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

\+ **INCOME TAX APPEAL NOS. 654/2012, 656/2012, 659/2012 & 661/2012**

Reserved on : 22nd July, 2014
Date of decision: 25th August, 2014

M/S GALILEO NEDERLAND BV ..... Appellant

Through Mr. Farrokh V. Irani & Mr. Saubhagya Agarwal, Advocates.

versus

ASSISTANT DIRECTOR OF INCOME TAX, CIRCLE-1(2), (INTL. TAX), NEW DELHI ..... Respondent

Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.:

1. This common judgment will dispose of appeals filed by Galileo Nederland BV, now known as Travelport Global Distribution System BV, pertaining to Assessment Years 2003-04 to 2006-07. These appeals arise out of a common order of the Income Tax Appellate Tribunal (Tribunal, in short) dated 29th June, 2012 by which the issue/question of profits attributable to Indian operations was remitted to the Assessing Officer for fresh determination. The case of the appellant-assessee is that the order of the Tribunal is erroneous as the question of profits attributable to Indian operations has already been determined in Assessment Years 1995-96 to 2002-03 and does not require reconsideration. The impugned order of the Tribunal mistakenly understands and interprets the order passed by the High Court in the case of Amadeus IT Group and, therefore, incorrectly

observes that the ratio or formula applied in earlier years cannot be appli in respect of Assessment Years 2003-04 to 2004-07. It is submitted that similar reasoning by the Tribunal was rejected by the High Court in Amadeus IT Group. Submission of the Revenue is that in view of globalisation, the earlier formula or profit attribution ratio should not be applied and the Tribunal was justified in remitting the question of profits attributable to the Assessing Officer.

2. We begin with a caveat that a limited issue and question arises for consideration in these appeals and we are not required and are not pronouncing any opinion and finding on whether the appellant-assessee had a Permanent Establishment (PE) in India and other related issues. The only question and issue raised in these appeals relates to profit attribution to Indian operations on the assumption that the appellant-assessee had a PE in India.

3. By order dated 14th December, 2012, the following substantial questions of law were admitted for hearing:-

> "1. Did the Tribunal fall into error in holding that the estimate of 15% fixed in its earlier orders as attributable to the assessee's income arising in India, is inapplicable to the assessment years in question for the reasons mentioned in its impugned order?
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> 2. Did the Tribunal fall into error in departing from its reasoning in the case of the assessee's predecessor for the period 1995-96 to 2000-2003 [sic, 2002-2003] through different orders?
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> 3. Whether the Tribunal fell into error in applying the ratio of Amadeus in disregard of the order of this Court in the concerned appeals?
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> 4. Whether on the facts and in the circumstances of the case and in law the ITAT ought to have held that even if any income of the appellant could be attributed to India, the same stood exhausted by the expense incurred

by the appellant in India, resulting in the appellant having no tax liability in India?"

4. The appellant, a company incorporated in Netherlands at the relevant time was engaged in the business of providing electronic distribution services to travel industry through Computerised Reservation System (CRS). CRS is an automated system which processes booking data and other data and provides the following functions:-

1. Display flight schedules and seat availability.
2. Display and/or quote airline fare.
3. Make airline seat reservation.
4. Issue airline tickets.
5. Any or all of the functions similar to the above functions in respect of hotel, car and other travel related services apart from air services.

5. The appellant had maintained computer facility at Denver, Colorado in USA, which stored the data fed on real time basis on availability of airlines seats, hotel rooms, car hires, fares etc. The appellant-assessee had entered into agreements with different airlines, hotels, car hire companies etc. to enable them to acquire, procure and store data. The said functions were performed outside India. The aforesaid CRS enabled travel agents and others who make airline, hotel and car bookings using the data stored on the appellant-assessee's computer on real time basis by communicating their requirements online. The data provided information regarding possible itineraries, availability of seats/room fares etc. and enabled booking in airlines, hotels etc.

6. The appellant-assessee has appointed an exclusive distributor in India, M/s Galileo India Private Limited under an agreement. The said distributor negotiated and entered into contracts with various travel agents

in India who wished to be connected to the appellant-assessee's CRS a provided connectivity to them. The appellant-assessee did not physically carry any operations in India and did not engage or have employees in India. In order to enable the travel agents in India to connect to the CRS, the appellant assessee has entered into an agreement with Societe Internationale de Telecommunications Aeronautiques (SITA), an independent and a separate entity. SITA provided nodes in India which SITA owned and the travel agents through these nodes remained connected and established communication link with CRS. As per the agreement with SITA, the appellant-assessee had to pay costs for connectivity charges from its data centre in USA to the nodes, which as noticed were owned by SITA in India. SITA did not own communication lines in India and, therefore, had procured them from local telephone companies for different circuits.

7. Travel agents were paid/remunerated by the airlines for the bookings on tickets issued using the appellant assessee's data base, CRS. The appellant-assessee was also paid/remunerated by the airlines for the worldwide bookings including bookings made in India. The appellant-assessee received these payments outside India. The appellant-assessee did not receive any payment from the travel agents in India. The appellant-assessee had received Euro 3 for each completed booking from the airline etc. The appellant-assessee had paid Euro 1 for each completed booking to their distributor in India.

8. As noticed above, the sole question and dispute in the present appeals relate to computation or assessment of the profits/income attributable to Indian operations, i.e. income earned by the appellant-assessee through and from their PE in India. Other aspects and issues need not be examined in these appeals.

9. The Assessing Officer held that as per Explanation to Section 9(1)(i) of Income Tax Act, 1961 (Act, in short) where all business operations were not carried out in India, the income of business deemed as taxable in India shall only be such part of income as was reasonably attributable to the operations carried out in India. Article 7(2) of the Indo-Netherlands Tax Treaty states that only profits attributable to the PE were taxable in the State where the PE existed. He held that major part of business activity of the appellant assessee leading to generation of profits attributable to PE in India was carried out in India observing that fixed place of business was created by the computer of the travel agent and when passengers booked tickets through such agents. This had happened on thousands of occasion on every day basis. The nodes of SITA were located in India, which enabled the travel agents to have access to the data stored in the CRS of the computers of the appellant in Denver, USA. In light of the above, three-fourth of the profit generated from operations in India was attributed to PE in India and such profit was held to be taxable in India. The exact reasoning given by the Assessing Officer on the said aspect reads as under:-

> "Since a major part of the business activity of the assessee leading to generation of profit is attributable to its permanent establishment in India, attribution of profits is also to be made on this guiding principle. The assessee's PE in India is constituted in India by way of fixed place of business created at the computer of the travel agent, when passengers book tickets and such travel agents, numerous as they are, transact on thousands of occasions on everyday basis. The node of SITA is also located in India which enables the travel agent to access the CRS of the assessee. The servers of the assessee, however, are located in the USA. Similarly, the agency PE created through the distributor is responsible for

> all the major activities leading to profits to the assessee. The contracts with the travel agents are contracted in India on a regular basis and the distributor has such authority and also procures orders for the assessee on a regular server corporate office and set up a relocated in, are attributable to its set up in the USA.
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> In the light of the above, it is held that three fourth profits generated from India operations are attributable to its permanent establishment in India. The figure of 75% is an estimate adopted on the basis of the examination of the extent of activities carried out in India and the USA."

10. Commissioner of Income Tax (Appeals) observed that the appellant-assessee had business connection in India and in terms of Section 9(1)(i) of the Act, as income from bookings made from India and income was earned from such operations was deemed to accrue or arise to the appellant-assessee in India. On the question of attributable income to the Indian operations, he observed that Functions, Assets and Risk (FAR) Analysis was undertaken by the Tribunal for the Assessment Years 1995-96 to 1998-99 and the facts for the year under consideration being identical, 15% of the revenue accruing or arising in India was reasonable attribution towards income accruing or arising to the appellant-assessee in India and chargeable under Section 5(2) read with Section 9(1)(i) of the Act. He further observed that Tribunal had in earlier years held that the payment made to the Indian distributor (i.e. Euro 1) was more than the income attributable to India (15% of Euro 3 or Euro 0.45), thus, extinguishing the appellant-assessee's liability to pay tax. With regard to Circular No. 23 relied on by the Tribunal in the said case it was observed that the withdrawal would be effective from 22nd October, 2009, i.e., prospectively and not retrospectively. Thus, the remuneration paid by the appellant-

assessee to Galileo India Limited, the distributor for the functions carri out in India, being more than the income attributable to the appellant assessee's earning from India, extinguished their tax liability. This meant that the appellant assessee did not have any liability to pay tax in India. Following the orders in earlier years, the appeals filed by the appellant-assessee to this extent were allowed by the Commissioner of Income Tax (Appeals).

11. Revenue preferred an appeal against the aforesaid findings and the Tribunal in the impugned order on the issue in question observed as under:-

> "16. We have heard the rival submissions of both the parties and have gone through the material available on record. The citation relied upon by the Ld. DR relates to the assessment year 2001-02 & 2002-03 and was decided on 27.4.2009 i.e. after the earlier order of Hon'ble ITAT dated 21st November, 2008. similarly, the Hon'ble Delhi High Court had refused to intervene in both the cases i.e. one filed by the revenue and the other filed by the assessee. In the first case relating to assessee for the assessment years 1995-96 to 1998-99 wherein the ITAT had attributed 15% as attributable to operation in India, the High Court had held as under:-
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> "Nothing has been urged before us either on behalf of the assessee - appellant or on behalf of the revenue-respondent to assail the finding of the Tribunal in the supplementary statement of case. The question is as to what proportion of the profit of the sale in categories (a), (b) (c) & (d) arose or accrued in British India is essentially one of the fact depending upon the circumstances of the case. In the absence of some statutory or other fixed formula any finding on the question or proportion involves some element of guess work. The endeavour can only be a approximate and there cannot be in the very nature of things be great precision and exactness in the matter. As long as the proportion fixed by the Tribunal is based upon the relevant material it should not be disturbed.
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> We, therefore, are of opinion that no question of law arises in these matters which needs any further determination by this court."

17. In the other case of Amadius IT Group similar controversy has arisen and Ld. AR had relied upon the ITAT order in the case of M/s Galileo International (the assessee in the present case) in I.T.A. No.,108/Del/ dated 21.11.2008. However, the Hon'ble Tribunal had rejected the claim of the assessee and had referred back the matter to the file of Assessing Officer for fresh adjudication. The relevant paragraph of Hon'ble Tribunal is reproduced below:-

"Apropos the other issue i.e. estimate about the expenditure of profits of PE in India we are unable to accept the contentions of ld. counsels that the issue is covered in its favour inasmuch as, the Tribunal gave above decision on the peculiar facts of that year. Looking at globalization the share of Indian travellers in terms of booking has increased considerably. Besides the extent of assessee's expenses is not known which has been informed that such expenditure cannot be apportioned. In view thereof we are inclined to set aside the issue about the estimate of taxability of India PE back to the file of Assessing Officer to consider our observations and above ITAT and High Court judgment to decide the same afresh in accordance with law and above observations after giving the assessee an opportunity of being heard."

18. On assessee's appeal to High Court, the High Court had refused to interfere in the order of ITAT.

19. From the facts of the case and from two citations of Hon'ble High Court and Hon'ble Tribunal's order in assessee's own case and in the case of Amadeous Travels (supra), we are of the opinion that an estimate of 15% ratio fixed 10 years cannot be applied now in the name of consistency especially keeping in view the increase in globalization increase in Indian passengers originating from India and the facts that assessee is not in losses. The Income tax proceedings are applicable from year to year depending upon facts of each year and principle of res judicata do not ordinarily apply to income tax proceedings and therefore facts of the case which relate to back to initial for years of setting up of business. Estimate of 10 back years cannot said to be applicable for years to come without considering the change in facts and circumstances. The estimation of profits attributable to Indian operations should ideally be based upon number of bookings originating from India viz-a-viz total bookings in a particular year and consideration of global accounts. That comparison can easily lead to a fair estimation of percentage of total business attributable to Indian operations. Similarly expenditure attributable to Indian

> operations can be calculated on some sound commercial basis keeping in view the bookings from India or in the alternative the Assessing Officer can calculate net profits attributable to India operations by calculating proportionate net profits of the company with respect to bookings from India viz-a-viz total bookings. With these directions, we remit the matter back to the file of the Assessing Officer for fresh consideration by adopting a reasonable and commercial test for estimation of business attributable to India and net taxable income which could have been said to have accrued to appellant due to bookings from India. To determine the profits attributable to Indian operations, Assessing Officer may verify the global accounts of the assessee."

12. Appellant-assessee is right in his submission that the Tribunal has misread the order dated 24th January, 2011 passed by the High Court in Amdeus IT Group SA case for the Assessment Years 2001-02 and 2002-03. Tribunal for the assessment years 2001-02 and 2002-03, relying on their earlier order dated 27th April, 2009 in the case of Amadeus Global Travel Distribution, Spain relating to Assessment Years 2001-02 and 2002-03 had issued similar directions but the High Court in appeal had specifically and clearly rejected the reasoning. In order to appreciate the contentions, we would first like to refer to the decision of the Tribunal in the case of Amadeus Global Travel Distribution, who was engaged in the identical business and were competitors of the appellant-assessee. Appeal filed by Amadeus Global Travel Distribution for the Assessment Years 2001-02 and 2002-03 came up for hearing before the Tribunal and was decided by order dated 27th April, 2009. The Tribunal observed that the High Court had already decided and held that 15% of the operations were attributable to India but nothing would be taxable as the expenses incurred were more. In the result, the taxable income of Indian PE was nil as there were no taxable profits. However, in spite of the aforementioned observations, agreeing with the submissions made by the Departmental Representatives, Tribunal in order dated 27th April, 2009 held:-

> "4. Learned DR, on the other hand, contends that it is not the ratio of the Tribunal that for all years to come there will be no income, inasmuch as the number of travellers in India have hugely increased resulting in an increase in the percentage of share of Indian revenue and profits. Therefore, the ITAT judgment apropos estimation cannot be held as applicable to all the subsequent years. If this test is applied always in that eventuality assessee will not be liable for any tax for all the years to come, this cannot be the proposition of this Tribunal judgment, which is purely on estimate. Since the lower authorities have held all the profits of assessee as taxable in India, they had no benefit of this Tribunal and High Court judgments, the matter may be set aside on this issue back to the file of AO to decide the same afresh taking into consideration the scope of operations of the assessee, the estimate about expenses and Indian share in profitability after duly considering the ITAT and High Court judgment in accordance with law.
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> 5. XXXXX
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> 6. Apropos the other issue i.e. estimate about expenditure of profits of PE in India, we are unable to accept the contention of learned counsel that the issue is covered in its favour, inasmuch as the Tribunal gave above decision on the peculiar facts of that year. Looking at the globalisation, the share of Indian travellers in terms of booking has increased considerably besides the extent of assessee's expenses is not known, it has been informed that such expenditure cannot be apportioned summarily. In view thereof, we are inclined to set aside the issue about estimate of taxability of Indian PE back to the file of AO to consider our observations and above ITAT and High Court judgment to decide the same afresh in accordance with law and above observations after giving the assessee an opportunity of being heard."

13. What is clearly noticeable is that the reasoning recorded above finds replication and repetition in the impugned order passed by the Tribunal in the present appeals. Tribunal in the two orders has highlighted that looking at globalisation, share of Indian travellers in terms of bookings should have increased considerably and, therefore, the issue to attribution of profits required a fresh decision by the Assessing Officer. However, the aforesaid reasoning was not accepted by the Delhi High Court when the Amadeus IT

Group SA filed appeals being ITA Nos. 1040/2009 and 1041/2009 and was held as under:-

> "The only issue raised in these appeals which are filed by the same assessee but for the different assessment years is as to whether the assessee is running permanent establishment in India or not. We find that all the Authorities below, after considering various facts, have arrived at the finding of fact that the assessee is having permanent establishment in India.
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> However, limited grievance of the learned counsel for the appellant is that even when the Income Tax Appellate Tribunal has accepted that the income chargeable to tax shall be 15% of the income earned in India, in Para 6 of the impugned order, the ITAT has sent the matter back to the Assessing Officer to consider the question of apportionment of the expenses. Para 6 reads as under:
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> "6. Apropos the other issue i.e. estimate about the expenditure of profits of PE in India we are unable to accept the contentions of ld. counsels that the issue is covered in its favour inasmuch as, the Tribunal gave above decision on the peculiar facts of that year. Looking at globalization the share of Indian travellers in terms of booking has increased considerably. Besides the extent of assessee's expenses is not known it has been informed that such expenditure cannot be apportioned. In view thereof we are inclined to set aside the issue about the estimate of taxability of India PE back to the file of Assessing Officer to consider our observations and above ITAT and High Court judgment to decide the same afresh in accordance with law and above observations after giving the assessee an opportunity of being heard."
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> It is not in dispute that as per the judgment of this Court in the case of ***Director of Income Tax vs. Galileo International Inc. [224 CTR 251]***, the income to the extent of 15% of the revenues in India is be charged to tax. This income is subject to the deduction of expenditure. We clarify that it is that expenditure which the Tribunal has referred to and not the issue of 15% chargeable to tax.
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> With the aforesaid clarifications, these appeals are disposed of."

14. Thus, it is clear that the High Court did not approve of the reasoning

that globalisation would have resulted or would result in change attribution of profits per se. The observation of the Tribunal in the impugned order to the effect that the Delhi High Court had refused to interfere with the order dated 27th April, 2009 is factually incorrect and wrong. The said reasoning was clearly not accepted and overturned by the High Court.

15. Not only this, the said determination of quantum of income attributable to India in the case of the appellant-assessee has been followed by the Delhi High Court in Assessment Years 1999-2000 to 2002-03 in order dated 25th September, 2012. Thus, the 15% formula, which was applied for Assessment Years 1995-96 to 1998-99 has been followed upto Assessment Year 2002-03. The impugned order in the present case, as noticed, is dated 29th June, 2012. Appeals for the Assessment Years 1999-2000 to 2002-03 were decided by the Delhi High Court on 25th September, 2012, i.e., after pronouncement of the order dated 29th June, 2012.

16. The appellant-assessee has placed on record copy of orders dated 28th April, 2011 in the case of Amadeus Global Travel Distributors, SA in ITA No. 689/2011, wherein appeal filed by the Revenue was dismissed in view of the order dated 24th January, 2011 in the case of the present assessee. Similar appeals for Assessment Years 2004-05 and 2005-06 being ITA Nos. 795/2011 and 797/2011 in the case of Amadeus IT Group SA were dismissed by the High Court vide order dated 31st May, 2011.

17. The appellant-assessee has also placed on record orders passed by the Delhi High Court in the case of Sabre Inc., USA, another non-resident company engaged in identical business. Their proportionate earnings were sought to be taxed in India. The appeals filed by the Revenue on the said aspect have been dismissed. One such appeal relates to Assessment Year 2005-06.

18. The aforesaid decisions by Coordinate Division Benches are binding on us and we do not think it will be appropriate to disregard and not follow the said orders. Appropriately appeals by the Revenue are pending before the Supreme Court and the issues and questions can be decided there. Division Benches of the Delhi High Court have specifically rejected the plea and submission that globalisation by itself mandates and requires change in 15% formula for attribution profits to Indian PE.

19. We are aware that each assessment year is separate and distinct and principle of res judicata does not apply to proceedings for subsequent or other years. However, decision on an issue or question though not binding should be followed and not ignored unless there are good and sufficient reasons to take a different view. Thus, it was/is possible for the Assessing Officer to depart from the finding or a decision in one year as it is final and conclusive only in relation to a particular year for which it is made but as observed in ***Radhasoami Satsang versus Commissioner of Income Tax***, [1992] 193 ITR 321 (SC), when a fundamental aspect pervading through different assessment years has been found as a fact in one way or the other, it would inappropriate to allow the position to be changed in a subsequent year particularly when the said finding has been accepted. The said principle is also based upon the rules of certainty and consistency that a decision taken after due application of mind should be followed consistently as this lead to certainty, unless there are valid and good reasons for deviating and not accepting the earlier decision.

20. We have already quoted the assessment order on the question of attribution to ascertain whether there was any attempt by the Assessing Officer to differentiate or cull out new data and facts on the issue of attribution of income to the Indian PE. No such attempt and application of mind was made and undertaken in the assessment order.

21. In these circumstances, the Sr. Standing Counsel for the Reven made specific reference to paragraph 19 of the order of Tribunal and submitted that there is a distinguishing factor. The estimate of 15% ratio requires reconsideration because of increase in bookings from India. It was submitted that the estimate of 15% was made ten years back, therefore, cannot be considered to be appropriate. The Tribunal has observed that estimation of profits would be ideally based upon number of bookings originating from India in comparison with the bookings in a particular year and on consideration of global accounts. It is not possible to agree with the said submission for several reasons. Firstly, this is not the basis of the assessment made by the Assessing Officer. In fact, the Assessing Officer had mentioned in the assessment orders that the facts and circumstances of the case remain the same. Foundation and basis should have been first made in the assessment order. Secondly, the Tribunal in the earlier appeal in the case of ***Galileo International Inc.*** (2008) 19 SOT 257 (Delhi) relating to Assessment Years 1995-96 to 1998-99 had undertaken the FAR Analysis and in respect of functions of the appellant-assessee observed:-

> "9. ...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 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 (sic USA) 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% 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."

22. It was this reasoning, which was approved by the Delhi High Court in ITA Nos. 851/2008 & etc., ***Director of Income Tax versus Galileo International Corporation***, decided on 25th February, 2009 along with other ITAs, rejecting the submission of the Revenue that the Tribunal had erred in attributing only 15% of the said income as attributed to Indian operations. High Court also rejected the submission that the Tribunal's finding was erroneous as Double Taxation Avoidance Agreement with USA advanced attribution of profits and not revenue, observing that the Tribunal had applied principles of attribution of profits and not revenue. It

was specifically held that the Tribunal had undertaken the exercise assess what would be attributable to operations in India and thereafter found that only a small or miniscule part of CRS operations and functions were performed in India. These were limited to the extent of generating the request and receiving the result in India. The major functioning, i.e., collecting data bases with various airlines, hotels etc. and entering or feeding them into the computer took place outside India. It was in the computer in Denver, USA that various processed data with regard to schedule of flights timing, pricing, availability, meal preference, special facilities etc. was stored and process undertaken. The role performed by the computers in India or the Indian agents was to merely get connected or be configured so that the travel agents could perform the booking function. The computers in India were not capable of processing data, which was processed abroad. Further, the functions required huge investment and capacity, which was not installed and available in the computers at the desk of the travel agents in India but were available in the host computer in the USA. Thus, it was looking at the nature and the character of the functions undertaken in India viz., the functions and assets outside India, 15% was attributed to India. (Aspect of risk has not been discussed but it has never been the case of the revenue that risk factor tilts the scale for higher attribution of income to Indian PE). This worked out to Euro 0.45 and this was less than the commission of Euro 1, which was paid by the appellant-assessee to the distributor in India. There was substantial difference between expense of Euro 1 and attribution of Euro 0.45, as an income, which left a gap of Euro 0.55 per booking.

23. It has been rightly submitted on behalf of the appellant that there is another error in the reasoning given in paragraph 19. The Tribunal has wrongly observed that earlier appellant-assessee was in losses. There is no

such finding in the earlier orders. The appellant-assessee was maintaining globalised accounts and India specific attribution of profits/losses was not undertaken in the accounts being maintained.

24. In view of the aforesaid position, the questions Nos. 1 and 2 have to be answered in favour of the appellant-assessee and against the Revenue. Similarly, it has to be held that the Tribunal fell in error in applying the ratio of Amadeus case without noticing the decision of the Delhi High Court. Question No. 4 need not be answered in view of the discussion on question Nos. 1 and 2. The earlier decisions of the Delhi High Court would equally apply as there was no change in circumstances highlighted and brought out in the assessment orders.

25. The appeals are accordingly disposed of. No costs.

(SANJIV KHANNA)
JUDGE

(V. KAMESWAR RAO)
JUDGE

August 25th, 2014
VKR/kkb