IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI

BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND SHRI RAHUL CHAUDHARY, HON'BLE JUDICIAL MEMBER

ITA NOs. 803 & 2330/MUM/2022
(A.Ys: 2018-19& 2019-20)

RGA International Reinsurance Company Designated Activity Company C/o. Ernst and Young LLP 17th Floor, The Ruby 29, Senapati Bapat Marg, Dadar (W) Mumbai - 400028 **PAN: AADCR1226K**	*v.*	DCIT (Intl. Taxation) – 4(1)(1) Room No. 1712, 17th Floor Air India Building, Nariman Point, Mumbai – 400 021
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri Anish Thacker**
Department Represented by	**:**	**Shri Ajay Kumar Sharma**
Date of Conclusion of Hearing	**:**	**04.07.2023**
Date of Pronouncement	**:**	**06.09.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. These appeals are filed by assessee against final assessment order and directions of the Dispute Resolution Panel of Learned Commissioner of Income Tax (DRP-2), Mumbai-1 [hereinafter in short "Ld.DRP"] dated

18.01.2022 and 01.06.2022 for the A.Ys. 2018-19 and 2019-20 respectively, passed u/s. 144C(5) of Income-tax Act, 1961 (in short "Act").

2. Since the issues raised in both these the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal ITA.No. 803/MUM/2022 for Assessment Year 2018-19 as a lead appeal.

ITA.NO. 803/MUM/2022 (A.Y. 2018-19)

3. Brief facts of the case are, assessee filed its return of income declaring total income at ₹.NIL on 26.10.2018. The case was selected for scrutiny assessment under CASS and notices u/s. 143(2) and 142(1) of Income-tax Act, 1961 (in short "Act") were issued and served on the assessee electronically. In response to the above notices, Authorised Representative of the assessee attended and submitted the relevant information as called for.

4. Assessee is a foreign company and a tax resident of the Ireland. Assessee is in the business of providing reinsurance services to insurers/

cedants. It is primarily involved in providing reinsurance services for life insurance. The assessee has entered into various reinsurance treaties with Indian Insurance Companies. For underwriting the risk, the assessee receives reinsurance premium, under the reinsurance treaties entered by it with Indian insurance companies. The Assessing Officer observed that assessee has received total premium amount of ₹.435,14,07,217/- during the year and assessee has claimed the same as business income of the assessee, and it does not have a Permanent Establishment in India and hence these receipts are not taxable in India.

5. Further, Assessing Officer observed that assessee has signed reinsurance agreements with various insurers in India, and has also signed a reinsurance support services agreement dated 01.04.2006 with its associated enterprise in India RGA Services India Pvt. Ltd., (RGA Services) by which the Indian entity provides business support - underwriting / actuarial support, risk profiling, data synopsis and suggestions for underwriting proposals along with marketing support - marketing research, customer relationship management and administrative assistance to the assessee.

6. The Assessing Officer observed that, there is no variation in the nature of business activity of the assessee and its dealings with its clients and the associate enterprises, by observing the above facts, the Assessing Officer asked the assessee through show-cause notice dated 15.04.2021 as to why it should not be held that the assessee has a business connection / Permanent Establishment in India and accordingly its business income from India held not to be taxable in India. The assessee was also asked to furnish details of the income attributable to operations in India / income from business done through the PE, and the profit derived from such business.

7. In response, assessee vide its letter dated 18.02.2020 submitted the explanation as to why the assessee does not have a business connection / PE in India and contested that the assessee neither has a business connection nor Fixed Place of PE nor an Agency PE nor PE under Article 5(7) of the DTAA. Therefore, no income can be attributed to India on account of a PE in India. The submissions of the assessee are reproduced at Para No. 5 of the Assessment Order.

8. After considering the submissions of the assessee, the Assessing Officer rejected the same and Assessing Officer discussed the issues

involved in reinsurance business at Para No. 7.2 to 7.3 of the Assessment Order and observed that there is a "real and intimate" connection between the trading activity outside India i.e., business of the assessee, and the trading activity done within India by RGA Services by means of providing marketing support, marketing research, communication channel, actuarial and underwriting services, claim settlement, and other administrative services performed based on the Reinsurance Support Services agreement between RGA Services and the assessee. Further, in Para No.7.6 of the Assessment Order, the Assessing Officer observed that the business of the assessee is to provide reinsurance services to clients / cedants in India. In the course of such business, RGA Services an Indian company, a wholly-owned subsidiary of the assessee, acts as a Permanent Establishment of the assessee in India. In the present situation, RGA Services can be considered as Fixed Place Permanent Establishment of the assessee in India. The assessee has entered into a Reinsurance Support Services Agreement (RSSA) dated 01.04.2006 with RGA Services for obtaining risk assessment services, market intelligence and administrative support in India and in turn, remunerates/compensates RGA Services on a cost plus 12 percent margin basis. This agreement is updated by another

Agreement dated 31.08.2010 between the assessee and its group entity RGA Americas Reinsurance Company Ltd., and RGA India. He observed that the type of services provided by RGA Services to its group entities are the same as per the agreement dated 31.08.2010 vis-a-vis agreement dated 01.04.2006. Further, Assessing Officer observed that the various terms of the agreement support the finding that RGA India acts as a Fixed place PE of the assessee in India as per the provisions of Article 5(1) of the DTAA. The Assessing Officer extracted the business support services from the above said agreement and extracted the various services offered by the RGA Services in India in his order.

9. Further, in Para No. 11 of the Assessment Order, Assessing Officer observed that RGA Services provides technical and core reinsurance services of actuarial and underwriting support and risk assessment. RGA Services gives inputs to country-specific risk parameters in the risk frameworks designed by the actuaries. He observed that the necessary decisions for the Indian policy writing risk framework are also done based on the mortality/morbidity experience studies and data review carried out by RGA Services.

10. Further, he observed that assessee also submitted that "assessee approaches RGA Services for assistance for evaluation of underwriting of such reinsurance proposals", therefore it shows that the dependence of assessee on RGA Services for key activity of underwriting. By analyzing the various clauses of the agreement, the Assessing Officer came to the conclusion that the RGA Services performs the entire marketing activity and stakeholder relationship management, market research, morbidity / mortality studies, observational studies and industry expert interviews which aid in product designing and understanding the underlying country-specific risks in India, along with crucial customer interface in India by acting as a channel between the customers and the assessee. These activities are vital to any reinsurance business, apart from the actuarial and underwriting functions also provided by RGA Services.

11. Further, Assessing Officer observed that RGA Services is also processing the claims putforth by the cedants in respect of the insurance claims arising subsequently. Further, he observed that RGA Services is performing a spectrum of crucial business activities and also captive service provider for the assessee. He rejected the claim of the assessee

that RGA Services does not have the authority to secure contracts nor solicit business for the assessee.

12. Further, he observed that RGA Services is dependent on the assessee and it is required to maintain records and produce the same to assessee's auditors, and also transfer the records to the assessee upon the termination of the agreement.

13. Further, he observed that assessee has remunerated RGA Services on cost-plus basis, accordingly, assessee as per agreement, reimburses cost plus a margin of 12%, by observing the above, the Assessing Officer opined that RGA Services is representative and related enterprise performing risk assessment, actuarial and underwriting services, collection of information in the reinsurance field and co-ordination with the cedants for reinsurance business gets substantially performed in India itself and thereafter not much critical functions remain to be performed outside India except for just signing the contract and observed that the final entry into contracts though undertaken de facto by the assessee on paper, in reality, is based on the vital inputs and functions performed by RGA Services in India.

14. Further, he rejected the claim of the assessee that Article 5(7) of DTAA makes the insurance company liable to tax if it collects insurance premiums in India and insures risks of Indian residents or their agents except in the case of reinsurance services, and the claim that the both the Governments intention to exclude reinsurance business from the tax net. He observed that Article 5(7) is an enabling clause which creates deeming fiction of existence of a Permanent Establishment in respect of insurance business. However, Clause 5(7) exempts re-insurance premium payments by way of deeming fiction, but does not contemplate to restrict the applicability of provisions of clause (1), (2) or, clause (6) of Article 5, if found applicable.

15. Further, he held that RGA Services is held to be Dependent Agent Permanent Establishment (DAPE) of the assessee in India in terms of Article 5(6) of the DTAA. By holding that RGA Services is a DAPE and as such by relying on the decisions of Morgan Stanley and Co. Inc. [2007] 292 ITR 416 (SC), held that reinsurance premium received by the assessee to the extent of attribution of services in India. He held that 50% of the insurance income is attributable to India, accordingly, he

determined the profit attributable to Indian DAPE is 10% of the 50% of the gross reinsurance premium received by the assessee.

16. Aggrieved with the above order assessee preferred an objection before Ld. DRP. Ld. DRP after considering the detailed submissions which is reproduced in his order held that the findings of the Ld. DRP in earlier year are similar to the material facts and circumstances in the current Assessment Year 2018-19. Accordingly, they dismissed the grounds raised by the assessee.

17. Further, Ld. DRP sustained the findings of the Assessing Officer that services provided by RGA Services cannot be considered as preparatory or auxiliary services by following the MLI Treaty. Further, Ld. DRP also rejected the submissions made by the assessee relating to the findings of the Assessing Officer that Indian Cedants i.e. unrelated third parties constitute a DAPE of the assessee in India as per Article 5(6) of the treaty. Ld. DRP also sustained the addition in the above issues by relying on the decision of the Ld.DRP in earlier years.

18. Aggrieved assessee preferred an appeal before us raising following grounds in its appeal: -

"1. Ground 1

The learned AO has, on the facts and circumstances of the case in law, and based on the directions of the Hon'ble DRP, erred in concluding that the Appellant has a business connection in India as per the provisions of section 9(1)(1) of the Act on the basis that the Appellant is earning income from India on a regular and continuous basis

2. Ground 2

The learned AO has, on the facts and circumstances of the case in law, and based on the directions of the Hon'ble DRP, erred in concluding that the Appellant has a fixed place permanent establishment (PE) in India as per Article 5(1) of the Double Taxation Avoidance Agreement entered between India and Ireland (India-Ireland Tax Treaty).

3. Ground 3

The learned AO has, on the facts and circumstances of the case in law, and based on the directions of the Hon'ble DRP, erred in concluding that RGA Services acts as a Dependent Agent PE of the Appellant in India as per Article 5(6) of the India-Ireland Tax Treaty.

4. Ground 4

The learned AO has, on the facts and circumstances of the case in law, and based on the directions of the Hon'ble DRP, erred in concluding that the support services performed by RGA Services are not in the nature of preparatory or auxiliary services but are core and crucial business activities in relation to reinsurance business.

5. Ground 5

The learned AO has, on the facts and circumstances of the case and in law, erred in applying the provisions of Multilateral Conventions to implement tax treaty related measures to prevent base erosion and profit sharing (MLI) between India and Ireland to the definition of PE in the current financial year. The learned AO failed to appreciate the fact that the said provisions are applicable from 1 April 2020.

Without prejudice to the above, the learned AO failed to appreciate the fact that there is no artificial segregation of work between the Appellant and RGA Services and that the services provided by RGA

Services are merely in the nature of administrative and ancillary support services.

Without prejudice to the above, the learned AO also failed to appreciate the fact that Article 5(7) of India-Ireland Tax Treaty specifically exclude reinsurance company from constituting PE in India where the agent collects premium on behalf of the reinsurance company in India.

6. Ground 6

The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in not considering the Appellant's claim that no further income can be attributed to the Appellant's alleged PE, on the fact that remuneration paid to RGA Services is at arm's length price.

7. Ground 7

Without prejudice to ground 6, the learned AO has, on the facts and in the circumstances of the case and in law, erred in estimating 10 percent of the gross receipts attributable to the Indian operations to be the profit generally made by a reinsurance company in India and in estimating 50 percent of the profit determined above to be attributable to the Appellant in India.

8. Ground 8

The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in applying a tax rate of 40 per cent instead of 12.5 per cent (plus applicable surcharge and education cess) applicable in case of life reinsurance business as per section 115B of the Act.

9. Ground 9

The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in levying interest under section 234B of the Act.

10. Ground 10

The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in levying interest under section 234A of the Act.

11. Ground 11

The learned AO has, on the facts and circumstances of the case and in law, and based on the directions of the Hon'ble DRP, erred in initiating penalty proceedings under section 270A of the Act."

19. At the time of hearing, Ld. AR of the assessee brought to our notice relevant facts of the case and filed its written submissions, for the sake of clarity it is reproduced below: -

"A) Background of RGA International Reinsurance Company Designated Activity Company ('RIRC' or 'the Assessee') and operations undertaken from India perspective

For the period from Financial Year 2003 to 31 March 2017

1. RIRC is a company incorporated in Ireland on 23 June 2003 and is a tax resident of Ireland. RIRC is a part of Reinsurance Group of America (RGA) and undertakes reinsurance business with insurers in Europe, United Kingdom and Asia (which includes India). In terms of its India business, RIRC undertakes reinsurance business with Indian life insurance companies (Indian Cedents) from the year 2003.

2. The key function in re-insurance is the acceptance of the risk that an insurance company transfers (cedes) to a re-insurer. The income to the re-insurer accrues in the jurisdiction in which the re-insurer accepts the said risk. In the case before your Honours, the decision of whether to accept the risks ceded by Indian Cedents to RIRC is taken by RIRC outside of India. Further, what is also important is that RIRC underwrites such risk based on its capital and assets, both of which are outside of India - as can be seen from the audited financial statements. Please refer to page number 165 of the Paperbook filed on 23 January 2023 which shows that the total capital of RIRC is Euros 606 million (approximately) and investments (assets) are of Euros 3,490 million (approximately), Once RIRC has decided that it will underwrite the risk assumed by the Indian Cedents, it will enter into a contract with the Indian Cedents. In doing so, RIRC will enter into negotiations, discuss the pricing terms and finalise the terms and conditions of the contracts, all of which activities are done by RIRC outside India. Given the niche life reinsurance business undertaken by RIRC with Indian Cedents, the Indian Cedents usually directly reach out to RIRC as

and when the requirement arises. The agreements (i.e., the treaties) entered into by RIRC with Indian Cedents are on a long-term basis and not on a year on year basis. Such agreements are signed by RIRC in Ireland - please refer to page number 85 and 109 of the Paper book filed on 23 January 2023, where as a sample, the treaty with OM Kotak Mahindra Life Insurance Company Limited and Kotak Mahindra Old Mutual Life Insurance Limited is annexed. You Honours will note that this treaty is signed by the authorised signatory of RIRC, with the place of signing being in Ireland. Further, in case of RIRC, analysis of claims to be settled, approval of settlement of claims and actual discharge of settlement is undertaken by RIRC in Ireland, i.e., from outside of India.

For the period from 1 April 2017

3. The RGA Group has a company in Canada, i.e., RGA Life Reinsurance Company of Canada (RGA Canada). RGA Canada made an application to the Insurance Regulatory and Development Authority of India (IRDAI) under the IRDAI [Branch Offices of Foreign Reinsurers (excluding Lloyd's) Regulations, 2015] (IRDAI Regulations) for setting-up its branch in India. IRDAI granted approval on 21 December 2016 for setting-up its branch in India, i.e., RGA Canada India Branch. RGA Canada - India Branch received approval from IRDAI to commence its business with effect from 21 December 2016. This entity in Canada is different from the Assessee.

4. Pursuant to set up of RGA Canada - India Branch, the new reinsurance treaties with Indian Cedents were entered into by RGA Canada's India Branch. RIRC did not enter into any new treaties with Indian Cedents post set up of RGA Canada - India Branch with effect from 1 April 2017 (the India Branch, I.e., RGA Canada India Branch actually commenced business from this date). However, all the older reinsurance treaties (ie., treaties entered into by RIRC prior to commencement of business by RGA Canada - India Branch) between RIRC and the Indian Cedents remained with RIRC under which RIRC earns premiums from the Indian Cedents.

5. Further, 45 percent of the premiums earned by RGA Canada India Branch is retroceded to RIRC.

B) Background of RGA Services India Private Limited (RGA Services)

6. RGA Services, subsidiary of Reinsurance Group of America, Inc. (United States of America) and thus, a group entity of RIRC, was incorporated in India on 14 June 2006. RGA Services provides support services to RIRC for its transaction with Indian Cedants as

well as to RIRC's operations outside India and other entities of the RGA Group.

7. RGA Services does not have a license from IRDAI to undertake reinsurance business or even to act as a reinsurance broker and the services provided are restricted only to support services to RIRC's operations in and outside India and Group entities' business operations outside India.

8. RGA Services provides support services to RGA group entities including RIRC in connection with the following:

a) RIRC's business with Indian Cedents;

b) RIRC's offshore business with foreign cedents; and

c) Similar support to other RGA group entities for their non-Indian business.

9. RIRC has entered into an agreement with RGA Services on a principal to principal basis.

10. A brief nature of the services provided by RGA Services to RIRC was submitted during the course of the assessment proceedings vide submission dated 20 April 2021 which is also part of the Paperbook filed on 23 January 2023-refer paragraph number 2.6 at page number 123 and 124 of the Paperbook.

11. For ease of reference, the brief description of the support services provided to RIRC in connection with RIRC's India business is given below:

a) Claims Support

- *RGA Services acts as a communication channel between RIRC and the Indian Cedents (with respect to existing treaties) to obtain and provide clarifications requested by the Indian Cedents from time to time.*

- *Indian Cedents approach RIRC for claims settlement under the re-insurance treaties. RIRC in turn approaches RGA Services for its assistance with respect to evaluation of the claim settlement request of its clients.*

- *RGA Services evaluates the proposal from medical and financial perspectives. The personnel of RGA Services review the documents regarding the medical history of the life reinsured, death records and other claim documents. If required, they could also request for additional documents.*

b) Claims Data Synopsis

- *The data collected by RGA Services from the claim documents that the cedents submit are synopsized and shared with RIRC who in turn takes the final decision to settle the claims or not.*

- *The personnel of RGA Services do the data entry into the software tool provided by RIRC. Additionally, this team provides support in respect of certain underwriting tools used by the aforementioned third party Indian Cedents,*

c) Administration support and other ancillary services

- *This function includes keeping track of premiums received with respect to various re-insurance policies, amount of premium received during a particular period etc.*

- *Further, these services also include other ancillary services like human resource support services, data entry accounting services to RIRC.*

12. Thus, RGA Services is a back office entity which has only provided support services to RIRC and other group companies. RGA Services has provided services in the form of claims support, claim data synopsis and administration and other ancillary services in connection with RIRC's India business. Further, RGA Services has also not provided any marketing services in respect of RIRC's India Business during the year. RGA Services does not act as an agent and it does not take any independent decision on behalf of RIRC with regard to any claim lodged against RIRC by the Indian Cedents.

C) RGA Services does not constitute a Dependant Agent Permanent Establishment (DAPE) of RIRC

13. Your Honor's may note that Article 5(6) of the India-Ireland Tax Treaty provides that a person acting on behalf of an enterprise may be deemed to be a PE in India of such an enterprise if such person is:

a) cting in India on behalf of an overseas enterprise (other than an agent of independent status' of the overseas enterprise); and

b) such person, inter alia:

- *has and habitually exercises in India, an authority to conclude contracts for or on behalf of the enterprise, unless his activities are limited to the purchase of goods for the enterprise: or*

- *has no authority, but habitually maintains a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise: or*

- *habitually secures orders in India wholly or almost wholly for the enterprise."*

14. Thus, as per Article 5(6) of India-Ireland Tax Treaty, a DAPE is constituted in India only where the following conditions are cumulatively met:

- *there should be an agent in India:*

- *the agent is a dependent agent (not an independent agent); and*

- *the agent habitually exercises an authority to conclude contracts or maintain and delivers merchandise or secures orders for the non-resident entity.*

As mentioned above, RGA Services is not an agent of RIRC and acts in an independent manner which is evident from page 3 of the compilation which contains the Reinsurance Services Agreement between RIRC, RGA Services and RGA Inc entered into between RGA Services and RIRC (copy enclosed as Annexure 1- refer page number 1 to 22 of the compilation).

15. Your Honours may note the following facts for the year under consideration which were also submitted before the learned AO during the course of assessment proceedings vide submission dated 20 April 2021:

RGA Services only provides support services to RIRC:

• the agreement between RGA Services and RIRC is on principal to principal basis where the role performed by RGA Services is different from RIRC since RIRC carries on reinsurance business whereas RGA Services provides support services to RIRC and other RGA Group entities;

• RGA Services is not licensed to undertake reinsurance activities and hence, is unable to provide any core re-insurance services. RGA Services does not have the requisite regulatory

approval from IRDAI to undertake reinsurance business or even act as a broker;

- *RGA Services acts only as a communication channel between the Indian Cedents and RIRC. RGA Services only inputs the data into the system and final decisions of acceptance/rejections are always taken by RIRC from Ireland; and*

- *Employees of RGA Services only provide services to RGA Services in the ordinary course of their employment with RGA Services. RIRC does not have any control or dominion over the functioning of such employees of RGA Services (i.e., the employees of RGA Services do not take direction from RIRC).*

16. Thus, as can be evident from the said agreement referred above, RGA Services is not an agent of RIRC nor does it represent itself as the agent of RIRC to any cedent. It is also provided in the agreement that RGA services shall not act on behalf of the RIRC, not conclude contracts on behalf of RIRC, not bind RIRC by any contract or bind RIRC to conclude contracts, not alter or modify any contracts entered in to by RIRC, not make any commitment on behalf of RIRC, not make or give any representation or warranty to any clients of RIRC or hold itself out as having any authority not granted to it by RIRC under this agreement. Further, it is laid down that it is RIRC who will set out the terms and offers for reinsurance and that RIRC is solely responsible for conducting contracts and signing them. RIRC as the risk carrier shall invoice premiums, decide on terms for accepting and cancelling such risks and paying such claims. It is also laid down that RGA Services shall not undertake activities that may amount to insurance or re- insurance business whether in India or overseas.

17. Thus, the relationship between RIRC and RGA Services is that of principal to principal and not principal to agent, as is alleged by the Department. RGA Services is not an agent of RIRC.

18. As captured in paragraph 7 above, RGA Services provides services to RIRC and other RGA group entities. The activities performed by RGA Services for RIRC and other RGA entities are performed in an independent manner. RIRC does not give any detailed instructions or exercises any control on RGA Services with respect to the conduct of its business. RGA Services is not licensed to undertake reinsurance distribution activities and hence, is unable to provide any core re-insurance services, RGA Services does not have the requisite regulatory approval from IRDAI to undertake reinsurance business or even act as a broker. Thus, RGA Services is not dependent on RIRC and acts in an independent manner while providing services to RIRC and other RGA group entities.

RGA Services does not habitually exercises an authority to conclude contracts or maintain and delivers merchandise or secures orders for RIRC

19. RGA Services does not habitually exercise an authority to conclude contracts or maintain and deliver merchandise or secure orders for RIRC and hence is not a dependent Agent PE of the Assessee as alleged by the learned AO/ DRP.

20. In this regard, the Assessee wishes to places reliance on the decision of the Mumbai Bench of Income-tax Appellant Tribunal ('ITAT) in the case of General Reinsurance AG [2018] ITA No. 7433/MUM/2018 dated 14 June 2019, wherein the ITAT held that where the Indian subsidiary does not have any authority to secure contracts or solicit business on behalf of the foreign enterprise in India and merely using brand name of the foreign enterprise while carrying out its activities in India cannot be a ground to say that there exists a dependent PE of the foreign enterprise in India. The ITAT also held that mere observations of the Department without any instances to show that the Indian subsidiary had concluded contract or secured orders on behalf of the foreign enterprise cannot be accepted to hold that a DAPE of foreign enterprise exists in India in the form of the Indian subsidiary. The burden of proof is to be discharged by the Department. We have reproduced the relevant extract of the judgment hereunder for ready reference:

> *"20. So far as the case of the Revenue that there is a dependent PE in India is concerned, herein also, the Revenue has merely brushed aside the claim of the assessee that the Indian subsidiary does not have any authority to secure contracts or solicit business on its behalf in India independent of the assessee. According to the Revenue, the Indian subsidiary uses brand name of the assessee while carrying out its activities in India. In our view, the same cannot be a ground to say that there existed a dependent PE in India. In fact, a point which has been emphasised before us is that the assertions of the Revenue that the Indian subsidiary has a decision making authority is a mere bald assertion and is devoid of any factual support."*

21. Reliance is further placed on the following decisions (relevant extracts enclosed separately at Annexure 2 - refer page nos. 23 to 26 of the compilation):

- *Formula One World Championship Limited v. CIT [2017] 390 ITR 199 (Delhi);*

- *International Reinsurance and Insurance Consultancy & Broking Services Pvt. Ltd [222 TTJ 515 (Mumbai ITAT)]: Daimler Chrysler AG (52 SOT 93) (Mumbai ITAT);*

- *Reuters Ltd. v. DCIT ((2016) 176 TTJ 0299 (Mumbai)]; and*

- *Adobe Systems Incorporated & Ors. v. ADIT [2016] 137 DTR 0255 (Del).*

22. In the case of the Assessee as well, the learned AO and the learned DR only make observations that RGA Services habitually secures orders on behalf of RIRC. However, the learned AO as well as the learned DR (vide the DR submission) has not brought out anything on the record to substantiate such allegations that RGA Services habitually secures orders on behalf of RIRC. In fact, the Assessee has submitted the treaty entered into by it with OM Kotak Mahindra Life Insurance Company Limited and Kotak Mahindra Old Mutual Life Insurance Limited which has been signed by the authorised signatory of RIRC and the place of signing is Ireland, i.e., outside India.

23. In light of the above discussions, it is humbly submitted that RGA Services does not constitute a DAPE of RIRC in India.

24. Thus, in light of the discussions laid down above, the submission of the learned DR that RGA Services constitutes a DAPE of RIRC since it secures orders and is a dependent agent of RIRC are erroneous and not in accordance with the law and the facts of the case.

25. Further, since a DAPE of the Assessee is not constituted in India, the issue on whether further profits need to be attributed where a DAPE is constituted, is a wholly academic issue."

20. Further, Ld. AR of the assessee submitted that the issue is decided in favour of the assessee for the A.Y. 2017-18 by the Coordinate Bench in ITA.No. 1022/Mum/2021 dated 02.05.2023 (Copy of the order is placed on record).

21. On the other hand, Ld. DR submitted as under by expressing his objections to the submissions made by the AR of the Assessee: -

"1. The primary controversy in this case is that when a foreign company i.e. RGA Ireland operates in India through a Dependent Agent (DA) and if arms' length remuneration is paid to the DA which is separately assessed to tax in India, on account of its "residential status", whether any tax becomes payable by foreign company on income attributable to its activities in India carried out through permanent establishment in the form of Dependent Agent Permanent Establishment on "source basis".

2. It is respectfully submitted that the earlier decisions have been given on the basis of the 'single taxpayer approach', holding that once an arm's length payment is made to a dependent agent PE, no further profits can be taxed in the hands of foreign enterprise. This 'single taxpayer entity approach' has been rejected in unequivocal terms by the OECD and India's DTAAS.

3. Furthermore, the Hon'ble Supreme Court in the case of DIT (International Taxation) Vis Morgan Stanley & Co. Inc. [2007 292 ITR 416] dt. 09.07.2007, at para 16, has affirmed the principles of 'separate entity approach'/ 'two point taxation', that is, both the P.E. on its own income earned in India as per I. T. Act and MNE L.e. the foreign principal, in respect of profits attributable to the PE are taxable separately. The concept of two point taxation has been discussed lucidly by the ITAT in case of Set Satellite (Singapore) Pte. Ltd, AY. 1999- 2000, in its order dated 24.04.2007. The Tribunal after an elaborate discussion on legal principles involved in Articles 7(1) and 7(2) of the Singapore DTAA and international practices followed, held that tax liability of a foreign enterprise in respect of its DependentAgent Permanent Establishment (DAPE) is not extinguished by making an arm's length payment to the Dependant Agent (DA) which represents remuneration/compensation for his services only. The tribunal also held that any compensation paid to the dependent agent shall represent only the remuneration for the services rendered and it shall not take into account the 'profit' or any part of it arising to the non-resident principal. The profits attributable to the non-resident principal based on the functions performed, risks assumed and assets used will necessarily have to be determined. This means that

a) There are two taxpayers in the source country

- *Dependent agent enterprise*

- *Dependent agent permanent establishment (DAPE)*

b) Whether the dependent agent performs some functions on behalf of the foreign principal that cause attribution of risks or assets of foreign principal to host country, i.e., country of source besides performing its own functions for which it is otherwise taxable in India. It means that the DA is performing additional functions for and on behalf of the foreign company which are not part of its profile and for which it is not being remunerated by the foreign company.

c) If so, profits (or losses) may be attributed to the DAPE by host country based onthose assets used, risks assumed and functions performed

d) DAPE is entitled to deduction in host country for arm's length compensation/ remuneration paid to dependant agent enterprise.

4. It is respectfully submitted that the concept of DA and Dependent Agency PE is very well recognized internationally. Profits can be attributed to a Dependent Agent Permanent Establishment (DAPE) even if arms length price has been paid to a Dependant Agent who is a resident assessee in the 'source country' and assessable under the Indian Income Tax Act, i.e. the Act prevailing in the country of source of income. The assertion that 'once the Indian Dependent Agent is taxed on its own income nothing further would be taxable in the hands of the non resident foreign company' may not be the correct interpretation of law. If the espousal of this view is sustained, then it would lead to a situation where profits of a non- resident assessee from business carried out through a dependent agent in India (DAPE) can never be taxed in India. This will render the concept of agency permanent establishment (Agency PE) redundant. This will also have wider ramifications on similar cases of insurance companies, service industries, etc., with significant revenue effect and will seriously erode the 'source based' principle of taxation advanced by developing countries.

5. Firstly, the 'Dependent Agent', i.e., RGA India, and the 'Dependent Agent Permanent Establishment' i.e. the assessee are two separate entities with regard to their activities in India. The former is taxable in India in accordance with the provisions of Income Tax Act being resident assessee while the later would be taxable in India under Article 7 of DTAA in respect of the profits attributable to the Permanent Establishment of RGA Ireland, read with the provisions of section 9 of the Act. It means that RGA India is taxable separately in respect of incomes earned in India as per the Indian I. T. Act. At the same time the income which it is

earning for and on behalf of the foreign non resident company (RGA Ireland), will also be taxable in the hands of the non resident as per the principles laid down in the charging section 9 of the I.T. Act and the DTAA.

6. Now, the question arises as to how to compute the income which is attributable to it as dependent agent permanent establishment (DAPE). This requires a detailed factual analysis on the basis of functions performed, assets used and risks assumed, which is also confirmed by the Hon'ble SC. The OECD in its commentary on Article 7(2) provides the guidelines for this analysis as under:

> *"26. Where, under paragraph 5 of Article 5, a permanent establishment of an enterprise of a Contracting State is deemed to exist in the other Contracting State by reason of the activities of a so called dependent agent (see paragraph 32 of the Commentary on Article 5), the same principles used to attribute profits to other types of permanent establishment will apply to attribute profits to that deemed permanent establishment. As a first step, the activities that the dependent agent undertakes for the enterprise will be identified through a functional and factual analysis that will determine the functions undertaken by the dependent agent both on its own account and on behalf of the enterprise. The dependent agent and the enterprise on behalf of which it is acting constitute two separate potential taxpayers. On the one hand, the dependent agent will derive its own income or profits from the activities that it performs on its own account for the enterprise; if the agent is itself a resident of either Contracting State, the provisions of the Convention (including Article 9 if that agent is an enterprise associated to the enterprise on behalf of which it is acting) will be relevant to the taxation of such income or profits. On the other hand, the deemed permanent establishment of the enterprise will be attributed the assets and risks of the enterprise relating to the functions performed by the dependent agent on behalf of the enterprise (i.e. the activities that the dependent agent undertakes for that enterprise) together with sufficient capital to support those assets and risks. Profits will then be attributed to the deemed permanent establishment on the basis of those assets, risks and capital; these profits will be separate*

> *from, and will not include, the income or profits that are properly attributable to the dependent agent itself (see section D-5 of Part I of the Report "Attribution of Profits to Permanent Establishments")."*

The OECD emphasizes that profits attributable to the deemed PE are separate from the profits attributable to the dependent agent itself.

7. Secondly, the Hon'ble Supreme Court in DIT (International Taxation) V/s Morgan Stanley & Co. Inc. [2007 292 ITR 416] dt. 09.07.2007 has in fact, affirmed the principle of 'two point taxation' and has held that the host country has taxation rights over the dependent agent in respect of its income earned in India and over the foreign entity in respect of theprofits attributable to its permanent establishment in India. This is evident from paragraph no. 16 and concluding paragraph no. 33 of the judgment. These paragraphs, in brief, are as under:

> *16."..... Therefore, there is a difference between the taxability of the PE in respect of its income earned by it in India which is in accordance with the Income Tax Act, 1961 and which has nothing to do with the taxability of MNE, which is also taxable in India under Article 7, in respect of the profits attributable to its P.E....."*
>
> *As per para 33 under the 'conclusion' the Hon'ble SC has held as under:*
>
> *33... 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 profit 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 (MSAM 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 rate 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."*

8. Thirdly, as seen from the above, the Hon'ble Supreme Court in DIT (International Taxation) Vs Morgan Stanly & Co. Inc. [Supra] has held that the income of a foreign company will be taxable in India and further profits can be attributed to it regarding the functions performed, assets used and risks assumed only when these have not been considered by the transfer pricing analysis. (para 33)

8.1. In the case of Morgan Stanley, as in the present case, there are two taxpayers, that is, MSAS and MSC; and RGA Ireland (the appellant) and RGA India in the present case. MSAS, the Indian resident company, would be taxed at 29% markup (that is at 29% profit rate), which was held to be arm's length remuneration by the Hon'ble Apex Court. Just because, 29% was held to be arm's length, does that mean that MSC is not required to pay tax in India? It is submitted that this is not the ratio of the judgment delivered by the Hon'ble Apex Court. In fact the reverse is true. The Hon'ble Court has held that the income of MSC is taxable and has provided guidelines for determining the said income as is evident from last lines of para 33 of the judgment (conclusion).

8.2 The Hon'ble Court in the concluding para 33 has clearly held as under:

> *"33. As regards income attributable to the PE (MSAS) we hold that the Transactional Net Margin Method was the appropriate method for determination ofthe 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-up worked out at 29% on the operating costs of MSAS.*
>
> *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.

9. It is apparent that if paragraph 33 of the decision is read in its entirety, Hon'ble Apex Court held that no profit can be attributed to PE if and only if the 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.

10. Furthermore, no Transfer Pricing Analysis has been done by the TPO for the impugned assessment year.

11. Let us take the analogy in the present case. RGA India is reimbursed at 12% markup on cost incurred in India. Does this mean that RGA Ireland (the appellant) is not taxable in India as per the ratio of the judgment of Hon'ble Supreme Court? It is respectfully submitted that this is not the case. RGA India is an Indian company and has been set up by RGA group to perform certain specific functions. Revenues earned by RGA India on this account will of course be taxable in India. However, RGA Ireland is also taxable in India as it has a DAPE in the form of RGA India and RGA India is performing some functions purely for and on behalf of RGA Ireland and these functions are over and above and in addition to the specific functions which RGA India is supposed to perform for itself. It is submitted that the starting point for attribution of profits of the income of the appellant to the activities of its Dependant Agent in India should be the filing of India specific profit and loss account by the assessee. After that, the income of the assessee is computed as per the provisions of the Act in which necessary disallowances, if any, need to be made. After these disallowances, the profit and loss account as per I. T. Act, 1961 can be drawn. Thereafter, various income and expenses must be allocated between Ireland Head Office and the Dependant Agent PE on some reasonable basis as mandated by Hon'ble Apex Court in last 5-6 lines of para 33 of the decision in the case of Morgan Stanley.

