

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

Before Sh. Saktijit Dey, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 7354/Del/2017: Asstt. Year: 2013-14

ACIT, International Taxation, Circle-3(1)(2), New Delhi	Vs	Sabre Decision Technologies International LLC, 3150, Sabre Drive, South Lake, Texas, USA
(APPELLANT)		(RESPONDENT)
PAN No. AAOCS8327B		

CO. No. 54/Del/2021

(In ITA No. 7354/Del/2017: Asstt. Year: 2013-14)

Sabre Decision Technologies International LLC, 3150, Sabre Drive, South Lake, Texas, USA	Vs	ACIT, International Taxation, Circle-3(1)(2), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAOCS8327B		

ITA No. 5782/Del/2017: Asstt. Year: 2014-15

Sabre Decision Technologies International LLC, Tarandeep Singh, Advocate, C/o. M.S. Associates, F-99, Lajpat Nagar-II, New Delhi	Vs	ACIT, International Taxation, Circle-3(1)(2), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAOCS8327B		

Assessee by : Sh. Tarandeep Singh, Adv.

Revenue by : Sh. Gangadhar Panda, CIT-DR

Date of Hearing: 07.11.2022	Date of Pronouncement: 03.01.2023
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals and cross objection filed by the assessee and revenue against the order of the Id CIT(A)-43, New Delhi dated 21.09.2017.

2. The revenue has raised the following grounds of appeal in ITA No. 7354/Del/2017 for Assessment Year 2013-14:-

"1. Whether in facts and circumstances of the case, the CIT(A) erred in holding that the assessee does not have a business PE in India, whereas in similar cases and also in case of its group company, it has been judicially held that the said non-resident entities have fixed place business PE in India."

3. The assessee has raised the following grounds of appeal in ITA NO. 5782/Del/2017 for Ay 2014-15:-

"1. That on facts and in law the AO has erred in assessing the total income of the appellant at Rs 121,09,51,819/- as against a returned total income of Rs 1,60,78,620/-.

2. That on facts and in law the AO / DRP have erred in holding / upholding that the appellant has a Permanent Establishment (PE) in India.

2.1 That on facts and in law the AO erred in presuming that appellant has admitted existence of PE in India.

3. That on facts and in law the AO / DRP erred in not appreciating that business model of appellant was materially different from the erstwhile business model of M/s Sabre GBL Inc.

3.1 That on facts and in law the DRP erred in relying upon extraneous material not relevant to the appellant.

4. That on the facts and in law AO has erred in holding and the DRP has erred in upholding that the amounts received by the appellant from its customers in India (i.e. various airlines) are chargeable to tax as income from "Royalty" as defined u/s 9 of the Act.

4.1 That on facts and in law the AO/DRP have erred in holding that receipts of the appellant fall under the definition of "Royalty" for alleged use of system / software license and process.

4.2 That on facts and in law the lower authorities have erred in not appreciating that the amounts received by the appellant from its customers in India

are for the use of a standardized facility and not for the use of any software / process.

5. That on the facts and in law the AO / DRP have erred in holding / upholding that:

- (a) provisions of Section 44DA of the Income-tax Act, 1961 are applicable*
- (b) gross receipts of the appellant (from customers in India) are chargeable to tax*
- (c) Income chargeable to tax cannot be determined under Rule 10(ii) of Income Tax Rules.*

6. Without prejudice, that on facts and in law the AO has erred in levying tax on gross receipts of Rs 121,09,51,819/- as against the actual total gross receipts of Rs 117,05,95,299/- declared by the appellant in its return of income.

7. That on facts and in law the AO erred in levying interest u/s 234A, 234B, and 234C of the Income Tax Act.

8. That on facts and in law the order passed by Assessing Officer {hereinabove referred to as the "AO"} and Dispute Resolution Panel {hereinabove referred to as the "DRP"} are bad in law and void ab-initio."

4. The revenue has raised the following grounds in Cross Objection No. 54/Del/2019 for Assessment Year 2013-14:-

- "1. That on facts and in law, the Commissioner of Income-tax (Appeals)-43 New Delhi [‘Ld. CIT(A)] erred in assessing the total income of the respondent at INR 88,33,78,910/- as against a returned total income of INR 1,28,28,565/-.*
- 2. That on facts and in law, Ld. CIT(A) erred in holding that receipts amounting to INR 88,33,78,910/- earned by the respondent from its Indian customers constitute "Royalty" under Section 9(1)(vi) of the Income-tax Act, 1961, (‘the Act’) and is eligible to be taxed as such.*
- 2.1 That on facts and in law, Ld. CIT(A) erred in holding that receipts of the respondent fall under the definition of "Royalty" for alleged use of a process or the imparting of any information concerning commercial knowledge, experience or skill."*

5. The revenue's main contention was that the assessee, a non-resident has a fixed place PE in India for the A.Y. 2013-14. For the A.Y. 2013-14, the assessee filed CO against the order of the Id. CIT(A) holding that the receipts of the assessee from Indian customers constitute royalty u/s 9(1)(iv) of the Income Tax Act, 1961.

6. The assessee's objection for the A.Y. 2014-15 against the decision of the Id. DRP holding that the assessee has a PE in India and also for holding that the amounts received by the assessee from his customers are chargeable to tax as income from royalty as defined u/s 9 of the Income Tax Act, 1961.

7. The pertinent facts relevant to the adjudication of the issue are as under:

8. The assessee is a Delaware registered Limited Liability Company. It is directly held by Sabre International B.V. and indirectly held by Sabre GLBL Inc. The assessee markets and provides travel related products and services to airlines such as Airline decision support applications, passenger solutions, consulting services etc. These services are rendered using servers located in USA.

9. For the year under consideration, the assessee derived revenues from its airline customers in India for the above mentioned services. The assessee has also submitted that the services rendered by it are similar to the ones rendered by its group enterprise - Sabre GLBL Inc. It has been further submitted by the assessee that the services are rendered to the airline customers in India using the similar modus operandi as Sabre GLBL Inc i.e. services are rendered using computer systems located in USA.

10. It is submitted by the assessee that in case of Sabre GLBL Inc., it has been held by Hon'ble ITAT and Hon'ble Delhi High Court (ITA 295 of 2010) that it constitutes both a business connection in India within the meaning of Section 9 of the I.T Act, 1961 and also a Permanent Establishment ('PE') in India within the meaning of Article 5 of the DTAA between India and USA.

11. The assessee in its notes to computation of income for the subject assessment year stated that it does not have any office/ place of business in India nor does it have any employees based out of India. However, applying the ratio of order of Hon'ble High Court in case of Sabre GLBL Inc., it has filed its return of income for the year under consideration on the assumption (without admitting) that it constitutes a business connection in India within the meaning of Section 9 of the I.T. Act, 1961.

12. It was stated that the assessee does not hold a valid Tax Residency Certificate ('TRC') issued by tax authorities in United States of America ('USA') and hence the benefit of the India-USA Double Taxation Avoidance Agreement ('DTAA') has not been claimed by the assessee and the income has been offered under the provisions of the I.T. Act, 1961.

13. The assessee has offered 15% of net profits from revenues derived from its customers in India to the business connection in India. The net profits are stated to have been calculated by applying global profitability ratio as prescribed by Rule 10(ii) of the Income-tax Rules ('the Rules') and in support the assessee has also filed audited profit and loss account. It claimed that global expenses

have been apportioned to India business in the same ratio which the Indian revenues bear to the Global revenues. The said expenses have been claimed as a deduction by the assessee in its return of income for the subject AY.

14. After going through the Explanation 2 to Section 9(1) of the I.T. Act, the Assessing Officer treated the entire receipts of Rs.8.33 crores without giving any expenses as taxable income to be taxed @ 40%.

Existence of PE in India:

15. The Id. CIT(A) examined the issue primarily whether there is any PE of the assessee in India or not. The order of the Id. CIT(A) Sh. Raman Chopra is as under:

It is however seen that the concept of PE is narrower than the concept of business connection. A business connection referred to in Sec. 9 of the Income tax Act is an inclusive definition given in Explanation 2 only for the purpose of defining a situation where a non resident operating through an agent is deemed to have a business connection in India. That may not be relevant to the present case. Therefore the facts of the case are per se required to be examined as to what is the business of the assessee and how it operates. On the other hand, the term 'Permanent Establishment' (PE) is not defined for the purposes of Sec. 9 of the Income-tax Act or for the Act as a whole in section 2. However an inclusive definition is given in Sec.92F. Same is also reproduced here under:

In Sections 92, 92A, 92B, 92C, 92D and 92E, unless the context otherwise requires,-

....[(iii) "permanent establishment", referred to in clause (iii), includes a fixed place of business through which the business of the enterprise is wholly or partly carried on;]

This definition is for Sec.92, 92A, 92B, 92C, 92D & 92E. A reasonable guidance however, may be drawn from this definition for other sections in the Act in respect of a fixed place PE. The above

definition suggests that a fixed place of business is required for a permanent establishment to exist. The AO in his order does not indicate as to how a fixed place PE exists in the case of the assessee. It is further mentioned that the assessee is a Delaware based LLC which operates its business from US. It has however been submitted by the assessee that the Tax Residency Certificate of the US is not available with the company and therefore treaty benefits under the DTAA are not available to the assessee. The interpretation of PE in the case of the assessee, therefore, has to be determined only in accordance with the domestic law. In the present case, the assessee does not have a fixed place of business, as no equipment is installed by the assessee with its clients. There is no agent who is a dependant agent and therefore, DA PE is also not present. Therefore, the case for existence of a PE in India is not made out. The assessee also does not have any other presence in India.

However, the term 'business connection' being a far broader concept even though not admitted by the assessee, is clearly established in his case. The clients of the assessee are located in India, which are the Airlines. These clients / are the entities to which certain specific services are being rendered by the assessee. The mode of delivery of such advice and services is through a login portal available to the client in India. This is the basic touch point in the Indian jurisdiction which is the point of delivery of the services. Further, the nature of those services determines revenue chargeable by the assessee from the clients. Revenue is also charged by the assessee for providing the point of delivery of the services in India, that is, the login portal. Thus, the business of delivery of specialized services related to decision making in the Airline industry of this foreign company i.e. the assessee conclusively has a business connection in the Indian Jurisdiction. Therefore, as a business connection of the assessee is clearly made out, there is apparently some income which is arising to the assessee from such operations. The Sec.9 of the Income Tax Act 1961, clearly states that any income arising through or from a business connection is liable to tax in India. However no PE in India is made out in the assessee's case."

16. Against the decision of the Id. CIT(A), before us, the Id. DR, Sh. Gangadhar Panda filed his arguments in writing which are as under:

"Sub: Written Submission in the above case-reg.

During the course of hearings on 07-11-2022, the Hon'ble Bench directed the undersigned to give a short written submission on the issues under consideration i.e.

Issue 1: Receipts earned by the appellant from its Indian customers fall under the definition of "Royalty" for use of a process or the imparting of any information concerning commercial knowledge, experience or skill.

Issue 2: Whether the assessee has a business PE in India?

2. Submission of the Revenue:

On the issue of receipts earned by the appellant being in the nature of Royalty, it is submitted that the Revenue has relied on the findings of the CIT (Appeals) in addition to the oral arguments made during the course of the hearing. On the issue of whether the assessee has a PE in India, following submission is made for consideration in addition to the oral arguments made during the hearing:

2.1. In this case, the appellant (Sabre Decision Technologies, hereafter referred as SDT) markets and provides travel related products and services to airlines including applications like Passenger Solutions, such as hosted reservations and departure control systems and Airline decision support applications etc. These services are rendered by the appellant using its servers located in USA. The services rendered by SDT are similar in nature to those rendered by its own group company, Sabre GBL Inc. in the sense that both are hosted software services provided from computer servers located outside India. Accordingly, while computing the taxable income, the appellant followed the order of the Hon'ble Delhi High Court (ITA no. 295 of 2010) in case Sabre GBL Inc. and suo-moto offered 15% of its business profits from India to tax on the assumption that there is a business connection of SDT in India.

2.2. In this connection, AO has given a finding in beginning of para 10 of final assessment order that assessee itself claimed to have a PE in India and has offered the receipts to tax as business income. However, appellant countered this finding during the appeal proceedings stating that its assumption of forming a business

connection in India was merely to buy peace and to avoid litigation, and should not be equated with appellant having a PE in India under the Act. In this regard, reference was drawn to the various judgments by appellant and submitted that even where a business connection in India existed under Section 9(1) of the Act, the same could not be equated with the appellant constituting a PE in India so as to apply Section 44DA of the Act. The assessee has strongly contested this issue and has stated that it has never admitted to have a PE in India since it had no office nor any place of business or any server installed in India by the assessee.

2.3. Ld. CIT(A) in his order observed that the clients of the assessee i.e. various airlines /travel agents are located in India to whom specific services were rendered by the assessee. The mode of delivery of such specialized advice and services is through a login portal in India by the airline industry which led to existence of business connection in the India as per sec 9(1) of the IT act and thus the income arising from business connection is liable to tax in India. However, the CIT gave a ruling that no PE in India is made out in the assessee's case as assessee did not have a fixed place of business nor any dependent agent PE (DAPE).

2.4. In regard to existence of PE in India, the AO has brought out in the assessment order (para -2) that in order to provide these specialized resources/services, the applicant facilitates access for the ticket agents/passengers to flight reservation information, On-Real Time basis, through the Main Sabre Ticket booking System, by pulling out customers' ticket booking data and provides further supporting services as mentioned above. Therefore, the Revenue is of the view that going by the nature of supporting services i.e. advance seat purchases, food and beverages booking, extra baggage booking etc. by the clients already booked the air tickets from Sabre Main Ticket booking systems, such real time data access and accelerated data exchange not possible unless dedicated Sabre interface system is activated in the clients' computer terminals, and certainly not possible through remote access to the server located in USA. Therefore, contrary to the claims of the applicant that there is no PE as its server is outside India, the computer terminals of the clients of the applicant are enabled to be an integral part of the Main Ticket booking system of Sabre group , which has been accessed and exploited by the applicant in an integrated manner in a seamless environment to provide uninterrupted supporting services to its clients. No supporting services relating to a specific booked ticket be made available without accessing to the main Booking System to pull out booking data .Thus the Booking system operated by Sabre parent group entity and supporting services by Sabre Decision are seamlessly integrated for providing the necessary supporting services. It means

that the Sabre Booking Interface enabled in the clients' computer terminals are functioning in Indian territory through log-in access rights provided by the applicant and the agents use such services on real-time basis through the servers nodes installed in their work stations located in India. Thus, even though the server may not be inside India, but the Interface System hooked to the Agents' computers would amount to an existence of PE for the applicant in respect of the utilization of resources which are in the nature of royalty.

2.4. Thus, in view of the applicant having a PE in India would give rise to business income , and as per Art 12 of DTAA , the income has to be assessed under ART 7 or Sec 44DA of the IT Act, as discussed by AO at para-10.1 of the final assessment order .

2.5. Revenue relies on the following judicial rulings in regard to existence of PE in the case of the applicant i.e. the ruling of the Hon'ble AAR in the case of 'Mastercard Asia Pacific Pte Ltd' (MasterCard) and the decisions of Hon'ble ITAT, Delhi Bench in the cases of Amadeus Global Travel Distribution SA vs DCIT [2008] 113 TTJ (ITAT Delhi) 767 &Galileo International Inc. [2008] 19 SOT 257 (Delhi). The legal positions discussed in aforesaid cases are as under-

(A) The Hon'ble ITAT Delhi Bench in these two cases held that CRS systems installed in the premises of Indian agents constituted a PE in India, and 15% of income from Indian operations was chargeable to tax in India.

(B) In case of Galileo, facts of the case were that the non-resident enterprise was running a fully automatic computer reservation and distribution system with the ability to perform comprehensive information, communication, reservations, ticketing, distribution, and related functions on a worldwide basis for travel industry, particularly participating airlines, hotels etc. (referred as CRS). In India CRS was installed on the computer of travel agents. Customers approached the travel agent who used this CRS to transfer the requests to main server outside India which did processing to throw up the best possible results for hotels and airlines, matching the customers' preferences. On these facts, it was held that CRS constituted PE of the non-resident in India.

(C) In the case of Mater Card before the Hon'ble AAR, [2018] 94 taxmann.com 195 (AAR - New Delhi) (copy annexed), Revenue relied upon the above decisions to establish that Mastercard Interface Processor (MIPs) along with the master card network consisting of transmission towers, leased lines, fiber optic cables, nodes,

internet etc., though provided by third party service provider but at disposal of MAPL, constituted PE in India.

(a) After considering submissions of the assessee and the Revenue, the Hon'ble AAR at para 16.2.2 of its order held that MIPs placed at the site of customer banks in India, can create a PE provided other tests are satisfied. Hon'ble AAR held that MIPs passed test of permanency as they were placed at the site of customer banks throughout the year.

(b) At para 17.5.2 of its order, Hon'ble AAR has discussed the above two case laws relied upon by the Revenue. Hon'ble AAR held that what was CRS in Amadeus and Galileo cases was MIP and application software (master connect and Mastercard file) in case of MAPL. It was held that MIP was the instrument and software which conducted the business of the MAPL in India and it was installed in India. Relevant part of the order is reproduced below:

In the case of Amadeus and Galileo, it is installed inside the computers of travel agents (which could be computers of travel agent modified after including CRS or computer itself provided by assessee or its agent). In our case, the software and process technology (which is part of MIPs and is owned by the Applicant or licensed to it by the owner) is installed in the premises of the Customers of Banks/FIs etc.) in India. The application software (Master Connect and Master Card file, owned by the Applicant) is installed at the computers of Banks/FIs. The connectivity to MIP and Banks computers is provided by various service providers through cables as well as internet. Similar was the position in the cases of Amadeus and Galileo as well.

(D) Further, the Hon'ble AAR held that functions of MIP and Mastercard network in India were significantly more than what were performed in India in the cases of Amadeus and Galileo.

(E) Para 17.5.5.3 of the order further elaborately discusses applicability of decisions of Amadeus and Galileo to the facts of case of MAPL wherein the Hon'ble AAR held that CRS system installed in the premises of Indian agents was capable of booking of tickets and therefore generation of revenue for the assessee even though the main processing was done outside India. It was held that computers and CRS system installed in India constituted PE in India and therefore, income was attributable to the same.

(F) Further, drawing similarity with the above cases, the Hon'ble AAR held that what CRS was doing in Galileo case was the same what was being done by the

application software (Master Connect and Mastercard File) in case of MAPL i.e. sending the request and receiving the result. Furthermore, the Hon'ble AAR held that case of MAPL was stronger than the case of Galileo for creation of PE. The Hon'ble AAR vide para 17.5.6, 17.5.7 and 17.6 concluded that MIPs and Mastercard network constituted fixed place PE in India. The relevant part of the order is reproduced below:

17.5.6 The Applicant has stated that use of MasterCard Connect and MasterCard File express is incidental to the main activity of transaction processing service and they perform preparatory and auxiliary services. We have already discussed how the role of these two application software is similar to what CRS was doing in Amadeus and Galileo cases in India. Thus, the objection of the Applicant is not valid. In addition, when we talk about MasterCard network, we have to see as a whole whether all the constituents of MasterCard network, i.e. MIP, transmission tower, leased lines, fiber optic cable, nodes, internet, Master Connect and Master Card File express, together, perform activities which can be considered as preparatory or auxiliary. We have already demonstrated that MIP alone does activities which are not preparatory or auxiliary. When combined with transmission tower, leased lines, fiber optic cable, nodes, internet, application software, the scope of activity gets even bigger and cannot be called preparatory or auxiliary.

17.5.7 The Applicant has also claimed that net debit/credit balance calculation of millions of transactions by GCMS and SAM involve high power computers and analysis. We have already discussed that settlement position of two banks for various transactions are already known to them. What Applicant is doing outside India is simple calculation to add all these transactions and deduct the fee charged to arrive at net position. Even otherwise, there is no case that once significant activities are happening outside India; there cannot be a PE in India, even though significant activities are also happening in India. For deciding whether there is PE in India, we need to see what are the functions performed in India in the context of overall functions performed by the Applicant and whether the tests of PE are passed or not.

17.6 In view of above discussion, we hold that MasterCard Network also creates fixed place PE of the Applicant in India.

(G) Further, it is to state that the above two decisions still hold good and issue of PE and attribution of 15% of income to such PE has been upheld by higher courts in case of Galileo and Amadeus. Therefore, the ratio of the above cases is applicable to case of MAPL and similarly placed cases; however, attribution of

income is a fact-based exercise wherein functions performed, assets deployed and risk assumed determine the quantum of income attribution.

2.5. Conclusion: In view of above, the assessee company's protected software or portal offers facility to the clients to login, to furnish some data and then access reports generated after the data is analyzed. Further, the assessee which allows its travel agents /clients to have access to the main Booking Interface System /Processor owned/ at the disposal of the Sabre group entity , in order to execute / process the requests of the Sabre Clients (already having a Ticket through its networks) which is placed at customers' locations in India for processing of Seat Booking, Food booking transactions using Sabre global network and infrastructure. Thus the part of fees received/to be received by applicant from Indian Customers are in the nature of royalty for the use of system/software license and since it is effectively connected to PE, as discussed in preceding paragraphs, it would be taxed under article 7 of India-US DTAA as well as under Sec. 44DA of the IT Act."

17. For the A.Y. 2014-15, the Id. DRP held that the assessee had PE in India the services provided by the assessee are software services covered under Explanation 2 to Section 9(1)(vi) of the Act.

18. Having heard the arguments of both the parties who reiterated the similar arguments taken up before the authorities below, we decline to interfere with the reasoned order of the Id. CIT(A) resulting in dismissal of the appeal of the Revenue on the issue of PE in India.

Royalty:

19. While the AO taxed the entire receipts as income of the assessee to be taxed @ 40%, the Id. CIT(A) held that the gross income has to be taxed @ 10% in accordance with the provisions of Section 9(1)(vi) and Section 115A of the Income Tax Act, 1961.

20. The ratio of the of Id. CIT(A) while reducing tax rate of 40% to 10% is as under:

"4.3 Now the two fundamental questions remain to be addressed.

1. Whether the income of the assessee is in the nature of royalty under section 9(1)(vi) of the Act?

2. Whether the income of the assessee is of the nature of "fee for technical services" under the section 9(1)(vii) of the Income Tax Act 1961?

This is required to be determined in view of the fact that, where a specific provision in the Act is laid down for determining the taxability of any income, the general provision is overridden. This implies that if the income is classifiable under the head 'royalty', then is mandatorily required to be taxed as royalty and not as business income under 9(1)(i) of the Income-tax Act. Before deciding on this aspect, the submission of the assessee indicating that the revenues of the assessee (SDT) are not in the nature of Royalty or FTS, it is noted that the submissions are required to be examined with the following facts in mind:

- the assessee does not have a TRC of the USA*
- the definitions and the scope of the terms FTS and royalty would not be imported from the DTAA or the treaty with USA and would be strictly in accordance with the domestic provisions only.*

4.4 Nature of Business of the assessee: The assessee company is offering specific solutions on a day to day basis to the airlines. The mechanism for offering these solutions is through functionality which has been mentioned clearly in the Work Order with one of the clients i.e. M/s Jet Airways. The extract of the functionality is as under:

1. Description of Functionality and Service

a. Functionality. Sabre will provide Customer with access and use of the functionality described in the attached Appendix A (the 'Functionality'). Once implemented, the Functionality shall be considered to be a part of the System covered under Work Order Number 1 to the Agreement entered into by the parties with a Work Order Effective Date of 31st March, 2008 (the "CSS Work Order").

b. *Implementation of Functionality.* Sabre will implement the Functionality for Customer as soon as reasonably practicable following the Work Order Effective Date set forth above, in practice this means the first available implementation slot for this functionality at the time of signing of this Work Order.

c. *Customer Responsibilities.* In connection with the implementation of the Functionality to be provided by Sabre hereunder, Customer shall be responsible for the activities described in the attached Appendix B.

2. *Usage Rights Granted*

Use Rights, Effective upon the date on which the Functionality is made available to Customs for productive use, and provided that Customer is and remains in compliance with the terms of the Agreement and this Work Order, the System license set out in the CSS Work Order shall apply with respect to the Functionality.

The fees being charged for such functionality is also given in Para 4 of the Work Order. This is also reproduced as under:

a. *Customer shall pay Sabre the following fees for Sabre's provision of access and use of the Functionality and Services described herein:*

i. *Functionality Implementation Fee.* Customer shall pay Sabre, upon execution of this Work Order, an implementation fee of USD \$40,000.

ii. *Functionality Usage Fee.*

For access and use of the System(s) described Appendix A of this Work Order. Customer will pay Sabre a monthly fee equal to (i) US\$34,000 per month upon the Commencement Date and continuing for the first twelve (12) months from that date (the "First Year System Usage Fee"); and (ii) US\$0.04 per Passenger Boarded during such month from the second year onwards, for all subsequent months for the remainder of the Term (the "System Usage Fee"). Commencement Date means the date on which the Functionality or any part of the Functionality is cutover and made available for Customer's use.

iii. *Travel and Incidentals Fee.* Travel and other out of pocket Expenses are paid as they are incurred and invoiced in accordance with the Agreement.

4.4.1 *The mechanism to provide these services, in plain terms, is that the assessee would provide the login and password to the client through which the client would be able to interact with the assessee. In such interaction, the functionality. In other words, the client would furnish some data or write up after logging in on his login portal. This data would be utilized and analyzed by the assessee on it's off shore location in the US. The assessee company, after application of its Intellectual Property and also its experience in the field of airlines, would generate some solution for the customer or the client. This implies that the data analyzed and outputs of the data collected at the customer portal have worked on through exclusive IP. The advice or the solutions provided are based on principally protected software and the experience and data analyzed by experts, which has been developed by the assessee company. This protected software or portal offers facility to the clients to login, furnish some data and then access reports generated after the data is analyzed. The entire revenues of the assessee i.e. Rs.883378906 have been held by the AO to be in the nature of Royalties.*

4.4.2 *The submissions of the assessee against the consideration being in the nature of Royalty are as under:*

Revenues earned by SDT are not in the nature of Royalty

We submit that for the reasons given below, revenues earned by SDT cannot be construed to be royalties under Section 9(1) (id) of the Act.

Transfer or use of patent, invention, model, design, secret formula or process or trademark or similar property or imparting of any information concerning their working

At the outset, it is submitted that in the present case there is no transfer of any of patent, invention, model, design, secret formula or process or trademark or similar property (collectively referred to as intellectual property rights) as the appellant has only marketed and distributed travel-related products and sendees to its customers i.e.

airlines in India. The appellant has not transferred any intellectual property rights but has only provided standardized products and allied services using its computer systems located in USA.

Reference in this regard may also be drawn to the appellant's master service agreement with Jet Airways, submitted with the Ld. AO vide submissions dated February 12, 2016 wherein it has been clearly specified that no intellectual property rights of SDT shall be transferred to Jet Airways (copy of agreement with Jet Airways is enclosed as Item IV of the Paperbook).

It is further submitted that sale of the Sabre Airline Solutions products and rendering of aforesaid services by SDT shall not constitute grant or transfer or use of any of the aforesaid intellectual property rights in view of the following:

Invention, Patent, model, design or secret formula

It is further submitted that if any patents exist which may have been registered by SDT, SDT does not give its Indian customers the right to use such patents and SDT only uses such patents, if they exist, to provide products and services to its Indian customers.

Further, Black's Law Dictionary has defined a "model" as a "preliminary pattern or representation of something to be made or something already made. A facsimile of something invented, made on a reduced scale, in compliance with patent laws. A replication of something made to scale style or design of product or item. Only when a payment is made towards use of such model or design, it could give rise to royalty."

It can be observed that a model refers more to a tangible product, which has been developed for industrial purposes. The same analogy applies to design as well.

In the present case, as specified above, SDT is only involved in rendition of standardized trawl related products and services and there is no transfer of any 'tangible product'. Accordingly, consideration received by SDT from its Indian customers cannot be said to be for use of a design or model

Process

It is submitted that no process has been used by customers of the appellant in India. The automated process taking place in SDT's servers can at most be said to be used

by SDT itself while its customers in India are only in receipt of a standard facility/ end product in the form of data.

4.4.3 In this regard, the assessee submitted the following judgments which are stated to be in his favor on the issue of what constitutes royalty. Each of the judgments is distinguished from the assessee's case, on the basis of the nature of business of the assessee and how it operates.

- In Asia Satellite Telecommunication (332 ITR 340), the Delhi High Court laid down the principle that payment was not for the use of any process or equipment, since control over the process or equipment was with Asia Satellite Telecommunications and not with the Customers/Argument was addressed on the meaning which is assigned to the term "royalty" occurring in sub-clause (vi) of Explanation 2. The learned counsel for the appellant had argued that the doctrine of noscitur a sociis would apply and the process should be treated as item of intellectual property. On this it was argued that the process employed in the transponder of a satellite, i.e., changing of frequency and amplifying the signal, is not at all an item of intellectual property. Though there appears to be some force in this argument, it is not necessary to answer it conclusively. The fact remains that there is no use of 'process' by the TV channels."*

The above ruling of Asia Satellite Telecommunication (332 ITR 340) in fact clearly states that the process of conversion of frequencies is not an item of intellectual property. The assessee's present case is totally different and distinguishable on the ground that the client is basically using services provided by the assessee which are based on the data furnished by the client. There is no concept of a simplicitor use of electronic equipment such as a transponder or a transmitting channel for which a payment is required to be made by the client to the service provider. In the assessee's case the data transmitted to the assessee by the client is analyzed and a solution provided.

Therefore, this decision is not applicable to the assessee's case. Further the High Court has held that the process applied i.e. changing of frequency and amplifying the signal, is not at all an item of intellectual property; thereby implying that if the process involves an intellectual property, then the consideration would qualify as royalty. The assessee further submitted the following decisions which were also primarily of the same format as the decision discussed above.

- In Pan Anxsat International Systems Inc. (9 SOT 100), of the Hon'ble Delhi Income-tax Appellate Tribunal ('ITAT') held that the service fee received from non-resident television channels for use of its transponder to transmit signals to Indian viewers is neither Royalty nor Fees for included services, as no secret formula or process was involved therein*
- Skycell Communications Limited (251 ITR 53), the Hon'ble Madras High Court held that when a person subscribes to a cellular telephone service for communicating with others, he does not receive a technical service.*
- In ISRO Satellite Centre (220 CTR 13), the Authority of Advance Rulings ('AAR') held that the transponder capacity at a particular frequency is received by ISRO Satellite Center at a ground station set up and operated by it. The ruling therefore held that payment for lease of the navigation transponder would not constitute royalty.*
- DIT v. Shin Satellite Public Co. (ITA 500/2012) and DIT v. New Skies Satellite B.V. (ITA 473/2012), the Hon'ble ITAT has held that while providing transmission services to customers, payment from the customers cannot be termed as Royalty for the use of a process or equipment under the respective double taxation avoidance agreement.*
- In Bharti Airtel Limited (ITA 3593 to 3596 Del/2012), the Hon'ble Delhi ITAT held that payment of Inter-connect Usage Charges by Bharti Airtel to Foreign Telecom Operators ('FTO') in connection with its telecom service business does not*

constitute FTS or royalty (including process royalty under Section 9(l)(vi)/(vii) of the Act.

- In ADDIT v. Taj TV Ltd. the Hon'ble Mumbai ITAT held that transponder charges and uplinking charges paid to a USA company for providing transponder facility (for telecasting its channel in various countries including India) is not taxable as royalty under India-US Double Taxation Avoidance Agreement ('tax treaty').*
- In the case of Atos Information Technology HK Ltd. (ITA Nos. 237- 240/MUM/2016), the Hon'ble ITAT held that the payments received by the assessee on account of rendering data processing services, using servers located outside India does not qualify either as 'Royalty' or 'FTS'.*

4.4.4 All the above decisions are not even remotely linked to the assessee's business per se. It is seen that the assessee provides a specialized login portal to its clients which are the Airlines and these clients use the portal for taking business decisions. The advice for such business decisions is provided by the assessee through the use of its experience, data base and other intellectual properties which are located at its Head Office in the USA. Comparison to a simplicitor rent payment or lease charges for use of equipment such as a transponder is out of place and incorrect.

4.4.5 To understand the business of the assessee, the public website of the assessee also provided some inputs. The business activities are to provide functionalities to the client airlines. The Appendix A which states the functionality is partly reproduced here under. Only a part of the Appendix is reproduced to highlight the activities and what is actually being delivered by the assessee to its clients. The activity of product merchandising is studied and then analyzed:

Appendix. A: Functionality Description

Product Merchandising is an end to end solution allowing for the distribution, pricing, reservations and fulfillment via Electronic Miscellaneous Documents (EMD-A) of ancillary product and services.

The system integrates industry standards such as ATPCO Optional Services and EMD fulfillment together with, pricing and reporting tools, to create, sell, deliver and account for a variety of new ancillary products and services.

Ancillary Services - provides the capability of generating non air revenue via add-on or ancillary sales. Includes support of ATPCO Optional Services (OC) or Merchandising

Manager filings for display and pricing of ancillaries and integrating them into the reservation/ check-in workflow in a way that an agent can see what services are offered, understand what they represent, and is able to fulfill the ancillary to the passenger. Similarly in the web workflow the consumer of the airline website will be able to see what services are offered, purchase in-path with the (light or purchase/ modify post booking and fulfill the ancillary.

- *ATPCO Optional Services (OC) - Support for industry standard data filing structures related to ancillary or optional service fees filed by airlines via ATPCO. Supporting the industry standard provides consistent filing formats for airlines and normalizes the services being offered as well as reduces manual updates. Supporting these new filing structures helps airlines authorize the sale of optional products and services using a standardized distribution process.*
- *Merchandising Manager - an online GUI based application that allows the Customer to define Ancillary fees and other optional services items. Ancillaries filed through Merchandising Manager can be displayed directly alongside Ancillaries filed through ATPCO, and sold/fill filled through the same EMD process in the airline's direct channel*

The Ancillary Services solution currently supports the following flight related ancillary offerings;

- *Ancillary Seats (i.e. the capability to charge for pre-reserving a specific seat). This requires Pre-reserved Seats (PRS).*
- *Lounge Access*
- *In-flight Entertainment*
- *Meals/Beverages.*
- *Pet Transportation (e.g. Pet in cabin, Pet in Hold, etc.)*
- *Unaccompanied Travel*
- *Medical Services (e.g. Medical assistance, oxygen, stretcher, wheelchair, etc.)*
- *Ground Transportation*
- *Pay for baggage (e.g. Pre-sale of baggage, pay for excess baggage, pay for oversized baggage)*

From the above it is seen that Product Merchandising has been referred to in the Appendix A which states the functionality to be enabled for the client M/s Jet Airways in the Master Agreement. An extract from the website (Sabre Air Solutions) of the assessee related to one of the primary services provided by the assessee which is of "Product Merchandising" is given hereunder: -

Product Merchandising the Comprehensive Solution

More than just selling additional products and services, product merchandising is a business strategy that touches all phases of the customer experience.

We provide an end-to-end product merchandising solution that aligns with your needs. Create, sell, deliver and account for all products and services that increase revenue using our solution.

Your team will be empowered to offer customers the right product and services at the right price and the right time while being assured of complying with industry standards and regulations when using our solution.

Our product merchandising solution will enable you to:

Increase Revenue

- *Provides opportunity to generate incremental revenue through the sale of ancillary products and services*

- *Provides connection to the largest global travel marketplace with access to more than 55,000 agency locations, 3,000 corporations and 250,000 points of sale in 113 countries*

Deliver a Unique Customer Experience

- *Allows an airline to differentiate, brand, market and merchandise its products and services within its direct channels while optionally supporting indirect channels*

- *Enables the delivery of a consistent customer experience — across offline and online channels*

Reduce Costs

- *By utilizing ATPCo's "Optional Services", ancillaries may be distributed through multiple channels in the same way as fares, and modifications can be made to respond to market opportunities*

The replies and arguments of the assessee are considered with the above business model being projected and the services delivered by the assessee.

4.4.6 For making out a case that revenues are not royalty, the assessee further argues on the basis of the definition of process and refers to the explanation 6 in arriving at the interpretation of the term. At the outset, it is seen that the explanation is related to transmission of signals. The assessee is again trying to digress and divert attention from the actual issue at hand. The consideration and fees received by the assessee is not for transmission of signals or transmission of information. The consideration is for the value of the advice which is transmitted in the form of information to the client. This advice, it is repeated, is based on intellectual property owned by the assessee. The reference to explanation 6 is therefore, uncalled for. Notwithstanding this, it is mentioned in para 4.4.2 above, that if the process uses intellectual property, then the consideration for the same may qualify as Royalty. The AO has nowhere held that the SDT i.e. the assessee is providing a data link or lease line to its customers for the consideration paid to SDT. The arguments of the

assessee to consider the payments as payments for use of equipment are therefore, incorrect.

4.4.7 The assessee further submits the interpretation of the term 'Use or right' to use any industrial, commercial or scientific equipment. The submission of the assessee quotes the case of AAR in Dell International Services India (P) Ltd. In Re (2008) [305 ITR 37(AAR)]. The relevant paragraphs of that judgment are reproduced below -

13.1 the expression 'use' occurring in the relevant provision does not simply mean taking advantage of something or utilizing a facility provided by another through its own network. What is contemplated by the word 'use' in clause (iva) is that the customer comes face to face with the equipment, operates it or controls its functioning in some manner, but, if it does nothing to or with the equipment (in this case, it is circuit, according to the revenue) and does not exercise any possessory rights in relation thereto, it only makes use of the facility created by the service provider who is the owner of entire network and related equipment. There is no scope to invoke clause (iv.a) in such a case because the element of service predominates".

The aforesaid decision relates to a case where there is passive use of a facility created by a network operator and the equipment put in place by such network operator is used by the client as such. This is not the case of the assessee. Again, the use by the client is not of any equipment and the payment made to the assessee is not for use of equipment. The payment is for advice rendered through an electronic platform. It is incorrect to compare it to a passive use as decided in the case of Dell by the AAR. However, even here the concept of interactive use where "the customer comes face to face with the equipment, operates it or controls its functioning in some manner" , has been held to qualify under the meaning of Mse' under the clause of Royalty. On an electronic platform, a unique login which enables upload of data is certainly an interactive use where the outputs of the intellectual property equipment are controlled by the inputs of the client.

4.4.9 The assessee has further compared to the consideration paid for web hosting services and quoted the case of Sawis Communication

Corporation (ITA 7340/2012), The Hon'ble Mumbai ITAT and the case of ITO vs People Interactive (I) P. Limited (ITA No.2179-2182/2012). The aforesaid cases and citation quoted clearly indicate that the person making payment did not have any independent right to use the equipment. Here also the focus is payment for use of equipment. In the assessee's case, the payments received are for providing the client a login portal with a distinct password, thereby facilitating a unique access for the client. Such access results in delivery of expert advice and solutions to the client. The usage of the portal though and the payment thereof is not for simply using any equipment. It is for receiving consultancy in decision making in the Airline Sector. There is no comparison to the activity of web hosting which is basically a different service altogether. In web hosting only a specific server space is allocated to the client for which rentals are paid. There is no concept of rendering any advice. Moreover the above cases have been decided on the basis of interpretations of the Indo-US Tax Treaty not the domestic law. The treaty benefit is not available to the assessee.

4.4.10 Further, the assessee quoted the case of Qualcomm India Private Limited v. ADIT (ITA No. 1664 to 16677 2011/Hyd), where the Hon'ble Hyderabad ITAT ruled that payment made by an Indian company to Verizon USA for providing internet and bandwidth services and also for providing customer premises equipment ('CPE'), does not amount to royalty.The Hon'ble ITAT also observed that CPE is not personalized/sophisticated equipment for specific and exclusive use of the assessee. The aforesaid citation of Qualcomm is in fact going against the assessee. The Hon'ble ITAT has clearly stated that the CPE is not personalized/sophisticated equipment for specific and exclusive use of the assessee. A simple deduction from this finding of the ITAT is that, if the assessee is provided a personalized and specific and exclusive use of a sophisticated property, the payment for the same can be said to be in the nature of royalty under the Act. The assessee is clearly provided with an exclusive use from an electronic portal and this use is of an intellectual property. Both indicators of exclusive use and intellectual property make the payments received to be in the nature of royalty. The assessee further submitted:

It is submitted that SDT has only provided standardized product and services which did not impart any technical know-how related to intellectual property rights or equipment to its customers in India. Hence, provision of services by SDT to its customers does not qualify as imparting any information concerning intellectual property rights or industrial, commercial or scientific equipment.

Further, it is also relevant to note here that Explanation 5 to Section 9(l)(vi) of the Act would not get attracted to the present case as it covers consideration received in respect of any right, property or information. In the present case, there is no right or property which is granted by SDT to its customers in India. Further, as discussed above, the word information would allude to know-how and that in the present case there is no know-how which is being transferred to customers in India.

4.4.11 The assessee's argument that SDT has only provided only standardized product to the clients and therefore, no technical knowhow is imparted to its customers, is not on a sound footing. The assessee provides a data entry portal at the login platform. This data collected is analyzed by the assessee and a decision and advice is passed on to the client. If this does not constitute information based on intellectual property, then it cannot have any other meaning. It is not a question of transferring of property or right therein. The issue is that the client has been authorized an access to an intellectual property and such access results in delivery of consultancy advice to the client. Such services would necessarily qualify under the definition of royalty referred to in Section 9(l)(vi) of the Income Tax Act. These will also fall under the head 'Fee for technical services' which is discussed here under.

4.4.12 The assessee has further given detailed arguments that the consideration for sale of software or computer program does not fall in the definition of Royalty under the section 9(l)(vi) of the Act. A number of judgments have also been given in support of the arguments of the assessee. The AO has given detailed reasons for his decision in the assessment order. The same are not reproduced as the business of the assessee is not to sell software. The business of the assessee is providing advice on decisions to be taken in the

airline industry. An electronic platform has been made to enable the interaction of the assessee and his clients. The platform also enables passage of advice to the client. It would be childish to assume that the consideration being paid is for the provision of computer software. The consideration is nothing other than Royalty and this has been further elaborated later in this order.

4.5.1 The assessee also submitted that the consideration for services rendered does not fall in the ambit of fee for technical services as provided in section 9(1)(vii) of the Income-tax Act. Though royalty being a more specific clause, and as the services being rendered by the assessee, as discussed above clearly fall in the ambit of Royalty, there is no requirement to separately deal with this argument. However, the reasoning given by the assessee is nevertheless controverted hereunder.

4.5.2 The assessee has stated that FTS means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient chargeable under the head Salaries. The assessee has picked up the definition of Consultancy Services from Black's law dictionary as "The act of asking the advice or opinion of someone (such as lawyer)" or Webster's Encyclopedia states that to consult is to "seek from a presumably qualified personal or an impersonal source advice, opinion, etc." Though the assessee claims that has not provided any advice or opinion to its customers, the statement is without any basis. The assessee is certainly providing solutions to aid decisions to airline clients. The name of the assessee is itself, Sabre Decision Technologies which reflects the business and the website is Sabreairsolutions. If solutions which aid decisions do not constitute advice, then nothing can. The payments received by the assessee are therefore, for services absolutely of the nature of consultancy. The mode of delivery of services which is an electronic platform in this case, or the basis of processing the data which results in the information to be delivered, can in no way, change the substance of the information which is in the nature of advice. Therefore, the services also can be categorized as consultancy

services and the consideration thereof fall within the meaning of fee for technical services.

4.5.3 Assessee also quoted the case of CIT v Bharti Cellular Limited (175 Taxman 573), the Hon'ble Delhi Court to make out a case that the receipts were not fee for technical services. Therein it was held

The facility provided, by MTNL/other companies for interconnection/port access is one which is provided automatically by machines. It is independently provided by the use of technology and that too, sophisticated technology but that does not mean that MTNL/other companies which provide such facilities are rendering any technical services as contemplated in the Explanation 2 to Section 9(1)(vii). This is so because the expression 'technical services' takes colour from the expression 'managerial services and consultancy services' which necessarily involves a human element or, what is now a days fashionably called, human 'interface'. In the instant case, the sendees rendered qua interconnection/port access did not involve any human interface and, therefore, the same could not be regarded as technical services as contemplated under said Section."

- In the case of M/s. Kotak Securities Ltd. (Civil Appeal No. 3141 of 2016), the Hon'ble Supreme Court reversed the decision of the Hon'ble High Court and held that services which do not satisfy test of catering to specialized, exclusive and individual requirement of the user would be merely in the nature of a facility offered and consequently, would not fall within Explanation 2 to Section 9(1)(vii) of the Act.*

The aforesaid citations are also against the assessee as the Hon'ble Supreme Court held that services which do not satisfy test of catering to specialized, exclusive and individual requirement of the user would be merely in the nature of a facility offered and consequently, would not fall within Explanation 2 to Section 9(1)(vii) of the Act. In the assessee's case, the services or the advice rendered is specialized, exclusive and based on the individual requirement of the user and also has a human input or analysis. So these clearly fall within explanation 2 of Sec. 9(1)(vii). Therefore, they can also be classified as technical services and the consideration

received for these services fall under the head 'Fee for technical services'.

4.5.4 The assessee also referred to the case of Escotel Mobile and Hutchison Essar Telecom, the Hon'ble Delhi High Court where it was held

"...It is obvious that the service of consultancy also necessarily entails human intervention:. Consequently, applying the rule of noscitur a sociis, the word — "technical" as appearing in Explanation 2 to Section 9 (1) (vii) would also have to be construed as involving a human element. In the facts of the present appeals, the services rendered qua interconnection/Port access do not involve any human interface and, therefore, the same cannot be regarded as —technical services ... as contemplated under Section 194J of the said Act."

The finding of the Delhi HC in the aforesaid case cannot be interpreted to say that where services are delivered through an electronic platform, there is no human interface. The database and intellectual property, on which the solutions provided to the clients are based, cannot be created by a machine. In the assessee's case, specialized sequences based on experience, data and IP rights have been created to provide solutions. These specialized sequences and IP rights necessarily require a human background. The client may not interact with a human being while logging in to an electronic portal but the advice and consultancy received by him on the electronic platform is certainly a result of human effort. That being a sine qua non of classification in the aforesaid citation would certainly make the citation against the assessee. The other cases quoted by the assessee are also based on the same logic of human intervention. On this account, the consideration received by the assessee is also classified as FTS.

4.6 Going further from the above discussion on Ground No. 3, it is required to be seen as to what is the nature of income of the assessee for the purpose of taxation. It has been held in a number of judgments that where income is of a specific nature, it would be assessed under the specific provisions and it would not be chargeable to tax under the general provisions. In the present case, the assessee has offered business income to tax arising through a

business connection in India. The AO in his order has made out the case for charging the income to tax as royalty. The AO is principally relied on the case of Cargo Communication Network Pvt. Ltd. decided by the Authority for Advanced Ruling in Application No.688/2006. In the said case, however the liaison office was setup for the purpose of acting as a connection channel between the head office and parties located in India. The LO also provided technical support in the nature of training to the clients, personnel and provide day to day support. In this context, after analyzing the activities of the aforesaid entity the AAR held as under:

The applicant is engaged in the business of providing access to an Internet based Air Cargo Portal known as Ezycargo at Singapore. An agent who books cargo through various airlines can subscribe for the portal - Ezycargo - which enables him to access the data bank of the airlines like flight schedules, availability of cargo space etc. The portal enables an agent to check the connect flight details to the desired place and enables him to arrive at the economics of transporting the cargo to the desired destination

After carefully going through the above provisions we find that meaning of the term 'Royalty' as used in Explanation (2) to clause (vi) of sub-section (1) of section 9, is at par with the term 'Royalties' as used in article 12 (3)(b) of the DTAA. The term 'Fees for technical services' as used in Explanation (2) of clause (vii) of sub-section (1) of section 9, is analogous to the term 'Fees for technical services' as used in article 12 (4)(a) of the DTAA. In view of this position, the payments being made by the agents/subscribers (residents), to the C.C.N Pvt. Ltd. (a non-resident), are chargeable to tax in India, under article 12 of the DTAA as also under section 9 of the Act. In as much as we have concluded that the payments made by the subscribers to the applicant are in the nature of "Royalties and fees for technical services" and taxable under article 12 of the DTAA, the said payments cannot, therefore, be treated as business income.

4.6.2 In the above case the payments made for the use of assessee cargo portal by the Indian clients was held to be in the nature of royalties. Secondly, the payments for training etc. were held to be in the nature of fee for technical services as these were

ancillary and subsidiary to the application and enjoyment of the use of scientific equipment for commercial purposes.

From the above discussions in Para 4.1 to Para 4.5, it is seen that

- The assessee has a business connection but no permanent establishment*
- The income or receipts can be classified as royalty*
- The receipts can also be classified as fee for technical service.*

In such a case where the income can fall into a general class i.e. 'business income' and also a specific class or sub class the taxability would be of the most specific class in which the income falls. The taxability of the assessee's income therefore has to be as royalty and not business income. This is further supported by the following decision of the Gujarat High Court in Meteor Satellite Ltd. Vs. Income-tax Officer 121 ITR 311

12. One of the contentions urged by Mr. Desai was on the question of interpretation of s. 9(1), clause (vi) and he contended that even if the proviso to clause (vi) of s. 9(1) applied, the only thing that the provision would help the petitioner in doing would be to take this particular income by way of royalty out of the provisions of clause (vi) but that would still leave the matter open to be brought under clause (i) or clause (iii) of s. 9(1). In our opinion, this contention must fail. Clause (vi) of s. 9(1) deals with a specific type of income, namely, income by way of royalty, whereas clause (i) of s. 9(1) is a more general provision, which deals with all incomes accruing or arising, whether directly or indirectly, through or from, any business connection in India. Income by way of royalty is a species or one of the categories of a larger class mentioned in clause (i) of s. 9(1) and, hence, the specific instance having been provided by clause (vi), once we come across the question of royalty, we have only to look at that clause (vi) and not to the more general provision of clause (i) of s. 9(1). Similarly, income by way of fees for technical assistance, which is covered by clause (vii), is a more general category as compared to the royalty which is referred to in clause (vi), particularly in the light of the definition of "royalty" in Explan. 2 to

clause (vi) of s. 9(1). Again, the same principle of particular excluding the general has to be applied.

Therefore as the payments received by the assessee are in the nature of royalty, these and are mandatorily required to be assessed under the clause (vi) of section 9 relating to royalty.

5. The taxability of the income of the assessee is now discussed in a consolidated manner, integrating the aforesaid arguments. In the present case as discussed, while dealing with the specific judgments above, the assessee company is offering specific solutions on a day to day basis to the airlines. The mechanism for offering these solutions is through functionality which has been mentioned clearly in the Work Order with one of the clients i.e. M/s Jet Airways. The extract of the functionality is already given above in para 4.4.5 of the order.

5.2 The fees being charged for such functionality is also given in Para 4 of the Work Order. This is also reproduced again as under:

4. Fees

a. Customer shall pay Sabre the following fees for Sabre's provision of access and use of the Functionality and Services described herein:

i. Functionality Implementation Fee. Customer shall pay Sabre, upon execution of this Work Order, an implementation fee of USD \$40,000.

ii. Functionality Usage Fee.

For access and use of the System(s) described Appendix A of this Work Order. Customer will pay Sabre a monthly fee equal to (i) US\$34,000 per month upon the Commencement Date and continuing for the first twelve (12) months from that date (the "First Year System Usage Fee"); and (ii) US\$0.04 per Passenger Boarded during such month from the second year onwards, for all subsequent months for the remainder of the Term (the "System Usage Fee"). Commencement Date means the date on which the Functionality or any part of the Functionality is cutover and made available for Customer's use.

iii. Travel and Incidentals Fee. Travel and other out of pocket Expenses are paid as they are incurred and invoiced in accordance-with the Agreement.

5.3 The mechanism is listed out again that the assessee would provide the login and password to the client, through which the client would be able to interact with the assessee. In such interaction, the client would be able to avail to the specific services which are offered in the functionality. In other words, the client would furnish some data or write up after logging in on his login portal. This data would be utilized and analyzed by the assessee on it's off shore location in the US. The assessee company after application of its Intellectual Property and expert advice would generate some solution for the customer or the client. It has been clearly mentioned in the Master Agreement that the data analyzed and outputs of the data collected at the customer portal have been worked on through exclusive IP. The advice or the solutions provided are based on principally protected software and the experience and data analyzed by experts, which has been developed by the assessee company. This protected software offers facility to the clients to login, furnish some data and then access reports generated on the data. Now it is important to see the definition of Royalty under the Act. Again it is reiterated that the assessee does not have a TRC of the US and therefore the taxability is to be determined only in accordance with the domestic tax law. The definition 'royalty' under section 9 of the Income-tax Act is as under:

Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—

- (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;*
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;*

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;]

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films

5.4 As seen above the nature of services rendered by the assessee qualify under three clauses of the definition of royalty: -

(ii) the imparting of any information concerning the use of, a process

(iii) the use of any process;

(iv) the imparting of any information concerning commercial knowledge, experience or skill ;

Sub-clause (iii) clearly mentions that royalty means consideration for the use of any process. Sub clause (ii) refers to the imparting of any information concerning the use of a process and the sub-clause (iv) is also squarely applicable as it covers imparting of any information concerning commercial knowledge. Process in the context of the assessee has already been discussed above. It is the series of steps involved in creation of an electronic platform, followed by input of data by the client and this data is analyzed and an output advice generated. In the present case, the source code of the process developed by the assessee is the basis of supplied information to the clients. It is actually a set of steps or a combination of processes which are followed for the analysis of data. The consideration being paid by the client is mentioned above is both for

- *Execution and implementation of the software on the client's end.*
- *Per month charges payable by the client to the parent company, and*
- *Payment also made on a passenger based usage fee*

The payment being made is prima facie for the purpose of specific services being rendered to the client. These services take the shape of royalty since the consideration for these services is for the use of a process. It is also noteworthy that this process [a dedicated software] is actually Intellectual Property of the client. On both accounts, the use of such process or property is in the nature of royalty. The assessee in his submission has tried explaining that the consideration received is for use of a standardized product. The detailed submission by the assessee has already been discussed on various limbs of the definition of royalty. A number of case laws have been also quoted by the assessee to be in its favor. It is however seen that almost all the judgments are distinguishable on facts which have been discussed above. The assessee is not providing standardized services. In its submission dated 24.7.2017 it is submitted that SDT is responsible for configuration of its services according to customer specifications. The nature of services is dependent on the client inputs.

5.5 In the present case, the basic structure of the business activity of the assessee is that the portal has been provided to the client. The client enters specific data and seeks a solution from the assessee. The assessee on the basis of its own knowledge base and developed Intellectual Property provides a solution to the client. The client accesses this solution through the login portal available and uses it. This use of the solution is wholly for commercial purposes in the client's case. So much so, even specific passenger based payment is also being made to the assessee company by the client airlines. Therefore the services being rendered are in the nature of royalty in the assessee's case. The principal reliance of the assessee on DIT VS Nokia Networks states that the purpose of payment or consideration should be for obtaining of copyrights of literary work being on software is misplaced. The assessee as explained above is not

receiving consideration for supply of software and therefore the case is distinguished. Here the consideration is for solutions. Further the assessee quotes the Metapath Software which states that commercial exploitation of the acquired right to use is the underlying necessity to qualify as royalty. Again the judgment is in the context of supply of computer software which is not the assessee's case. Therefore the payment received by the assessee for offering solutions on a login platform by using the IP protected software at an offshore location as in the nature of royalty covered by Explanation 2 u/s 9(l)(vi).

6.1 Once it has been held that the payment is in the nature of royalty or fee for technical services, the taxability of the same is required to be examined. It has already been decided that the assessee does not have a PE in India. The provisions of section 44DA use the definition of permanent establishment as mentioned in section 92F. The definition includes a fixed place PE which the assessee does not have. As a result, the provisions of Section 44D\$. are not applicable to the assessee.

6.2 In the absence of availability of Sec.44DA, the royalty cannot be taxed on a net basis. This implies that there cannot be any allowance for any expenses as provided in section 44AD. Therefore the only mechanism available for taxation of the revenue raised from the Indian clients is on a gross basis.

The taxability of FTS or Royalty being at a lower rate of 10% is on the gross amount is also the reason that no expenses can be allowed when it is taxed as such.

6.3 Further, since the tax rate has already been reduced, the question of attribution while taxing it on a gross basis does not arise. Or in other words when a tax is charged at the rate of 10% of the gross amount it factors in attribution also since normal rate of tax is 40% to a foreign company. The assessee therefore also does not have any recourse to Rule 10 as the said rule is applicable only to business income referred to in 9(1)(i) and the income from Indian revenues, is chargeable as royalty in the assessee's hands. The rate of taxation on the current income has to be in accordance with sbc,115A of the ITA. The designated rate is at 10%. Therefore the entire revenue received deemed to be income accruing or arising in

India in accordance with the provisions of section 9(1)(vi) of the Act and Rs. 88,33,78,906/- is chargeable to tax at 10%."

21. We have gone through the entire arguments given by the assessee and the judgments quoted by the assessee which have been duly incorporated in the order of the Id. CIT(A). We have also been made aware that the receipts of the assessee for the subsequent A.Ys. 2015-16, 2016,-17, 2017-18 have also been taxed @ 10% which has been the ratio followed by the Id. CIT(A) for the A.Y. 2013-14. In view of the settled position, we hereby affirm the decision of the Id. CIT(A).

22. In the result, the appeal of the revenue is dismissed. For the very same reasons assessee's appeal as well as Cross Objection are dismissed.

Order Pronounced in the Open Court on 03/01/2023.

Sd/-

Sd/-

(Saktijit Dey)
Judicial Member

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 03/01/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR