IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI [THROUGH VIDEO CONFERENCE]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI K. N CHARY, JUDICIAL MEMBER

ITA No. 6499/DEL/2012 [A.Y 2006-07]
ITA No. 6500/DEL/2012 [A.Y 2007-08]
ITA No. 1480/DEL/2012 [A.Y 2008-09]
ITA No. 217/DEL/2014 [A.Y 2009-10]
ITA No. 218/DEL/2014 [A.Y 2010-11]

The Dy D.I.T Circle 2(2) New Delhi	Vs.	M/s Travelport L.P. USA C/o Price Water House Coopers Pvt Ltd Sucheta Bhawan, Gate No. 2, 1st Floor 11-A, Vishnu Digamber Marg, New Delhi
		PAN: AAAFW 8525 C
[Appellant]		[Respondent]

Assessee by : Shri Kanchan Kaushal, FCA,
ShriRishab Malhotra, Adv

Revenue by : Shri Satpal Gulati, CIT-DR

Date of Hearing : 02.11.2020

Date of Pronouncement : 09.11.2020

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The above captioned appeals are by the Revenue for A.Ys 2006-07to 2010-11. This bunch of appeals were remitted back by the Hon'ble High Court of Delhi directing the Tribunal for recording specific findings on the issue of attribution of 15% Revenue to the PE in India.

2. Facts on which the Hon'ble High Court of Delhi remitted the matter back to the Tribunal are as under:

3. The assessee is a limited partnership in the State of Delaware, USA and is a tax resident of USA. The assessee is engaged in the business of providing information, reservations, transaction processing and related services for airlines, travel agencies and other travel-related entities. It owns and operates a Global Distribution System located outside India, referred to as Computerized Reservation System (CRS) and provides subscribers with access to and use of this CRS. The assessee earns its revenue through participating in carrier agreements with airlines for which the bookings are made through the CRS.

4. The assessee entered into an agreement with Travelport Services Limited (TSL,) a limited company existing under the laws of England and which is a 100% subsidiary of the assessee to market the CRS and other services of TLP in the United Kingdom, Europe, the Middle East, Africa, and parts of Asia.

5. During the years under appeal, the UK based company was marketing and distributing the CRS of the assessee through its non-exclusive representative, Calleo Distribution Technologies Pvt. Ltd. which is an independent third-party company registered in New Delhi, India. As per the distribution agreement, it was specifically provided that Calleo Distribution Technologies Pvt. Ltd. is appointed as the distributor of CRS belonging to the assessee. Under the said Agreement, Calleo Distribution Technologies Pvt. Ltd. was granted a non-exclusive, non-transferble, limited right to access the CRS and to use, translate and reproduce the documentation for its internal use and for use by the subscribers.

6. During the course of scrutiny assessment proceedings, the Assessing Officer found that the facts of the assessee are similar to the facts of Galileo International Inc., 19 SOT 257, wherein on similar facts, the Tribunal has held that there exists a PE of Galileo in India.

7. Drawing similarity, the Assessing Officer held that Travelport LP has a business connection in India under Section 9(1)(i) of the Act, fixed place of business within the meaning of Article 5(1) of Indo US Treaty and Dependent Agent PE in terms of Article 5(4)(a) of Indo US Treaty and accordingly held that the entire revenue of the assessee from India is taxable in India after allowing deduction of commission paid to Calleo Distribution Technologies Pvt. Ltd.

8. Aggrieved by the order of the Assessing Officer, the assessee preferred appeal before the ld. CIT(A) and the ld. CIT(A) held that the assessee has a business connection in terms of section 9(1)(i) of the Act and PE in India and further agreed that the facts of the assessee are similar to the facts in the case of Galileo International Inc. (supra). However, at the same time, the ld. CIT(A) observed that the case of assessee is even on stronger footing, as no assets were deployed by the assessee in India, whereas in the case of Galileo International Inc., the

travel agents were provided computer hardware and connectivity free of cost.

9. The ld. CIT(A) accordingly held that 15% of the revenue generated from the bookings made within India is the revenue attributable to the PE of the assessee. Since, the payment to Calleo Distribution Technologies Pvt. Ltd. in India is more than the revenue attributable to the PE in India the assessee's tax liability was reduced to NIL.

10. Both the assessee and the revenue filed appeal before the Tribunal. The Tribunal approved the order of the ld. CIT(A) and confirmed his findings on the PE as well as attribution.

11. Aggrieved by the order of the Tribunal, both the assessee as well as the revenue preferred appeals before the Hon'ble High Court of Delhi u/s 260A of the Act.

12. The Hon'ble High Court of Delhi, vided order dated 09.11.2016 for Assessment Years 2006-07, 2007-08 & 2008-09 and order vide dated 01.03.2017 for Assessment Years 2009-10 & 2010-11, dismissed the

appeals of the assessee. However, on the challenge of the revenue relating to attribution of 15% revenue, the Hon'ble High Court remanded back the matter to the Tribunal vide order dated 19.12.2016 for Assessment Years 2007-08 order dated 20.12.2016 for Assessment Years 2006-07 & 2008-09 and order dated 26.04.2017 for Assessment Years 2009-10 & 2010-11.

13. The relevant findings of the Hon'ble High Court of Delhi read as under:

> "*10. It is apparent from the above discussion that the specific and limited challenge by the Revenue in this appeal is to the ITAT's order, rather mechanical adherence to the Galileo International Inc's case (supra) attribution, principally to the extent it followed the 15% ratio. In the present case, the AO had based his conclusions and determined the income based upon figures furnished by the assessee, as is apparent from a plain reading of the order. In the circumstances, the ITAT, in our opinion, ought not to have disturbed that order, without a finding.*
>
> *11. This Court has also in its order dated 19.12.2016 recorded a similar conclusion in ITA No.827/2016 between the same parties. Accordingly, the present appeal is disposed off with a direction to*

the ITAT to render specific findings on the questions urged after hearing both the parties."

