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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 410/2024**

**COMMISSIONER OF INCOME TAX INTERNATIONAL
TAXATION-2, NEW DELHI**Appellant

Through: Mr. Sunil Agarwal, SSC with
Mr. Shivansh B. Pandya, JSC &
Mr. Viplav Acharya, JSC with
Mr. Utkarsh Tiwari, Advts.

versus

NCR GLOBAL SOLUTIONS LIMITED.Respondent

Through: Mr. Nageswar Rao and Mr.
Parth, Advts.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

% **02.08.2024**

CM APPL. 43784/2024 (Exemption)

Allowed, subject to all just exceptions.

Application stands disposed of.

CM APPL. 43783/2024 (280 Days Delay)

Bearing in mind the disclosures made, the delay of 280 days in filing the appeal is condoned.

The application shall stand disposed of.

ITA 410/2024

1. The Commissioner of Income Tax impugns the order of the Income Tax Appellate Tribunal [“**Tribunal**”] dated 10 April 2023 and posits the following question for our consideration:-

“Whether on the facts and circumstances of the case, the Hon’ble ITAT erred in holding M/s NCR Corporation India Pvt. Ltd. is not PE of the assessee without appreciating the facts that it is working mainly or wholly on behalf of the assessee and concludes contracts



and secures order mainly or exclusively for the assessee?”

2. We note that the issue of whether a Permanent Establishment existed in the relevant Assessment Year becomes academic in light of the following findings of the Tribunal:-

“7. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. In respect of transfer pricing adjustment related to sale of software/hardware, the contention of the assessee are multifold. It is stated that the assessee has no fixed place/PE during the period in appeal. The entire sale was executed at off shores and without prejudice, it was submitted that the impugned transaction of sale of software/hardware that was executed outside India to group company in India i.e. NCR Corporation India Pvt. Ltd. were subjected to transfer pricing scrutiny in the hands of alleged PE and were accepted to be at arm's length. Therefore, nothing further would be attributable to the alleged PE in India. In respect of this contention, reliance is placed on the judgement of the Hon'ble Supreme Court in the case DIT vs Morgan Stanley & Co. (2007) 292 ITR 416 (SC). It is contended that in the facts and circumstances of the present case, the AO was not justified in making the transfer pricing adjustment. Consequently, making addition of Rs.43,91,20,359/- being the business income of PE taxable @ 40% plus applicable surcharge and cess. Ld. Counsel for the assessee has pointed out various discrepancies in the findings of the authorities below. Some of them being that the finding that the assessee concluded sales of software/hardware through its PE and affiliates. In India, NCR GSL has appointed a group entity namely, NCR Corporation India Pvt. Ltd. for executing software products and services and hardware services in exchange of payments of CIPL distribution activities. The say of the assessee is that sale affected in India is principal to principal. There is no evidence placed by the authorities below that the sales were affected through NCR Corporation India Pvt. Ltd. since no invoice was raised in the name of the assessee by the Indian customers. Moreover, the Revenue failed to rebut the fact that impugned transaction of sale of software/hardware was undertaken outside India to group company in India and were subjected to transfer pricing scrutiny in the hands of the alleged PE and same was accepted to be at arm's length price. Therefore, nothing further would be attributable to the alleged PE. Hon'ble Supreme Court in the case of *DIT vs Morgan Stanley & Co.* (supra) has held as under:-

33. *“To conclude, we hold that the AAR was right in ruling that MSAS would be a Service PE in India under*



Article 5(2)(l), though only on account of the services to be performed by the deputationists deployed by MSCo and not on account of stewardship activities. As regards income attributable to the PE (MSAS) we hold that the Transactional Net Margin Method was the appropriate method for determination of the arm's length price in respect of transaction between MSCo and MSAS. We accept as correct the computation of the remuneration based on cost plus mark-up worked out at 29% on the operating costs of MSAS. This position is also accepted by the Assessing Officer in his order dated 29.12.06 (after the impugned ruling) and also by the transfer pricing officer vide order dated 22.9.06. As regards attribution of further profits to the PE of MSCo where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE. The situation would be different if the transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the PE for those functions/risks that have not been considered. The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represents the value of the profit attributable to his service. In this connection, the Department has also to examine whether the PE has obtained services from the multinational enterprise at lower than the arm's length cost? Therefore, the Department has to determine income, expense or cost allocations having regard to arm's length prices to decide the applicability of the transfer pricing regulations.

34. Economic nexus is an important aspect of the principle of Attribution of Profits.

35. In the light of what is stated above, the impugned ruling by AAR stands modified to the extent indicated hereinabove. Accordingly, both the civil appeals filed by the applicant (MSCo) and by the Department are partly allowed with no order as to costs."

8. It is also argued that since the sale of software was affected outside India in the absence of PE, it would not be taxable in India as Royalty. Moreover, after the judgement of Hon'ble Supreme



Court in the case of *Engineering Analysis Centre of Excellence (P.) Ltd. vs CCIT [2021] 432 ITR 471 (SC)*, such consideration for sale of software cannot be lawfully categorized as Royalty and subjected to tax under the Act r.w. Article 12 of the India Ireland DTAA. The Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence (P.) Ltd. vs CCIT (supra)* has held as under:-

169. "Our answer to the question posed before us, is 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, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment."

9. Looking to the facts of the present case, we find merit into the contention of the assessee that the Assessing Authority was not justified in making addition in the hands of the assessee when in the case of alleged PE of the assessee, the transactions have been treated to be arm's length price. Furthermore, the assessee has pointed out that while making addition, the AO has also included the transaction related to hardware whereas allegation of PE is related to software. In the light of the binding precedents, we are of the considered view that the authorities below erred in making the impugned additions. We therefore, direct the AO to delete the same. Ground Nos. 1 to 10 raised by the assessee are hence, allowed."

3. In view of the aforesaid and the undisputed position that an exercise to attribute profit had already been undertaken, we find that the appeal fails to raise any substantial question of law. Consequently, it shall stand dismissed.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

AUGUST 2, 2024/rm