Teradata Operations Inc., United ... vs Dcit, Circle- 3(1)(1), International ... on 19 March, 2020

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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.7805/Del./2017
Assessment Year: 2014-15
And
ITA No.2580/Del/2018
Assessment Year: 2014-15

M/s. Teradata Operations Inc., 10000, Innovation Drive, Dayton, Ohio-45301, USA PAN :AAECT0303L	Vs.	DCIT, Circle-3(1)(1), International Taxation, New Delhi
(Appellant)		(Respondent)

Appellant by	Shri Salil Kapoor, Adv. Ms. Ananya Kapoor, Adv.
Respondent by	Shri Satpal Gulati, CIT(DR)
Date of hearing	13.01.2020
Date of pronouncement	19.03.2020

ORDER

PER O.P. KANT, AM:

These two appeals have been filed by the assessee, against the final assessment order dated 18/10/2017 passed by the Learned Deputy Commissioner of Income-tax, Circle-3(1)(1), International Taxation, New Delhi, (in short 'the Ld. Assessing Officer') pursuant to the direction of the learned Dispute Resolution Panel ('DRP') for assessment year 2014-15, and rectification order dated 09/02/2018 passed by the Ld. Assessing ITA No. 7805/Del./2017 & 2580/Del/2018 Officer for same Assessment year respectively. Both the appeals being connected with same assessment year, have been heard together and disposed off by way of this consolidated order for convenience. The grounds in ITA No. 7805/Del./2017 are reproduced as under:

> "These grounds of appeal represent the grievances of the Appellant against order dated 18 October 2017 passed by the Learned Deputy Commissioner of Income Tax, Circle - 3(1)(1), New Delhi ("Ld. AO") under Section 143(3) r.w.s. 144C (5) of the Income-tax Act, 1961 (''the Act") in pursuance of the directions issued by Learned Dispute resolution Panel - 1, Delhi ("DRP") dated 28 August 2017.

1. That the assessment order passed under section 143(3) r.w.s.

144C(5) of the Act by the Ld. AO and the additions made by the Ld. AO, are bad in law .unlawful and unjust.

2. That, in view of the facts and circumstances of the case and in law, the Ld. AO has erred in determining the total income of the Appellant at 3,07,34,310/- as against the returned income of Rs. 72,84,230/- which was offered to tax on gross basis as per Article 12 of Double Taxation Avoidance Agreement ("DTAA") by making an addition of Rs. 2,32,98,701/- (assessed income Rs. 3,07,34,310/- Less Rs. 1,51,473/- offered to tax by the Appellant on account of inadvertent mistake in return of income filed) on account of secondment arrangement between the Appellant and its Indian Associated Enterprise ("AE").

That, in view of the facts and circumstances of the case and in law:

2.1 The Ld. AO/ DRP erred in not passing a speaking order/directions.

2.2 The Ld. AO/ DRP erred in holding that the Appellant constitutes a Fixed Place Permanent Establishment ("PE") in India as per Article 5 of the India-USA DTAA.

2.3 The Ld. AO/ DRP erred in holding that the Appellant constitutes a Service PE in India as per Article 5 of the India-USA DTAA.

2.4 Ld. AO/ DRP erred in perceiving, interpreting and evaluating facts and law in deciding/ relied upon cases and in reasoning towards preferred outcome by totally ignoring/ misinterpreting underlying facts as also principles laid down in such decisions and applying the same to facts.

ITA No. 7805/Del./2017 & 2580/Del/2018 2.5 That, Without prejudice, the Ld. AO/ DRP erred in holding and attributing profits to the alleged PE of the Appellant by considering that the total reimbursement for 'relocation expenses' of Rs. 4,10,60,108/- was received by the Appellant only in relation to the secondment arrangement and thus erred in not considering that it also includes reimbursement for other employees of its AE.

2.6 The Ld. AO/ DRP erred in not taking cognizance of the additional evidence providing segregation of the relocation expenses, filed and admitted by the Appellant during the proceedings before the Ld. DRP.

2.7 That, without prejudice, the Ld. AO/ DRP erred in not allowing the cost of seconded persons while attributing profits to the alleged PE in India.

2.8 That, without prejudice, the Ld. AO/ DRP erred in estimating an ad-hoc 25% as profits attributable to the alleged PE. The Ld. AO erred in ignoring the Global Profitability Statements filed on 27 October 2017 as directed by Ld. DRP.

3. That, on the facts and in law, the Ld. AO has erred in initiating penalty under section 274 read with section 271 of the Act.

4. That on the facts and in law, the Ld. AO has erred in charging interest under section 234B of the Act.

5. That on the facts and in law, the Ld. AO has erred in not granting credit of tax deducted at source amounting to Rs. 22,721.

The above grounds of appeal are mutually exclusive and without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case.

2. Grounds raised in ITA No. 2580/Del/2018 are reproduced as under:

> "These grounds of appeal represent the grievances of the Appellant against order dated 9 February 2018 passed by the Learned Deputy Commissioner of Income Tax, Circle - 3(1)(1), New Delhi ("Ld. AO') under section 154 of the Income-tax Act, 1961 ("the Act") ("impugned order") in pursuance of the rectification application dated 11 January 2018 filed ITA No. 7805/Del./2017 & 2580/Del/2018 by the Appellant against the final assessment order dated 18 October 2017 passed under section 143(3) read with section 144C(13) of the Act.
>
> 1. That, the order passed under section 154 read with section 143(3) of the Act by the Ld. AO is illegal, bad in law, without jurisdiction and contrary to the facts of case.
>
> 2. That, in view of the facts and circumstances of the case and in law, the Ld. AO has erred in ignoring the settled position of law that proceedings before the Dispute Resolution Panel ("DRP") are part of the assessment proceedings only and therefore, failed to appreciate that detail of relocation expenses filed before the Ld. DRP was part of the assessment records.
>
> 3. That, in view of the facts and circumstances of the case and in law, the Ld. AO has erred in holding that no segregation of relocation expenses was provided by the Appellant during the assessment proceedings and accordingly, erroneously held that there is no mistake apparent from records in the assessment order.
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> 4. That, in view of the facts and circumstances of the case and in law, the Ld. AO erred in not appreciating that this a mistake apparent on record and hence falls within the purview of Section 154 of the Act.

5. That, without prejudice, in any case, no addition is called for in relocation expenses, hence the same is liable to be deleted.

The above grounds of appeal are mutually exclusive and without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal."

3. Briefly stated facts of the case are that the assessee is a company incorporated in and tax resident of the United States of America (USA) and a part of "Teredata" group. The assessee was engaged in business of providing 'data warehousing services' in the form of their proprietary package called 'Teredata solution'. During the year, the assessee provided certain professional services and also received royalty in respect of software license to its Associated Enterprise (AE) in India, namely, Teradata India ITA No. 7805/Del./2017 & 2580/Del/2018 Pvt. Ltd. (TIPL). For the year under consideration, the assessee filed return of income on 29/11/2014 declaring total income of 72,84,230/-. During the year, the assessee also received certain reimbursement in respect of the employees seconded to TIPL, which, inter alia, include the following:

1. 5,21,34,696/-in respect of the cost of seconded persons included on behalf of M/s Teradata India private limited (TIPL)of in short 'Teradata India'.

2. 4,10,60,108/- in respect of reimbursement of relocation expenses i.e. visa expenses and other travel cost.

3.1 The return of income was selected for scrutiny assessment and information in respect of the seconded person was filed before the Assessing Officer. Summary of the information in respect of the seconded person filed is as under:

Name of person seconded	Qualification of person seconded	Job profile
Malla Reddy	MS Computer Science	Software Development
Sunanda Reddy	MS Electrical Engineering	Software Development
Bashyam Ramesh	MS Computer Science and BE Electrical and Electronic Engineering	Software Development and guiding Teradata India team technically in developing Teradata technology and features
Raj Cherabuddi	MS Computer Science	Software Development and handling Teradata India teams working on wide variety of software development projects

3.2 In the draft assessment order dated 22/12/2016 issued by the learned Assessing Officer under section 144C(1) read with section 143(3) of the Act, he proposed that the arrangement of seconded employees constitute existence of Permanent Establishment (PE) in India and a sum of 2,32,98,701 (25% of 9,31,94,804) was attributed to the said PE. The amount of 9,31,94,804/-was computed as under:

Particulars Amount (in Rs.) Towards payments made for insurance, retirement 5,21,34,696 costs and social security contributions Towards VISA charges and other travel costs paid by 4,10,60,108 company for seconded persons Total 9,31,94,804 3.3 Before the Assessing Officer, the assessee contended that:

i. The employees are seconded to Teradata India under a secondment agreement under which those employees worked as employees of Indian company.

ii. The seconded employees worked under the control and supervision of 'Teradata India'.

iii. The salary of seconded employees was disbursed by the assessee in their home country (USA) for administrative convenience as those seconded employees were situated in the USA and the 'Teradata India' reimbursed to the assessee company for the payments made in the USA on actual cost basis.

3.4 The Assessing Officer, however, did not accept the contention of the assessee. The learned Assessing Officer referred to the decision of the Hon'ble Delhi High Court in the case of ITA No. 7805/Del./2017 & 2580/Del/2018 Centrica India Offshore Private Limited (2014) 44 taxmann.com

300. The Assessing Officer observed that in the instant case, secondment agreement regarding secondment of the employees between the foreign company (i.e. the assessee) and the Indian entity (i.e. Teradata India) and secondment/assignment agreement between the foreign company (i.e. the assessee) and the expatriate, exist but no employment agreement between the expatriate and the Indian company (i.e. Teradata India) existed.

This fact was duly admitted by the assessee before the Assessing Officer. In absence of any such employment agreement between the expatriate and the Teradata India, the Assessing Officer rejected the following arguments of the assessee that:

i. "The Teradata India has right to control and supervise expatriate employees.

ii. The Teradata India has right to take discipline reaction against the expatriate employees.

iii. The Teradata India has an obligation to pay salary to the expatriate employees iv. All the standard terms of employment with Teradata India shall apply to the expatriate employees.

