. While completing the assessment, Assessing Officer held that assessee had a permanent

establishment (PE) in India in terms of Article 5 of the DTAA. Proceeding further, he held that the assessee had a fixed place PE, service PE and dependent agent PE. In the aforesaid premises, the Assessing Officer computed profit of Rs.111,49,67,544/- as attributable to the PE in India. Further, the Assessing Officer held that the receipts from IPLC/link charges are taxable as equipment royalty in terms of clause (4a) of explanation 2 to section 9(1)(vi) of the Act as well as Article 12(2) read with Article 12(3)(b) of India – USA DTAA and process royalty in terms of explanation 6 to section 9(1)(vi) of the Act and Article 12 of DTAA. In the aforesaid line, the Assessing Officer completed the assessment. Against the assessment order so passed, the assessee preferred an appeal before learned Commissioner (Appeals). While deciding the appeal, learned Commissioner (Appeals) agreed with the submissions of the assessee that the assessee does not have a dependent agent PE and service PE in India. However, he held that the assessee had a fixed place PE in India. With regard to attribution of profit to the PE, learned Commissioner (Appeals) held that profits could be attributed on account of assets provided by the assessee to CIS. In this regard, learned Commissioner (Appeals) followed the methodology

provided in the order of the Tribunal in assessment year 2006-07. Further, learned Commissioner (Appeals) held that receipts from link charges do not qualify as equipment royalty and process royalty under Article 12 of the tax treaty. Being aggrieved, both the assessee and Revenue are before us.

4. Learned counsel appearing for the assessee submitted, issues arising in both the appeals are squarely covered by the decisions of the Tribunal in assessment years 2006-07 to 2013-14. He submitted, though, Tribunal held that the assessee has a fixed place PE in India, however, in the matter of attribution of profit to PE the Tribunal held as under in assessment years 2006-07 to 2008-09:

> *"11.17. In view of the above facts, circumstances, case law, CBDT circulars and various articles of India-USA DTAA, following conclusions are arrived at:*
>
> *A. The Ld. CIT (A) accepted the revenue from end-customer with regard to contracts/projects wherein services were procured from CIS of USD 138.9 million submitted by the assessee for assessment year 2006-07. The end customer revenue has been accepted by the AO is the assessment of all the other years on the same basis.*
>
> *B. The methodology adopted by the AO and the ld. CIT(A) cannot be accepted as they have considered revenue of the assessee company (CMG as a multi-national enterprise) as the starting point for arriving at the profits attributable to the PE of assessee in India. The revenue of the assessee company cannot be considered as the revenue of the PE by any stretch of imagination. Furthermore the expenses incurred outside India are linked with the business activities of the assessee*

undertaken outside India for the functions performed outside India and are not linked to the PE of the assessee in India.

C. *The attribution of profits to the PE should be made by the transfer pricing principles supported by the CBDT Circular No. 5 of 2004 as well as the judgment of the Supreme Court in Morgan Stanley (292 ITR 416). As per the Supreme Court in the case of Morgan Stanley, it has been held as under:*

> *"The impugned ruling is correct in principle insofar as an associated enterprise, that also constitutes a PE, has been remunerated on an arm's length basis taking into account all the risk-taking functions of the enterprise. In such cases nothing further would. be left to be attributed to the PE. The situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a situation, there would be a need to attribute profits to the PE for those functions/risks that have not been considered. Therefore, in each case the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case. Lastly, it may be added that taxing corporates on the basis of the concept of economic nexus is an important feature of attributable profits (profits attributable to the PE)."*

The application of transfer pricing principles is also supported by the decisions of the Bombay High Court in Set Satellite (Singapore) Pte. Ltd. (307 ITR 205), jurisdictional High Court in Rolls Royce Singapore Pvt. Ltd. (202 Taxman 45) (Del.), Director of Income Tax vs. BBC Worldwide Ltd. (203 Taxman 554) (Del.)

D. *The ld. CIT (A) has held. that further profit was required to be attributed on account of Assets provided by the assessee to CIS and management of risk by the assessee in India. In our view no attribution of profits can be made on account of management of risk as risk resides outside India. Even otherwise the charge for the employees seconded to CIS and employees visiting India to provide the technical services is subsumed in the transfer pricing analysis of CIS. Therefore, attribution can only be made on account of free of cost assets and software's provided by the assessee to CIS.*

E. The assessee has submitted that it does not prepare India specific accounts, therefore the attribution of profits on the basis as disclosed in the transfer pricing study for assets and software cannot be accepted. Further, in the facts and circumstances of the case Profit Split method is not the correct method for attribution of profits to the PE of the assessee in India.

F. In our considered opinion, the correct approach to arrive at the profits attributable to the PE should. be as under:
Step 1: Compute Global operating Income percentage of the customer care business as per annual report/10K of the company.

Step 2: This percentage should. be applied to the end-customer revenue with regard to contracts/projects where services were procured from CIS. The amount arrived at is the Operating Income from Indian operations.
Step 3: The operating income from India operations is to be reduced by the profit before tax of CIS. This residual is now attributable between US and India.
Step 4: The profit attributable to the PE should be estimated on residual profits as determined under Step 3 above. The attribution of India profit shall be worked out as under, mentioned after the table:

11.18. In the computation based on the above approach for the assessment year 2006-07, the profits attributable to India comes as under:

Particulars	Amount (in USD)
Total Revenue of CMG as per the Annual Report (A)	1,663,600,000
Operating Income of CMG as per the Annual Report (B)	175,500,000
Operating Income as a percentage of revenue earned (C = B/A)	10.55%
End-customer revenue from Indian operations (D)	138,900,000
Operating Income from Indian operations (E = C * D)	14,653,950
Operating Income of CIS (Profit before tax of CIS) (F)	13,800,000
Profit retained by CMG in the US (G = E – F) Placitum 'X'	853,950

11.19. As per this working, the worldwide profit earned by CMG for A.Y. 2006-07 comes to USD 853950. This by and large tallies with the submission of the assessee dated 26-12-2010 to the assessing officer in which it has been submitted that the approximate operating profits of CMG in USD come to 0.8 million. Now the important question that arises is as to how much of the profits shall be attributable to CMG's Indian PE over and above the profits declared by its subsidiary CIS.

11.20. Apropos TPO's estimation, we are of the view that the same is not justified as it involves a very unrealistic method of counting the worldwide number of employees and dividing it with CMG's global revenue without considering the relevant aspects. The finer and material aspects about the status, capacity of the employees are over looked and result become very vague and distorted. Therefore, the method adopted by assessing officer cannot be relied on as most appropriate method.

11.21. Apropos CIT(A)'s estimate about attribution, though he accepted the proposition that there cannot be notional addition to India revenue, however, CIT(A)'s method also does not become a rational inasmuch as the various expenditures incurred by CMG i.e. research & development, depreciation, amortization etc. have not been considered and 50% of selling, general and administrative expenses have been ignored along with other expenses incurred by CMG outside India for earning the revenue from end customers. In our considered view, this approach is also not viable and appropriate.

11.22. As the methods for calculating the attribution profit as adopted by TPO and CIT(A) are not reliable. Ld. Counsel has further demonstrated that if both the methods are harmoniously applied, this leads to a situation where no further attribution to the assessee's income can be made. Thus a harmonious intermixed rationalization of TPO and CIT(A) method results into no further attribution of profits to Indian PE.

11.23. In this backdrop we are reminded of two case laws decided by Hon'ble Supreme Court which have dealt with attribution of the profits to the Indian PEs:

(i) Anglo French Textile Company Ltd. vs CIT 23 ITR 101 (SC), in which 10% attribution has been held to be reasonable.

(ii) Hukum Chand Mills Ltd. Vs. CIT 103 ITR 548 (SC), in which 15% attribution has been held to be reasonable.

11.24. These cases decided by the Apex Court though are old, but they still hold the field as they have not been tinkered with. In our considered view, the adoption of higher figure of 15% as held by Hon'ble Supreme Court in the Hukum Chand Mills Ltd. (supra), for attribution of assessee's Indian PE operations will meet the ends of justice. Thus, the attribution of Indian PE income should be made at 15% of profit retained by CMG in the US.

11.25. In other words 15% of the placitum 'X' (result of G=E-F) in the chart at para 11.18, as mentioned above as a reasonable attribution of profit of India PE, will meet the ends of justice. Thus, assessing officer will work out the profits attributable to Indian PE on this method for A.Y. 2006-07.
11.26. Following same profit attribution for assessment year 2008- 09 should be done also by this methodology. The grounds of appeal of the assessee and the department in respect of profit attribution for A.Y. 2006- 07 and 2008-09 are accordingly disposed off.

5. He submitted, this view was followed by the Tribunal in assessment year 2013-14 as well. He submitted, in the year under consideration no employees were seconded to the PE, but, 15 employees visited India for short duration. Thus, he submitted, there is no fixed place PE either.

6. Learned Departmental Representative relied upon the observations of the Assessing Officer.

7. Having considered rival submissions and perused the materials on record, we find, these are recurring issues between the parties from assessment years 2006-07 onwards. While deciding the issue in the latest order passed for the assessment year 2013-14 in ITA No. 7724/Del/2017, dated 27.11.2020, the Coordinate Bench has held as under:

> *"6.2 After duly considering the submissions of both the sides as well as the impugned order, we are of the considered opinion that the Tribunal in assessee's own case for Assessment Years 2006-07 and 2008-09 has reached the conclusion that there was a fixed place PE of the assessee in India and that profit attribution had to be made in the hands of the assessee due to such fixed place PE. Although, the assessee has approached the Hon'ble High Court against the said order of the Tribunal holding that the assessee had fixed place PE in India, the appeals are yet to be disposed of by the Hon'ble High Court. Thus, as of date, the order of the Co-ordinate Bench of the Tribunal for Assessment Years 2006-07 and 2008-09 have a binding precedential value for us because bound by judicial discipline, we are to follow the decisions of the Co-ordinate Bench, especially if the same have been rendered in assessee's own case. The relevant observations and findings of the ITAT in assessee's own case for Assessment Years 32 2006-07 and 2008-09 are contained in para 9.8 of the said order and the same are reproduced herein under for a ready reference:-*
>
> > *"9.8 Looking at the entirety of facts and circumstances, we are of the view that the Ld. CIT(A)'s order on the proposition of PE deserves to be upheld. The employees of the assessee frequently visited the premises of CIS to provide supervision, direction and control over the operations of CIS and such employees had a fixed place of business at their disposal. CIS was practically the projection of assessee's business in India and carried out its business under the control and guidance of the assessee and without assuming any significant risk in relation to such functions. Besides*

> *assessee has also provided certain hardware and software assets on free of cost basis to CIS. Thus, the findings of the CIT(A) that assessee has a fixed place PE in India under Article 5(1) of the DTAA is upheld."*

6.3 Accordingly, respectfully following the order of the Coordinate Bench in assessee's own case for Assessment Years 2006-07 and 2008-09, we uphold the action of the Ld. CIT(A) in holding that the assessees has a fixed place PE in India.

6.4 As far as the methodology of profit attribution is concerned, the Co-ordinate Bench in assessee's own case for Assessment Years 2006-07 and 2008-09 has laid down the 33 methodology in paragraphs 11.17 to 11.26 of the said order and respectfully following the same, the TPO is directed to adopt the same methodology as enumerated by the Co-ordinate Bench. Thus, the issue to attribution of profits is restored to the file of TPO for computing the attribution of profits with respect to the fixed place PE after giving due opportunities to the assessee to submit its computation and calculations. Thus, Ground Nos.3 & 4 in assessee's appeal and Ground No.3 in Department's appeal stand allowed for statistical purposes.

7.0 As far as the department's appeal is concerned, it is challenging the act of the Ld. CIT (A) in holding that the assessee did not have a dependent Agent PE or a service PE in India and it also challenges the reduction in profit attribution done by the AO. The Department's appeal also challenges the action of the Ld. CIT (A) in holding that the receipts towards IPLC / link charges were not taxable in India as royalty. The issues raised by the department are squarely covered in favour of the assessee by the order of the Tribunal in assessee's own case for assessment year 2006-07 and 2008-09. The relevant observations of the ITAT with respect to the assessee not having a service PE in India are contained in paragraph 3.10 of the order of the Tribunal and it has been followed by the Ld. CIT (A) in the year under consideration. Observations of the Tribunal are contained 34 in Para 3.10 and the same is being reproduced here in under for ready reference:-

> *"3.10. Aggrieved with the order of the CIT (A), both assessee and revenue have preferred appeals before the ITAT. The revenue has not challenged the order of the CIT (A) holding that assessee has no Service PE. Thus, the revenue has accepted that CMG does not have a Service PE in India."*

7.0.1 We also note that the Ld. CIT (A) has returned a finding based on the order of the ITAT and has also noted that even in assessment year 2006-07, the Ld. CIT (A) had held that there was

no service PE in India and that the AO had not challenged this before the ITAT. The findings of the Ld. CIT (A) are reproduced here in under for a ready reference:-

> *"On the issue of service PE, AO has mentioned in the assessment order for AY 2013-14 that the Appellant is providing services to CIS and these services are not in the nature of fee for included services. In this regard, the appellant has submitted that, the personnel of the Company visited India for rendering services that qualify as Fee for Included Services under Article 12 of the DTAA and the company has accordingly offered such income to tax in its tax return. Even in the assessment order the Ld. AO has 35 accepted the returned position and taxed the said amount as Fee for Included Services in terms of Article 12 of the DTAA. Even in AY 2006-07, the CIT(A) has held that there is no Service PE in India and the AO had not challenged this before ITAT. Accordingly, I hold that the Appellant does not have a Service PE under Article 5(2X1) of the DTAA. Accordingly, Ground no 5.12 is allowed."*

7.0.2 Therefore, in absence of the department pointing out any distinguishing facts in this year, on identical facts, we dismiss the related grounds raised by the department.

7.1 As far as the issue of dependent agent PE is concerned, it is again seen that this issue was decided in favour of the assessee by the Tribunal in assessee's own case in assessment year 2006-07 and the relevant observations are contained in Para 4.26 which are reproduced here in under for a ready reference :-

> *"4.26. In the light of above, even assuming, CIS is not an agent of CMG, it does not have any authority to conclude contracts or secure orders on behalf of CMG and hence CMG does not have a Dependent Agent PE in India."*

7.1.1 We also note that the Ld. CIT (A) has duly taken note of this order of the Tribunal as has made the following observations:

> *"Regarding the constitution of dependent agent of PE 36 (DAPE) of the Appellant in India, I am in agreement with the submission of the Appellant and the order of the ITAT in Appellant's own case for AY 2006-07 and AY 2008-09. In view of the business model of the Appellant and in absence of any material on record that the conditions mentioned in Article 5(4) of the DTAA is satisfied viz. habitually exercising authority to conclude contracts or maintaining stock of goods or habitually securing orders. I am of the view that CIS did*

> *not constitute a dependent agent PE of the Appellant in India. In view of this, Grounds 5.9 to 5.11 are allowed."*
>
> *7.1.2 In this case also, the department has not been able to bring out any distinguishing facts in this year under consideration and, therefore, following the order of the ITAT in earlier assessment years, we dismiss the related grounds in department's appeal in this year also."*

8. Thus, as could be seen from the aforesaid observations of the Coordinate Bench, all the issues relating to existence of PE and attribution of profit have been decided/resolved in assessee's own case in earlier assessment years. Therefore, the decision of the Tribunal, as referred, will squarely apply to the present appeals as well. Though, learned counsel for the assessee attempted to make out a case that there was no fixed place PE in the year under consideration, however, we are not convinced as the arrangement between the assessee and PE remains identical with earlier years. As regards attribution of profit to PE, we direct the Assessing Officer to follow the directions of the Tribunal in assessment years 2006-07 to 2013-14.

9. As far as the only other surviving ground raised by the assessee in relation to taxability of link charges, this issue has also been decided by the Tribunal in assessee's own case in assessment years 2013-14, holding as under:

"7.2 Similarly, the issue of payment link charges/IPLC charges being taxable under royalty has been decided in assessee's favour by the Tribunal in assessment year 2006-07 in Para 3.5 of the said order. The same is being reproduced here in under for a ready reference:-

> *"3.5. In view of the foregoing observations we hold that there is no transfer of the right to use, either to the assessee or to CIS. The assessee has merely procured a service and provided the same to CIS, no part of equipment was leased out to CIS. Even otherwise, the payment is in the nature of reimbursement of expenses and accordingly not taxable in the hands of the assessee. Therefore, it is held, that the said payments do not constitute Royalty under the provisions of Article 12 of the tax treaty and the ground is allowed in favour of assessee."*

7.2.1 It is also seen that the Ld. CIT (A) has taken due cognizance of this finding of the Tribunal in the year under consideration and has allowed relief to the assessee. The findings of the Ld. CIT (A) are contained in paragraph 8-9 which is being reproduced here in under:-

> *"8.9 The Hon'ble Delhi High Court in the case of New Skies Satellite BV (supra) further held that India's change in position to the OECD commentary cannot act as influence in interpreting the word royalty as it stands today. The only way such change can he brought about is through such change being incorporated in the DTAA itself an amendment in the domestic law cannot bring about a unilateral change in the DTAA. Further, Hon'ble court observed that the argument that certain incomes would slip out of the bands of 38 Revenue, where such position is taken, cannot be accepted. The Hon'ble Court concluded that amendment in section 9 will not affect DTAA, and the term Royalty' would have to be understood as defined DTAA only.*
>
> *8.10 As discussed above, the Hon'ble ITAT, Delhi in its order dated May 10,2013 in Appellants own case/or Assessment Tear 2006-07 and Assessment Year 2008-09 has held that there is no transfer of the right to use, either to CMG or to CIS. The ITAT observed that the Appellant has merely procured a service and provided the same to CIS. Further, ITAT observed that even otherwise, the payment is in the nature or reimbursement of expenses and accordingly not taxable in the hands of the Appellant. Therefore, it is held that the said payments do not constitute Royalty under the provisions of the DTAA.*

> *8.11 Respectfully following the Hon'ble ITAT decision in the case of the Appellant and jurisdiction High Court's decision of New Skies Satellite BV (Supra) wherein it is held that the amendment in section 9 will not affect the DTAA, I find that the payment of link charges received by the Appellant from Conuergys India Services Rut. Ltd. would not qualify as "process" royalty in terms ofArticle 12 of lndia-US 39 DTAA. Hence, the ground of appeal, including additional ground of appeal is allowed."*
>
> *7.2.2 Therefore, in absence of any contrary facts having been pointed out by the department, in view of the order of the coordinate bench in assessee's own case as aforementioned, we dismiss the related grounds raised by the department in this regard."*

10. Facts being identical, respectfully following the decision of the Coordinate Bench, we uphold the order of learned Commission (Appeals) on the issue.

11. In the result, assessee's appeal is partly allowed, whereas, Revenue's appeal is dismissed.

Order pronounced in the open court on 11th January, 2023

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 11th January, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi