$~95, 96 & 97

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

% *Date of Decision : 17.12.2025*

\+ ITA 748/2025
\+ ITA 749/2025
\+ ITA 752/2025

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAX-1), NEW DELHI

.....Appellant

Through: Mr. Puneet Rai, SSC, Mr. Ashvini Kumar, Mr. Gibran, JSCs, and Mr. Rishabh Nangia, Adv.

versus

EXL SERVICE.COM INC (PRESENTLY KNOWN AS EXL SERVICE COM LLC)

.....Respondent

Through: Mr. Ajay Vohra, Sr. Advocate with Mr. Neeraj Jain and Mr. Tavish Verma, Advs.
Mr. Vipul Agrawal (Sr. SC) with Ms. Sakshi Shairwal, Mr. Akshat Singh (Jr. SCs) and Ms. Harshita Kotru (Advs.).

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE VINOD KUMAR

V. KAMESWAR RAO , J. (ORAL)

CM APPL. 78977/2025 (delay in filing) in ITA 748/2025
CM APPL. 78995/2025 (delay in filing) in ITA 749/2025
CM APPL. 79332/2025 (delay in filing) in ITA 752/2025

1. For the reasons stated in the applications, the delay of 18 days in filing the appeals is condoned.

2. The applications are disposed of.

CM APPL. 78978/2025 (delay in refiling) in ITA 748/2025
CM APPL. 78996/2025 (delay in refiling) in ITA 749/2025
CM APPL. 79333/2025 (delay in refiling) in ITA 752/2025

3. For the reasons stated in the applications, the delay of 519, 517 & 520 days in re-filing the appeals are condoned.

4. The applications are disposed of.

ITA 748/2025
ITA 749/2025
ITA 752/2025

5. These three appeals lay a challenge to a common order passed by the Income Tax Appellate Tribunal (Tribunal) dated 20.12.2023 in ITA nos. 4183/DEL/2013 (A.R. 2003-04), 5627/DEL/2014 (A.R. 2004-05) and 3408/DEL/2014 (A.R. 2006-07).

6. At the outset, Mr. Puneet Rai, SSC for the appellant states that the appeal against ITA 5627/DEL/2014 relatable to the Assessment Year 2004-05 may not have been filed because of low tax effect.

7. The Tribunal had allowed the appeals filed by the assessee and dismissed the appeal filed by the Revenue. Mr. Rai states that these appeals are confined to the conclusion drawn by the Tribunal in the appeals filed by the respondent/assessee.

8. The challenge in the appeals was primarily to the orders of the CIT (Appeals)-XI, New Delhi dated 05.03.2013 for the Assessment Year 2003-04, CIT (Appeals)-XXIX order dated 26.05.2014 for the Assessment Years

2004-05 and 2005-06 and DRP-1 order dated 21.03.2014 pertaining to the Assessment Year 2006-07.

9. The facts as noted by the Tribunal are that the Assessee is a company incorporated under the laws of Delaware, USA. It develops and deploys business process outsourcing solutions including transaction processing services and Internet/voice-based customer care services for its clients. The Assessee is stated to be providing such services to customers located in the USA and the UK. The parent company of the group as on 31.03.2002 was Conseco Inc., which held 100% of the paid-up capital of Exl, USA. The Assessee company (Exl. Inc) performs sales and marketing function, contract negotiations and conclusion of contracts and customer relationship management.

10. Exl India entered into a service agreement with the Assessee under which, Exl India provides internet and voice-based customer care services and backroom operation services to the customers of the Assessee and in consideration of these services, Exl India invoices the Assessee at pre-determined hourly rates and in return, the Assessee raises invoices on the end customers.

11. The activities performed by the respondent/Assessee have been noted by the Tribunal in paragraph 6 of the impugned order which is reproduced as under :

> *"• Preparing the corporate strategy for the EXL Group (including new service lines, prospective clients, etc.)*
> *• Managing the flow of corporate funds for the EXL Group*
> *• Preparing consolidated financial statements for the EXL Group*
> *• Managing relationships with corporate investors*
> *• Undertaking sales and marketing activities and*

negotiating and concluding client contracts

• Undertaking all risks in respect of the client contracts including but not limited to business risk, bad debt risk, service liability risk, rework risk, etc.

• Managing relationships with clients to broaden the spectrum of services being offered by EXL group

• Incurring numerous expenses including compensation of employees and corporate overheads and technology and telecommunications related expenses."

12. The conclusion drawn by the Tribunal in paragraph 7 of the impugned order is that, the significant part of the activities were provided by the Assessee from the USA during the FY 2002–03 and Exl India's primary function was delivery of the agreed outsourced services from India. For undertaking the activities as noted in paragraph 6, the Assessee has established marketing offices in various cities in the USA.

13. The submission on behalf of the respondent/Assessee is that in the assessment order dated 30.03.2006 framed under Section 143(3) of the Income-tax Act, 1961 (the Act), the Assessing Officer held that the Assessee had established a Permanent Establishment (PE) in India under Article 5 of the India-USA DTAA and under Section 9(1)(ii) of the Act, respectively, holding that its income was taxable in India for the years under consideration.

14. The Tribunal in paragraphs 10 onwards has come to the following conclusion :

"10. We have given thoughtful consideration to the impugned assessment order. In our understanding, the Assessing Officer has based his finding on the following points, which have also been highlighted by the ld. DR during the course of his submissions:

(i) The entire activity for performance of the contract was undertaken in India and even though the assessee did not have much role to play in securing the contract and no role in its performance, it retained substantial portion of revenue earned by the performance of contract from Indian set up.

(ii) Marketing job was done by employees of Exl, India but still the major portion of profits was retained by the assessee.

(iii) The assessee and Exl India were nothing but one and the same, as the primary activity of the assessee is carried out by the Indian company and facilities of Exl India was a fixed place of business for the assessee.

(iv) The assessee was technically dependent on the Indian company for all practical purposes and it had neither the competence nor the facility to execute the contracts through
which it earned its revenue.

(v) The facilities in India were at the disposal of the assessee since it was not required to take formal consent of Indian set up before entering into a contract with the customer.

(vi) Shri Rohit Kapoor, in the capacity of CEO for both the assessee and Exl India, had signed contracts, meaning thereby, that the assessee had authority to conclude the contracts on behalf of the Indian entity and Indian entity is fully controlled, operated and managed by the assessee.

(vii) Activities of the assessee was minimum, yet it was in receipt of substantial income by retaining considerable portion of receipts from the client for which the entire processes were carried out by the PE in India and profits for A.Y 2003–04 was attributed to such PE on the basis of ratio of assets held by the assessee and Exl India.

11. On the above facts, we are of the considered view that since the assessee is a company resident in USA, it is entitled to treaty benefits under India - US Tax Treaty. Article 7 of the India US Tax Treaty dealing with taxation of "business profits" is as under:

> *"ARTICLE 7: Business profits - 1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment ; (b) sales in the other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment ; or (c) other business activities carried on in the other State of the same or similar kind as those effected through that permanent establishment.*
>
> *2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly at arm's length with the enterprise of which it is a permanent establishment and other enterprises controlling, controlled by or subject to the same common control as that enterprise. In any case where the correct amount of profits attributable to a permanent establishment is incapable of determination or the determination thereof*

presents exceptional difficulties, the profits attributable to the permanent establishment may be estimated on a reasonable basis. The estimate adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article."

12. A perusal of the above shows that the business profits arising to a US enterprise shall be taxable in India, only if the US enterprise has a PE in India, meaning thereby, that if there is no PE in India, no part of the business profit arising to the US enterprise is taxable in India.

13. Article 5 of the treaty defines PE as under:

"ARTICLE 5: Permanent establishment - 1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(g) a warehouse, in relation to a person providing storage facilities for others;

(h) a farm, plantation or other place where agriculture, forestry, plantation or related activities are carried on;

(i) a store or premises used as a sales outlet ;

(j) an installation or structure used for the exploration or exploitation of natural resources, but only if so used for a period of more than 120 days in any twelve-month period ;

(k) a building site or construction, installation or assembly project or supervisory activities in

connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 120 days in any twelve-month period ;

(l) the furnishing of services, other than included services as defined in Article 12 (Royalties and Fees for Included Services), within a Contracting State by an enterprise through employees or other personnel, but only if:

(i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve-month period ; or

(ii) the services are performed within that State for a related enterprise [within the meaning of paragraph 1 of Article 9 (Associated Enterprises)].

3. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include any one or more of the following :

(a) the use of facilities solely for the purpose of storage, display, or occasional delivery of goods or merchandise belonging to the enterprise ;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display, or occasional delivery ;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise ;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of

collecting information, for the enterprise ;

(e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for other activities which have a preparatory or auxiliary character, for the enterprise.

4. Notwithstanding the provisions of paragraphs 1 and 2, where a person—other than an agent of an independent status to whom paragraph 5 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if :

(a) he has and habitually exercises in the first-mentioned State an authority to conclude on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph ;

(b) he has no such authority but habitually maintains in the first mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, and some additional activities conducted in the State on behalf of the enterprise have contributed to the sale of the goods or merchandise ;

Or

(c) he habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent, or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted

wholly or almost wholly on behalf of that enterprise and the transactions between the agent and the enterprise are not made under arm's length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph.

6. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other."

14. To constitute a fixed place PE, we have to look into the OECD Commentary on Article 5 of the OECD Model Convention, which states the following conditions should exist in order to constitute "fixed place of business:

• the existence of a "place of business", i.e. a facility such as premises

or, in certain instances, machinery or equipment.

• this place of business must be "fixed", i.e., it must be established at a distinct place with a certain degree of permanence.

• the carrying on of the business of the enterprise through this fixed place of business. This usually means that persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the State in which the fixed place is situated.

15. In our understanding, nature of fixed place of business is very much that of a physical location, i.e., one must be able to point to a physical location at the disposal of the enterprise through which the business is carried on. Understandably, the fixed place of business need not be owned or leased by the foreign enterprise, provided it is at the disposal of the enterprise in the sense of having some right to use the premises for the purposes of its business and not solely for the purposes of the project undertaken on behalf of the owner of the premises.

16. This means that a "fixed place of business" should satisfy, amongst others, the "power of disposition" test to qualify as PE under Article 5(1). The 'core business' of the foreign enterprise should be conducted through the place of business which means that there should be a nexus between the place of business and carrying on of business.

17. The Supreme Court in the case of Formula One World Championship Ltd 394 ITR 80 after referring to the OECD Model Tax Convention, Commentaries by Professor Philip Baker and Professor Klaus Vogel, international tax jurisprudence observed that in terms of Article 5(1) of the India-UK Tax Treaty, a fixed place PE is constituted in India, if the following twin conditions are satisfied viz, (i) Existence of a fixed place of business at the disposal of the foreign enterprise in India; (ii) through which the business of the foreign enterprise is wholly or partly carried on.

18. On the issue of "fixed place of business", we find that the facts considered by the Hon'ble Supreme Court in the case of eFunds IT Solution and Ors 399 ITR 34 are pari materia same as that of the assessee. Therefore, it would be pertinent to refer to the decision of the Hon'ble Supreme Court [supra]. The relevant findings read as under:

"19. Before the Supreme Court it was argued by the Revenue that a PE of the US entities is constituted in India due to the following reasons:

- *Almost 40% of the employees of the entire group are in India.*
- *eFunds Corp has call centers and software development centers only in India.*
- *eFunds Corp is essentially doing marketing work only and its contracts with clients are assigned, or sub-contracted to eFunds India.*
- *The master services agreement between the American and the Indian entity gives complete control to the American entity in regard to personnel employed by the Indian entity.*
- *It is only through the proprietary database and software of eFunds Corp, that eFunds India carries out*

its functions for eFunds Corp.

• The Corporate office of eFunds India houses an 'International Division' comprising the President's office and a sales team servicing EFI and eFunds group entities in the United Kingdom, South East Asia, Australia and Venezuela. The President's office primarily oversees operations of eFunds India and eFunds group entities overseas. The sales team undertakes marketing efforts for affiliate entities also.

• eFunds India provides management support and marketing support services to eFunds Corp group companies outside India.

On this issues of fixed place PE, the Supreme Court relied on the decision of Formula One World Championship Ltd. vs. CIT (supra) and held that in order to ascertain as to whether an establishment has a fixed place of business or not is that such physically located premises have to be 'at the disposal' of the enterprise. However, merely giving access to such a place to the enterprise for the purposes of the project would not suffice. The place would be treated as 'at the disposal' of the enterprise when the enterprise has right to use the said place and has control thereupon.

The AO has adopted a fundamentally erroneous approach in saying that the US companies were contracting with a 100 per cent subsidiary and were outsourcing business to such subsidiary, which resulted in the creation of a PE. e-Funds India was a separate entity and was/is entitled to provide services to the assessees who were/are independent separate taxpayers. Indian entity i.e. subsidiary company will not become location PE merely because there is interaction or cross transactions between the Indian subsidiary and the foreign company. Even if the foreign entities have saved and reduced their expenditure by transferring business or back office

operations to the Indian subsidiary, it would not by itself create a fixed place PE.

On the issue of constitution of service PE, the Supreme Court held that the requirement of Article 5(2)(l) of the India US Tax Treaty is that an enterprise must furnish services 'within India' through employees or other personnel. Since none of the customers of the assessees are located in India or have received any services in India, therefore, the question of constitution of service PE does not arise since the foreign company is not rendering any services to any customer in India.

On the issue of agency PE, the Supreme Court observed that since there is no factual finding as to whether and how e-Funds India was authorized to or exercised any authority to conclude contracts on behalf of the US company, the US company cannot be said to constitute agency PE in India in terms of Article 5(4) of the India US Tax Treaty.

The Supreme Court further held that since the transactions between the US company and Indian subsidiary have been held to be at an arm's length by the TPO, no further profits would be attributable even if there exists a PE in India. Relevant extracts of the decision are reproduced below:

"11. Since the Revenue originally relied on fixed place of business PE, this will be tackled first. Under Article 5(1), a PE means a fixed place of business through which the business of an enterprise is wholly or partly carried on. What is a "fixed place of business" is no longer res integra. In Formula One World Championship Ltd. (supra), this Court, after setting out Article 5 of the DTAA, held as follows:

…….

12. Thus, it is clear that there must exist a fixed place of business in India, which is at the disposal of the US companies, through which they carry on their own business. There is, in fact, no specific finding in the assessment order or the appellate orders that applying the aforesaid tests, any fixed place of business has been put at the disposal of these companies. The assessing officer, CIT (Appeals) and the ITAT have essentially adopted a fundamentally erroneous approach in saying that they were contracting with a 100% subsidiary and were outsourcing business to such subsidiary, which resulted in the creation of a PE.

15. Also, Shri Ganesh has pointed out that the two American
companies have four main business activities which are: ATM Management Services, Electronic Payment Management, Decision Support and Risk Management and Global Outsourcing and Professional Services. He was at great pains to point out the report of Deloitte Haskins and Sells dated 13th March, 2009, produced before the CIT (Appeals), in which, on behalf of their American clients, the said firm of Chartered Accountants stated:
"2. The nature of business under each of the above verticals is detailed below:

(a) ATM Management Services

eFunds US's ATM Management Services ("ATM Services") segment covers the business of ATM deployment, management and branding services. eFunds US is an independent provider of ATMs and it places ATMs in convenience, grocery, general merchandise, and drug stores
as well as gas stations located throughout the United States and Canada. The ATMs run on an operating software which is generally owned by the original

ATM manufacturer whereas the datacentre, to which such ATMs are connected, operate on the software platforms such as 'Connex' which have been developed and maintained by eFunds US.

***Services provided by eFunds US**: eFunds US provided the processing for over 11,000 of the ATM machines in its network. Most of the ATMs were owned by the Appellant and its associate companies. All these ATMs were installed outside India and mainly in United States.*

***Services provided by eFunds India**: The only involvement of eFunds India was responding to queries raised by the customers, if they faced any difficulty in operation of their transaction which was part of activity (d) referred above.*

(b) Electronic Payment Management

eFunds US's Electronic Payment Management segment provides products and services in two broad categories: Payment Processing Software and Electronic Payment Processing Services. The business involves processing transactions for regional automated teller machine or ATM networks in the United States and also transaction processing for retail point-of-sale terminals that accept payments from debit cards and paper cheques that have been converted into electronic transactions.

***Processing Services**: eFunds US processes transactions for regional ATM networks in the United States. They also provide transaction processing for retail point of sale ("POS") terminals that accept payments from debit cards and paper cheques that have been converted into electronic transactions. Transaction processing involves electronically*

transferring money from a person's checking or savings account according to his or her instructions. To carry out the tasks required, each ATM or POS device is typically connected to several computer networks. None of these networks is installed in India. These networks include private networks that connect the devices of a single owner, shared networks that serve several device owners in a region, and national shared networks that provide access to devices across regions. Each shared network has numerous financial institution members. eFunds US provides its Customers with access across multiple networks.

eFunds US's Government services EBT (Electronic Benefits Transfer) business was started in response to federal mandates that require state and local Governmental agencies to convert to electronic payment methods for the distribution of benefits under entitlement programs, primarily food stamps and Transitional Aid to Needy Families. The EBT processing system manages, supports, and controls the electronic payment and distribution of cash benefits to program participants through ATMs and POS networks. As mentioned earlier, these are mostly located in USA. In any case, none was located in India.

***Software Products**: eFunds US develops and sells electronic funds transfer software, Connex and Architect, used in electronic payment services to in-house processors and regional networks in 23 foreign countries and in the United States. None of the software products of eFunds US was licensed or installed in India. This software runs on IBM and Tandem computing platforms. eFunds US also provides software maintenance and support services as part of its Global Outsourcing business. eFunds US has developed various other software/solutions.*

Services provided by eFunds US*: eFunds US was responsible for Customer Interface and customization of products and services as per the dictates of the Customer. Agreement/contracts with the Customer were entered into by eFunds US. All risks and responsibilities for performance of the Contract at all times were of eFunds US only. All Software's/solutions are developed by eFunds US. Software writing and conceptualization of ideas were done by eFunds US. All Networks and Infrastructure for this category of services is owned by eFunds US only. Connex was developed by a company acquired by eFunds US. eFunds US's associate company in United Kingdom has developed and owns the Architect software which is middleware used primarily by financial institutions in Europe (there is one customer in Chicago). This software runs on IBM and Tandem computing platforms. All of them were located outside India.*

In accordance with the terms of the contract with Government Agencies, eFunds US is responsible for management, support and control of the electronic payment band distribution of cash benefits to program participants through its ATM and point of sale network.

Services provided by eFunds India*: eFunds India provided testing, bug fixing and other related software development support services to eFunds US for various software/software based solutions developed by eFunds US. Such services are required by eFunds US in the course of development of software/software based solutions and their use in providing services to customers. The process of development of software/solutions involves testing the same with sample data to determine the workability of the software. Further, certain errors or bugs may be found in the software/solutions at such eFunds US avails the*

services of eFunds India for bug fixing.

The work performed by eFunds India for eFunds Government Services Business (EBT Processing) was limited to responding to the inbound calls made to its call centre for enquiry on non-acceptance of cheques and opening of accounts.

(c) Decision Support & Risk Management

eFunds' US Decision Support & Risk Management ("Risk Management") segment provides risk management-based data and other products to financial institutions, retailers and other businesses that assist in detecting fraud and assessing the risk of opening a new account or accepting a cheque. This segment offers products and services that help determine the likelihood of account fraud and identity manipulation and assess the overall risks involved in opening new accounts or accepting payment transactions.

***SCAN**: SCAN or Shared Cheque Authorization Network, helps retailers reduce the risk of write-offs for dishonouredcheques due to insufficient funds and other forms of account fraud or identity manipulation. When a cheque is presented as payment at the point-ofsale, SCAN members run the cheque through a scanner. The information on the cheque is then compared to the SCAN database to determine whether there have been payment problems with the cheque writer or his or her account. SCAN then reports any issues to the retailer and the merchant decides whether or not to accept the cheque.*

***ChexSystems**: The ChexSystems business is a provider of new account applicant verification services for financial institutions. ChexSystems provides access to*

more than 17 million closed-forcause account histories and has recorded 124 million new account enquiries. An account is considered closed-for-cause when, for example, a consumer refuses to pay the account fee and the bank closes the account. ChexSystems helps financial institutions immediately assess the risks involved in opening an account for a new customer by supporting real-time enquiries to its database of consumer debit account performance. ChexSystems' database includes account history data provided by or purchased from financial institutions and other data purchased from third parties including driver's license data, deceased person's records and suspect address lists. All such data base relates to the persons located in the US and the customers of this data base were banks and retailers located in the US.

***Services provided by eFunds US**: eFunds US was responsible for Customer interface and agreement/contracts with the customers were entered into by eFunds US. All risks and responsibilities for performance of contracts at all times were of eFunds US only. All eFunds risk management services are based on, or enhanced by eFunds' proprietary DebitBureau database, which is located in data centres of the group situated in USA. DebitBureau contains over three billion records and includes data form eFunds ChexSystemsSM and SCANSM databases and other sources. The data in DebitBureau is used to screen for potentially incorrect, inconsistent, or fraudulent social security numbers, home addresses, telephone numbers, driver license information, and other indicators of possible identity*
manipulation. Using this data, eFunds US can perform various tests to validate a consumer's identity and assess and rank the risk of fraud associated with opening an account for or accepting a payment from that consumer. eFunds US software development

centers in the United States, as well as in the U.S. data centers and remotely at the customers' sites develop and maintain software for these service offerings.

***Services provided by eFunds India**: The work performed by eFunds India involved responding to the inbound calls made by the customers located outside India to customer support center of eFunds US. These calls were routed to eFunds India for enquiry on nonacceptance of cheques and opening of accounts.*

eFunds India also provided software support services for SCAN and Chex process. eFunds India was only involved in bug fixing and software maintenance.

(d) Global Outsourcing Services & Professional Services

eFunds US provide its clients with information technology and business process outsourcing services to complement and support its electronic payments business. Its business process management and outsourcing services focus on both back-office and customer support business processes, such as accounting operations, help desk, account management, transaction processing and call center operations. It consists of providing information technology services including maintenance of hardware and networks, installation of eFunds US electronic payment products and the integration of these products within the customer's existing information technology infrastructure. All of these hardwares, networks and information technology infrastructure were located outside India. Professional services include customizing standard eFunds US products and developing new applications for clients who want additional features and functionality and help clients test and refine eFunds US products in their

information technology environments. In addition, it also covers providing on-site user training on eFunds US products and solutions for the information technology, operations and management staff of clients.

***Services provided by eFunds US**: eFunds US was responsible for Customer Interface and customization of products and services as per the dictates of the Customer. Agreement/ contracts with the customers were entered into by eFunds US. All risks and responsibilities for performance of the contracts at all times were of eFunds US only.*

***Services provided by eFunds India**: eFunds US subcontracted part of its responsibilities under professional services contract with some of its customers to eFunds India which involve the following:*

> *Data Processing Services including making outbound calls*
> *to collate data;*
>
> *Making soft outbound calls to customers of eFunds US*
> *clients to follow up payment; and*
>
> *Responding to inbound calls from customers from dealers/customers of telecom services providers (who are customers of eFunds US), to check on the status of applications made for new connections, change in billing plans etc.*

***Note**: Logica Global, an independent company, had received an order from the Reserve Bank of India for development and implementation of certain software. A part of this work was subcontracted to eFunds India directly by Logica Global. The Appellant had nothing*

to do with this contract."

16. This report would show that no part of the main business and revenue earning activity of the two American companies is carried on through a fixed business place in India which has been put at their disposal. It is clear from the above that the Indian company only renders support services which enable the assessees in turn to render services to their clients abroad. This outsourcing of work to India would not give rise to a fixed place PE and the High Court judgment is, therefore, correct on this score.

17. Insofar as a service PE is concerned, the requirement of Article 5(2)(l) of the DTAA is that an enterprise must furnish services "within India" through employees or other personnel. In this regard, this Court has held, in Morgan Stanley (supra), as follows:
……

18. It has already been seen that none of the customers of the assessees are located in India or have received any services in India. This being the case, it is clear that the very first ingredient contained in Article 5(2)(l) is not satisfied.……

21. Shri Ganesh has argued before us that the "agency PE" aspect of the case need not be gone into as it was given up before the ITAT. He is right in this submission as no argument on this score is found before the ITAT. However, for the sake of completeness, it is only necessary to agree with the High Court, that it has never been the case of Revenue that e-Funds India was authorized to or exercised any authority to conclude contracts on behalf of the US company, nor was any factual foundation laid to attract any of the said clauses contained in Article 5(4) of the DTAA. This aspect of the case, therefore, need not detain us any

further.

Shri Ganesh is correct in stating that as the arm's length principle has been satisfied in the present case, no further profits would be attributable even if there exists a PE in India. This was specifically held in Morgan Stanley (supra) as follows:

"32. As regards determination of profits attributable to a PE in India (MSAS) is concerned on the basis of arm's length principle we have quoted Article 7(2) of DTAA. According to AAR where there is an international transaction under which a non-resident compensates a PE at arm's length price, no further profits would be attributable in India. In this connection, AAR has relied upon Circular No. 23 of 1969 issued by CBDT as well as Circular No. 5 of 2004 also issued by CBDT. This is the key question which arises for determination in these civil appeals.

(at page 25)

** **

35. The object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India. Under Article 7(2) not all profits of MSCo would be taxable in India but only those which have economic nexus with PE in India. A foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the PE in India. The quantum of taxable income is to be determined in accordance with the provisions of the IT Act. All provisions of the IT Act are applicable, including provisions relating to depreciation, investment losses, deductible expenses, carry forward and set-off losses, etc. However, deviations are made by DTAA in cases of royalty, interest, etc. Such deviations are also made under the

IT Act (for example Sections 44-BB, 44-BBA, etc.).

36. Under the impugned ruling delivered by AAR, remuneration to MSAS was justified by a transfer pricing analysis and, therefore, no further income could be attributed to the PE (MSAS). In other words, the said ruling equates an arm's length analysis (ALA) with attribution of profits. It holds that once a transfer pricing analysis is undertaken, there is no further need to attribute profits to a PE. The impugned ruling is correct in principle insofar as an associated enterprise, that also constitutes a PE, has been remunerated on an arm's length basis taking into account all the risk-taking functions of the enterprise. In such cases nothing further would be left to be attributed to PE. The situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a situation, there would be a need to attribute profits to PE for those functions/risks that have not been considered. Therefore, in each case the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case. Lastly, it may be added that taxing corporates on the basis of the concept of economic nexus is an important feature of attributable profits (profits attributable to PE)."

20. A comparative chart of the facts of the case in hand and those considered by the Hon'ble Supreme Court in the case of eFunds IT Solutions and Ors [supra] is as under"

Particulars	***E-Funds Case***	***Appellant's case***
Foreign entity (eFunds Corp) has BPO service provider only in India	*Yes*	*Yes*

Employees of the Foreign entity (eFunds Corp) are seconded to Indian Entity (eFunds India)	*Yes*	*Yes*
Foreign entity (eFunds Corp) is doing marketing work only and its contracts with clients are assigned, or subcontracted to Indian Entity (eFunds India)	*Yes*	*Yes. Infact the appellant is undertaking much more work in the US*
The master services agreement between the American and the Indian entity gives complete control to the American entity in regard to personnel employed by the Indian entity	*Yes*	*No*
It is only through the proprietary database and software of Foreign entity (eFunds Corp), that Indian Entity (eFunds India) carries out its functions for Foreign entity (eFunds Corp	*Yes*	*No*
Indian Entity (eFunds India) provides management support and marketing support services to Foreign entity (eFunds Corp) group companies outside India.	*Yes*	*No. The Indian entity only provide back office and BPO related services.*
Place of business of the Indian entity is not at the disposal of the US company	*Yes*	*Yes*
Indian entity is not negotiating and concluding contracts on behalf of the foreign parent company	*Yes*	*Yes*
All the clients to whom services are rendered are located outside India	*Yes*	*Yes*
The Indian entity has been remunerated on an arm's length basis which has also been accepted by the TPO. Accordingly, no further attribution to be made to India	*Yes*	*Yes*

21. On understanding the facts mentioned hereinabove, we are of the considered view that it is not the case of the Revenue that the employees of foreign enterprises furnished services in India Nothing has been brought on record by the Revenue to show that there was secondment of employees by Exl US to Exl India.

22. A perusal of the Service Agreement shows that foreign enterprise i.e. Exl US is doing marketing work only and its contracts with clients are assigned or sub-contracted to

Indian entity i.e. Exl India.

23. The expenses of the firm/enterprise Exl US can be understood from the following chart:

Exl Inc.'s P&L

ANNEXURE 2

Amounts in $	Apr-Dec'02	Jan-Mar'03	Apr-Mar'03
Revenue	20,542,870	4,079,010	24,621,879
Operating Expenses			
Consulting Expenses - India	17,280,847	3,151,809	20,432,657
Salaries and Personnel Expenses	2,283,562	675,491	2,959,052
Amortization/Depreciation	755,031	251,684	1,006,715
Premise Expenses	162,343	66,196	228,539
Professional Fees	400,307	385,432	785,740
Marketing Expenses	-	12,477	12,477
Communications	1,629,900	445,816	2,075,716
General Administration	683,039	161,474	844,513
Travel and Entertainment	823,447	182,532	1,005,979
Total Operating Expenses	24,018,476	5,332,911	29,351,387
Income / (Loss) from Operations	(3,475,607)	(1,253,901)	(4,729,508)
Other Income / (Expenses)			
Interest & Other Income	34,294	15,792	50,086
Interest Expense	72,614	-	72,614
Foreign Exchange Gain / (Loss)	-	-	-
Income / (Loss) Before Income Taxes and Extraordinary Items	(3,368,698)	(1,238,110)	(4,606,808)
Provision for Tax	6,339	0	6,339
Extraordinary Items	-	-	-
Net Income / (Loss)	(3,375,037)	(1,238,110)	(4,613,147)

24. The ld. DR vehemently stated that Shri Rohit Kapoor as Chief Financial Officer has signed agreement both for Exl Serviuces.com [India] Private Limited and Exl Services India Private Limited to which the ld. counsel for the assessee vehemently stated that agreement which is referred to by the ld. DR is between Conseco Inc and Exl

Service.com India Private Limited and made a categorical finding that Shri Rohit Kapoor is not employed with the Indian company but is under employment of Exl US and pointed out that the addresses for service of notices are different for Conesco Inc and Exl Delaware or Exl India.

25. Coming to the next allegation PE being Agency PE, in our understanding, an Agency PE is constituted where a person, other than an agent of an independent status, is acting on behalf of a US enterprise in India and such person has authority to conclude contracts on behalf of the US enterprise and such authority habitually secures orders in India wholly or almost wholly for the foreign enterprise.

26. On the facts of the case in hand, such conditions are absent, as Exl India has no authority to conclude any contract on behalf the US enter5pirse and all customers are based out of US and none of it is present in India. Reference is made to the decision of the Hon'ble Supreme Court in the case of Morgan Stanley & Co. Inc: 292 ITR 416 wherein it has been held as under:

"MSC, a US based company was an investment bank engaged in business of providing financial advisory services, corporate lending and securities underwriting. It entered into an agreement with Morgan Stanley Advantage Services Pvt Ltd ('MSAS'), a wholly owned Indian subsidiary for providing certain support services to MSC. MSAS was set-up to support the main office functions in equity and fixed income research, account reconciliation and IT enabled services such as back office operations which are preparatory and auxiliary in nature, data processing and support centre to MSC pursuant to the aforesaid agreement. The Supreme Court held that one has to undertake a factual and functional analysis of each of the activities performed by an enterprise to determine whether a PE has been constituted.

On the basis of such an analysis, it was concluded that the activities performed by its subsidiary in India were only back office operations. Consequently, the second part of Article 5(1) (i.e. business activities of an enterprise are carried out wholly or in part through the fixed place) of the treaty was not satisfied and there was no fixed place PE in India.

The Court further held that MSAS does not constitute an agency PE since MSAS does not have any authority to enter into or conclude the contracts on behalf of MSC in India. However, since MSC is rendering services through its employees to MSAS, therefore, service PE of MSC is constituted in India.

27. There is no dispute that no part of the business premises of Exl India has been made available to the assessee for its use. Even the Assessing Officer has not placed any material on record to show that the assessee had a right to use any part of the business premises of Exl India to carry on its own business activities. Moreover, Exl India is merely a work contract to it by the assessee and core activities such as key management functions, such as, development of strategy, identifying new business areas, guidance to the group, sales and marketing, contract negotiation and conclusion, and customer relationship management are managed by the assessee from outside India.

28. Merely because the assessee owns 100% of share capital of EXl India does not have effect or consequence of EXL India becoming the PE of the assessee in India. The assessee being the major shareholder of EXL India, it has the legal right to nominate a director on the Board of EXL India and merely because the assessee has nominated a director on the Board of EXL India would not mean that the assessee has a "Place of Management" in India.

29. Considering the facts in totality in light of the decision of the Hon'ble Supreme Court in the case of eFunds IT Solution and Ors [supra] and Morgan Stanley & Co. Inc [supra], we are of the considered view that the assessee does not have a fixed place PE in India, Service PE in India and dependent Agent PE in India. Therefore, no profit is attributable as no business connection has been established under Article 5 of the DTAA between India and the US.

30. For the sake of completeness, in respect of attribution of income to the PE, the Hon'ble Supreme Court in the case of Morgan Stanley & Co. Inc [supra] has held that if the transactions between the PE and the foreign Associated Enterprise are found to have taken place at arms' length prices, then there is no question of attributing any income to the PE. The relevant part of the order reads as under:

> *"33.Toconclude,wehold that the AAR was right in ruling that MSAS would be a Service PE in India under Article 5(2)(l), though only on account of these services to be performed by the deputationists deployed by MSCo and not on account of stewardship activities. As regards income attributable to the PE(MSAS) we hold that the Transactional Net Margin Method was the appropriate method for determination of the arm's length price in respect of transaction between MSCo and MSAS. We accept as correct the computation of the remuneration based on cost plus mark-lup worked out at29% on the operating costs of MSAS. This position is also accepted by the Assessing Officer in his order dated 29-12-06 (after the impugned ruling) and also by the transfer pricing officer vide order dated 22-09-06. As regards attribution of further profits to the PE of MSCo where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle*

provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE. The situation would be different if the transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the PE for those functions risks that have not been considered. The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represents the value of the profit attributable to his service. In this connection, the Department has also to examine whether the PE has obtained services from the multinational enterprise at lower than the arm's length cost? Therefore, the Department has to determine income, expense or cost allocations having regard to arm's length prices to decide the applicability of the transfer pricing regulations."

31. In light of the aforementioned discussion, Ground Nos. C, D and E, are allowed and Ground Nos. F to P become otiose.

32. Ground No. Q was not disposed of by the ld. CIT(A). We, therefore, direct the ld. CIT(A) to decide this grievance raised by the assessee before him. Accordingly, this ground is allowed for statistical purposes.

33. Ground No. R relates to the levy of interest u/s 234A, 234B and 234c of the Act.

34. Levy of interest is consequential and the Assessing Officer is directed to charge interest as per provisions of

law.

35. In so far as interest u/s 234B is concerned, u/s 195 of the Act, tax is deductible at source from payments made to non-residents. The assessee being a non-resident, tax is deductible at source u/s 195 of the Act from the payments made to the assessee. Therefore, no advance tax was payable as per the provisions of section 208 r.w.s. 209 of the Act. Therefore, the assessee had no liability for payment of advance tax. Provisions of section 234B are not applicable.

36. For this proposition, we draw support from the decision of the Hon'ble Supreme Court in the case of Mitsubishi Corporation 438 ITR 174 wherein the Court held as under:

> *"20. We do not find force in the contention of the Revenue that section234B should be read in isolation without reference to the other provisions of Chapter XVII. The liability for payment of interest as provided in section234B is for default in payment of advance tax. While the definition of "assessed tax" under section234B pertains to tax deducted or collected at source, the preconditions of Section234B, viz. liability to pay advance tax and nonpayment or short payment of such tax, have to be satisfied, after which interest can be levied taking into account the assessed tax. Therefore, section 209 of the Act which relates to the computation of advance tax payable by the assessee cannot be ignored while construing the contents of section234B. As we have already held that prior to the financial year 2012-13, the amount of income-tax which is deductible or collectible at source can be reduced by the assessee while calculating advance tax, the Respondent cannot be held to have defaulted in payment of its advance tax liability. We uphold*

the view adopted in the impugned judgement of the Delhi High Court in Civil Appeal No. 1262 of 2016 as well as by the Madras High Court in the Madras Fertilizers Ltd. case (supra), that the Revenue is not remediless and there are provisions in the Act enabling the Revenue to proceed against the payer who has defaulted in deducting tax at source. There is no doubt that the position has changed since the financial year 2012-13, in view of the proviso to section 209(1)(d), pursuant to which if the assessee receives any amount, including the tax deductible at source on such amount, the assessee cannot reduce such tax while computing its advance tax liability."

37. Though the Finance Act, 2012 has amended the relevant provisions, but the said amendment is w.e.f. 01.04.2012 and not applicable for the years under consideration.

38. As a result, the appeals of the assessee are allowed in part for statistical purposes.

39. Before closing, wherever the TPO has made adjustments while determining the ALP, the said TP adjustment has been deleted by this Tribunal in the case of Exl Service India Pvt ltd. Copies of the decision of the co-ordinate bench are placed at pages 357 to 480 of the Paper Book. Since the TP adjustments have been deleted in the hands of the Exl India, the same are adjudicated automatically wherever relevant in the captioned appeals.

40. In the result, the appeals of the assessee in ITA Nos. ITA No. 4183/DEL/2014, ITA No. 5627/DEL/2014, ITA No. 5628/DEL/2014 and ITA No. 3408/DEL/2014 are partly allowed for statistical purposes and that of the Revenue in ITA No. 4989/DEL/2014 is dismissed."

(emphasis supplied)

15. The Tribunal having referred to the judgment of the Supreme Court in ***DIT v. eFunds IT Solution & Ors.(2017), 399 ITR 34*** and by way of a chart compared the facts in the following manner :-

"

Particulars	***E-Funds Case***	***Appellant's case***
Foreign entity (eFunds Corp) has BPO service provider only in India	*Yes*	*Yes*
Employees of the Foreign entity (eFunds Corp) are seconded to Indian Entity (eFunds India)	*Yes*	*Yes*
Foreign entity (eFunds Corp) is doing marketing work only and its contracts with clients are assigned, or subcontracted to Indian Entity (eFunds India)	*Yes*	*Yes. Infact the appellant is undertaking much more work in the US*
The master services agreement between the American and the Indian entity gives complete control to the American entity in regard to personnel employed by the Indian entity	*Yes*	*No*
It is only through the proprietary database and software of Foreign entity (eFunds Corp), that Indian Entity (eFunds India) carries out its functions for Foreign entity (eFunds Corp	*Yes*	*No*
Indian Entity (eFunds India) provides management support and marketing support services to Foreign entity (eFunds Corp) group companies outside India.	*Yes*	*No. The Indian entity only provide back office and BPO related services.*
Place of business of the Indian entity is not at the disposal of the US company	*Yes*	*Yes*
Indian entity is not negotiating and concluding contracts on behalf of the foreign parent company	*Yes*	*Yes*
All the clients to whom services are rendered are located outside India	*Yes*	*Yes*
The Indian entity has been remunerated on an arm's length basis which has also been accepted by the TPO. Accordingly, no further attribution to be made to India	*Yes*	*Yes*

> *21. On understanding the facts mentioned hereinabove, we are of the considered view that it is not the case of the Revenue that the employees of foreign enterprises furnished services in India Nothing has been brought on record by the Revenue to show that there was secondment of employees by Exl US to Exl India."*

16. The Tribunal concluded that, it is not the case of Revenue that the employees of foreign enterprises furnished services in India. At least nothing has been brought on record by the Revenue to show that there was secondment of employees by Assesssee to Exl India. The findings of fact include that the service agreement shows that the foreign enterprise/Exl US is doing only marketing work and its contracts with the clients are assigned or sub-contracted to Indian entity i.e. Exl India.

17. The plea advanced by the appellant/Revenue is that the Chief Financial Officer has signed the agreement both for Exl Services.com Inc and Exl Services India Private Limited. This plea was contested by the respondent/Assessee stating that the Chief Financial Officer is not employed with the Indian company but is under employment of Assesssee. It was also pointed out that the addresses for service of notices are different for Conesco Inc and Exl Delaware or Exl India.

18. The Tribunal observed that, an Agency PE is constituted where a person, other than an agent of an independent status, is acting on behalf of a foreign/US enterprise in India and such person has authority to conclude contracts on behalf of the foreign /US enterprise and such authority habitually secures orders in India wholly or almost wholly for the foreign enterprise.

19. It is the conclusion of the Tribunal that in the facts, such conditions are not fulfilled, as Exl India has no authority to conclude any contract on behalf the US enterprise and all customers are based out of US and none of them is present in India. Hence, the Tribunal held that there is no PE. Reference has been made by the Tribunal to the judgment in the case of ***DIT v. Morgan Stanley & Co. Inc: 292 ITR 416;*** wherein paragraph 33, the Supreme Court, concluded that, if the transactions between the PE and the foreign Associated Enterprise are found to have taken place at Arms' Length Price, then there is no question of attributing any income to the PE, as reproduced as under :

> *"33.Toconclude,wehold that the AAR was right in ruling that MSAS would be a Service PE in India under Article 5(2)(l), though only on account of these services to be performed by the deputationists deployed by MSCo and not on account of stewardship activities. As regards income attributable to the PE(MSAS) we hold that the Transactional Net Margin Method was the appropriate method for determination of the arm's length price in respect of transaction between MSCo and MSAS. We accept as correct the computation of the remuneration based on cost plus mark-lup worked out at 29% on the operating costs of MSAS. This position is also accepted by the Assessing Officer in his order dated 29-12-06 (after the impugned ruling) and also by the transfer pricing officer vide order dated 22-09-06.* ***As regards attribution of further profits to the PE of MSCo where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE****. The situation would be different if the transfer*

pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the PE for those functions risks that have not been considered. The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represents the value of the profit attributable to his service. In this connection, the Department has also to examine whether the PE has obtained services from the multinational enterprise at lower than the arm's length cost? Therefore, the Department has to determine income, expense or cost allocations having regard to arm's length prices to decide the applicability of the transfer pricing regulations."

(Emphasis supplied)

20. Relying on the aforesaid conclusion, the Tribunal accepted the grounds urged by the respondent/Assessee at C, D and E.

21. Additionally, the conclusion drawn by the Tribunal in paragraph 39 as reproduced above is that pursuant to demand made by the Tribunal in the appeal filed by Exl Service India Pvt. Ltd., the TPO had deleted the transfer pricing adjustments resulting in consequential orders being passed by the Assessing Officer, as can be seen in the compilation filed by Mr. Vohra, at pages 53, 107 and 121 relatable to the aforesaid three Assessment Years stating that the total adjustment has been revised to *nil* in all the three Assessment Years. It follows that since the TP adjustment has been deleted at the hands of Exl India, the same shall have a bearing in so far as the appeals filed by the respondent and decided by the ITAT.

22. Hence, we are of the view that the conclusion drawn by the Tribunal in all three Assessment Years/appeals is justified. As, no substantial question of law arises in these appeals, the appeals being without any merit

are dismissed.

23. In view of the aforesaid conclusion, the challenge made by the Revenue to the order dated 20.12.2023 rejecting its appeal being ITA 4989/Del/2014 is also consequentially dismissed.

V. KAMESWAR RAO, J

VINOD KUMAR, J

DECEMBER 17, 2025
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