3.5 In para 5.6 of the assessment order, the Assessing Officer has justified that the expatriate employees continue to be the employee of the assessee company due to following reasons:

"i. The employees continue to make social security contributions in USA as employees of assessee company and the salaries are disbursed to their bank accounts in USA by assessee company. This also implies that the seconded employees continue on the payroll of assessee company. This fact has been submitted by the assessee and is also evident from Clause 4.2 of the Secondment agreement which provides that ITA No. 7805/Del./2017 & 2580/Del/2018 amongst other things, Teradata India shall also reimburse assessee for social security contributions mad? ;,n -he USA.

ii. The employees continue to be under assessee's employment and/or have lien on overseas employment with assessee company. Thes e are released only for a short period of time to provide services to Teradata India. This is evident from the relevant clause (objective clauses on first page) of Secondment Agreement which provides that "And Whereas the International Assiqnee shall be released IbrTP their work under the supervision of Teradata Operations and'shall be integrated as employees of Teradata India for a period of Secondment with Teradata India".

iii. Where the expatriate employees continue to be the employees of the assessee company and there is no employer-employee relationship between , it is difficult to accept that these employees work under the control and supervision of the Indian Company. The said claim of the assessee remains completely unsubstantiated also on account of the fact that expatriate continues to enjoy lien with the foreign company and also his account on social benefit continues in the foreign country. If it is not so, no foreign expatriate would like to be seconded.Apparently, therefore, there is control exercised by the foreign company on the seconded employee even if he shown to have been economically working with the Indian Company i.e. Teradata India.

iv. It is not without significance that the agreement is for the "Secondment" of the personnel. That the agreement envisages "Secondment" of the personnel from the home entity to the host entity is by itself indicative of the fact that effectively the expatriate employees were and continue to be the employees of the home entity.The dictionary meaning of the term "Secondment" provides that temporary detachment of a person from their regular organization for temporary assignment elsewhere. This suggests an element of continuity of the relationship between the home entity and the expatriate deputed to render services in India. No employee who has served the employer (i.e. the home entity herein) and has earned valuable rights in the form of seniority,, qualifying service

counting towards pensionary/severance benefits, and other social and economic benefits by virtue of long employment with an employer, would agree to lose those rights by abruptly leaving the employer and enter into fresh employment with a new employer, unless there is a clear understanding that he or she effectively continues to be the employee of the home entity for all practical purposes."

ITA No. 7805/Del./2017 & 2580/Del/2018 3.6 The Assessing Officer also highlighted various terms of assignment extension letter between Mr. Raj Cherabuddi, inter alia, fixed compensation provided subject to certain adjustment by the assessee; expatriate salary was based on home country (USA) policies and practices; terms of employment after end of the assignment will be governed by the policies of the home country; expatriate shall abide and adhere to assessee company's policies and applicable laws regarding code of business conduct and ethics.

3.7 The Assessing Officer observed that the seconded employees were actually the employees of the assessee who had come to India to render services and conduct the home entities business in India.

3.8 In view of the observation, the learned Assessing Officer held that the premises of Teradata India, where the seconded employee were stationed, remained at the disposal of the assessee throughout the duration of the stay of those employees and accordingly, he concluded existence of fixed place PE as under:

> "7. The place made available by Teradata India was used as fixed place by them for the business activities of the home entity. It is settled law that the foreign entity need not be owner of the premises from which the business activity are carried out. The place of business need only be at the disposal of the enterprise and it is not necessary that it should be for the exclusive vie of the enterprise. The premises of Teradata India, where the seconded employees were stationed, remained at the disposal of the assessee through- out the duration of the stay of the transferred employees. Therefore, a Fixed Place PE of the assessee is constituted in India in the form of the premises from which these transferred employees operated."

ITA No. 7805/Del./2017 & 2580/Del/2018 3.9 The Assessing Officer also concluded that the seconded employees rendered services on behalf of the assessee in India, they also constituted the service PE in India in view of the decision of the Hon'ble Supreme Court in the case of Morgan Stanley & Co (supra).

3.10 The Assessing Officer held that the reimbursement in the hands of the assessee is a business income as those payments have been on account of services rendered by the assessee through its employees in India and, therefore, the profit generated on the amount of activities carried out by the employee in India is liable to tax in India as business income of foreign entity under Article 7 of the DTAA read with section 9(1) of the Act. 3.11 As regard the quantification of the income of the PE, the learned Assessing Officer taken the cost of salary and relatable expenses paid by 'Teradata India' in respect of the employees under reference and profit markup on such reimbursement @ 25% (in absence of global profitability data and audited global accounts). The relevant part of the assessment

order is reproduced as under:

> "10.3 The above amounts towards salary and relatable expenses has been directly / indirectly met by / paid by Teradata India in respect of employees working for the assessee company i.e. rendering services in India. The aforesaid amounts results in income to the assessee and shall be considered to be the cost related to employees working in India and therefore relates to the Service PE / Fixed Place PE of assessee company in India.
>
> 11. The determination of income and tax for a foreign company is a function of two factors, namely, profits embedded in the payments the attribution of income/profits to activities carried out through the PE in India. In the present case, the payments are on account of the services rendered in India. It is the understanding that the entire services rendered by the employees have been in India therefore the ITA No. 7805/Del./2017 & 2580/Del/2018 entire income generated from the services rendered by employees shall be attributable to the PE being established. Further, it is prudent to consider that in an independent scenario, no service provider shall be providing services without any profit element or mark-up on cost. For determination of such income/profits, the cost recouped by Teradata India to the assessee for rendition of services amounting to INR 9,31,94,804/- could be taken as the base. In absence of global profitability data and audited global accounts, I have left with no option but to invoke the provisions of rule 10 of IT Rule, 1962 to determine the profit on the reimbursement amount. Keeping in view the nature of services and facts of the case a reasonable profit of 25% is estimated on the entire receipt of Rs. 9,31,94,840/- which would be earned by any service provider in an independent scenario."

3.12 Alternatively, the Assessing Officer also held the revenue received by the assessee by view of reimbursement as fee for included services, placing reliance on the decision of the Hon'ble Delhi High Court in the case of Centrica India offshore private limited (supra).

3.13 The assessee raised objection before the Learned DRP. The Learned DRP agreed with the finding of the Assessing Officer on the issue of Fixed Place PE and service PE, however, on the issue of the attribution of the profit to the PE, issued direction as under:

> "xv. Since it has been held that the A' has PE in India, profits needs to be attributed to such PE. The AO has mentioned that global profit figures of the A' were not available and therefore an attribution of 25% was made by applying Rule 10 of IT Rules. It is observed that even during the proceedings before us, the A' has not submitted the global profit figures or the audited account which could be used for the purpose of reasonable attribution as desired by the A' itself. In view of the same, the AO is directed to once again verify whether the global profitability of the A' is readily available and use the same for attribution of profit. If not, the attribution as per rule 10 is upheld.

> xvi Further, the A' has mentioned that the relocation expenses of Rs.4,10,60,108/- include the expenses both for the seconded employees and the other employees of the AE. The AO is directed to verify if any such segregation has been provided by the A' during ITA No. 7805/Del./2017 & 2580/Del/2018 the assessment proceeding and to exclude the sum which represents reimbursement towards "Relocation Expenses" in relation with the other employees of TIPL while quantifying the profits attributable to the PE of the Assessee in India."

3.14 In the impugned final Assessment order, the Assessing Officer has claimed to have complied the direction of the Learned DRP as under:

> "18.1 The Perusal of assessment record shows that the assessee company has not provided the information in respect of its Global Profitability. The same is not readily available for calculation of profit for attribution to the PE of the assessee in India. In these circumstances, the provision of Rule 10 of IT Rule 1962 to determine the profit on the reimbursement amount are hereby invoked.
>
> 19. During the proceedings before Hon'ble DRP, the assessee has claimed that the relocation expense of Rs. 4,10,60,108/- include the expenses both for the seconded employees and the other employees of the associate enterprise. In Para xvi, the Hon'ble DRP has directed to verify, if any, such segregation has been provided by the assessee during the assessment proceedings and to exclude the sum which represents reimbursement towards relocation expenses in relation with the other employees of TIPL while quantifying the profits attributable to the PE of the assessee in India.
>
> 19.1 The assessment record is perused and it is found that the assessee neither has claimed such segregation nor has filed any such details during assessment proceedings. Hence, the same is not verifiable from the assessment record. In these circumstances, I am left with no option but to apply the provisions of Rule 10 of IT Rule, 1962 and to attribute the profit @ 25% of the profit estimated @ 15% of Gross receipts of Rs. 9,31,94,804/-, as calculated in draft assessment order."

3.15 Aggrieved with the final assessment order, the assessee is before us by way of appeal having ITA No.7805/Del/2017.

4. According to the assessee, in the final assessment order, the Assessing Officer did not follow the direction of the Learned DRP for segregating the relocation expenses of 4,10,60,108/- towards seconded employee and other employees of Teredata India and therefore, it filed rectification application before the ITA No. 7805/Del./2017 & 2580/Del/2018 Assessing Officer, which was rejected by the Learned Assessing Officer. Aggrieved with the rejection of the rectification, the assessee is before us by way of appeal in ITA No. 2580/Del./2018.

Assessment Year: 2014-15

5. First, we take up the appeal bearing ITA No. 7805/Del/2017 for assessment year 2014-15.

6. We have heard rival submission of the parties on the issue in dispute. The learned Counsel of the assessee reiterated the submission made before the lower authorities and submitted that absence only of employment agreement between the Teradata India and expatriate is not determinative of employer- employee relationship and other factors like control and direction to employees are important. He submitted that relevant clauses of the seconded agreement established beyond doubt the fact that seconded persons were working under the employment of Teredata India and had no responsibility towards the assessee. Though the Ld. Counsel objected to the existence of PE of the assessee in India, but could controvert that issue in dispute in the instant case is covered by the decision in the case of Centrica India Offshore Private Limited (supra), and he focused his arguments on no profit attribution. He submitted that no profit element was involved in reimbursement of costs incurred by the assessee in relation to salary and other expenses of seconded employees.

ITA No. 7805/Del./2017 & 2580/Del/2018 6.1 As far as the decision in the case of Centrica India Offshore Private Limited (supra) is concerned, we find that in that case Centrica, UK outsourced some of their back office support functions to third parties vendors in India. The Centrica UK set up 'Centrica India' to act as an interface between the third party vendors in India and the overseas entities. The Centrica India provided services to overseas entities in terms of a service agreement under cost-plus arrangement. The Centrica India, in order to comply with its obligations in the service agreement had asked Centrica UK and its other global affiliate to provide staff with knowledge and experience of various processes and practices. Pursuant to that request, a secondment agreement was entered into between Centrica India and overseas entities, under which some management employees of overseas entities were deputed to Centrica India for short term assignments ranging from three to nineteen months. In above circumstances, the Hon'ble High Court confirmed existence of PE of Centrica UK in India observing as under:

> "34. To determine the existence of a service PE, CIOP argues that the Court must look towards the substance of the employment relationship and not the form. This is correct. In the present case, the seconded employees are to be integrated into CIOP, for the agreed period and are subject to its supervision and control. The rules, regulations, policies and other practices of CIOP for its employees were applicable to these employees too. The seconded employee's duties and functions were dictated by the instructions and directions of the CIOP. He/she had to perform the duties assigned with due diligence in accordance with the applicable laws and regulations, standards and practices and control of CIOP. The overseas entities were not responsible for any errors or omissions of such seconded employees or for their work. CIOP bore all risks in relation to the work of seconded employees, and reaped the benefit from the output. CIOP also bore the cost of monthly remuneration and reimbursement of cost to seconded employees. However, crucially, ITA No. 7805/Del./2017 & 2580/Del/2018 these seconded employees retained their entitlement to participate in the overseas entities retirement and social security plans and other benefits in terms of its applicable policies, and the salary was

properly payable by the overseas entitle, which claimed the money from CIOP. There was no purported employment relationship between CIOP and the secondees. None of the documents, including the attachment to the secondment agreements placed on record (between the secondees and CIOP) reveal that the latter can terminate the secondment arrangement; there is no entitlement or obligation, clearly spelt out, whereby CIOP has to bear the salary cost of these employees. The WP(C) No.6807/2012 Page 40 secondees cannot in fact sue the CIOP for default in payment of their salary- no obligation is spelt out vis-à-vis the Petitioner. All direct costs of such seconded employee's basic salary and other compensation, cost of participation in overseas entities' retirement and social security plans and other benefits in accordance with its applicable policies and other costs were ultimately paid by the overseas entity. Whilst CIOP was given the right to terminate the secondment, (in its agreement with the overseas entities) the services of the secondee vis-à-vis the overseas entities - the original and subsisting employment relationship - could not be terminated. Rather, that employment relationship remained independent, and beyond the control of COIP.

35. The concept of a legal and economic employer, as considered by Vogel (relied upon by CIOP), is when "a local employer wishing to employ foreign labour for one or more periods of less than 183 days recruits through an intermediary established abroad who purports to be the employer and hires the labour out to the employer." In this case, the temporal element of the three-way employment relationship is crucial. The secondees were - originally - employees of the overseas entities. They were not hired by that entity as a false façade, whose productivity is to be ultimately traced to CIOP. Rather, the secondees were regular employees of the overseas entities. There is no dispute with this fact. They have only been seconded or transferred for a limited period of time to another organization, CIOP, in order to utilize their technical expertise in the latter. The secondment agreement between CIOP and the overseas entity, and the agreement WP(C) No.6807/2012 Page 41 between CIOP and the employees, envisages an end to this exception, and a return to the usual state of affairs, when the secondees return to the overseas entities. The employment relationship between the secondee and the overseas organization is at no point terminated, nor is CIOP given any authority to even modify that relationship. The attachment of the secondees to the overseas organization is not fraudulent or even fleeting, but rather, permanent, especially in comparison to CIOP, which is admittedly only their temporary home. Today, CIOP attempts to cast that employment relationship as a ITA No. 7805/Del./2017 & 2580/Del/2018 tenuous link because, for the duration of the secondment, CIOP pays the salary of these. Even here, the salary is ultimately paid through the overseas entity, which is not a mere conduit. Crucially, the social security, emoluments, additional benefits etc. provided by the overseas entity to the secondee, and more generally, its employees, still govern the secondee in its relationship with CIOP. It would be incongruous to wish away the employment relationship, as CIOP seeks to do today, in the face of such strong linkages. Whilst CIOP may have operational control over these persons in terms of

the daily work, and may be responsible (in terms of the agreement) for their failures, these limited and sparse factors cannot displace the larger and established context of employment abroad.

36. In this context, the decision of the Supreme Court in Morgan Stanley (supra) offers support for the Authority s viewpoint, rather than the contrary stance. In that case, the Court considered various forms of PEs, agency, service etc, each of which contemplate a different characteristic and link between the deputed WP(C) No.6807/2012 Page 42 employee/organization and the parent. In the context with which we are presently concerned, the following observations are critical:

"15. As regards the question of deputation, we are of the view that an employee of MSCO when deputed to MSAS does not become an employee of MSAS. A deputationist has a lien on his employment with MSCO. As long as the lien remains with the MSCO the said company retains control over the deputationist's terms and employment. ... It is important to note that where the activities of the multinational enterprise entails it being responsible for the work of deputationists and the employees continue to be on the payroll of "the multinational enterprise or they continue to have their lien on their jobs with the multinational enterprise, a service PE can emerge. ... A deputationist under such circumstances is expected to be experienced in banking and finance. On completion of his tenure he is repatriated to his parent job. He retains his lien when he comes to India. He lends his experience to MSAS in India as an employee of MSCO as he retains his lien and in that sense there is a service PE (MSAS) under Article 5(2)(1). We find no infirmity in the ruling of the ARR on this aspect. In the above situation, MSCO is rendering services through its employees to MSAS. Therefore, the Department is right in its contention that under the above situation there exists a Service PE in India (MSAS). Accordingly, the civil appeal filed by the Department stands partly allowed."