14. In view of the aforementioned directions of the Hon'ble High Court, the present appeals were heard.

15. The assessee moved applications u/r 11 and u/r 27 of the ITAT Rules, raising an additional plea, which was never taken in the first round of litigation, challenging the jurisdiction of the Assessing Officer claiming that the assessments for Assessment Years 2007-08, 2008-09 and 2009-10 are barred by limitation and further, assessment for Assessment Year 2010-11 is also barred by limitation on the ground that provisions of section 144C of the Act do not apply.

16. The ld. DR strongly opposed these two applications moved by the assessee stating that this is the second round of litigation and the appeals are being heard to honour the specific directions of the Hon'ble High Court of Delhi and, therefore, any deviation from the specific directions of the Hon'ble High Court would vitiate the proceedings. It is the say of the ld. DR that the validity of assessment

cannot be questioned in the second round of litigation when the matter has been remitted back by the Hon'ble High Court of Delhi.

17. Rule 11 of the ITAT Rules reads as under:

> "Rule 11. Determination of income from transactions with non residents – The profits and gains derived from any business carried on in the manner referred to in section 92 may be determined for the purposes of assessment to income tax according to Rule 10."

18. The Bench pointed out to the ld. counsel for the assessee that when he is not the appellant, then how Rule 11 is applicable.

19. The ld. counsel for the assessee drew our attention to the judgment of the Hon'ble High Court of Gauhati in the case of Assam Company India Ltd Vs. CIT 256 ITR 423 and pointed out that under similar circumstances, the Hon'ble High Court held that even if the respondent is not in appeal, it can raise an addition plea before the Tribunal.

20. We have carefully perused the judgment of the Hon'ble High Court of Gauhati. We find force in the contention of the ld. counsel for the assessee. Following findings from the judgment of the Hon'ble High Court would justify the claim of the assessee:

> "We are therefore not in favour of granting such a primacy to the rules of procedure so as to wipe offa substantial right otherwise available to the assessee in law. We find this view of ours alsoreinforced by the language of Rule 11 which does not require the Tribunal to be confined to thegrounds set forth in the memorandum of appeal or taken by leave of the Tribunal provided the partywho may be affected thereby had sufficient opportunity of being heard on that ground. In taking thisview, we are conscious about the observations of the Madras High Court and the Calcutta HighCourt made in the decisions relied upon by learned counsel for the Revenue but we are, in the factsand circumstances of the case, persuaded to accept the observations of the apex court made in thisregard in the case of National Thermal Power Co. Ltd. [1998] 229 ITR 383. We are therefore of theview that it is permissible on the part of the Tribunal to entertain a ground beyond thoseincorporated in the memorandum of appeal though the party urging the said ground had neitherappealed before it nor had filed a cross-objection in the appeal filed by

the other party. We musthowever hasten to add that in order to enable either the assessee or the Department to urge aground in the appeal filed by the other side, the relevant facts on which such ground is to be foundedshould be available on record. In the absence of such primary facts, in our opinion, neither theassessee nor the Department can be permitted to urge any ground other than those which are incorporated in the memorandum of appeal filed by the other party. In other words, if the assesseeor the Department, without filing any appeal or a cross-objection seeks to urge a ground other thanthe grounds incorporated in the memorandum of appeal filed by the other side, the evidentiary factsin support of new ground must be available on record.

For the view that we have taken as above, we hold that the Tribunal erred in not considering thecontention of the assessee-applicant company that the warehouse charges was covered bySub-clause (iv) of Section 35B(1)(b) of the Act only on the ground that the applicant-company hadnot filed any appeal or cross-objection. We therefore answer the question referred, in the affirmativeand remand the proceeding to the Tribunal for consideration of the said contention of theapplicant-assessee on merits. We however make it absolutely clear that in case the basic factsrelating to

> the claim of the applicant-company for weighted deduction under Section 35B(1)(b)(iv)are not available on record, the applicant-company would not be permitted to urge that ground andthe Tribunal would pass appropriate orders as it would deem fit in accordance with law."

21. The Hon'ble High Court has put a rider that relevant facts should be available on record in support of new grounds taken by the party. We find that the date of assessment order is in the body of the assessment order itself and, therefore, the evidentiary facts are very much available on record.

22. Similar view was taken by the Hon'ble High Court of Gujarat in the case of P.V. Doshi Vs. CIT 113 ITR 22. The relevant findings of the Hon'ble High Court of Gujarat read as under:

> "16. Even the alternative ground of finality of this order of the Tribunal suffers from the same infirmity, as the Tribunal has failed to notice this material distinction between a mere procedural provision which could be waived and such jurisdictional provision or a mandatory provision enacted in public interest which could not be waived, because by consent no jurisdiction could be conferred on the authority unless the conditions precedent were first fulfilled. In DasaMuni Reddy v. Appa Rao, AIR 1974

SC 2089, 2092, such a question of waiver was examined also in the context of the bar of estoppel or of res judicata. At page 2091, it was us exercise of jurisdiction. If there is want of jurisdiction the whole proceeding is coram non judice. The absence of a condition necessary to found the jurisdiction to make an order to give a decision deprives the order or decision of any conclusive effect. (See Halsbury's Laws of England, 3rd edition, volume 15, paragraph 384). Further proceeding at page 2092, it was pointed out that just as the courts normally did not permit contracting out of the Acts so there could be no contracting in. A status of control of premises under the Rent Control Acts could not be acquired either by estoppel or by res judicata. Their Lordships in terms held that the principle was that neither estoppel nor res judicata could give the court jurisdiction under the Acts which those Acts said it was not to have. Therefore, bar of res judicata or estoppel or waiver were negatived in such a case where the plea was outside the ambit of the Rent Control Act, for the simple reason that as one could not confer jurisdiction by consent, similarly one could not by agreement waive exclusive jurisdiction of the rent courts over the buildings in question. It is true that section 254(4) in terms provides that save as provided in section 256 (which provides for the reference to the High Court), orders passed by the Appellate Tribunal on appeal shall be final. That finality or conclusiveness could only arise in respect of orders which are competent orders with jurisdiction and if the proceedings of reassessment are not validly initiated at all, the order would be avoid order as per the settled legal position which could never have any finality or conclusiveness. If the original order is without jurisdiction it would be only a nullity confirmed in further appeals. If the essential distinction is borne in mind in such cases when there is such

defect of jurisdiction because the conditions to found jurisdiction are absent, the Tribunal also would be suffering from the same defect and it could not confer any jurisdiction on the Income-tax Officer by making the remand order, because of the settled legal principle that consent could not confer jurisdiction when jurisdiction could be created only by fulfilment of the condition precedent as in the present case. Therefore, no question of finality of the remand order could ever arise in the present context, if the mandatory conditions for founding jurisdiction for initiating reassessment proceeding were absent. This is the view in Commissioner of Income-tax v. NanalalTribhovandas (1975) 100 ITR 734 (Guj), agreeing with the Madras view that there would be no such finality by remand because consent could not confer jurisdiction, and so, such objection in regard to the validity of the notice under section 34 could be raised before the Appellate Assistant Commissioner. 17. The learned standing counsel in this connection marshalled in aid the decision in Northern Railway Co-operative Credit Society Ltd. v. Industrial Tribunal, Rajasthan, AIR 1967 SC 1182; 31 FJR 511, which could hardly be invoked in the present case. There the High Court in writ jurisdiction had held at the earlier stage that the dispute in question was an industrial dispute and, therefore, the reference being a competent reference, the writ petition was dismissed. The order of the High Court was a final judgment which terminated the independent writ proceeding. It was held at page 1186 that order having not been appealed before the Supreme Court, it had become final and it was no longer open to the parties to raise a plea of jurisdiction in appeal against the subsequent award given by the Industrial Tribunal after exercising jurisdiction which the Tribunal was permitted to exercise by the order of the High Court. These were competent proceedings and the independent writ proceeding

was also finally terminated and, therefore, this final order precluded the parties from reagitating the same question before the Industrial Tribunal. Their Lordships distinguished the earlier decision in Satyadhyan Ghosal v. Smt.DeorajinDebi, AIR 1960 SC 941, where the question had arisen about the applicability of section 28 of the CalcuttaThika Tenancy Act, 1949, and the plea having been rejected by the munsif trying a suit, revision, the High Court had held that operation of section 28 of the Act was not affected by the subsequent amendment Act and the case was remanded to the munsif for disposal according to law. After the final decree was passed by the munsif and the appeal finally came to the Supreme Court, it was held by the Supreme Court that the order of the High Court holding section 28 to be applicable could not operate as res judicata in appeal before the Supreme Court, because the High Court's order of remand was merely an interlocutory order, which did not terminate the proceeding pending before the munsif and which did not terminate the proceeding pending before the munsif and which had not been appealed from at that stage. Consequently, in the appeal from the final decree or order it was open to the party concerned to challenge the correctness of the High Court's decision. The two special features which distinguished that case were : one, that the order of the High Court which was relied upon to invoke the principle of res judicata was an interlocutory order, and the other, that it was made in a pending suit which as a result of that order did not finally terminate. In the present case also the remand order did not terminate the proceedings at the earlier stage. In fact,no question of any bar of res judicata even at the subsequent stage of the same proceeding could arise in the present case for the 599 11/2/2020 P.V. Doshi vs Commissioner Of Income-Tax, for the simple reason that the original order

is said to be without jurisdiction. The first condition in invoking any bar of res judicata is the condition about the competence of the court. Similarly, the provision of finality in this relevant provision in section 254(4) could also not be attracted in such a case, where the question admittedly, went to the root of the jurisdiction and if that contention was upheld, it would have made all the proceedings of reassessment totally void and without jurisdiction. As per the aforesaid settled legal position such a point could not be waived and there can be no question of the earlier remand order operating as a final order, because if such a jurisdictional point could not be waived, even the fact of passing of the remand order by the Tribunal could not confer jurisdiction on the Income-tax Officer, if the conditions to found his jurisdiction were absent. 18. Therefore, if this settled position was borne in mind, the Tribunal's view was clearly erroneous that the matter became final when the Tribunal passed the earlier remand order so that this point of jurisdiction got finally settled, which could not be agitated unless the assessee had come in the reference to this court at that stage. The Tribunal's view was also incorrect that in restoring the case to the file of the Income-tax Officer by the earlier order, the only point left open was in respect of addition of Rs. 19,421 on merits and that the legal or jurisdictional aspect whether the reassessment proceedings were legally initiated was not kept open. Even on the third question the Tribunal's view was erroneous that even though this point went to the root of the jurisdiction and was a pure question of law, merely because the point was initially raised and not pressed when the matter was taken up before the Appellate Assistant Commissioner, it could be waived and it could not be reagitated. Therefore, in view of the settled legal position our answers on questions Nos. 1 and 2 are in the negative, while our answer on question

No. 3 is in the affirmative, that is to say, all the questions are answered against the revenue and in favour of the assessee. The reference is accordingly disposed of and the Commissioner shall pay the costs of the assessee."

23. In light of the aforesaid judgments of the Hon'ble High Courts of Gauhati and Gujarat, we allow the application u/r 11 of the ITAT Rules.

RULE 27

24. Rule 27 reads as under:

"27. The arrangements referred to in [53][sections 194 and 236] to be made by a company for the declaration and payment of dividends (including dividends on preference shares) within India shall be as follows :

(1) The share-register of the company for all shareholders shall be regularly maintained at its principal place of business within India, in respect of any assessment year from a date not later than the 1st day of April of such year.

(2) The general meeting for passing the accounts of the previous year relevant to the assessment year and for declaring any dividends in respect thereof shall be held only at a place within India.

(3) The dividends declared, if any, shall be payable only within India to all shareholders.

24. The Bench pointed out to the ld. Counsel for the assessee that when nothing has been decided against him, therefore, how Rule 27 is applicable in its case.

25. The ld. Counsel for the assessee drew our attention to the decision of the co-ordinate bench in the case of DCIT v. Jubliant Enpro (P.) Ltd 32 ITR (T) 702 and pointed out that on similar circumstances, the Tribunal allowed the application u/r 27 of the Rules.

26. We have carefully perused the decision of the co-ordinate bench. The relevant findings of the coordinate bench read as under:

> "14.1. The assessee has filed an application under Rule 27 of the Income Tax (Appellate Tribunal) Rules, 1963 requesting for the deletion of entire penalty on a legal issue, being the final determination of total income of the assessee u/s 115JA of the Act and the additions sustained pertaining only to the income computed under the normal provisions of the Act. The ld. AR relied on the judgment of the Hon'ble jurisdictional High Court

in CIT Vs Nalwa Sons Investment Ltd. (2010) 327 ITR 543 (Del) to propel this submission.

14.2. Before proceeding with the matter on merit, it would be apposite to first decide about the maintainability or otherwise of such application. Rule 27 of ITAT Rules, 1963 with its marginal note reads as under :-

`Respondent may support order on grounds decided against him.

The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him.' 14.3. The effect of this rule is that a respondent has been entitled to support the order on the ground which has been decided against him. The underlying idea and the spirit of Rule 27 is to arm a respondent, in an appeal filed by the plaintiff, with an option to contest unfavourable decision of the CIT(A) on the aspect(s) of an issue, the final decision on which issue has been delivered in his favour. Take an instance of first appellate authority deciding the legal issue of reopening of an assessment against the assessee but deleting the addition on merits in favour of the assessee. When the Revenue files appeal against this order before the tribunal, it will naturally assail the finding of the CIT(A) qua the deletion of addition on merits. Notwithstanding the fact that the respondent assessee did not file any appeal against the order passed by the CIT(A), shall still be entitled under Rule 27 of the ITAT Rules, 1963, to support

the conclusion of the order of the first appellate authority, being the deletion of addition, by challenging the finding of the CIT(A) which was delivered against him on the legal issue of reopening of assessment.

14.4. The mandate of Rule 27 is to be seen in contradistinction to the provisions of section 253(4) of the Act, which empower the respondent, on an appeal filed by the plaintiff, to file cross objection against any part of the order. At this stage, it may be fruitful to take note of the prescription of sec. 253(4), which provides that : ` The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) or the Assessing Officer in pursuance of the directions of the Dispute Resolution Panel has been preferred under sub-section (1) or sub-section (2) or sub-section (2A) by the other party, may, notwithstanding that he may not have appealed against such order or any part thereof; within thirty days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Assessing Officer (in pursuance of the directions of the Dispute Resolution Panel) or Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3) or sub-section (3A).' When we consider Rule 27 of the ITAT rules in juxtaposition to

sec. 253(4) of the Act, the position which emerges is that whereas rule 27 is a remedy to the respondent to `support' the ultimate favourable conclusion of the CIT(A) by challenging such aspects of the issue which were decided against him, a cross objection u/s 253(4) of the Act is a remedy to the respondent to `challenge' the ultimate unfavourable conclusion of the CIT(A).

14.5. A cursory look at the language of rule 27 transpires that a respondent has been empowered to support the order appealed against on any of the grounds `decided against him.' In other words, the challenge can be made by a respondent only in respect of a `ground decided against him'. In such circumstances, a question arises that if there is no decision at all of the CIT(A) on a particular aspect, which is otherwise germane to the overall issue decided in favour of the respondent, can the respondent espouse such aspect under rule 27 in an appeal filed by the plaintiff ? If we go by the literal interpretation of the Rule, then the answer is in negative that unless the ground is not `decided against' the respondent, he cannot take recourse to this provision. However, it is of paramount importance to keep in mind the fundamental object of enshrining rule 27, being giving an opportunity to the respondent to support the impugned order in an appeal filed by the plaintiff. A pragmatic approach on consideration of the object of such Rule, in our considered opinion, necessitates the adoption of liberal interpretation that when a particular issue is decided in

favour of the respondent and the plaintiff has come up in appeal against such decision on the issue, then all the relevant aspects having bearing on the overall issue, even though not specifically decided against the plaintiff, should be open for challenge by the respondent under the rule. If the respondent is debarred from raising that aspect of the issue, which was not taken up before the first appellate authority or taken up but remained undecided, and the appeal of the plaintiff is allowed, the respondent would be rendered without remedy. It has been noticed above that a respondent is not entitled to file cross objection on such aspects of the issue u/s 253(4) of the Act, the scope of which provision is circumscribed to challenging the ultimate unfavourable conclusion drawn by the CIT(A). In common parlance, when an issue is decided in favour of one party whether on one aspect or the other, it is not expected of such a party to challenge the order by asserting that the decision should have been given in his favour on that issue on all the aspects and not on that particular aspect on which it was given. When an appeal is filed against such favourable decision on the issue by the other party, and suppose the impugned order is not sustainable on that aspect of the issue on which it was decided, but on some other aspect which was not decided by the first appellate authority and the respondent is restrained from taking up such aspect on the reasoning that Rule 27 is not applicable on such aspect, the respondent would stand nowhere. In view of the foregoing discussion, it is clear that hyper technicalities of rule

> 27 cannot come in the way of the deciding such aspects of the issue taken up by the respondent before the tribunal which were germane to the main issue but were not contested or decided provided no fresh investigation of facts is required for rendering decision on such aspects."

27. Drawing support from the findings of the co-ordinate bench [supra], we allow the application u/r 27 of the Rules.

28. For both the applications, the ld. DR vehemently stated that the order of the Tribunal is merged with the order of the Hon'ble Delhi High Court and therefore, on Doctrine of Merger, these applications should not be allowed.

29. The ld. DR, through his written submissions, has stated as under:

> "1. The written submission in this case is mainly to respond to the application filed by the assessee under Rule 11 & 27 of ITAT Rules.
>
> 2. At the outset, it is submitted that the case pending before Hon'ble ITAT is a case remanded back to ITAT by Hon'ble Delhi High Court with specific directions which are reproduced as under:-

"10. The Revenue's limited and specific argument in this appeal is that the exact particulars with respect to the assessee's operations in respect of India were available and therefore attribution of 15% was not warranted. The learned counsel for the assessee resisted the appeal and submitted that the ITA T was correct in following the decision of Galileo International lnc's case (supra) in the circumstances.

11. It is apparent from the above discussion that the specific and limited challenge by the Revenue in this appeal is to the ITA T's order, rather mechanical adherence to the Galileo International Inc's case (supra) attribution, principally to the extend it followed 15% rule. In the present case, the AO had based his conclusions and determined the income based upon figures furnished by the assessee, as is apparent from a plain reading of the order. In the circumstances, the ITA T, in our opinion, ought not to have disturbed that order, without appropriate hearing."

3. It flows from the above findings of the Hon"ble High Court that the case has attained finality except for the directions of remand back to Hon'ble Tribunal on specific point of reasonability of attribution of income which is the ground of appeal filed by the revenue. However, in such a remanded back case to give specific finding on the ground taken up by the revenue before Delhi High court, the appellant in the capacity of respondent has filed application under Rule 11 & 27 of ITAT Rules wherein the appellant has taken additional ground of appeal which is legal in nature. It may be relevant to reproduce the Rule 11 & 27 of ITAT Rules for ready reference;-

"Grounds which may be taken in appeal.

11. The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set-forth in the memorandum of appeal or taken by leave of the Tribunal under this rule:

Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground.

Respondent may support order on grounds decided against him.

27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him"

4. It may be important to place on record that the appellant is not entitled to file application under Rule 11 or Rule 27 before Hon'ble ITAT at this stage. The most critical objection in this regard is that by following the doctrine of merger, the order in this case is of Delhi High Court which is open before ITAT only to decide on the specific point/issue as per the directions of Hon'ble Delhi High Court. Therefore, it is submitted that acceptance of application of the assessee by Hon'ble Tribunal in order to raise additional ground of appeal by the respondent at this stage would result into tinkering with the order of Higher authority without their specific direction, which is against the established practice of judicial discipline. The appellant may raise this ground of appeal only before Hon'ble Delhi High Court or Supreme Court.

5. Further, it may be relevant to highlight that Rule 11 starts with phrase "the appellant", which means that this rule can be invoked only by an appellant to file additional ground of appeal. The assessee in this case being respondent is not in a position to take shelter of Rule 11 of ITAT Rules which is evident from the plain language of Rule 11.

6. As regards application under Rule 27, the rule says that the respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him. However, it is not a case where the ground has been decided against the assessee. In this regard, the appellant relied on the decision of ITAT, Delhi in the case of where V the facts of the case are that the penalty was deleted by Ld. CIT(A) and ITAT upheld the penalty on part of the additions made in this case. At this stage, the respondent, challenged the penalty ground on jurisdictional/legal ground of appeal. Hon'ble tribunal accepted the application under Rule 27 in this case. However, it is important to note that the cited case was very mush pending before Hon'ble tribunal on all scores and it was not a case of remanded back case as against the present case which has been remanded

back to ITAT on specific point/issue as per the order of Hon'ble Delhi High Court. Therefore, the reliance placed by the assessee on the cited case is clearly distinguishable.

7. It is noteworthy that all case laws relied upon by the assessee were open before the Hon'ble Tribunal for adjudication. There is only one case where the facts involve a case of remand and that case is of Hon'ble Gujarat High Court in the case of P.V.Doshi. Interestingly, in the cited case of P.V.Doshi, Hon'ble Tribunal set aside the case back to the file of the AO for deciding on a specific matter. The assessee filed appeal before the Ld. CIT(A) in second round of appeal and raised the ground of wrong initiation of reassessment. Ld. CIT(A) accepted the ground of the assessee and held the order without proper jurisdiction. The revenue took the matter before Hon'ble tribunal where the tribunal held that the matter had attained finality due to the order of the Tribunal when the case was set aside for specific matter and therefore, Ld. CIT(A) has wrongly held the order invalid on the ground of reopening which was not agitated in first round of appeal. In given facts of the case, Hon'ble Gujrat High Court held that the tribunal was wrong not to consider the challenge to the initiation of reopening of assessment in this case in second round of appeal. The court observed that

- If the original order is without jurisdiction it would be only a nullity confirmed in further appeals.

- When there is such defect of jurisdiction, the Tribunal also would be suffering from the same defect and it could not confer any jurisdiction on the Income-tax Officer by making the remand order

- Therefore, no question of finality of the remand order could ever arise if the mandatory conditions for founding jurisdiction for initiating reassessment proceeding were absent

8. On analysis of the aforesaid decision, it flows that the tribunal considered it to be a case where the appeal had attained finality by its earlier order. However, the Gujrat High Court held that the tribunal failed to appreciate that the earlier order was without considering the jurisdictional ground of appeal and therefore, did not attain finality. Applying the same logic, it is submitted that in the present case of Travelport, it is Hon'ble High court which has remanded the matter back

to Hon'ble tribunal on specific point and it is open to Delhi High Court to take up the jurisdictional issue even at this stage as it is the order of Hon'ble High Court. However, due to doctrine of merger, the tribunal is not empowered to decide on this point at this stage where the case has been remanded by Hon'ble High Court on a particular aspect.

9. It may also be interesting to take note of the decision of landmark judgement of Delhi HC in Sanjay Sawhney case ITA 834/2019 Dated 18.05.2020which considered a no. of watershed renderings viz., CIT vs. Edward Keventor Successive Pvt. Ltd., CIT vs. Divine Infra Pvt. Ltd, Commissioner of Income Tax, Madras vs. Sundaram & Co. Pvt. Ltd.(1964) 52 ITR 763 (Madras) etc. Para 20 of the decision reads as under:-

"If we refer to Rule 27 of ITAT Rules, 1963, a bare reading thereof manifest that a Respondent has a right to support the impugned order, without having filed any cross appeal or cross objection. This understanding emerges from the language of the said provision which begins with the words "The Respondent, though he may not have appealed, ". This means that the provision is to enable a Respondent to effectively defend the order appealed before the Appellate forum. The expression "though he may not have appealed" also indicates that the provision is to be resorted to in a situation where a Respondent may otherwise have a right to file an appeal or cross objections, but has chosen not to avail of this remedy. Thus, a party who has not availed of the option of filing an appeal, in a given situation, if arrayed as a Respondent before the Appellate Tribunal, can rely upon Rule 27, to support the order under appeal. The aforesaid expression also suggests that recourse to Rule 27 would only be available in case the remedy of appeal is otherwise available with the Respondent, and he has elected not to avail the same. In other words, in case a Respondent would not have such a right [of filing a cross appeal or cross objection], then he would not have the option to invoke the said provision."

10. It flows from the aforesaid decision that if right of cross appeal or cross objection are not there, the rule 27 also cannot be invoked. In the present case, no such right of cross-appeal or cross-objection remain as it is a case of remand back on specific point, therefore, the question of exercising such a right leading to consequential invoking of Rule 27 does not arise. The part of appeal now decided by Hon'ble HC has already

become final and cannot be reactivated in a lower court even on jurisdiction. The subject-matter of appeal is now fully circumscribed and falls in a bounded matrix without any scope for expansion through Rule 27. It can be reactivated only by the court where the matter has reached finality which in this case if Hon'ble Delhi High Court.

11. In view of the above, it is prayed that the application under Rule 11 and 27 may not be considered at this stage of appeal. "

29. In our considered opinion, the submissions of the ld. DR are not acceptable for the simple reason that the issues which have been considered and decided get merged with the findings of the superior court but the issues which have neither been considered or have been decided by inferior court cannot merge with the orders of the superior court.

30. In our considered view, the logic underlying the Doctrine of Merger is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time. Once the superior court has disposed of the list before it either way - it is the decree or order of the superior court which is final and binding. In the present case, the point of jurisdiction was never raised before the lower authorities and accordingly, the same never formed the subject matter of appeal before the Hon'ble High Court and hence the

doctrine of Merger will not be applicable in the case in hand. Therefore, in our view, the distinction sought by the ld. DR in the decision of the Hon'ble High Court of Gujarat in the case of P.V. Doshi [supra] does not hold any water.

31. The ld. DR has heavily relied upon the decision of the Hon'ble High Court of Delhi in the case of Sanjay Sawhney [supra].

32. We have carefully gone through the decision of the Hon'ble High Court of Delhi. We find that in the very beginning of Para 20, the Hon'ble High Court has observed as under:

> "If we refer to Rule 27 of ITAT Rules, 1963, a bare reading thereof manifest that a Respondent has a right to support the impugned order, without having filed any cross appeal or cross objection. This understanding emerges from the language of the said provision which begins with the words "The Respondent, though he may not have appealed,". This means that the provision is to enable a Respondent to effectively defend the order appealed before the Appellate forum. The expression "though he may not have appealed" also indicates that the provision is to be resorted to in a situation where a Respondent may otherwise have a right to

> file an appeal or cross objections, but has chosen not to avail of this remedy. Thus, a party who has not availed of the option of filing an appeal, in a given situation, if arrayed as a Respondent before the Appellate Tribunal, can rely upon Rule 27, to support the order under appeal. The aforesaid expression also suggests that recourse to Rule 27 would only be available in case the remedy of appeal is otherwise available with the Respondent, and he has elected not to avail the same. In other words, in case a Respondent would not have such a right [of filing a cross appeal or cross objection], then he would not have the option to invoke the said provision."

33. In the same breath, somewhere in the middle, the Hon'ble High Court further observed as under:

> "We are, therefore, of the view that invocation of Rule 27 for challenging the decision of the CIT (A) on the legal ground was well within the scope of Rule 27."

34. We are of the considered view that the decision of the Hon'ble High Court of Delhi is more in favour of the assessee than to the Revenue>

35. With the above discussion, let us now consider the status of assessment for A.Ys 2007-08, 2008-09 and 2009-10.

36. Facts on record show that for A.Y. 2007-08, draft assessment order is dated December 24, 2009 and final assessment order is dated 05.02.2010. For 2008-09, draft order is dated 24.12.2010, and final order is dated 28.01.2011. For 2009-10, draft order is dated 19.12.2011 and final assessment order is dated 30.01.2012. For A.Y. 2010-11 draft order is dated 15.03.2013 and final order is dated 06.05.2013.

37. It can be seen from the assessment orders that the Assessing Officer has framed draft assessment order and thereafter final assessment orders were passed. Provisions of section 144C of the Act which relates to reference to Dispute resolutions Panel were inserted vide Finance Act [No. 2] Act 2009 w.e.f. 01.04.2009. The provisions read as under:

> "The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereinafter in this section referred to as the draft order) to the eligible assessee

> if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee."

38. The aforesaid section 144C of the Act can only apply prospectively i.e. from A.Y. 2011-12 and is not applicable to the captioned assessment years.The Hon'ble High Court of Madras in the case of M/s Vedanta Limited vs. ACIT Writ Petition No.1729 of 2011 has categorically held that the provisions of Section 144C of the Act can be held to be applicable prospectively, from AY 2011-12 only. The relevant findings read as under:

> "26. Thus, where there is a change in the form of assessment itself, such change is not a mere deviation in procedure but a substantive shift in the manner of framing an assessment. A substantive right has enured to the parties by virtue of the introduction of Section 144C, that, bearing in mind the settled position that the law applicable on the first day of assessment year be reckoned as the applicable law for assessment for that year, leads one to the inescapable conclusion that the provisions of Section 144C can be held to be applicable only prospectively, from AY 2011-12 only."

39. In all the A.Ys under challenge, on the proposition that they are barred by limitation, the Assessing Officer has framed draft assessment order when the provisions were not there in the statute. Therefore, the period of limitation, as prescribed u/s 153 of the Act were applicable and, therefore, the date of final assessment order makes the assessment barred by limitation.

40. Considering the facts in totality, in the light of the decision of the Hon'ble Madras High Court [supra], we have no hesitation in holding that the assessments for A.Ys 2007-08 to 2010-11 are barred by limitation and accordingly quashed.

A.Y 2006-07

41. As mentioned elsewhere, the Hon'ble High Court of Delhi has directed the Tribunal to render specific findings on the question of attribution. Elsewhere, we have explained the nature of business of the assessee. The business activities of the assessee can be summarised as under:

• CRS is a software developed and operated by Travelport USA which provides information about schedules, fares, rates and availability of the products and services of travel suppliers and enables making of reservations and issuance of tickets for such products and services. The same CRS is maintained outside of India.

• Travelport USA earns its revenues through participating carrier agreements with airlines for which the bookings are made through the CRS. These agreements are concluded outside of India Page 15 of 26.

• CRS is a real time system which collects, stores, processes, displays and distributes information concerning air and ground transportation, lodging and other travel related services and enables its users, generally travel agents and other non-airline personnel, to: -

(1) inquire about, reserve or otherwise confirm the availability of such services; and/or

(2) issue tickets to permit the purchase or use of such services.

The primary business activity of Travelport USA is to facilitate

booking of airline tickets through CRS, servers of which is in Georgia, USA.

• The major functions like collecting the database of various airlines, which have entered into carrier agreements with the Respondent Assessee takes place outside India.

• The computer at Georgia in USA processes schedule of flights,

• The computer at Georgia in USA processes timings, pricing, the availability and connection etc.

• The aforesaid data is processed on the basis of neutral display real time on line. All of this takes place outside India.

• Travelport USA is responsible for the design and product development by which it decides which market segments to pursue, the software characteristics that are needed to meet the market demand etc. The key personnel of Travelport would undertake the conceptualization and coding of software. Further, it also makes constant updates to the software whenever it is required. These activities are carried outside of India.

• The invoicing is done outside of India and the payment too is received outside of India

• Travelport USA is responsible for the development and enhancement of products, obtaining legal protection for the developed intangibles. These activities again are carried outside of India.

42. Out of the aforesaid several activities, the activities of Calleo Distribution Technologies Pvt. Ltd. are only in respect of generating request and receiving end-result of the process carried out in India. In other words, bookings, execution and receiving of the tickets are in India. In other words, the computers at the desk of travel agent in India are merely connected or configured to the extent that it can perform a booking function but are not capable of processing the data of all the airlines together at one place.

43. We find that the assessee has not deployed any assets in India. Keeping in mind the aforesaid facts relating to the assessee, let us now consider the facts considered by the Tribunal in the case of Galileo International Inc [supra] which are as under:

"9. The next question therefore, arises is whether having held that there is business connection in India, how much income is chargeable to tax in India. As per Section 9(1)(i) of the Act, income accruing or arising whether directly or indirectly through or from any business connection in India shall be deemed to accrue or arises in India. As per Clause (a) of Explanation 1 to Section 9(1)(i) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this Clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. Thus in a given case if all the operations are not carried out in India, the income has to be apportioned between the income accruing in India and income accruing outside India. In the present case, we find that only part of CRS system operates or functions in India. The extent of work in India is only to the extent of generating request and receiving end result of the process in India. The major functions like collecting the database of various airlines and hotels, which have entered into PCA with the appellant takes place outside India. The computer at Denver in USA processes various data like schedule of flights, timings, pricing, the availability, connection, meal preference, special facility, etc. and that too on the basis of neutral display real time on line takes place outside India. The computers at the desk of travel agent in India are merely connected or configured to the extent that it can perform a booking function but are not capable of processing the data of all the airlines together at one place. Such function requires huge investment and huge capacity, which is not available

to the computers installed at the desk of subscriber in India. The major part of the work or to say a lion's share of such activity, are processed at the host computer in Denver in USA. The activities in India are only minuscule portion. The appellant's computer in Germany is also responsible for all other functions like keeping data of the booking made worldwide and also keeping track of all the airlines/hotels worldwide that have entered into PCA. Though no guidelines are available as to how much should be income reasonably attributable to the operations carried out in India, the same has to be determined on the factual situation prevailing in each case. However, broadly to determine such attribution one has to look into the factors like functions performed, assets used and risk undertaken. On the basis of such analysis of functions performed, assets used and risk shared in two different countries, the income can be attributed. In the present case, we have found that majority of the functions are performed outside India. Even the majority of the assets i.e. host computer which is having very large capacity which processes information of all the participants is situated outside India. The CRS as a whole is developed and maintained outside India. The risk in this regard entirely rests with the appellant and that is in USA, outside India. However, it is equally important to note that but for the presence of the assessee in India and the configuration and connectivity being provided in India, the income would not have generated. Thus the initial cause of generation of income is in India also. On the basis of above facts we can reasonably attribute 15% of the revenue accruing to the assessee in respect of bookings made in India as

income accruing/or arising in India and chargeable under Section 5(2) read with Section 9(1)(i) of the Act.

44. In the light of the above, we find that the facts of the present case are in parity with the facts of the case of Galileo International Inc [supra].

45. As mentioned elsewhere, since major part of the business activities were carried out outside of India and only limited activities were attributable to India and finding parity in the facts with those of Galileo International Inc [supra], we are of the considered view that 15% of the revenue is enough to attribute towards the activities done in India.

46. Both the Assessing Officer and the ld. CIT(A) have also found the facts in parity with the facts of Galileo International Inc [supra], and have therefore, attributed 15% of the revenue inspite of the fact that in the case of Galileo International Inc [supra], the assessee has provided computersat the desk of the travel agents in India, whereas in

the case in hand, no such facility was provided by the assessee to the travel agents in India.

47. On identical facts, the Tribunal in the case of SABRE Inc. v. DDIT 2009 taxmann.com 1021 has held that the said company had a PE in India but only 15 per cent of revenue accruing to assessee in respect of bookings made in India should be treated as income accrued or assessed in India.

48. Again, the Delhi Tribunal in the case of Amadeus Global Travel Distribution S.A. v. DCIT 113 TTJ 767 had the occasion to consider identical facts and held as under:

> "As per section 9(1)(i), income accruing or arising whether 'directly or indirectly through or from any business connection in India shall be deemed to accrue or arises in India. As per clause (a) of Explanation 1 to section 9(1)(i) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. Thus in a given case if all the operations are not carried out in India, the income has to be apportioned between the income accruing in India and income

accruing outside India. In instant case, it was found that only part of CRS system operated or functioned in India. The extent of work in India was only to the extent of generating request and receiving end result of the process in India. The major functions like collecting the database of various airlines and hotels, which had entered into PCA with the assessee took place outside India. The computer at Erding in Germany processed various data like schedule of flights, timings, pricing, the availability, connection, meal preference, special facility, etc. and that too on the basis of neutral display real time on line took place outside India. The computers at the desk of travel Page 21 of 26 agent in India were merely connected or configured to the extent that it could perform a booking function but were not capable of processing the data of all the airlines together at one place. Such function required huge investment and huge capacity, which was not available to the computers installed at the desk of subscriber in India. The major part of the work or to say a lion's share of such activity, were processed at the host computer in Erding in Germany. The activities in India were only minuscule portion. The assessee's computer in Germany was also responsible for all other functions like keeping data of the booking made worldwide and also keeping track of all the airlines/hotels worldwide who had entered into PCA. Though no guidelines are available as to how much should be income reasonably attributable to the operations carried out in India, the same has to be determined on the factual situation prevailing in each case. However, broadly to determine such attribution one has to look into the factors like functions performed, assets used and risk undertaken. On the basis of such analysis of functions performed, assets used and risk shared in two different countries, the income can be attributed. In the instant case, majority of the functions

were performed outside India. Even the majority of the assets i.e. host computer which was having very large capacity which processed information of all the participants was situated outside India. The CRS as a whole was developed and maintained outside India. The risk in this regard entirely rested with the assessee and that was in Spain, outside India. However, it was equally important to note that but for the presence of the assessee in India and the configuration and connectivity being provided in India, the income would not have generated. Thus the initial cause of generation of income was in India also. On the basis of above facts one could reasonably attribute 15 per cent of the revenue accruing to the assessee in respect of bookings made in India as income accruing or arising in India and chargeable under section 5(2), read with section 9(1)(i)."

49. Facts considered in the case of Amadeus Global Travel Distribution SA are identical to the facts of the present appeal in as much as in the present appeal also, Travelport LP owned and maintained a CRS and had the same distribution and revenue earning model. Hence, a similar attribution of 15% of the revenue accruing to the assessee in respect of bookings made in India as income accruing or arising in India is also warranted in the case at hand.

50. On similar facts, similar view was taken by the Hon'ble High Court of Delhi in the case of Galileo Nederland BV v. DCIT [2014] 51 taxmann.com 419 Delhi) wherein the assessee was a providing travel industry services of Computerized Reservation System and its Indian distributor merely gave connection to Indian travel agents for booking and major functioning of collecting and data analysis/development took place in, USA.

51. The Hon'ble High Court held as under:

> "The major functioning, i.e., collecting data bases with various airlines, hotels etc. and entering or feeding them into the computer took place outside India. It was in the computer in Denver, USA that various processed data with regard to schedule of flights timing, pricing, availability, meal preference, special facilities etc. was stored and process undertaken. The role performed by the computers in India or the Indian agents was to merely get connected or be configured so that the travel agents could perform the booking function. The computers in India were not capable of processing data, which was processed abroad. Further, the functions required huge investment and capacity, which was not installed and available in the computers at the desk of the travel agents in India but were available in the host computer in the USA. Thus, it was looking at the nature and the character of the functions undertaken in India viz., the functions and assets outside India, 15 per cent was attributed to India.

In view of the aforesaid position the Tribunal fell into error in holding that the estimate of 15 per cent fixed in its earlier orders as attributable to the assessee's income arising in India, is inapplicable to the assessment years in question for the reasons mentioned in its impugned order. The Tribunal also fell into error in departing from its reasoning in the case of the assessee's predecessor for the period 1995-96 to 2000-2003 [sic, 2002-2003] through different orders."

52. In our humble opinion, since no guidelines are available as to how much should income be reasonably attributable to India, the same has to be determined on the basis of the facts of the case and judicial precedents. On finding parity in the facts of the case in hand with the facts of the judicial precedents discussed hereinabove, we are of the considered view that the ld. CIT(A) rightly attributed 15% of the Revenue and therefore, we do not find any error or infirmity in the findings of the ld. CIT(A).

53. To sum up, the appeal of the Revenue for A.Y 2006-07 is dismissed on merits and appeals for A.Ys 2007-08 to 2010-11 are dismissed as barred by limitation.

54. In the result, all the appeals of the Revenue ITA No. 6499/DEL/2012, ITA No. 6500/DEL/2012, ITA No. 1480/DEL/2012, ITA No. 217/DEL/2014 and ITA No. 218/DEL/2014 stand dismissed.

The order is pronounced in the open court on 09.11.2020.

Sd/-	**Sd/-**
[K. N. CHARY**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 09th November, 2020

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before	
Date on which the typed draft is placed before	
Date on which the approved draft comes to	
Date on which the fair order is placed before	
Date on which the fair order comes back to	
Date on which the final order is uploaded on	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the	
Date of dispatch of the Order	