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

BEFORE
SH. I.C.SUDHIR, JM
AND
SH. PRASHANT MAHARISHI, AM

ITA No.6326 6327, 1342/Del/2012
A.Y. : 2006-07, 2007-08 & 2008-09

Travelport L.P. USA C/o. PricewaterhouseCoopers (P) Ltd. Sucheta Bhavan, Gate No. 2, 1st Floor, 11A, Vishnu Digamber Marg New Delhi	Vs	DDIT Circle-2(2) International Taxation New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAAFW8525C		

ITA No. 6499, 6500, 1480/Del/2012
A.Y. : 2006-07, 2007-08 & 2008-09

DDIT Circle-2(2), International Taxation New Delhi	Vs	Worldspan L.P.USA (Now known as Travelport L.P. USA) C/o. Pricewaterhouse Coopers Pvt. Ltd., Sucheta Bhawan, Gate No. 2, 1st Floor, 11-A, Vishnu Digamber Marg New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAAFW8525C		

Assessee by : Sh. Pawan Kr., Adv
Sh. Ravi Sharma, Adv.
Sh. Siddarth Dadu, CA
Revenue by : Sh. Sameer Sharma, Sr. DR

Date of Hearing : 09.11.2015		**Date of Pronouncement :23.11.2015**

ORDER

Per Prashant Maharishi, AM:

01. Parties have preferred these six cross appeals for three assessment years against the order of CIT (A) - XXIX, New Delhi dated 27.10.2012 for AY 2008-09 and dated 25/10/2012 for AY 2006-07 and

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2007-08. Facts and grounds of appeal for all the three assessment years in appeal of parties are similar and therefore we dispose off these six appeals by this common order.

02. For A Y 2006-07 in ITA no. 6499/D/2012, revenue has raised following grounds of appeal :-

1. *Whether on the facts and circumstance of the case, the CIT (A) has erred in relying upon the decision of the Hon'ble High Court in the case of Galileo International Inc (19 SOT 257) when the findings of the Hon'ble High Court regarding attribution of 15% of the revenue to the PE have not been accepted by the department, and SLP has been filed therein.*
2. *Whether on the facts and circumstances of the case, the CIT(A) has erred in applying the FAR analysis carried out by ITAT Delhi in the case of Galileo Intl Inc vs. DCIT holding that the facts of the year under consideration were identical when functions, assets and risks are typically entity specific and fact specific.*
3. *Whether on the facts and circumstances of the case, the CIT (A) after accepting that the assessee had both business connection and PE in India, has erred in ignoring the finding of the AO that the entire booking fee generated from India was liable to be taxed in India since the entire process from initiation of query to the delivery of the ticket culminated in India.*
4. *Whether on the facts and circumstances of the case, the CIT(A) has erred in not appreciating that AO had duly allowed 50% expenses against revenues and that there was no justification in allowing further expenses out of the net 15% of income attributed to the PE.*
5. *Whether on the facts and circumstances of the case, the CIT (A) has erred in holding that the remuneration paid to DAPE Calleo was more than the income attributable to the PE and thus it extinguished its liability to tax, without examining the functions, assets and risks performed.*
6. *Whether on the facts and circumstances of the case, the order of the CIT (A) is perverse and liable to be quashed."*

03. For A.Y. 2006-07 in ITA no. 6326/Del/2012, assessee has raised following grounds of appeal :-

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1. *THAT on the facts & in the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeals) ['CIT (A)'] erred in holding that the Appellant has a permanent establishment ('PE') in India in the form of fixed place of business within the meaning of Article 5(1) of the Double Taxation Avoidance Agreement between India and USA ('Tax Treaty').*
   - *1.1 THAT on the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the Appellant has a business connection in India under section 9(1)(i) of the Income Tax Act, 1961 ('Act') and accordingly the income from booking the tickets from India is deemed to accrue or arise in India.*
   - *1.2 THAT on the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the Appellant has a dependant agent in the form of distributor i.e. Calleo Distribution Technologies Private Limited (Calleo) in India and accordingly it has a Dependent Agent PE under Article 5(4)(a) of the Tax Treaty.*
   - *1.3 THAT on the facts & in the circumstances of the case and in law, the Ld. CIT (A) grossly erred in holding that the Appellant has a PE/Business Connection in India even after admitting in the appellate order that the facts of the case of the Appellant are on a stronger footing in comparison to the case of Galileo International Inc. v. DCIT reported in 19 SOT 257.*
2. *WITHOUT prejudice to the Ground No. 1 that the Appellant does not have a PE or a business connection in India, the Ld. CIT (A) grossly erred in attributing 15% of the revenue to alleged Indian PE by following the decision in the case of Galileo International Inc. Vs. DCIT (supra) even after admitting that the facts of the appellant case are on better footings, and accordingly such attribution of revenue are excessive and exorbitant.*
3. *THAT on the facts & in circumstances of the case and in law, the Ld. CIT(A) erred in not admitting the additional evidence filed by the appellant evidencing the revenue from India generated bookings relevant for the AY 2006-07."*

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04. Brief facts of the case are that assessee M/s Travelport L.P. USA (earlier known as Worldspan L.P.) (In short 'assessee') is a Limited partnership based in the State of Delaware, USA, having its principal place of business at 300 Galleria Parkway, N.W.Atlanta, Georgia 30339. It is engaged in the business of providing information, reservations, transaction processing and related services for airlines, Travel agencies and other travel-related entities. Assessee owns and operates a Global Distribution System located outside India known as computerized reservation system(CRS) and provides subscribers with access to and use of this GDS. CRS collects , stores, processes, displays and distributes concerning air and ground transportation etc. and enables its users to availability of such services and if required issue of tickets for such services. Through participating carrier agreements, it provides services to airlines and other travel services. Travel suppliers utilized CRS of assessee as a means of selling tickets and generating sales for which assessee charges travel suppliers fee for every transaction it processes. Assessee has entered into agreement on 1st January 1997 with World Span services Ltd. (in short 'WSL') which is 100% subsidiary of the assessee. The purpose of agreement is to market the CRS and other services of assessee in UK, Europe, the Middle East, Africa, and parts of Asia. The worlds Span Ltd. was marketing and distributing CRS through its non-exclusive representative Calleo Distribution Technologies Pvt. Ltd. (in short 'calleo') in India. For this, WSL and Calleo entered into an agreement appointing Calleo as the distributor of WSL for CRS.

05. For AY- 2006-07, assessee filed its return of income on 31st March, 2008 declaring nil income based on the following contentions:-

a. There is no business connection of assessee in India u/s 9(1) (i) of the Income Tax act as the calleo carrying out activities in India as per nonexclusive Representation agreement with WSL.

b. Assessee does not have Permanent establishment In India as per Indo US DTAA.

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c. Assuming while denying the PE of the assessee in India, as Caello has been remunerated at 57 % of the revenue; no further income can be attributed to such PE.

06. Assessing Officer passed an assessment order u/s 143(3) of the Act on 29th December, 2008 at total taxable income of Rs. 8,18,22,849/- computed as under.

Sr No	Particulars	Amount (US$)	Amount (INR)
1	Receipts from Airlines	4280894	
2	Less:- Commission paid by assessee to Calleo @ 57 % of the Receipts from Airlines	2440110	
3	Total taxable Income (1-2)	1840784	
4	Total taxable Income (Exchange rate Rs 44.45 Per US$)		81822849

07. Before AO assessee submitted that as Calleo is a distributor of worlds span services Ltd. (WSL) (a 100 % subsidiary of assessee in England) therefore there is no connection of assessee i.e. Word span L.P USA in India according to the provisions of section 9 (1)(i) of the Income Tax Act, 1961. Further as assessee is the tax resident of USA it is entitled to take benefit of India- USA Double Taxation avoidance agreement. Assessee further contends that it does not have any fixed place of business in India and further its activities do not fall under any of the clauses of Article 5 of DTAA, therefore it does not have permanent establishment (PE) in India, hence in absence of PE it does not have any taxable income in India. However, AO was of the view that in view of the decision of Delhi ITAT in case of Galileo International Inc. v. *CIT* [2008] 19 SOT 257 (Delhi) assessee has a permanent establishment in India in the form of equipment installed at the location of travel agents in India as well as its dependant agents in the form of Calleo as distributor. Further, it was also held that the assessee has a business connection within meaning of section 9(1) (i) of the Income Tax Act and therefore the stand of the assessee, that the income of the appellant is not chargeable to tax in India was rejected. Therefore, he computed the income in the manner stated above.

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08. Assessee aggrieved with the order of AO preferred an appeal before the CIT(A) who in turn following the decision of Galileo International Inc. v. *CIT* [2008] 19 SOT 257 (Delhi) held as under :-

a) Assessee is held to have a business connection in India hence in terms of Section 9 (1) (i) income from booking made from India and income from such operations deemed to operator arise to the appellant in India

b) In view of the decision of ITAT in case of Galileo International Corporation vs. DCIT 15% of the revenue accruing or arising from the bookings made in India is held as reasonable attribution of revenue in the hence of the appellant is chargeable u/s 5(2) read with section 9(1)(i) of the Act

c) Since the remuneration paid by appellant to Calleo for the functions performed in India which is more than income attributable to the assessee its liability to tax in India extinguishes

d) The access to CSR provided by the appellant to subscribers constituents fixed place of business i.e. PE as per para 1 of Article 5 of DTAA.

e) Calleo has habitually exercised the authorities to conclude contracts on behalf of the appellant and therefore is a dependent agent of the appellant according to the Article 5 (4) (a) of the DTAA.

f) 15% of the revenue generated from the bookings made within India is the revenue attributed to the PE. Since the payment to the agent in India is more than the revenue in attributable to the PE in India, no further tax liability arises on assessee.

09. Therefore assessee is in appeal contesting that its income is not chargeable to tax in India as per the Act and further it does not have any PE in India as per Indo US DTAA. It further contests that in any way the 15 % income attributed to its PE is excessive and exorbitant. Revenue is aggrieved and is in appeal before us contesting that quantum restricted to 15 % of revenue as profit attribution and further allowing expenses form the revenue so attributed to PE.

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10. It was contended by both the parties that issues in appeals of rival parties are squarely covered by the decision of Honourable Delhi High Court in case of M/s Galileo BV vs. ADI New Delhi vide order dated 25th February, 2009[2014] 51 taxmann.com 419 (Delhi) and order of ITAT *Galileo International Inc.* v. *CIT* [2008] 19 SOT 257 (Delhi). Both the parties advanced similar arguments before us, assessee contending that the assessee does not have 'business connection' as well as 'PE' in India and therefore income is not chargeable to tax in India. Further submitted that functions performed by assessee are lesser compared to the case cited and that income attributed to PE @ 15 % of gross revenue is exorbitant. In nutshell, assessee's submission was that it is on better footings than the decision relied up on. Revenue tried to distinguish the decision of ITAT in case of *Galileo International Inc.* v. *CIT* citing some differences in business model of assessee, agreements etc. However, either parties advance no new arguments, which compels us to depart from view taken by Hon. ITAT and confirmed by Hon Delhi high court.

11. Hon. ITAT decided the issue in *Galileo International Inc.* v. *CIT* [2008] 19 SOT 257 (Delhi) for AY 1995-96 to 1998-99. Hon Delhi high court confirmed the order of ITAT in [2009] 180 TAXMAN 357 (DELHI) *Director of Income tax* v. *Galileo International Inc.* For AY 2003-04 to 2006-07 there was challenge by assessee against the order of ITAT before Honorable Delhi high court where tribunal observed that the ratio or formula applied in earlier years cannot be applied in respect of assessment years 2003-04 to 2006-07. Hon Delhi high court in Galileo Nederland BV v. Assistant Director of Income-tax, Circle-1(2), (Intl. Tax), New Delhi 367 ITR 319 has held that Tribunal fell into error in holding that the estimate of 15 per cent fixed in its earlier orders as attributable to the assessee's income arising in India, is inapplicable to the assessment years in question (i.e. for AY 2003-04 to 2006-07) for the reasons mentioned in its impugned order. The Tribunal also fell into error in departing from its reasoning in the case of the assessee's case for the period 1995-96 to 2000-2003. Against this order, Honourable Supreme court has admitted SLP of the department reported in 230 taxman 361 (SC). Therefore, in view above judicial history

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the issue decided by ITAT in Galileo *International Inc.* v. *CIT 19 SOT 257* would be the guiding judicial precedent in case of these appeals.

12. Honourable ITAT in *Galileo International Inc.* v. *CIT* (supra) has decided the various issues in that order regarding business connection u/s 9(1) (i) of the act, permanent Establishments of the assessee under DTAA, and attribution of income to the PE. The relevant para of that decision are as under :-

a) Whether assessee has a business connection in India u/s 9(1) (i) of the act and its income is deemed to accrue or arise in India.

> 8.*2 In light of the above provisions in the Income-tax Act and the judicial pronouncements, we may appreciate the facts and deal with the issue. The appellant has developed a fully automatic reservation and distribution system known as Galileo system with ability to perform comprehensive information, communication, reservation, ticketing, distribution and related functions on a worldwide basis. Through this Galileo system, the appellant provides service to various participants, i.e., Airlines and hotels etc. whereby the subscribers who are enrolled through the efforts of NMC can perform the functions of reservations and ticketing etc. Thus the Galileo system or the CRS is capable not only processing the information of various Airlines for display at one place but also enables the subscribers to book tickets in a way which is a seamless system originating from the desk of the subscriber's computer which may or may not be provided by the appellant but which in all cases are configured and connected to such an extent that such computers can initiate or generate a request for reservation and also receive the information in this regard so as to enable the subscriber to book the airlines seat or hotel room. The request which originated from the subscriber's computer ended at the subscriber's computer and on the basis of information made available to the subscriber, reservations were also possible. It is to be noted that all the subscribers in respect of which income is held taxable are situated in India. The equipment, i.e., computer in some cases and the connectivity as well as configuration of the computer in all the cases are provided by the appellant. The booking takes place in India on the basis of the presence of such seamless CRS system. On the basis of booking made by the travel agent in India, the income generates to the appellant. But for the booking no income accrues to the appellant. Time and again it is contended that the whole of the processing work is carried out at host computer situated at Denver in Colorado, USA and only the display of information is in India for the proposition that there is no business connection in India. We are unable to agree with such proposition. The CRS extends to Indian territory also in the form of connectivity in India. But for*

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the request generated from the subscriber's computer's situate in India, the booking is not possible which is the source of revenue to the appellant. The assessee is not to receive the payment only for display of information but the income will accrue only when the booking is completed at the desk of the subscriber's computer. In such a situation, there is a continuous seamless process involved, at least part of which is in India and hence, there is a business connection in India. The computers at the subscriber's desk are not dumb or are in the nature of kiosk incapable of performing any function. The computers along with the configuration has been supplied either by the appellant or through its agent Interglobe and the connectivity being provided by the appellant enables the subscribers to access the CRS and perform the ticketing and booking functions. The existence of business connection can be summarised thus :

(1)Assessee hires SITA nodes in most major cities in India together 800 land lines for maintaining telecommunication network in India as evident at page Nos. 278 to 281 of the assessee's paper book No. 1.

(2)Assessee secures the provision of the operation of the communication network from SITA node to travel agent as evident at page 281 of assessee's paper book No. 1.

(3)By Clause 15.3 of the Distribution Agreement, the assessee specifically authorises Interglobe (Galileo India) to conclude agreements with the Travel agents in India in accordance with the model Subscriber Agreement which forms an annexure to the said Agreement.

(4)Assessee lays down targets and closely supervise and reviews the performance of Galileo India on day-to-day basis in accordance with the Annual Plan and the service manual prescribed by it as per clause 14 of Distribution Agreement.

(5)Assessee allots access code to the travel agents for using the CRS.

(6)The assessee's business comprises of :

(a)Maintenance and running of CRS;

(b)Providing computer modem and software to the travel agents in India so that they can use the CRS for making the bookings which generate charge on the airlines;

(c)Assessee hires from SITA and maintains and operates telecommunication network in India so that travel agents could make the bookings.

All these activities are integral part of the core business carried on by the assessee and these are not auxiliary or preparatory in nature.

The contention of Shri Vyas regarding reliance on the decision in the case of Fisher (supra) in this case is misplaced. Whether the contract for sale of ticket is completed in India or outside is irrelevant for the purpose of present discussion as we are not to determine the taxability of income of various airlines accruing as a result of sale of tickets through the CRS in

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India. Thus, the availability of the tickets displayed through the CRS at the desk of travel agents in India is whether offer for sale or an invitation to an offer is not a deciding factor. What we find is that part of the Galileo system exists in India in the form of configuration and connectivity of such system through which booking activities can be performed in India. The decision of ITAT, Bangalore Bench in the case of Wipro Ltd. (supra) is also misplaced as in that case no part of the data processing facility was performed in India but wholly outside India. In the present case, the appellant operates the Galileo system which is the source of revenue and part of such system exists in India. Thus there is a direct business connection established in India and hence in terms of section 9(1)(i) of the Act, the income in respect of the booking which takes place from the equipment in India can be deemed to accrue or arise in India and hence taxable in India.

b) Having held that there is business connection in India, how much income is chargeable to tax in India

9. The next question therefore, arises is whether having held that there is business connection in India, how much income is chargeable to tax in India. As per section 9(1)(i) of the Act, income accruing or arising whether directly or indirectly through or from any business connection in India shall be deemed to accrue or arise in India. As per clause (a) of Explanation 1 to section 9(1)(i) in the case of a business 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. Thus in a given case if all the operations are not carried out in India, the income has to be apportioned between the income accruing in India and income accruing outside India. In the present case, we find that only part of CRS system operates or functions in India. The extent of work in India is only to the extent of generating request and receiving end-result of the process in India. The major functions like collecting the database of various airlines and hotels, which have entered into PCA with the appellant takes place outside India. The computer at Denver in USA processes various data like schedule of flights, timings, pricing, the availability, connection, meal preference, special facility, etc. and that too on the basis of neutral display real time on line takes place outside India. The computers at the desk of travel agent in India are merely connected or configured to the extent that it can perform a booking function but are not

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capable of processing the data of all the airlines together at one place. Such function requires huge investment and huge capacity, which is not available to the computers installed at the desk of subscriber in India. The major part of the work or to say a lion's share of such activity, are processed at the host computer in Denver in USA. The activities in India are only minuscule portion. The appellant's computer in Germany is also responsible for all other functions like keeping data of the booking made worldwide and also keeping track of all the airlines/hotels worldwide that have entered into PCA. Though no guidelines are available as to how much should be income reasonably attributable to the operations carried out in India, the same has to be determined on the factual situation prevailing in each case. However, broadly to determine such attribution one has to look into the factors like functions performed, assets used and risk undertaken. On the basis of such analysis of functions performed, assets used and risk shared in two different countries, the income can be attributed. In the present case, we have found that majority of the functions are performed outside India. Even the majority of the assets, i.e., host computer which is having very large capacity which processes information of all the participants is situated outside India. The CRS as a whole is developed and maintained outside India. The risk in this regard entirely rests with the appellant and that is in USA, outside India. However, it is equally important to note that but for the presence of the assessee in India and the configuration and connectivity being provided in India, the income would not have generated. Thus the initial cause of generation of income is in India also. On the basis of above facts we can reasonably attribute 15 per cent of the revenue accruing to the assessee in respect of bookings made in India as income accruing or arising in India and chargeable under section 5(2) read with section 9(1)(i) of the Act.

c) Income accruing in India is consumed by the payment made to the agents in India, whether any income still is left to be taxed in India

13. Next question to be decided is if it is found that the income accruing in India is consumed by the payment made to the agents in India, whether any income still is left to be taxed in India. The activities of the appellant in India are entirely routed through the efforts of NMC namely Interglobe India (P.) Ltd. (Interglobe). Interglobe is responsible for monitoring the activities of the subscribers enrolled in India. The request originated from the computers at the desk of travel agent is once again routed through the facility of processing such information at Interglobe. If Interglobe finds that the subscriber accessing the CRS is authorized to do so, the request is further forwarded. Interglobe is also responsible for establishing connectivity of the computers of the subscribers and maintaining them. Interglobe is also responsible for training of the subscribers in respect of use of CRS. For all these services rendered by Interglobe to the appellant, it is being paid remuneration in terms of distribution agreement. Broadly the assessee receives three 'Euros' as fees

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per 'net booking', i.e., gross booking minus cancellation. The assessee passed one dollar to Interglobe for each net booking processed through Galileo system by subscriber. Thus in respect of the activities carried out in India and considering the income accruing in India, remuneration paid to the Indian agents consumes the entire income accruing or arising in India. It is also to be noted that the entire payment made by appellant to Interglobe has been allowed as expenses while computing total income of the appellant. In such a situation in view of Circular No. 23 of 23rd July, 1969 no income can be further charged to tax in India. As rightly contended by Shri Vyas the Circular equally applies to the sale of goods as well as rendering of services. The Hon'ble Supreme Court has taken judicial note of said Circular in the case of Morgan Stanley & Co. Inc. (supra) and have held that once associated enterprise which is considered as PE of the non-resident assessee is remunerated at arm's length, nothing further would be left to be attributed to the PE of the non-resident. We, therefore, hold that in view of the above facts, no income is taxable in India.

d) Whether a Permanent Establishment exists of assessee as per DTAA.

17. The next question to be decided is whether the appellant has any permanent establishment in India within the meaning of article 5 of DTAA between India and USA [187 ITR (St.) 102]. Article 5 of the Treaty provides as under :—

"INDO-US TREATY

Article 5. Permanent Establishment.—

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

(2) The term 'permanent establishment' includes especially :

(a)a place of management;
(b)a branch;
(c)an office;
(d)a factory;
(e)a workshop;
(f)a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
(g)a warehouse in relation to a person providing storage facilities for others.
(h)a farm, plantation or other place where agriculture forestry, plantation or related activities are carried on;
(i)a store or premises used as a sales outlet;
(j)an installation or structure used for the exploration or exploitation of natural resources, but only if so used for a period of more than 10 days in any twelve-month period;
(k)a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project

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or activities (together with other such sites, projects or activities, if any) continue for a period of more than 120 days in any twelve-months period;

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

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

(ii)the services are performed within that State for a related enterprise [within the meaning of paragraph 1 of article 9 (associated enterprises)].

(3) Notwithstanding the preceding provisions of this article, the term 'permanent establishment' shall be deemed not to include any one or more the following :

(a) the use of facilities solely for the purpose of storage or display or occasional delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display or occasional delivery;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods and merchandise, or of collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of advertising, for supply of information, for scientific research or for other activities which have a preparatory or auxillary character, for the enterprise.

(4) Notwithstanding the provisions of paragraphs 1 and 2, where a person other than an agent of an independent status to whom paragraph 5 applies—is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if

(a) he has and habitually exercises in the first mentioned State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph;

(b) he has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he

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regularly delivers goods or merchandise on behalf of the enterprise and some additional activities conducted in that State on behalf of the enterprise have contributed to the sale of the goods or merchandise; or

(c) he habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise.

(5) An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise and the transactions between the agent and the enterprise are not made under arm's length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph.

(6) The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other."

Paragraph 1 of the Treaty gives a general definition of the term "Permanent establishment" which brings out its essential characteristic of a permanent establishment in the sense of convention, i.e., a distinct sites, a fixed place of business through which the business of an enterprises is wholly or partly carried on. Thus what is to be seen is whether there is existence of a place of business, i.e., a facility such as a premise or in certain instances machinery or equipment. The place of business must be fixed, i.e., it must be established at a distinct place where a certain degree of permanence can be attached. Carrying on of the business of the enterprise should be through such fixed place of business. This means that the person who is in one way or the other is dependent on the enterprise, conduct the business of the enterprises in which such fixed place is situated. The term 'place of business' covers any premises, facility or installation used for carrying on the business of the enterprise, whether or not they are used ex- clusively for that purpose. A place of business may also exist where no premises are available or required for carrying on the business of the enterprise and it simply has a certain amount of space at its disposal. It is immaterial whether the premises, facilities or installations are owned or rented or are otherwise at the disposal of the enterprise. A place of business may thus be constituted by a pitch in a market place or by a certain permanently used area. The place of business can be situated in the business vicinity of another enterprise. What is to be seen is that on fact an enterprise has a certain amount of space at its disposal, which is used for business activities and then it is sufficient to constitute a place of business. No formal legal right to use that place is visualized or required. A PE could exist even where an enterprise

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unauthorizingly or illegally occupies certain locations where it carried on its business. For a place of business to constitute a PE, the enterprise using it must be carrying on its business wholly or partly through it. It is not necessary that whole of the business should be carried on through such PE or fixed place. Time and again it is being contended on behalf of appellant that for application of paragraph 1 of Article 5 of the Treaty to apply, it must have a productive character, i.e., contribution to the profits of the enterprise. However, considering paragraph 1 of Article 5 of the Treaty, it is not so mentioned within the framework of established business. It will be appropriate to presume that each part of the activities carried on contributes to the productivity of the whole. Thus even if some contribution is made in carrying on the business as a whole, even then it can be said that the business of an enterprise would partly be carried on from such place and accordingly a PE of such enterprise. Where the business of an enterprise is carried on mainly by the entrepreneur or employees who receive instructions from the enterprise, the rights of such persons in its relationship with third parties are irrelevant. So far as paragraph 1 of Article 5 is to apply whether or not, the dependent agent is authorized to conclude contracts is irrelevant so long as he operates from the fixed place of business. The PE will nevertheless exist if the business of the enterprise is carried on mainly through automatic equipment and the activities of the personnel being restricted to setting up and operating such equipment. A PE will still exist if the enterprise which sets up machine also operates and maintains them for its own account and whether operated by itself or by a dependent agent.

17.1 In the present case it is seen that the CRS, which is the source of revenue is partially existent in the machines namely various computers installed at the premises of the subscribers. In some cases, the appellant itself has placed those computers and in all the cases the connectivity in the form of nodes leased from SITA are installed by the appellant through its agent. The computers so connected and configured which can perform the function of reservation and ticketing is a part and parcel of the entire CRS. The computers so installed require further approval from appellant/Interglobe who allows the use of such computers for reservation and ticketing. Without the authority of appellant such computers are not capable of performing the reservation and ticketing part of the CRS system. The computer so installed cannot be shifted from one place to another even within the premises of the subscriber, leave apart the shifting of such computer from one person to another. Thus the appellant exercises complete control over the computers installed at the premises of the subscribers. In view of our discussion in the immediately preceding paragraph, this amounts to a fixed place of business for carrying on the business of the enterprise in India. But for the supply of computers, the configuration of computers and connectivity which are provided by the appellant either directly or through its agent Interglobe will amount to operating part of its CRS system through such subscribers in India and accordingly PE in the nature of a fixed place of business in India. Thus

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the appellant can be said to have established a PE within the meaning of paragraph 1 of Article 5 of Indo-Spain Treaty.

17.2 The next question to be considered is if there is a permanent establishment, whether the exception provided in paragraph 3 of Article 5 applies so as to hold that there is no permanent establishment in India. The case of the appellant is that the existence of such computers are merely for the purpose of advertising and the activities are preparatory or auxiliary in character and hence there is no fixed place PE in India in view of the Exception provided in paragraph 3 of Article 5. We are unable to accept such a contention. The function of the PE in India is not to advertise its products. The activity of the appellant is developing and maintaining a fully automatic reservation and distribution system with the ability to perform comprehensive information, communication, reservation, ticketing, distribution and related function on a worldwide basis. The computers installed at the premises of the subscribers are connected to the global CRS owned and operated by the appellant. Using part of the CRS System, the subscribers are capable of reserving and booking a ticket. Thus it cannot be considered as "solely for the purpose of advertising" of such CRS system. Similarly it is not in the nature of 'preparatory or auxiliary' character. It is difficult to distinguish between the activities which are 'preparatory or auxiliary' character and those which are not. The decisive criteria is whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the enterprise as a whole. Since part of the function is operated in India which directly contributes to the earning of revenue, the activities as narrated above carried out in India is in no way of 'preparatory or auxiliary' character. Thus the exception provided in Paragraph 3 of Article 5 will not apply and hence as stated above, the assessee shall be deemed to have a permanent establishment in India.

17.3 The next question arises is whether the assessee has a PE in India in the form of a dependent agent. It is commonly accepted principle that an enterprise should be treated as having a PE in a State if there is under it a person acting for it, even though the enterprise may not have a fixed place of business. Thus there can be two forms of permanent establishment, (i) fixed place or (ii) through the dependent agent. An agent is a person employed to do any act for another or to represent another in dealing with third person. What an enterprise can do directly but if not so done directly but done through an agent appointed for the purpose, it will be deemed to have been done indirectly. Even in such a situation it can be said that the enterprise carrying on the business through the efforts of such agent and hence can be said to have established a PE. In the present case the appellant avails the services of Interglobe to promote the use or CRS in India and for that purpose to appoint subscribers in India. Interglobe is authorized to enter into contract with the subscribers in terms of authority generated under Distribution Agreement (DA). The appellant binds itself in respect of booking made by subscriber using the CRS. Thus what could have been done directly

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by appellant is achieved through the service of Interglobe. Hence, Interglobe is to be treated as agent of appellant in India. Even though in the agreement between appellant and Interglobe, the existence of agency is denied, yet that will not be conclusive if on facts it is found to be agency. That will be relevant only for the limited purpose of agreement between these two parties but not relevant for third parties if on facts the existence of agency is found. However, all the persons other than agent of an independent status cannot be deemed to be a PE of the enterprise. The agents can be considered as PE only and only if when a person other than agent of an independent status, (i) has and habitually exercise in that State an authority to conclude contract or (ii) though he has no such authority but habitually maintains stock of goods from which he regularly delivers goods on behalf of the enterprise. Thus the first question to be decided is whether the agent is of a dependent status or of an independent status. In the present case we find that Interglobe is totally dependent on the appellant in respect of rendering services to subscribers in India. Thus that part of Interglobe's activities which earns its revenue by rendering services to the subscribers is carried on solely for the appellant. Though Interglobe might be carrying on any other activities, like a full fledge travel agency business, yet in respect of activity relating to installing CRS system of appellant at Subscribers Computers Provide connectivity, configuring the computers to enable it to access CRS, train the subscribers etc. is only and only for the appellant. Such type of activities are not carried on for any other person. Hence, the appellant and Interglobe are interdependent in this regard. The business of Interglobe is to provide data processing and software development services together with relative distribution of 'Galileo System' to the subscribers in India. Interglobe has also an authority to enter into agreements with the subscribers. Interglobe installs the computers, configures the computers for accessing the CRS and also provides connectivity through SITA notes. Thus functionally as well as financially it is dependent entirely on the appellant. It can, therefore, be said that Interglobe is a dependent agent of the appellant.

17.4 The next question to be decided is whether Interglobe is habitually exercising an authority to conclude contracts on behalf of the appellant. Under the distribution agreement entered into by the appellant with Interglobe, it is responsible for effecting and contracting with subscribers in the Indian territory and is to use reasonable efforts to provide access to all the 'Galileo System' out of Indian territory. Though the appellant and even the participating airlines are not party to the agreement entered into by Interglobe with the subscribers, yet the appellant through the PCA has ensured that the subscribers were authorized to use 'Galileo System'. Under an authority granted to them, subscribers use such products. The reservations and ticketing done using the CRS product are being honoured by the participants and for which the remuneration will be payable by the participants to the appellant. Thus Interglobe can be said to have and having exercised an authority to conclude contracts on behalf of the appellant. What

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the appellant could have done directly by entering into an agreement with the subscribers, was done through Interglobe. The subscribers agreement were entered into by Interglobe under an authority available to it in view of the distribution agreement. What could have been done directly is now done indirectly through the offices of Interglobe under an authority granted to it. The phrase "authority to conclude contracts on behalf of the enterprise" does not confine to application of paragraph 4 to an agent who enters into contract literally in the name of enterprise. The paragraph applies equally to an agent who concludes contracts which are binding on the enterprise even if those contracts are not actually in the name of enterprise. Lack of activity involved by enterprise in the transactions may suggest of an authority being granted to the agent. It is contended on behalf of the appellant that the agent to be called dependent agent should have an authority to conclude such contract which contributes to the income of appellant and no other ancillary contract. It is contended on behalf of the appellant that the contracts which generates revenue are the contracts with participating airlines and since the dependent agent has no authority to conclude contracts with such participants, Interglobe cannot be branded as a dependent agent within the meaning of paragraph 4 of Article 5 of the Treaty. On the other hand, the learned DR has submitted that on the plain reading of Treaty, there is no such provision that the contract to be habitually concluded should contribute to the revenue. In our opinion, what is relevant is that such contract shall have a nexus with the business operations as such and not merely contracts for hiring employees, premises etc. What is taxable in the Contracting State is the income accruing to such enterprise and the activities are carried on either through the PE namely fixed place or through a dependent agent. The dependent agent is not to be considered as PE unless he has authority to conclude contract on behalf of such enterprise. The authority to conclude contracts must be in respect of contracts relating to operations, which constitute the business proper of the enterprise. The appellant in the present case in order to enhance its business operations has appointed Interglobe as its agent who promote the 'Galileo System' in India. Interglobe in its turn has appointed various subscribers for use of 'Galileo System'. Though the revenue flows only from participants who have entered into PCA with the appellant, yet the revenue could not have been generated but for the subscribers using the 'Galileo System'. In a way the revenue is generated from the participants but only on the basis of use of CRS by the subscribers. But for such use no revenue would accrue to the appellant. Thus the agreements entered into by the Interglobe with the subscribers under an authority granted to it, are contracts relating to operations which constitute business proper and not merely in the nature of internal operations. Such contracts are habitually exercised and there is nothing on record to suggest that such authority was cancelled at any point of time. We, therefore, hold that Interglobe is dependent agent of the appellant who has habitually exercised the authority to conclude contracts on behalf of the appellant. To

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that extent the appellant has a PE in India. Since we have held that Interglobe is a dependent agent of appellant in India, we need not discuss para (5) of Article 5 of the treaty regarding independent agent form of PE.

17.5 The next question that arises is whether the appellant has PE in India within the meaning of clause (b) of paragraph 4 of Article 5 of the Treaty. Clause (b) of paragraph 4 of Article 5 will apply only where the dependent agent habitually maintains stock of goods from which he regularly delivers goods on behalf of the enterprise. In the present case, it is seen that the appellant is not dealing in any stock of goods. Since the appellant is not dealing in any goods, the question of delivery of such goods does not arise. The contention of learned DR that Interglobe maintains stock of computers which are delivered to the subscribers should be treated as delivery of goods. He also submitted that what is mentioned in Treaty is that there should be delivery of goods which may not necessarily be sale of goods. We are unable to accept such contention of the learned DR. The reference to "stock of goods" in clause (b) of paragraph 4 of Article 5 has to be understood in the sense the business proper carried on by the enterprise. The delivery should be from the stock of goods which if considered in proper prospective will only be of the stock of goods dealt with by the assessee in regular course of its business. If the agent is to deliver the goods either the goods should be such in which the enterprise deals in or which are regularly hired out which may be considered as given on bailment from which the revenue is to be generated. But in the present case the computers supplied by Interglobe to the subscribers are not dealt with by the assessee or which is by itself is the source of revenue. Thus clause (b) of paragraph 4 of Article 5 will not apply to consider the dependent agent as PE of the appellant in India.

e) What profit can be attributed to PE of the assessee in India.

18. Having considered that the appellant has a PE in India in two forms namely (1) fixed place (PE) under paragraph 1 of Article 5 and (2) Agency PE under clause (a) of paragraph 4 of Article 5, we shall examine as to what is the profit attributable to the PE in terms of Article 7 of the DTAA between India and USA. We shall also examine whether the income so computed would be absorbed by the expenses incurred to earn such income which will prima facie extinguish the assessment.

Paragraphs 1 to 3 of the Article 7 of the DTAA are extracted hereunder:—

Article 7

"Business profits.—(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 that other State of goods or merchandise of the same or similar kind as those sold through

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that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.

(2) Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly at arm's length with the enterprise of which it is a permanent establishment and other enterprise controlling, controlled by or subject to the same common control as that enterprise. In any case where the correct amount of profits attributable to a permanent establishment is incapable of determination or the determination thereof presents exceptional difficulties, the profits attributable to the permanent establishment may be estimated on a reasonable basis. The estimate adopted shall, however, be such that the result shall be in accordance with the principles contained in this article.

(3) In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including a reasonable allocation of executive and general administrative expenses, research and development expenses, interest and other expenses incurred or the purpose of the enterprise as a whole (or the part thereof which includes the permanent establishment), whether incurred in the State in which the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the taxation laws of that State. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents, know-how or other rights, or by way of commission or other charges, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charges (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents, know-how or other rights, or by way of commission or other charges for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices." [Emphasis supplied]

Reading the above Article 7 of the treaty it is clear that the profit of an enterprise will be taxable only to the extent as is attributable to that permanent establishment. This is in pari materia with clause (a) of

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Explanation 1 to section 9(1)(i) of the Income-tax Act. Paragraph 5 of Article 7 of the treaty prescribes as to how the profits to be attributed to the PE is to be arrived at. It provides that only the profits derived from assets and activities of the PE shall be treated as attributable to the permanent establishment. It is argued that the clause 'derived from' should have narrower meaning and only the immediate and direct nexus should be between earning of income and assets and activities of the PE which can be brought to tax. For this purpose, heavy reliance is placed on the decision of Hon'ble Supreme Court in the case of CIT v. Sterling Foods [1999] 237 ITR 5791 and Pandian Chemicals Ltd. v. CIT [2003] 262 ITR 278 2. While we broadly agree that the profits to be attributed to the PE as provided in Paragarph 1(a) of Article 7 shall include only the profits derived from assets and activities of the PE, the reference to the judgment of Hon'ble Supreme Court in this regard is misplaced. The judgment rendered by Hon'ble Supreme Court while interpreting the clause 'profit derived from industrial undertaking' for the purpose of computing deduction under section 80HH/80-I cannot be applied in relation to computation of profits to be attributed to the PE. Hon'ble Supreme Court was not called upon to interpret the Indo-US Treaty or as to how the profit should be attributed to the PE. Thus, the judgment of Hon'ble Supreme Court in India rendered in the context of interpreting one of the incentive provision cannot be applied in relation to the clauses in the treaty. The wordings in the treaty are not to be interpreted like a provision of the statute. In a way there should be some rational connection between existence of PE and the profits from the assets and activities of the PE which can be brought to tax and no further artificial meaning should be given as to the clause 'derived from'. Just in a case to be decided outside India the decisions rendered by the Apex Court in another country cannot be held as a binding precedent in that country in relation to interpretation of a clause in treaty, same way the judgment of the Apex Court cannot be applied even in the country where such decision is rendered particularly when the decision is not rendered interpreting the clauses of the treaty entered into between two countries. However, in all circumstances only that much of the profit as are arising due to the assets and activities of the PE can be brought to tax and if whole of the activities of the business are not carried out in India, the profit should be apportioned between that arising in India and that arising outside India. Thus where the entire activity of an enterprise are not carried out in a Contracting State where the PE is situated, than only so much of the profit as is attributable to the functions carried through the PE can be taxable in such source State. While dealing with the question as to what is such part of income as is reasonably attributable to the operations carried out in India, we have held that only 15 per cent of the revenue generated from the bookings made within India is taxable in India. The same proportion has to be adopted here while computing profit attributable to the PE. We have also held that since the payment to the agent in India is more than what is the income attributable to

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the PE in India, it extinguish the assessment as no further income is taxable in India. It is to be noted that even in the first assessment framed by the Assessing Officer, the entire expenses in the form of remuneration paid to Interglobe was held as allowable deduction and was reduced while computing the income of appellant. If that be the case, the income attributable to PE in India being less than the remuneration paid to the dependent agent, it extinguishes the assessment and requires no further exercise for computation of income. We accordingly hold so and in view of the same the income of the appellant will be NIL.

14. We have already described the judicial orders in case of Galileo International Inc. Be that it may be. Honourable Delhi high court has upheld the decision of ITAT Delhi in Galileo International Inc.v.Deputy Commissioner of Income-tax, Non-Resident Circle, New Delhi in 116 ITD 1 vide order in Director of Income-tax v. Galileo International Inc.* [2009] 336 ITR 264(DELHI) where in Honourable ITAT has held that:-

a. Assessee has business connection in India U/s 9 (1) (i) of the Income tax Act and therefore income accruing or deemed to accrue or arise in India on account of such business connection shall be chargeable to tax India u/s 5 (2) of the income tax act in the hands of the nonresident assessee.

b. The Assessee has a permanent establishment in India in terms of fixed place of business within the meaning of Article 5 (1) of the Indo US tax treaty. Further It has also agency PE in terms of article 5 (4) (a) of the treaty as assessee has dependent agent in form of distributor in India.

c. 15 % of Gross revenue of the assessee shall be profit attributable to the PE of the assessee in India and as the Indian agent is remunerated more than the revenue

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attributable to the PE of the assessee tax liability of assessee extinguishes.

15. As all the question of these appeals are decided in the above order of ITAT which is confirmed by honorable Delhi high court and therefore respectfully following the order of Honourable High court we hold that :-

A) <u>Assessee's appeal (ITA No 6326 / del 2012)</u>

a. Regarding Ground No 1 of the assessee's appeal that assessee has business connection in India U/s 9 (1) (i) of the Income tax Act and therefore income accruing or deemed to accrue or arise in India on account of such business connection shall be chargeable to tax India u/s 5 (2) of the income tax act in the hands of the nonresident assessee. The Assessee has a permanent establishment in India in terms of fixed place of business within the meaning of Article 5 (1) of the Indo US tax treaty. Further It has also agency PE in terms of article 5 (4) (a) of the treaty as assessee has dependent agent in form of distributor in India. Therefore, we confirm the order of CIT (A) and dismiss ground no 1 of the appeal of the assessee.

b. Regarding ground No 2, 15 % of Gross revenue of the assessee shall be profit attributable to the PE of the assessee in India. Therefore, we confirm the order of CIT (A) and dismiss this ground of appeal of the assessee.

c. Regarding ground no 3 assessee has not adduced any evidence or submitted any arguments hence this grounds of appeal is dismissed.

B) **<u>Revenue's Appeal ITA No 6499/del/2012</u>**

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a. Ground No 1 to 5 of the appeal are against profit attribution to PE of the assessee and extinguishment of further taxability in the hands of the assessee as Dependent agent is remunerated more than the income attributable to PE. As 15 % of the revenue is attributable to PE of assessee and as agent of the PE is remunerated more than income attributable to PE, liability of taxation of any further income extinguishes. Therefore, we confirm the order of CIT (A) and dismiss Ground No 1 to 5 of revenue's appeal.

16. Since the facts and grounds of appeal for AY 2007-08 and 2008-09 of the assessee (ITA No 6327 & 1342/del/2012) as well as revenue (ITA No 6500 & 1480/Del/2012) are same as compared appeal for AY 2006-07, we for reasons given above and respectfully following the decision of Honourable Delhi high court , dismiss all of them.

17. In view of this, all the six appeals of assessee as well as revenue are dismissed.

(Order Pronounced on 23/11/2015)

-Sd/- -Sd/-

(I.C.Sudhir)
JUDICIAL MEMBER

(Prashant Maharishi)
ACCOUNTANT MEMBER

Dated:23 /11/2015
B. Rukhaiyar
Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(Appeals)
5.DR: ITAT

ASSISTANT REGISTRAR