ITA No. 7805/Del./2017 & 2580/Del/2018 In fact, even the OECD Commentary on Article 15 of the Model Convention, on which learned counsel for CIOP has placed great reliance, interestingly notes that "[t]he situation is different if the employee works exclusively for the enterprise in the state of employment and was released for the period in question by the enterprise in his state of residence." This was clearly, and critically, not done in this case.

37. This brings the Court to the next issue, concerning reimbursement and the doctrine of diversion of income by overriding title. This Court notices that a case with almost identical circumstances, in In Re: AT and S India (P) Ltd., MANU/AR/0016/2006, also came up before the AAR. There, an agreement between AT&S India and its parent, AT& Austria was entered into, by which AT&S Austria undertook to assign or cause its subsidiaries to assign its qualified employees to the AT&S India. These individuals were to work for AT&S India and receive compensation substantially similar to what they would have received as employees of AT&S Austria. They were engaged by AT&S India on a full time basis. The question before the AAR was identical to this case:

> "Whether pursuant to the secondment agreement entered into by the applicant with AT&S Austria, the payment to be made by the applicant to AT&S Austria, towards reimbursement of salary cost incurred by AT&S Austria in respect of seconded personnel, would be subject to withholding tax under Section 195 of the IT Act, in view of the facts that (1) the payments are only in the nature of reimbursement of actual expenditure incurred by AT&S Austria. (2) AT&S Austria is not engaged in the business of providing technical services in the ordinary course of its business, (3) AT&S Austria is not charging the applicant any separate fee for the secondment and (4) the seconded personnel work under the direct control and supervision of the applicant?"

In holding that the obligation under Section 195 would be triggered, the AAR held as follows:

> "From the above analysis of both the agreements it is clear that pursuant to the obligation under the FCA, the AT&S Austria has offered the services of technical experts to the applicant on the latter's request and the terms and conditions for providing services of technical experts are contained in the secondment agreement which we have referred to above in great details. Though the term "reimbursement" is used in the agreements, the nature of payments under the secondment agreement has to satisfy the characteristic of reimbursement ITA No. 7805/Del./2017 & 2580/Del/2018 and that the term "reimbursement" in the agreement will not be determinative of nature of payments. The term "reimbursement" is not a technical word or a word of Article In Oxford English Dictionary, to reimburse means--to repay a person who has spent or lost money--and accordingly reimbursement means to make good the amount spent or lost. However, under the secondment agreement the applicant is required to compensate AT&S Austria for all costs directly or indirectly arisen from the secondment of personnel and that the compensation is not limited to salary, bonus, benefits, personal travel, etc. though salary, bonus, etc. and the amounts referred to in para 4.2 of the secondment agreement form part of compensation. The premise of the question that the payments are only in the nature of reimbursement of actual expenditure incurred by AT&S Austria is not tenable for reasons more than one. First it is not supported by any evidence as no material (except the debit notes of salaries of seconded personnel) is placed before us to show what actual expenditure was incurred by AT&S Austria and what is being claimed as reimbursement; secondly, assuming for the sake of argument that the debit notes represent the quantum of compensation as the actual expenditure, it would make no difference as the same is payable to the AT&S Austria under the secondment agreement for services provided by it. It would, therefore, be not only unrealistic but also contrary to the terms of the agreement to treat payments under the said agreement as mere reimbursement of salaries of the seconded employees who are said to be the employees of the applicant.
>
> To show that the real employer of such employees is the applicant and not the AT&S Austria, Mr. Chaitanya invited our attention to various employment agreements

entered into between the applicant and the seconded employees and also the certificate of deduction of tax at source on their global salary. All the employment agreements are similarly worded. We have carefully gone through the employment agreement between the applicant and Mr. Markus Stoinkellner. The duration of the employment is from 1st Sept., 2005 till 30th Aug., 2008. In Article 3 thereof salary of the employee is noted as the remuneration, perquisites and other entitlements as detailed in Appendix-A. However, Appendix-A does not specify any amount. All that it says, is that the salary will be as fixed and agreed between the employee and the company from time to time and that such salary may be paid either in India or outside India but the total salary shall not exceed the salary fixed as above, but no fixed salary is mentioned in the employment agreement. Other perquisites and entitlements are : travel expenses, transport, boarding, lodging; and ITA No. 7805/Del./2017 & 2580/Del/2018 annual leave of 30 days per year; and home leave which the employee will be entitled to once. The applicant shall have to organize an economic class return flight tickets to go on home leave. The employment agreement also provides that the employee will be responsible for meeting all requirements under Indian tax laws including tax compliance and filing of returns and the applicant is authorized to deduct taxes from the compensation and benefits payable."

38. The mere fact that CIOP, and the secondment agreement, phrases the payment made from CIOP to the overseas entity as „reimbursement cannot be determinative. Neither is the fact that the overseas does not charge a mark-up over and above the costs of maintaining the secondee relevant in itself, since the absence to mark- up (subject to an independent transfer pricing exercise) cannot negate the nature of the transaction. It would lead to an absurd conclusion if, WP(C) No.6807/2012 Page 46 all else constant, the fact that no payment is demanded negates accrual of income to the overseas entity. Instead, the various factors concerning the determination of the real employment link continue to operate, and the consequent finding that provision of employees to CIOP was the provision of services to CIOP by the overseas entities triggers the DTAAs. The nomenclature or lesser-than-expected amount charged for such services cannot change the nature of the services. Indeed, once it is established, as in this case, that there was a provision of services, the payment made may indeed be payment for services - which may be deducted in accordance with law - or reimbursement for costs incurred. This, however, cannot be used to claim that the entire amount is in the nature of reimbursement, for which the tax liability is not triggered in the first place. This would mean that in any circumstance where services are provided between related parties, the demand of only as much money as has been spent in providing the service would remove the tax liability altogether. This is clearly an incorrect reasoning that conflates liability to tax with subsequent deductions that may be claimed.

39. So far as the decision in M/s. E-Funds IT Solution, goes, the judgment notes the distinction between stewardship activities of employees and deputationists, which had been highlighted in Morgan Stanley. The Division Bench in E-Funds highlighted that the nature of activity undertaken by the employee is determinative of whether it constitutes a service. In the present case, the overseas entities outsource their back office support functions like debt collections/consumers billings/monthly jobs to third party vendors in WP(C) No.6807/2012 Page 47 India. The seconded

employees in the present case, oversee quality control of the work of such vendors. This work cannot be characterized as mere stewardship. What could have been left to CIOP to do is in fact being done through ITA No. 7805/Del./2017 & 2580/Del/2018 the seconded employees, whose expertise and training lends quality and content to the Indian entity. Therefore, it is held that the real employer of these seconded employees continues to be the overseas entity concerned."

6.2 In the instant case also, the employees of the assessee has been deputed to manage the affairs of the Indian entity and provide technical knowledge. The employees though worked at the premises of the Terdata India but for all practical purposes the remained employees of the assessee company. The employees continued to make their social security contributions in USA and their salaries were also distributed to their bank accounts in USA. In the case of Centrica (supra) there was agreement between the Indian entity and expatriate, but in this case, even there was no such agreement also. In view of the above facts, respectfully following the finding of the Hon'ble High Court, we uphold the finding of the lower authorities on the issue of existence of PE of the assessee in India in terms of the DTAA. The ground No. 2.1 to 2.4 of the appeal accordingly dismissed.

7. Regarding profit attribution, the Learned Counsel has made several arguments/ submissions in support of the Ground Nos. raised from 2.5 to 2.8 of the appeal.

7.1 The first submission which has been made is that relocation expenses of 4,10,60,108/- does not only relate to the secondment arrangement and were also paid for the other employees of the TIPL. The Assessing Officer is of the view that the entire amount was incurred towards VISA charges and other travel cost of seconded employees, which paid by the assessee company and reimbursed to it by the 'Teradata India'. According ITA No. 7805/Del./2017 & 2580/Del/2018 to the assessee, out of the total relocation expenses, expenses of 3,70,77,547/- related to employee other than seconded employees. This issue was raised by the assessee before the Learned DRP and learned DRP directed to verify the claim of the assessee, however, in the final assessment order, the Learned Assessing Officer considered the same amount for cost base on the ground that no such details were provided by the assessee in assessment proceedings. In our opinion, this is issue of the verification and if on verification certain expenses are not found pertaining to the seconded employees, same need to be excluded for taking cost base for profit attribution. Accordingly, we restore this issue to the file of the learned Assessing Officer for deciding after verification of each and every item of expense of 4,10,60,108/- and include only the item of the expenses pertaining to the seconded employees. The ground No. 2.5 and 2.6 of the appeal are accordingly allowed for statistical purposes.

8. The next submission of the assessee is regarding not considering the global profit of the assessee for applying markup on the cost base and adopting an ad-hoc 25% as profit attributable to the PE. The contention of the assessee that Learned DRP specifically directed the Assessing Officer for verifying the global profit of the assessee, however, the learned Assessing Officer did not consider the submission of the assessee. 8.1 We are of the opinion that this is issue of verification by the Assessing Officer accordingly. We restore this issue to the Assessing Officer for deciding after verification of the documents along with audited statements filed by the assessee in support of its claim of the global profit and decide the attribution of profit in ITA No. 7805/Del./2017 & 2580/Del/2018 accordance with Article 7 of the Indian-USA DTAA. The ground No. 2.8 of the

appeal is accordingly allowed for statistical purposes.

9. The next submission of the Learned Counsel is that the salary of Rs. 4,78,63,383/- by the TIPL to seconded employees in India has been accepted as the cost of the business of the TIPL, as hence salary payment made to the seconded employees by the assessee on behalf of the TIPL should also be considered as cost of business of the TIPL and should not be considered for attributing to the alleged PE.

9.1 This contention of the assessee is not acceptable because in the instant case, revenue earned by the PE for providing services to the Indian entity is under consideration for profit attribution and the cost or expenditure incurred by the Indian entity is not an issue in dispute.

9.2 Further, the assessee proposed that salary costs paid to seconded person is to be allowed as per Article 7 of the DTAA while making attribution to the alleged PE in India. The submission of the assessee are reproduced as under:

> "3.1.1 Article 7 of the DTAA governs the taxability of business income of an US resident in India, which provides for deduction of any expenses which are incurred for the business of PE.
>
> 3.1.2 In the instant case this cost is the amount expended towards the salary and other benefit paid to the seconded persons. It is also submitted that as the reimbursements were on a case to cost basis, no profit element would be left and therefore there would be no taxable income in India.
>
> 3.1.3 In the instant case, attribution of profits to the alleged PE in India under the provisions of the DTAA would stand as under:
>
> ITA No. 7805/Del./2017 & 2580/Del/2018 Particulars Amount (INR) Reimbursements received from TIPL for the 5,21,34,696 seconded persons Less: Salary cost paid by the Appellant (as 5,21,34,696 reimbursements are on cost-to-cost basis) Taxable Income NIL 9.3 From the above submission, what we find that the assessee is proposing that out of the reimbursement amount received from 'Teradata India', first the cost base should be deducted and then markup should be charged on the remaining amount, which will be nil in this case. We do not agree with this proposition of the assessee. The assessee has rendered services to the Teradata India through the PE and therefore the income which accrued to the PE is the market value of the services which has been provided by the seconded employees reduced by the cost of the services. The market value of the services to PE can also be deduced from the sale value or revenue fetched by Teradata India on those services reduced by the average profit margin of Teradata India. The Assessing Officer is required to attribute profit to the PE in accordance with Article 7 of the Indo-USA DTAA. The Article 7(2) prescribe that profit attributable to PE may be estimated on a reasonable basis, but the estimate adopted, however, should be in accordance with principle laid down in

Article 7 of the treaty. The deduction of expenses are also to be allowed as per Article 7(3) of the Treaty. The Assessing Officer has considered markup at the rate of 25% on the cost base of the seconded employees in absence of details of global profit of the assessee. In our opinion, this action of the Assessing Officer was ITA No. 7805/Del./2017 & 2580/Del/2018 not totally arbitrary or in violation of rules of estimation, though we have already restored the issue of the estimation of the profit to the file of the Assessing Officer in accordance with Article 7 of the Indian USA DTAA.

9.4 The learned Counsel also made an alternative argument that Teradata India was remunerated at arm's length price under transfer pricing principles and no further attribution to the alleged PE of the assessee is warranted. We also do not agree with this proposition because, nothing is brought on record to show whether the services of the seconded employee has been utilized towards international transactions of the Indian entity or has been utilized in domestic market. Even the services has been utilized by Associated Enterprises and remunerated at arm's length price to 'Teradata India', will not make any impact, as in the instant case the income taxable in the hands of the PE is under consideration and nothing has been brought on record that Arm's Length Price of the service transaction between PE of assessee and Indian Entity has been determined. What is relevant here is that income has to be taxed in the hands of the correct person and in the instant case income from rendering services by the PE has to be taxed in the hands of the PE and remunerating the Teradata India by other AEs at arm's-length price is not relevant. Accordingly, we reject this alternative argument of the assessee.

10. The ground No. 3 of the appeal is premature at this stage and the dismissed as infructuous.

11. The ground No. 4 is consequential and, therefore, accordingly dismissed as infructuous.

ITA No. 7805/Del./2017 & 2580/Del/2018

12. In ground no. 5, the assessee has sought credit of tax deducted at source for amount of 22,721/-. This is issue of verification by the Assessing Officer from the records of the assessee as well as from the record of the Department and therefore, accordingly, we restore this issue to the file of the learned Assessing Officer with the direction to the assessee to produce all the evidences in support before the Assessing Officer for verification and he will then after examination of the documents/evidence and data base of the department, allow the credit of TDS in accordance with law.

13. The assessee has also raised additional ground No. 6 and 7 as under:

"6. That, in view of the facts and circumstances of the case and in law, the learned AO has erred in ignoring the settled position of law that proceedings before the Dispute Resolution Panel ("DRP") are part of the assessment proceedings only and therefore, failed to appreciate that detail of relocation expenses filed before the learned DRP was part of the assessment records.

7. That, without prejudice to other grounds of appeal, the learned AO/DRP erred in ignoring the fact that for the subject secondment arrangement, TIPL was remunerated by the associated enterprises at an arm's length price under transfer pricing principles and accordingly, no further attribution to the alleged PE of the Appelalnt is warranted."

14. Both these grounds have already been adjudicated while dealing with the ground Nos. 2.5 to 2.8 of the appeal and accordingly, we are not required to adjudicate again on these grounds. The grounds are accordingly dismissed.

Assessment year 2014-15 ITA No. 7805/Del./2017 & 2580/Del/2018

15. In Appeal No. 2580/Del/2018, the assessee is aggrieved with rejection of the rectification application of the assessee. In the rectification application the assessee requested for complying with the direction of the learned DRP on the issue of relocation expenses. As this issue has already been restored by us to the file of the Assessing Officer while dealing with the grounds in ITA No. 7805/Del/2017 and, therefore, the grounds raised in ITA No. 2580/Del./2018 are rendered academic only and, therefore, we are not adjudicating upon the same. The appeal is accordingly dismissed as infructuous.

15. In the result, the appeal bearing ITA No. 7805/Del./2017 is allowed partly for statistical purposes and the appeal bearing ITA No.2580/Del/2018 is dismissed.

Order pronounced in the open court on 19th March, 2020.

Sd/-	Sd/-
(AMIT SHUKLA)	(O.P. KANT)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 19th March, 2020.
RK/-(D.T.D.S.)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi