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

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA Nos.5024 to 5029/DEL/2017
[Assessment Years: 2004-05 to 2006-07 & 2010-11 to 2012-13]

Dy. Commissioner of Income Tax, Circle-1(1)(1) International Taxation, Room No.409, Block E-2, Civic Centre, New Delhi-110002	Vs	M/s Adobe Systems Software Ireland Ltd. C/o- M/s Pricewaterhousecoopers Pvt. Ltd. Sucheta Bhawan, (Gate No.2), 11-A, Vishnu Digamber Marg, New Delhi-110002
		PAN-AAHCA7203M
Revenue		Assessee

ITA Nos.3079 & 3080/DEL/2019
[Assessment Year: 2007-08 & 2013-14]

Dy. Commissioner of Income Tax, Circle-1(1)(1) International Taxation, Room No.409, Block E-2, Civic Centre, New Delhi-110002	Vs	M/s Adobe Systems Software Ireland Ltd. C/o- M/s Pricewaterhousecoopers Pvt. Ltd. Sucheta Bhawan, (Gate No.2), 11-A, Vishnu Digamber Marg, New Delhi-110002
		PAN-AAHCA7203M
Revenue		Assessee

ITA No.7922/DEL/2019
[Assessment Year: 2015-16]

Dy. Commissioner of Income Tax, Circle-1(1)(1) International Taxation, Room No.409, Block E-2, Civic Centre, New Delhi-110002	Vs	M/s Adobe Systems Software Ireland Ltd. C/o- M/s Pricewaterhousecoopers Pvt. Ltd. Sucheta Bhawan, (Gate No.2), 11-A, Vishnu Digamber Marg, New Delhi-110002
		PAN-AAHCA7203M
Revenue		Assessee

ITA Nos.4921 TO 4923/DEL/2017
[Assessment Years: 2010-11 TO 2012-13]

M/s Adobe Systems Software Ireland Ltd. C/o- M/s Pricewaterhousecoopers Pvt. Ltd. Sucheta Bhawan, (Gate No.2), 11-A, Vishnu Digamber Marg, New Delhi-110002	Vs	Dy. Commissioner of Income Tax, Circle-1(1)(1) International Taxation, Room No.409, Block E-2, Civic Centre, New Delhi-110002
PAN-AAHCA7203M		
Revenue		Assessee

ITA No.1978 & 1979/DEL/2019
[Assessment Year: 2007-08 & 2013-14]

M/s Adobe Systems Software Ireland Ltd. C/o- M/s Pricewaterhousecoopers Pvt. Ltd. Sucheta Bhawan, (Gate No.2), 11-A, Vishnu Digamber Marg, New Delhi-110002	Vs	Dy. Commissioner of Income Tax, Circle-1(1)(1) International Taxation, Room No.409, Block E-2, Civic Centre, New Delhi-110002
PAN-AAHCA7203M		
Revenue		Assessee

ITA No.55 & 7460/DEL/2019
[Assessment Year: 2014-15 & 2015-16]

M/s Adobe Systems Software Ireland Ltd. C/o- M/s Pricewaterhousecoopers Pvt. Ltd. Sucheta Bhawan, (Gate No.2), 11-A, Vishnu Digamber Marg, New Delhi-110002	Vs	Dy. Commissioner of Income Tax, Circle-1(1)(1) International Taxation, Room No.409, Block E-2, Civic Centre, New Delhi-110002
PAN-AAHCA7203M		
Revenue		Assessee

Revenue by	Ms. Meenakshi Singh, CIT-DR
Assessee by	Sh. Ajay Vohra, Sr. Adv, Sh. Rishabh Malhotra, AR

Date of Hearing	**12.05.2022**
Date of Pronouncement	**27.07.2022**

ORDER

PER BENCH,

These are cross appeals by the assessee and Revenue arising out of the separate appellate orders. Since, the issues are common and connected and all the appeals were heard together these are being consolidated and disposed off together for the sake of convenience.

2. Brief facts of the case are that Adobe Systems Software Ireland Limited ('the company or 'ADIR') is a company incorporated under the laws of Ireland and is a tax resident of Ireland in accordance with Double Taxation Avoidance Agreement ('DTAA' or 'tax treaty') between India and Ireland. Therefore, it is entitled to the beneficial provisions of the India Ireland DTAA. ADIR is a wholly owned subsidiary of Adobe Software Trading Company Limited ('ASTCL') Adobe Systems Incorporated ('Adobe USA') is the ultimate parent company of ADIR. Adobe USA has a subsidiary in India known as Adobe Systems India Pvt. Ltd. ('Adobe India') that provides marketing support services to ADIR. The assessee is engaged in the distribution of shrink-wrapped/off the shelf/electronic download computer software ('Adobe Products') outside of North America including India and it supplies the Adobe Products to its non-exclusive Indian distributors on a principal to principal basis. As per the submission of the assessee, it purchases the software built by the third party turnkey manufacturers. No further customization or modification takes place by the assessee. The assessee itself does not undertake any R

& D, development and manufacturing of software. The distributors act as the supplier of the assessee in India for selling the Adobe products in India.

3. The Assessing Officer treated the amount received by ADIR from sale of software to Indian distributors as royalty income u/s 9(1)(vi) of the Act as well as under Article 12(3) of India Ireland tax treaty and taxed the same at the rates applicable with receipt as royalty income.

4. In the alternate, the Assessing Officer also held Adobe India is working for the assessee as an agent. He held that the assessee was having fixed place PE/dependent agent PE. On this basis, he attributed certain profit as revenue receipt from India as business profit taxable in India in the hands of the assessee. In some of the cases before us, this issue has been raised either by the Revenue or the assessee consequent upon the order of the First Appellate Authority in different case as above. A nutshell chart of the issues as recorded above is summarized hereunder as given by the ld. counsel for the assessee. The same is not disputed by the Revenue. The same duly captures the issues in dispute in the appeals here.

AY	Adobe Ireland's Appeal					Revenue's Appeal					
	Appeal number	Royalty	Fixed place PE	Dependent Agent PE	Attribut-ion	Appeal number	Royalty	Fixed place PE	Dependent Agent PE	Attribut-ion	234B
2007-08	ITA 1978/DEL/2019	-	-	Yes	Yes	ITA 3079/DEL/2019	Yes	-	-	Yes	Yes
2010-11	ITA 4921/DEL/17	-	-	Yes	Yes	ITA 5027/DEL/2017	Yes	Yes	-	-	Yes
2011-12	ITA 4922/DEL/17	-	-	Yes	Yes	ITA 5028/DEL/2017	Yes	Yes	-	-	Yes
2012-13	ITA 4923/DEL/17	-	-	Yes	Yes	ITA 5029/DEL/2017	Yes	Yes	-	-	Yes
2013-14	ITA 1979/DEL/2019	-	-	Yes	Yes	ITA 3080/DEL/2019	Yes	-	-	Yes	Yes
2014-15	ITA 55/DEL/2019	Yes	Yes	Yes	Yes	No appeal filed	-	-	-	-	-
2015-16	ITA 7460/DEL/2019	-	-	Yes	Yes	ITA 7922/DEL/2019	Yes	-	-	-	-

5. As regards, the receipt from the distribution/ supply of software as royalty, the Ld. Counsel for the assessee at threshold submitted that this issue is already covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited (Civil Appeal Nos.8733-8734 of 2018) and other civil appeals, wherein, it has been held that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/ suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements are not the payment of royalty for the purpose of copyright in the computer software, and the same do not give rise to any income taxable in India. Further, the ld. counsel for the assessee stated that apart from the above, in assessee's own matters for AY 2008-09 and AY 2009-10, the ITAT has considered similar facts and decided the issue in favour of the assessee. The Ld. Counsel for the assessee further submitted that in subsequent assessment years after the pronouncement of the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited (supra) i.e. for AY 2016-17, AY 2017-18, AY 2018-19, AY 2019-20 and AY 2020-21, the Assessing Officer has not alleged that the receipts of the assessee from distribution/supply of software are taxable royalty in India.

6. The Ld. CIT-DR did not dispute the above proposition either in the Court or in the written submission filed subsequently. Accordingly, we find that the issue involved is squarely covered in favour of the assessee

by the decision of the Hon'ble Apex Court as above. We decide this issue in favour of the assessee.

7. The next issue raised in these appeals relates to the existence of dependent PE in India/fixed place PE in India and the attribution of income as the case may be as emanating out of the chart hereinabove. A broad submission by the Ld. Counsel for the assessee has been filed in this regard, which are summarized as under:-

> *"**1. Receipts from distribution/supply of software as royalty***
>
> • ***Issue covered in favour of the Appellant by the recent ruling of the Hon'ble Supreme Court***
>
> *> With regard to the above, it is humbly submitted that the case of the Appellant is squarely covered by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited [Civil Appeal Nos. 8733-8734 of 2018] and other civil appeals wherein it has been held that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements are not the payment of royalty for the use of copyright in the computer software, and the same do not give rise to any income taxable in India.*
>
> *A chart depicting the similarities between the distribution agreements examined by the Hon'ble Supreme Court and the distribution agreements which were entered into by the Appellant during the years under consideration is enclosed at pages 2 to 4 of the convenience compilation.*
>
> • ***Issue decided in favour of the Appellant in prior years by this Hon'ble Bench of the ITAT***
>
> *> In addition to the above, it may be noted that in the Appellant's own matters for AY 2008- 09 and AY 2009-10, this Hon'ble Bench of the ITAT has considered similar facts and held that the payments received by the Appellant from sale of software products cannot be characterized as 'royalty', and therefore, such payments are outside the*

purview of taxation in view of the India-Ireland Double Taxation Avoidance Agreement ("tax treaty") (copies of the said orders are enclosed at pages 78 to 157 of the convenience compilation).

- ***No royalty allegation by the Revenue during the assessment / reassessment proceedings for future years***

It may kindly be noted that in the assessment/ reassessment orders passed by the Ld. AO after the pronouncement of the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited (supra) i.e. for AY 2016-17, AY 2017-18, AY 2018-19, AY 2019- 20 and AY 2020-21, the Ld. AO has not alleged that the receipts of the Assessee from distribution/supply of software are not taxable royalty in India.

- ***Lastly, even during the course of the hearings before the Hon'ble bench, the Ld. CIT DR mentioned that they do not have any contentions on software royalty and they agree that the Appellant's income from sale of software should not be taxed as Royalty under the India - Ireland Double Taxation Avoidance Agreement ('DTAA')***

2. Existence of a dependent agent PE in India

- ***Adobe Systems India Private Limited ('Adobe India') does not qualify as an agent of the Appellant***

In order to understand the meaning of the term agent, one has to rely upon the provisions of Indian Contract Act, 1872 ("ICA"). Section 182 of the ICA defines an agent as 'a person who is employed to do any act for another or to represent another in dealings with third persons'. Thus, The relationship of an agency exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The essential feature of an agent is his power of making the principal answerable to third persons viz. enabling the principal to sue third parties directly or render him liable to be sued directly by the third party. In this regard, the Appellant would like to humbly submit that Adobe India does not qualify as an agent since:-

Adobe India's relationship with Adobe Ireland is that of an independent contractor and not that of a partnership, joint venture, sales agency or principal and agent (please refer to

clause 3.3.1 "Nature of Relationship" of the marketing support services agreement between Adobe Ireland and Adobe India enclosed at pages 158 to 198 of the convenience compilation);

Adobe India does not have any power or authority to bind Adobe Ireland contractually (please refer to clause 3.3.1 "Nature of Relationship" of the marketing support services agreement between Adobe Ireland and Adobe India enclosed at pages 158 to 198 of the convenience compilation);

Adobe Ireland does not assume any responsibility for statement, promises or warranties made by Adobe India or any of its agents or employees with respect to Adobe Application Products, on its behalf. Additionally, Adobe India has agreed to indemnify and save harmless the Appellant against any claims that may arise from such representations. Furthermore, Adobe India has represented that it shall not undertake any liability on behalf of the Appellant or accept any payments from Distributors or other customers unless authorities to do so by Adobe Ireland, (please refer to clause 3.34 "Indemnity for Representations", and 3.3.5 (d) and 3.3.5 (e) "Adobe India Covenants" of the marketing support services agreement between Adobe Ireland and Adobe India enclosed at pages 158 to 198 of the convenience compilation)

• Even assuming without admitting that Adobe India is an agent of Adobe Ireland, it would be considered as an independent agent since it is not legally and economically dependent upon Adobe Ireland

It is pertinent to note that both the conditions i.e. economic dependence and legal dependence have to be satisfied cumulatively to be construed as a dependent agent.

Adobe India is legally independent from the Appellant

> In this regard, reliance is placed upon the decision of the Delhi ITAT in the case of Net App B.V. v. DDIT [2017] 78 taxmann.com 97 (Delhi - Trib.) (please refer to pages 227 to 272 of the case law compilation), wherein it has been held that legal independence must be tested on the lines of the agent's obligations. Accordingly, in order to constitute legal dependence, it is imperative for the Revenue to establish that the agent must tie subject to detailed instructions and comprehensive control.

> In the instant case, Adobe India is not subject to any detailed instructions and comprehensive control

by Adobe Ireland in the conduct of its business, i.e. providing marketing support services in India and is acting in an independent manner. Therefore, it cannot be said to be legally dependent upon Adobe Ireland.

A chart depicting the similarities between the facts of the instant case and Net App B.V. (supra) is enclosed as Annexure 1 to this note.

Adobe India is economically independent from the Appellant

> *The Ld. Assessing Officer ("Ld. AO") and the Ld. Commissioner of Income-tax (Appeals) ["CIT(A)"] have held that since the entire earnings of Adobe India are completely sourced from Adobe Group (Adobe US and Adobe Ireland), it is economically dependent upon the Appellant.*

> *In this regard, reliance may again be placed upon the decision of the Delhi ITAT in the case of Net App B.V. v. DDIT (supra) wherein it has been held that dependence has to be seen with respect to the foreign Assessee and not the entire group.*

> ***In the instant case, since the Adobe India's revenue from Adobe Ireland does not exceed 10% of its total revenue in any of the years under consideration, it cannot be said to be economically dependent upon the Appellant (please refer to Form 3CEB obtained by Adobe India for AY 2010-11 enclosed at pages 240 to 252 of the convenience compilation).***

> *Additionally, it may also be noted wherever tax treaty partners have deemed necessary to expand the scope of these deeming provisions, specific language to that effect has been inserted into the tax treaties. For example, Article 5(9) of the India-Singapore tax treaty specifically mentions that when the activities of an agent of a foreign enterprise are devoted wholly or almost wholly on behalf of that enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise, that agent will not be considered an agent of an independent status.*

> *Furthermore, it may also be noted that paragraph 2 of Article 12 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI") specifies that a person acting exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, shall not be considered to be an independent agent. In this regard, it is humbly submitted*

that although this clause has become a part of some of India's tax treaties like the India-Japan tax treaty with effect from April 01, 2020, since Ireland has reserved its right for the entirety of Article 12 not to apply to its Covered Tax Agreements fincluding its tax treaty with India), it would not apply to the India-Ireland tax treaty. Thus, for the years under consideration as well as future years. Adobe India should not be considered to be economically dependent upon the Appellant even if its entire earnings are sourced from the Adobe group.

• ***Even assuming Adobe India is not an independent agent, it does not negotiate contracts, conclude contracts or secure orders in India and hence, is not covered under the specific dependent agent PE activities clause provided in the India-Ireland tax treaty.***

> ***The Appellant's main distributors, Ingram and Redington (being unrelated multinational organisations), were old existing distributors of the Appellant since 2002.***

> *Furthermore,* ***the process of selection and on-boarding of new distributors is handled directly by Adobe Ireland with no participation from Adobe India*** *(please refer to the powerpoint presentation explaining the details of the on boarding process for distributors along with role of Adobe India enclosed at pages 205 to 211 of the convenience compilation).*

> ***The Appellant had complete control over the negotiation process and concludes the agreements for the purposes of the conducting business with customers in India.*** *The entire process is carried out without any intervention from Adobe India [as alleged by the Ld.AO and subsequently Ld. CIT(A)] even the orders are placed directly by the distributors on the portal of the Appellant (please refer to clause 2.2 "Nature of Appointment", clause 4.2 "Orders from Adobe Only", clause 4.3 "Distributors Orders", clause 4.7 "Shipments", clause 6.1 "License Fees" and clause 8.1 "Payment" of the distribution agreement between Adobe Ireland and its distributor Ingram Micro India Pvt. Ltd enclosed at pages 5 to 77 of the convenience compilation)*

> ***Adobe India does not have any authority to conclude contracts or accept orders on behalf of Adobe Ireland,*** *(please refer to clause 3.3.1 "Nature of Relationship" of the marketing support services agreement*

between Adobe Ireland and Adobe India enclosed at pages 158 to 198 of the convenience compilation and slides 2 and 3 of the powerpoint presentation enclosed at pages 205 to 211 of the convenience compilation wherein the detailed order placing process has been explained)

> ***All prices are standard and listed on the distributor portal/website for the distributors/resellers and the end customers to view.*** *Accordingly, there is no requirement of price discussions or approvals. In the limited cases where negotiation is required, the same is done by Adobe Ireland directly.*

> ***The orders are placed directly on the online portal by distributors of Adobe Ireland and accepted only after due validation/review by the Sales Order Management Group of Adobe Ireland situated outside India*** *(please refer to clause 4.2 "Orders from Adobe Only" and clause 4.3 "Distributors Orders" of the distribution agreement between Adobe Ireland and its distributor Ingram Micro India Pvt. Ltd enclosed at pages 5 to 77 of the convenience compilation. Furthermore, the detailed order placing process has been explained in slides 2 and 3 of the powerpoint presentation enclosed at pages 205 to 211 of the convenience compilation).*

> *Contrary to the allegations levelled by the Ld. AO and the Ld. CIT(A), the role of Adobe India with regard to the above process is limited to merely visiting the distributors with a view to promote, present and explain new Adobe application products and supporting the distributors and acting as a liaison if they have escalation issues / administration changes, queries with orders or technical issues on the portal. Furthermore, Adobe India may receive a notification of the orders placed by distributors and other customers on the online portal/ website so that it can coordinate and follow-up with the distributors and other customers until delivery of the orders.* ***Therefore, it cannot be said that the above-mentioned activities constitute concluding of contracts or securing of orders on behalf of Adobe Ireland and these are merely allegations without any basis.***

> *With regard to the above points, please refer to clause 3.3.1* ***"Nature of Relationship"*** *of the marketing support services agreement between Adobe Ireland and Adobe India enclosed at pages 158 to 198 of the convenience compilation, slides 4 and 5 of the powerpoint presentation enclosed at pages 199 to 204 and slides 2 and 3 of the powerpoint presentation enclosed at pages 205 to 211 of the*

convenience compilation wherein the detailed order placing process has been explained.

> *It is to be appreciated that Article 5(6) of the India-Ireland tax treaty that deals with dependent agent permanent establishment mandates that the agent in India should 'habitually' exercise an authority to conclude contracts or should 'habitually' secure orders on behalf of the Irish entity for the Irish entity to have a permanent establishment in India.. This principal is also supported by paragraph 33 of the OECD Model Commentary 2010 on Article 5. concerning the definition of permanent establishment, wherein it has been mentioned that the authority to conclude contracts has to be habitually exercised in the other State. In this regard, it may be noted that the Revenue authorities have not brought on record even a single instance that will prove that Adobe India was concluding contracts or securing orders on behalf of the Appellant, let alone doing so habitually. The allegations of the Ld. CIT(A) had been rebutted in a detailed manner at pages 373 to 376 of the convenience compilation.*

> *It may also be noted that as per paragraph 33 of the OECD Model Commentary 2010 on Article 5, concerning the definition of permanent establishment, the mere fact that a person has attended or even participated in negotiations in a State between an enterprise and a client will not be sufficient, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise. This would hold good even if the Indian agent participates in all the negotiations but does not play any principal role in it.*

> *Furthermore, it may also be noted that paragraph 1 of Article 12 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI") specifies that where a person is acting in a Contracting State on behalf of an enterprise and he habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, that enterprise shall be deemed to have a permanent establishment in that Contracting State in respect of any activities which that person undertakes for the enterprise In this regard, it is humbly submitted that although this clause has become a part of some of India's tax treaties like the India-Japan tax treaty with effect from April 01, 2020, since Ireland has reserved its right for the entirety of Article 12 not to apply to its Covered Tax Agreements (including its tax treaty with India), it would not apply to the India-Ireland tax treaty.*

Thus, for the years under consideration as well as future years. even it is assumed that Adobe India has habitually played a principal role leading to conclusion of contracts by Adobe Ireland, it should not lead to the conclusion that Adobe Ireland has a dependent agent PE in India.

- ***The inference drawn by the Ld. CIT(A) that the activities actually performed by Adobe India are wider in nature as against the activities pointed out in the contract between Adobe Ireland and Adobe India and Adobe India's transfer pricing report is based on an incorrect interpretation of the emails between Adobe India and Adobe Ireland's distributors***

> *It is humbly submitted that the Ld. CIT(A) has relied upon copies of email correspondences between Adobe India and the distributors of the Appellant to erroneously draw a negative conclusion that the Appellant has a dependent agent PE in India in the form of Adobe India.*

> *However, the email trails referred to by the Ld. CIT(A) do not at all correspond to the findings of the Ld. CIT(A) and the same were mere conjectures and surmises. As mentioned earlier, the Appellant's agreements with its main distributors, Ingram and Redington had already been concluded early as the year 2002. Furthermore, the on boarding of distributors was being handled directly by Adobe Ireland with no participation from Adobe India. All prices were standard and listed on the distributor portal/website for the distributors/resellers and the end customers to view. Accordingly, there was no requirement of price discussions or approvals. In the limited cases where negotiation was required, the same was done by Adobe Ireland directly. Even the orders were placed directly on the online portal by distributors of Adobe Ireland and accepted only after due validation/review by the Sales Order Management Group of Adobe Ireland situated outside India.*

> *For instance, in the appellate order, the Ld. CIT(A) has alleged that the quotes offered by Adobe Ireland's distributors to the customers/ resellers are after due discussion with Adobe India resources. The Ld. CIT(A) has based this finding upon two sets of emails; one where Mr. Barun Bhattacharya from Ingram (Adobe Ireland's distributor) had provided a quote for a product to Amrik of Expert Systems Solution (Adobe Ireland's customer/ reseller) by stating "as discussed with Alekh from Adobe, please find belovj quote for the same'' [please refer to para 7.11 at page 35 of the order passed by the CIT(A)forAY 2010-11 enclosed as a part of the appeal file]. The second email is where*

Navneet Sah from Adobe India had requested Sumant Mishra from Ingram (Adobe Ireland's distributor) to provide quotes for a product to Sonal Gupta from Wipro Infotech (Adobe Ireland's customer/ reseller) on priority and in response, Sumant Mishra had shared the best prices with Sonal Gupta [please refer to para 7.11 at page 36 of the order passed by the CIT(A) for AY 2010-11 enclosed as a part of the appeal file].

However, it should be noted that all Adobe India had done was to request the distributors to provide the quotes to the customers/ resellers and no person from Adobe India had provided any guidance or directions to the distributors regarding the actual quotes to be provided to the customers/ resellers. Furthermore, the quotes were provided by the distributors directly to the customers/ resellers. Thus, the conclusion drawn by the Ld. CIT(A) was flawed and incorrect.

> Similarly, in the appellate order, the Ld. CIT(A) has alleged that Adobe India exercises control on distributors with respect to achievement of assigned targets. The Ld. CIT(A) has based this finding upon an email sent by Nandkishore K. Jalgoankar of Adobe India to Pravin Mandlik of Softcell wherein Nandkishore has stated that Softcell has only completed 11% of its target and further requested him to share his plan for achieving the given target [please refer to para 7.11 at page 35 of the order passed by the CIT(A)for AY 2010-11 enclosed as a part of the appeal file].

However, it should be noted that whilst coming to this conclusion, the Ld. CIT(A) has ignored the fact that following up with the customers regarding poor achievements of targets was within the defined functions of Adobe India for which it was being duly compensated by the Appellant. Further, nowhere in the appellate order, the Ld. CIT(A) has thrown light on how discharging this function would tantamount to 'concluding contracts, 'securing orders' or 'maintaining stock' on behalf of the Appellant, the three activities which must be performed by an alleged agent for it to be held as a dependent agent PE of its principle

> In addition to the above, in the appellate order, the Ld. CIT(A) has mentioned that Adobe India was kept in the loop through alerts/mails at each stage of order process and delivery process and the function of follow up till delivery is mainly in the form of a guise to allow Adobe India to involve in sourcing and conclusion of order with end customers [please refer to para 7.13 at page 37 of the order passed by

the CIT(A) for AY 2010-11 enclosed as a part of the appeal file].

However, it should be noted that the reason behind Adobe India being kept in loop throughout the order processing and delivery process was for it to be to be able to provide support to the distributors and act as a liaison if they have escalation issues/ administration changes, queries with orders or technical issues on the portal. However, Adobe India did not have the authority to either conclude contracts or secure orders on behalf of the Appellant. Accordingly, the allegation that the function of follow up till delivery is mainly in the form of a guise to allow Adobe India to involve in sourcing and conclusion of order with end customers was factually incorrect. It is humbly submitted that these activities have been specifically mentioned in the agreement and the TP Study of Adobe India (please refer to page 520 of the convenience compilation) and the company is duly compensated by the Appellant for the same on an arm's Length basis [No adjustment by the TPO in the TP Proceedings in the case of Adobe India].

> Furthermore, to substantiate the contention of the Appellant that the negotiation and conclusion of contracts between the Appellant and its distributors took place outside India without any involvement of Adobe India, sample copies of the email correspondences between the Appellant and one its main distributors, Ingram, are enclosed as Annexure 2 to this note. It is humbly submitted that these emails have already been filed with the Ld. CIT(A) for the years under consideration.

> In view of the above, the reliance placed by the Ld. CIT(A) on the emails to draw a negative inference is incorrect and cannot be sustained either on facts or on law. A detailed mail-wise rebuttal to the contention raised by the Ld. CIT(A) is available at pages 373 to 376 of the convenience compilation.

*> Lastly, it is affirmed that the Appellant and Adobe India have not entered into any separate agreement with respect to the '**other support services**' mentioned in 'Section 1. Obligations of the Company' of the original agreement and any addendums thereto (please refer the marketing support services agreement between Adobe Ireland and Adobe India enclosed at pages 158 to 198 of the convenience compilation).*

3. Attribution of profits to the alleged PE

• ***Functions, Assets and Risk ("FAR") profile of Adobe India captured in the transfer pricing documentation already accepted by the tax authorities***

> ***The FAR profile of Adobe India has been appropriately captured in its transfer pricing documentation and the same has been accepted by the tax authorities during the course of transfer pricing assessment of Adobe India*** *(please refer to the relevant orders passed in the case of the Appellant and Adobe India for AY 2010-11 enclosed at pages 377 to 380 and 253 to 361 of the convenience compilation).* ***Accordingly, the additional FAR assigned by the CIT(A) to Adobe India are incorrect.*** *A detailed rebuttal to the incorrect conclusions drawn by the CIT(A) regarding the FAR profile of Adobe India [please refer to para 7.30 at page 43 of the order passed by the CIT(A) for AY 2010-11 enclosed as a part of the appeal file] is enclosed at pages 373 to 376 of the convenience compilation.*

> *In addition to the above, it may be noted that the Ld. TPO, in the case of the Appellant for all the years under consideration have held that no adverse inference could be drawn in respect of international transactions undertaken by the Appellant.* ***In this regard, it may be noted that during the transfer-pricing proceedings in the hands of the Appellant, the Ld. TPO has always inquired about the assessment orders framed in the case of the Appellant for the previous years. Thus, it is only after perusal of the said assessment orders (wherein Adobe India has been alleged to be a dependent agent PE of the Appellant in India) that the Ld. TPO has come to the conclusion that no adverse inference is to be drawn in the hands of t he Appellant.*** *It is humbly submitted that the order of the Ld. TPO in terms of section 92CA(4) of the Act is binding on the Ld. AO. Accordingly, no further profits can be attributed to the alleged PE of the Appellant. A copy of the TP order passed in the case of the Appellant is enclosed at pages 377 to 380 of the convenience compilation. Furthermore, a copy of notice issued by the Ld. TPO for AY 2010- 11 is enclosed as Annexure 3 to this note.*

• ***Once a transfer pricing analysis has been undertaken, no further profits would be attributable to the alleged PE***

> *As per the judgements of the Hon'ble Supreme Court in the case of DIT v. Morgan Stanley Co. Inc [2007] 292 ITR416 (SC), ADIT v. E-Funds IT Solution Inc. [2017] 399 ITR 34 (SC),*

Honda Motor Co. Ltd vs. ADIT (301 CTR 601) (SC) and of the Hon'ble Delhi High Court in the case of Adobe Systems Inc. v. ADIT [WP(C) 2384, 2385, 2390 of 2013] and DIT v. BBC Worldwide Ltd. [2011] 203 Taxman 554 (Delhi) (please refer to pages 273 to 402 of the case law compilation), ***once a transfer pricing analysis has been undertaken in respect of a instant case), nothing further would be left to be attributed to the alleged PE of Adobe Ireland and that, accordingly, would automatically extinguish the need for attribution of any additional profits to the alleged PE.***

- ***Without prejudice to the above, of any additional profits are required to be attributed, the same may be done in the hands of Adobe India***

> *Without prejudice to the above, if the tax authorities were to attribute any income in respect of the alleged functions performed by the alleged PE of Adobe Ireland, it may be made to the income of Adobe India. The aforesaid approach has been accepted by the Hon'ble Delhi High Court in the case of Adobe Systems Inc. v. ADIT (supra) (please refer to pages 364 to 394 of the case law compilation).*

- ***Attribution Methodology***

> *With respect to the above, it is humbly submitted that:-*

❖ ***As per Article 7 of the India-Ireland DTAA, only profits (and not revenue) of an assessee can be attributed to its PE in India.*** *Therefore, without prejudice to the above, it is humbly submitted that* ***if any profits are required to be attributed to the alleged PE of Adobe Ireland in India, the same should be determined keeping in mind its global net profit margins since the existing methodology adopted by the tax officer leads to the irrational and illogical conclusion that Adobe Ireland has been earning profits as high as 65-70%.*** *A chart depicting the profits that would be attributable to the alleged PE in this scenario for the years under consideration is enclosed at page 447 of the convenience compilation. Furthermore, please refer to the Global accounts the Company for AY 2010-11 captured on pages 381 to 446 of the convenience compilation.*

❖ *It maybe noted that the Delhi ITAT in the case of Motorola Inc. v. DCIT [2005] 95 ITD 269 (Delhi) (Special Bench), had followed a similar methodology wherein the global net profit percentage was applied to the Indian sales and the resulting figure was further multiplied by 20% to*

determine the attributable profits to the Indian PE. This Methodology has been approved by this Hon'ble Tribunal in the case of Ricardo UK Limited \ITA 4.QOQ/Del-2Qi8. Furthermore, this methodology has also been followed bv the Ld. CITfA) in Appellant's own case for AY 2007-08. AY 2013-14 and AY 2015-16. Please note, the revenue has not contested/appealed against the attribution methodology followed bv the Ld. CIT (A) in its order for AY 2015-16.

❖ *Without prejudice to the above, it is humbly submitted that even if Adobe Ireland's global net profit margins are computed by adding back the payments made to Adobe India for marketing support services and thereafter, allowing deduction for expenses attributable to the Indian PE, there'll be nothing left to attribute to the alleged Indian PE. A chart depicting the calculations of the profits that would be attributable to the alleged PE in this scenario for the years under consideration is enclosed as Annexure 4 to this note.*

❖ *Similarly, without prejudice to the above, it is humbly submitted that* ***if the profits that are required to be attributed to the alleged PE of Adobe Ireland in India have to be determined in accordance with the global gross profit margins of the Appellant, as contended in the appeals filed by the Department for AY 07-08 and AY 13-14, then, in accordance with Article 7(3) of the India-Ireland tax treaty, further deduction should be allowed for the payments made by the Appellant to Adobe India for marketing support services and other administrative and executive expenses incurred for the purposes of the alleged PE. In that scenario as well, no profits would be attributable to the alleged PE of Adobe Ireland in India.*** *A chart depicting the calculations of the profits that would be attributable to the alleged PE in this scenario for the years under consideration is enclosed at page 448 of the convenience compilation.*

4. Existence of a fixed place PE in India

• *In this regard, it is humbly submitted that Adobe Ireland does not require any fixed place in India and the supply of software is concluded from outside India on a principal-to-principal basis.*

• *The business being carried out through the premises of Adobe India is of Adobe India and not of Adobe Ireland; the mere fact that Adobe India was rendering services to Adobe Ireland does not tantamount to making available a fixed place of business to Adobe Ireland.*

- *No evidence has been brought on record by the Revenue to prove that the premises of Adobe India were at the disposal of Adobe Ireland.* ***In fact, in all the years under consideration, there is no finding from the Ld. AO that employees of Adobe Ireland were present in India to conduct business through the alleged fixed place.***

- ***It may be noted that the burden of proving the fact that a foreign assessee has a PE in India and must, therefore, suffer tax from the business generated from such PE is initially on the Revenue [ADIT v. E-Funds IT Solution Inc. (supra)] .***

- ***On the basis of the above, for AY 2007-08, AY 2010-11, AY 2011-12, AY 2012-13, AY 2013-14 and AY 2015-16, the Ld. CIT(A) has held that Adobe Ireland did not have a fixed place PE in India and the Revenue has not challenged the CIT(A) orders for AY 07-08, AY 13-14 and AY 15-16 as far as the issue of Fixed Place PE is concerned.***

- *In addition to the above, it is humbly submitted that during the hearing before this Hon'ble Bench of the ITAT, the Ld. Departmental Representative had conceded on thi s issue.*

5. Interest levied under section 234B of the Act (ground taken in appeals filed by the tax authorities)

- *The Ld. AO has levied interest under section 234B of the Act on the Appellant's assessed income for AY 2007-08 and AY 2010-11 to AY 2012-13, despite of the fact that tax was 'deductible' at source on the entire income earned by it in those years.*

- *However, on the basis of the decision of the Hon'ble Delhi High Court in the case of DIT v. Jacabs Civil Incorporated/ Mitsubhishi Corporation [2011] 330 ITR 578 (Delhi), and DIT v. GE Packaged Power Inc. [2015] 373 ITR 65 (Delhi) (please refer to pages 533 to 550 of the case law compilation), the CIT(A) has held that interest under section 234B of the Act should not be applied for until AY 2012-13.*

- ***Relying upon the above-mentioned judicial precedents, it may be contended that for AY 2007-08, AY 2010-11, AY 2011-12 and AY 2012-13, no interest should have been levied under section 234B of the Act for delay in payment of advance tax since as per the law, as it existed then, tax was 'deductible' at source***

on the entire income earned by Adobe Ireland from India. Accordingly, no advance tax was payable by the Appellant on such income and therefore, no interest under section 234B of the Act should have been charged on its income.

• In addition to the above, it is humbly submitted that during the hearing before this Hon'ble Bench of the ITAT, the Ld. Departmental Representative had conceded on this issue."

8. As regards revenue's pleading, a written submission has been filed by the Ld. CIT-DR in the course of hearing in support of the proposition that the assessee had dependent agent PE in India, that the assessee was not co-operating and providing complete details that the Adobe India is legally dependent of Adobe Ireland that there is fixed place PE in India. It was further submitted that profit attribution to PE was to be sustained despite the decision of the Hon'ble Supreme Court in the case of DIT v. Morgan Stanley & Co. Inc [2007] 292 ITR 416 on the basis of reasoning of Ld. CIT(A) drawn from appeal for AY 2010-11. Without prejudice to the above submission, it was submitted that attribution of profit by applying the FAR analysis has not been accepted by the Indian Government and the attribution of profit has to be determined by applying the relevant provisions of the DTAA read with Rule 10 of the Income Tax Rules, 1962. A detailed submission has been made in this regard, which has been summarised as under:-

"a. The assessee has not discharged its onus to provide complete details about email ids and copies of emails as asked from it by the Assessing Officer and the Ld. CIT(A) during the assessment and the appellate proceedings. The assessee has not provided such documents even before the Hon'ble ITAT.

b. The assessee has not submitted copies of all agreements entered into by with all the distributors in India. The assessee

has submitted copy of the agreement entered into with only one distributor, i.e. Ingram Micro India Pvt. Ltd. and not any of the other distributor, including Redington (India) Ltd. Further, it cannot be verified from the records whether there is any other agreement entered into by the assessee company with Adobe India or any other entity that was applicable during the years under consideration.

c. On the basis of the analysis of the sample emails provided by the assessee selectively, it has been found that Adobe India is performing functions which are wider in scope than the functions mentioned in the Agreement entered with the assessee and in the TP Study of Adobe India. In view of the same, reliance placed by the assessee on the agreement to substantiate its functions is misplaced and should not be relied upon. The assessee may be directed to provide complete set of emails to substantiate its claims that Adobe India is merely providing the services mentioned in the agreement and nothing beyond that.

d. The contention of the assessee that since less than 10% of the revenue of Adobe India is earned from the assessee for providing Market Support Services, it is not economically dependent on the assessee is incorrect. Relying on the commentary by Prof. Klaus Vogel, it is submitted that to determine if an entity is economically dependent, what has to be seen is only the revenue from those functions which constitute a PF. In the instant case, since the rest of the revenue of Adobe India is from Software Development Services, the same shall not be considered to determine the economic dependence test. The revenue from the market support functions is earned only from the assessee and not any other entity and therefore, Adobe India is economically dependent on the assessee.

e. The assessee failed to provide copies of any emails between itself and Adobe India even though the same were specifically asked by the Ld. CIT(A). Further, it did not submit even the details of the email ids of its concerned employees before the AO during the assessment proceedings. In absence of such details, the assessee has failed to discharge its onus to substantiate that Adobe India is not legally dependent on the assessee. Further, as per the TP Study of Adobe India, Adobe Ireland is responsible for the marketing and sales strategy and

therefore, Adobe India is legally dependent on the assessee company.

f. Further, reliance placed by the assessee on the ruling of the Hon'ble Delhi High Court in the case of Adobe Systems Inc. v. ADIT |WP(C) 2384, 2385, 2390 of 2013] (Pg 364 to 394 of the Case law Compilation) is misplaced. The case pertained to Adobe USA and as stated above, there is no sale of software in India through Adobe India by Adobe USA. Adobe India provides Software Development Services to Adobe USA. While in the case under consideration, the assessee sells software in India through Adobe India and Adobe India provides market support services. In view of the completely different facts, the reliance placed by the assessee on the above ruling to contend that Adobe India does not constitute a PE is misplaced.

g. ' In relation to Fixed Place PE, the observation of the Ld. CIT(A) that no employees of the assessee visited India is inconsistent with the assessee's own replies during the assessment proceedings before the AO wherein it has been stated that certain employees of the assessee visited India for official purposes.

h. In relation to profit attribution to PE. it is submitted that since the functions performed by the PE. i.e. Adobe India, is much wider than the scope of the agreement and the TP Study, further attribution is required to be done in the instant case. On detailed analysis of the FAR of the PE as compared to the FAR of the AE, the Ld. CIT(A) in the case of AY 2010-11 has accepted the attribution done by the AO during assessment proceedings.

i. Without prejudice to the above, it is submitted that the FAR approach to profit attribution has not been accepted by India in its DTAAs and the attribution of profit has to be done by applying Rule 10 as done by the AO during the assessment proceedings."

9. Thereafter, the Revenue has also submitted a further written submission dated 10.06.2022, which is addressed by the ACIT, Circle-1 (1)(1), International Taxation, New Delhi to Ld. CIT-DR,

International Taxation, Bench ITAT. In this submission basically there was further reproduction /changes in the earlier submissions.

10. Upon careful consideration, we find that the issue of attribution to profit when the transaction has been found to at Arm's Length between foreign party and the Indian AE, then no further attribution is required has already been decided by the decision of the Hon'ble Supreme Court in the case of DIT v. Morgan Stanley & Co. Inc [2007] 292 ITR 416 (SC). This aspect was very much before the Ld. CIT(A) and he has dealt with the same as under:-

> "As regards determination of profits attributable to a PE in India (MSAS) is concerned on the basis of arm's length principle Article 7(2) is relevant. According to the AAR where there is an international transaction under which a non-resident compensates a PE at arm's length price, no further profits would be attributable in India. In this connection, the AAR has relied upon Circular No. 23 of 1969 issued by CBDT as well as Circular No. 5 of 2004 also issued by CBDT. [Para 29]
>
> Article ***7*** of the U.N. Model Convention ***inter alia*** provides that only that portion of business profits is taxable in the source country which is attributable to the PE. It specifies how such business profits should be ascertained. Under the said Article, a PE is treated as if it is an independent enterprise (profit centre) ***dehors*** the head office and which deals with the head office at arm's length. Therefore, its profits are determined on the basis as if it is an independent enterprise. The profits of the PE are determined on the basis of what an independent enterprise under similar circumstances might be expected to derive on its own. Article 7(2) of the U.N. Model Convention advocates the arm's length approach for attribution of profits to a PE. [Para 31]
>
> The object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India. Under article 7(2) not all profits of MSCo would be taxable in India but only those which have economic nexus with PE in India. A foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the PE in India. The quantum of taxable income is to be determined in

> accordance with the provisions of Act. All provisions of Act are applicable, including provisions relating to depreciation, investment losses, deductible expenses, carryforward and set-off losses, etc. However, deviations are made by DTAA in cases of royalty, interest etc. Such deviations are also made under the Act for example: Sections 44BB, 44BBA etc.). Under the impugned riding delivered by the AAR, remuneration to MSAS was justified by a transfer pricing analysis and, therefore, no further income could be attributed to the PE (MSAS). In other words, the said ruling equates an arm's length analysis (ALA) with attribution of profits. It holds that once a transfer pricing analysis is undertaken; there is no further need to attribute profits to a PE. 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."

11. The Ld. CIT(A) in this regard held that the argument of the appellant is that if the international transactions between the parent entity (HO) and associated entity (AE) stand accepted at an Arm's length based on FAR analysis, in that case, the question of appropriation of profit to DAPE does not arise. That his argument sans the concept of separate entity approach as provided in article 7 of India Ireland DTAA to distinguish between PE and parent entity (HO). That if the international transactions between India AE and HO have been accepted at an arm's length by TPO, it does not automatically mean that FAR of DAPE stands subsumed in the same. That it is important to distinguish between the benchmarking analysis for the transactions between HO and associated

enterprise (AE) vis-a-vis that of HO and its PE. That it may be important to make a distinction between the FAR of the parent entity (Head Office (HO) in Ireland) and AR of the DAPE (India). Further, it is also important to note that FAR of the DAPE is distinct from FAR of the associate enterprise (AE) in India. That so, practically, it is a interplay of FAR amongst three entities i.e. parent entity (HO) in Ireland, DAPE in India and Associated Entity (AE) in India.

12. We find the above view of the Ld. CIT(A) is not sustainable in the light of the decision of the Hon'ble Supreme Court as above in the case of DIT vs Morgain Stanley & Co.(supra). To the same effect is the order of the ADIT v. E-Funds IT Solution Inc.[2017] 399 ITR 34(SC), Honda Motor Co. Ltd vs. ADIT (301 CTR 601)(SC) and of the Hon'ble Delhi High Court in the case of Adobe Systems Inc. v. ADIT [WP(C)2384, 2385, 2390 of 2013] and DIT v.BBC Worldwide Ltd.[2011] 203 Taxman 554(Delhi), once a transfer pricing analysis has been undertaken in respect of the Indian AE, nothing further would be left to be attributed to it as the alleged PE of Adobe Ireland and that, accordingly, would automatically extinguish the need for attribution of any additional profits to the alleged PE.

13. In all these cases, it has found that the transactions have been found to be at Arm's Length by the Transfer Pricing Officer in the Transfer pricing order of the AE i.e. Adobe India. This is not disputed by the Revenue. In such a situation, the decision of the Hon'ble Apex Court as above applies on all fours in these cases. The Revenue has tried to distinguish the order of the Hon'ble Supreme Court decision by firstly referring by submitting that the Adobe India is performing functions

which are wider in scope of the agreement entered with the assessee and in the TP study report of Adobe India. For this purpose, reliance has been placed on the order of the Ld. CIT(A) in this case for AY 2010-11. We find that the above submission by no stretch of imagination can be said to be distinguishing the decision of the Hon'ble Apex Court from being applicable from the facts of the present case. Very well understanding this proposition, the Revenue itself urged that without prejudice to the above, the judicial decision of the attribution of profit by applying FAR analysis has not been accepted by the Indian Government and the profit has to be determined by apply of provisions of DTAA r.w.s. 10A of the Income Tax Rules, 1962. In view of the above, we are of the opinion that the decision of the Hon'ble Apex Court as above squarely applies in this case. Hence holding that since the transactions between the assessee and its Indian AE has been found to be at Arm's Length in the transfer pricing adjustment, no further attribution can be made to the PE of the appellant as claimed. Hence, this issue needs to be decided in favour of the assessee.

14. We further find the above view of the Ld. CIT(A) is not sustainable in the light of the Hon'ble Supreme Court decision as above. The Ld. CIT(A) has opined that Adobe India while discharging the functions as assigned by Adobe Ireland has the right to use the intangible asset in the form of "brand, trademark and logo" but there is cost paid for the same to the assessee. Further he observed that there is persistent risk of violation of copyright of software product and unauthorized use of copies of the software product in Indian market. In

this regard, he has referred to case against the particular person filed by Adobe Systems, Inc. & Ors. The Ld. CIT(A) hypothesized that Adobe Systems, Inc. & Ors. would come to know about the instances of infringement of copyright only through the local presence of Adobe India Resources. The Ld.CIT(A) further opined that the function of the India AE of identification of potential customers and continuous engagement of registered customers goes into development of market of intangibles and no compensation has been made to the Indian AE for all such functions to develop market intangible asset. From this, the ld. CIT(A) opines that Adobe India is responsible for protecting, development & maintenance of the intangible assets (copyright, brand, patent & confidential data of customers) of Adobe group in India. Further, the Ld. CIT(A) opined that risk of receivables from distributors also exist in India but there is no compensation made for such functions. Keeping the above in view, the Ld. CIT(A) held that Adobe India is dependent PE of the assessee company and in order to compensate for the FAR assigned to DAPE, he has no reason to defer from the view of the Assessing Officer to attribute 35% of the total Revenue pertaining to India for this year.

15. Further, functions attributed to the Adobe India by the Revenue is also based upon the observations of the Ld. CIT(A) for Assessment Year 2010-11 primarily. The allegation of the Revenue is that the assessee was asked to produce dump of the emails correspondence between Adobe India and Adobe Ireland to deep dive to the activities so as to ascertain the clear cut facts to decide about PE. However, it was noted by the Ld. CIT(A) that after couple of months of gap, the assessee produced only

sample certain e-mails. On the basis of these e-mails of few instances, the Ld. CIT(A) inferred that quotes offered by the distributors to channel partners are after discussion with Adobe India. The reasoning was that orders are delivered after seeking confirmation from Adobe India resources. Further, one of the e-mails is said to be demonstrating, the control and monitoring by Adobe India of distributors in meeting assigned targets. Basing upon such few e-mails, the Revenue has concluded that activities actually performed by Adobe India are wider in nature as against the activities pointed out in the contract and transfer pricing report. We find that the above observations have been cogently rebutted by the ld. counsel for the assessee. As regards the few e-mails that have been referred they are only also marked to the Adobe India personnel which has been said to be done only for the sake of keeping the Adobe India in the loop. In none of the e-mail referred Adobe India has actually provided guidance and directions regarding the quotes. This is a fiction of imagination by the Revenue. Hence, the functions attributed on the basis of these e-mails are not at all enlarging the scope of actual functions performed by the AE than as per the agreement and the transfer pricing report. The plea that the email dump has not been provided is a peculiar plea. In Adobe India T.P. adjustment no such issue has been recorded. It is common knowledge e-mail correspondence is a two way process. So when everything was found in order in Adobe India T.P. Adjustment, hence, it cannot be said that Revenue did not have complete access to all the e-mails between Adobe India and Adobe Ireland. The Ld. CIT(A) is also of view that the assets client list gives rise

to in intangible assets has also no basis. No cogent case has been made out that Adobe India was provided with right to any intangible asset belonging to the assessee i.e. Adobe Ireland. The issue raised by the Ld. CIT(A) by relying upon legal dispute infringement of copy right in India being looked after by Adobe India/Adobe Ireland is also without any basis as it is Adobe USA, the IP owner which handles the legal matters relating to infringement of brand, copy right matters and other related actions to be undertaken in all jurisdiction in which the Adobe operates including India. Adobe USA is authorised in monitoring to Indian operations and their legal counsels handles the matters there from.

16. As regards the risk recoverable from distributors, the hypothesis that the risk is borne by Adobe India has also no basis. The documents clearly show that the collection from the customers is managed by the team Adobe Ireland. Thus, from the above, it is apparent that only on hypothesis and guess work and assigning of all sorts of imaginary motives by a few e-mails, the Ld. CIT(A) and therefore the Revenue is contending that the functions performed by Adobe India are much wider than the that as per the agreement and the transfer pricing analysis. We find that as discussed by us hereinabove these submissions are not at all cogent enough to warrant a view that the transfer pricing analysing done in the case of Adobe India does not adequately reflects functions performed and the risk assumed by the enterprise. In such a situation as held by Hon'ble Apex Court as above, there is no need to attribute any further profit as all functions and risk have been

considered in the computation of Arm's Length Price in the case of Adobe India.

17. As such, it follows that the finding of PE is also without cogent basis. Be that as it may issue of PE becomes academic and we are not engaging further into it. We have already found that functions performed by Adobe India are actually not different than the agreement and transfer pricing documentation.

18. Another ground in Revenue's appeal is with reference to levy of 234B interest.

19. We may gainfully refer to the submissions of Ld. AR on this issue as under:-

> ***5. Interest levied under section 234B of the Act (ground taken in appeals filed by the tax authorities)***
>
> • *The Ld. AO has levied interest under section 234B of the Act on the Appellant's assessed income for AY 2007-08 and AY 2010-11 to AY 2012-13, despite of the fact that tax was 'deductible' at source on the entire income earned by it in those years.*
>
> • *However, on the basis of the decision of the Hon'ble Delhi High Court in the case of DIT v. Jacabs Civil Incorporated/ Mitsubhishi Corporation [2011] 330 ITR 578 (Delhi), and DIT v. GE Packaged Power Inc. [2015] 373 ITR 65 (Delhi) (please refer to pages 533 to 550 of the case law compilation), the CIT(A) has held that interest under section 234B of the Act should not be applied for until AY 2012-13.*
>
> • ***Relying upon the above-mentioned judicial precedents, it may be contended that for AY 2007-08, AY 2010-11, AY 2011-12 and AY 2012-13, no interest should have been levied under section 234B of the Act for delay in payment of advance tax since as per the law, as it existed then, tax was 'deductible' at source on the entire income earned by Adobe Ireland from India. Accordingly, no advance tax was payable by the Appellant on such income and therefore, no interest under section 234B of the Act should have been charged on its income.***

> *• In addition to the above, it is humbly submitted that during the hearing before this Hon'ble Bench of the ITAT, the Ld. Departmental Representative had conceded on this issue."*

20. Accordingly, in the light of above, we remit the issue to the file of the Assessing Officer to decide this issue in accordance with case laws as mentioned above.

21. The above adjudication disposes off all the appeals receipt Revenue's appeals for Assessment Year 2004-05, 2005-06 & 2006-07, the status of these appeals is as under:-

22. These appeals are filed by the Revenue. The assessee had also filed appeal before the Tribunal for the same year in ITA No., 4918/Del/2017, 4919/Del/2017 and 4920/Del/2017. The said appeals were disposed of by this Tribunal vide order dated 17.02.2021 as the assessee had gone for withdrawal of the said appeal under Vivad Se Vishwas Scheme, 2020, however, no order of disposal of these appeals of the Revenue on record. The Ld. Counsel for the assessee submitted Form 5 certificate and claimed that Revenue appeals are also standing withdrawn in as much as the assessee has paid the requisite amount for obtaining the certificate under Form 5 for both the assessee's and Revenue's appeal. We may hereunder reproduce the snapshot of the chart determining the taxes in arrear which stood paid in Form No.5.

Sl. No.	Assessment Year / Financial Year	Details of dispute settled (Appeal reference number)	Nature of tax arrear (disputed tax /disputed penalty /disputed interest / disputed fee)	Amount of tax arrear
1	2004-05	ITA 4918 / DEL / 17	Disputed Tax	18494793
2	2004-05	ITA 5024 / DEL / 2017	Disputed Tax	0

Sl. No.	Assessment Year / Financial Year	Details of dispute settled (Appeal reference number)	Nature of tax arrear (disputed tax /disputed penalty /disputed interest / disputed fee)	Amount of tax arrear
1	2005-06	ITA 4919 / DEL / 2017	Disputed Tax	0
2	2005-06	ITA 5025 / DEL / 2017	Disputed Tax	177539763

Sl. No.	Assessment Year / Financial Year	Details of dispute settled (Appeal reference number)	Nature of tax arrear (disputed tax /disputed penalty /disputed interest / disputed fee)	Amount of tax arrear
1	2006-07	ITA 4920 / DEL / 2017	Disputed Tax	57711955
2	2006-07	ITA 5026 / DEL / 2017	Disputed Tax	0

23. Accordingly, since the assessee has already paid the requisite taxes for withdrawal of Revenue's appeal also, the Revenue's appeals are dismissed as withdrawn. However, we make it clear if there is any case for the Revenue that relevant dues have not been paid, Revenue is at liberty to appeal for recall of this aspect of the order.

24. In the result, appeals by the assessee stand allowed in terms of the above order and the Revenue's appeal stand dismissed as above.

Order pronounced in the open court on 27/07/2022.

Sd/- sd/-

[CHANDRA MOHAN GARG]
JUDICIAL MEMBER

[SHAMIM YAHYA]
ACCOUNTANT MEMBER

Delhi; 27.07.2022.
Shekhar,
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Draft dictated	13.05.2022/18.05.22
Draft placed before author	20.05.2022
Approved Draft comes to the Sr.PS/PS	27.05.2022
Order signed and pronounced on	27.05.2022
File sent to the Bench Clerk	27.05.2022
Date of uploading on the website	27.05.2022
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	