12. Since the India specific accounts and details of expenses have not been given, the Assessing Officer has computed the income applying Rule 10 of the Income tax Rules, 1962, and estimated profit of RGA Ireland attributable to its Indian operation at 10% of the receipts and 50% of the same has been attributed to the DAPE.

13. The Hon'ble Supreme Court, earlier in the case of Ishikawajma Harima Heavy Industries Ltd. v. DIT 4 (Appeal Civil No. 9 of 2007) dt. 04.01.2007 had held that - "the concept of

territorial nexus was fundamental in determining the taxability of any income in India, and that income from the offshore supply of equipment and services by a foreign company out-side India would not be taxable in India merely because the equipment was supplied in relation to a turnkey project in India". In essence, the Hon'ble Court in this case also upheld the principal of double point taxation, if the territorial connection with India could be established.

14. Thus, the Hon'ble Supreme Court in no uncertain terms has approved the principle that the income of a foreign company will be taxable in India and further profits can be attributed to it with regards to functions performed, assets used and risks assumed that have not been considered by the transfer pricing analysis. Now, how much profits will be attributable will be a question of pure factual determination.

15. Thus RGA India will be taxed independently for its own income received from the assessee. At the same time it will be taxed as PE of assessee in India for income of assessee attributable to the PE in India.

16. Thus, both the dependent agent (RGA India) and the dependent agent permanent establishment (DAPE, being hypothesized or deemed PE) are separate taxable entities with regard to their activities in India. The former is taxable in India in accordance with the provisions of I-T Act, 1961 being resident assessee while the latter would be taxable in India under Article 7 of the DTAA, in respect only of the profits attributable to the PE. This principle has been affirmed by Hon'ble Apex Court as well and, therefore, it is respectfully submitted that the existence of DAPE is not tax neutral.

17. Whether RGA India is an agent of the assessee-

The AO, vide paras 13.6, 14, 14.1 & 14.2 of his order, has clearly established that the relationship between the assessee and RGA India is in the nature of Principal & Agent rather than Principal to Principal.

17.1 Whether RGA India is an Dependent Agent of the assessee-

a) AO, vide para 12.1 of the order, has clearly mentioned that RGA India is captive services provider of the assessee alongwith other group companies of the RGA group. It does not derive revenue or does not offer services to any third partyoutside the RGA group. Therefore, RGA India is not economically

independent but completely dependent for its business on the assessee and other group companies.

b) A perusal of the Reinsurance Services Agreement between RGA India, assessee & RGA Inc dated 31.08.2010 reveals that RGA India is subject to detailed instructions and control on every aspect of its working from the assessee as well as other group companies. Some parts of this agreement have been reproduced by the AO in paras 8, 9, 11.3, 11.5, 11.7, 12.3 & 12.4 of the final assessment order. A perusal of these clauses/terms clearly reveals that RGA India is not legally independent.

17.2 Dependent v. Independent agent

- *An agent will not constitute PE of its principal if it is an agent of independentstatus*
- *"Independent" means not subject to authority or control of any person; free to act as one pleases, autonomous*
- *Agent would be independent where he has control over his business, bears therisk of his business and receives reward through the use of his skills andknowledge*
- *Independence has to be comprehensive i.e. both legal as well as economicindependence.*

17.3 OECD Commentary: Relevant paras are reproduced here:

"104. Whether a person acting as an agent is independent of the enterprise represented depends on the extent of the obligations which this person has vis-à-vis the enterprise. Where the person's commercial activities for the enterprise are subject to detailed instructions or to comprehensive control by it, such person cannot be regarded as independent of the enterprise. Another important criterion will be whether the entrepreneurial risk has to be borne by the person or by the enterprise the person represents.....

106. An independent agent will typically be responsible to his principal for the results of his work but not subject to significant control with respect to the manner in which that work is carried out. He will not be subject to detailed instructions from the principal as to the conduct of the work. The fact that

the principal is relying on the special skill and knowledge of the agent is an indication of independence."

17.4 Similar view adopted in the case of E-Funds [2014] 42 taxmann.com 50 (Delhi HC), Reuters Ltd [2015] 63 taxmann.com 115 (Mumbai ITAT) and Net App [2017] 78 taxmann.com 97 (Delhi ITAT).

17.5 From the above discussion, it is clear that RGA India is not an Agent of independent status within the meaning of Article 5(8) of India Ireland DTAA.

17.6 RGA India constitutes DAPE of the assessee in India. Perusal of various clauses of the Reinsurance Services Agreement dated 31.08.2010 as reproduced by the AO in paras 8, 9. 11.3. 11.5, 11.7, 12.2, 12.3 & 12.4 of the final assessment order reveals that RGA India habitually secures orders for the assessee or for the other group companies from India within the meaning of Article 5(6)(c) of the Ireland DTAA. Each and every function is being performed in India starting from actuarial services, underwriting services, market support services, reinsurance support services, business support services etc. The scope of market support services as mentioned in para 7.6 of the AO's order includes analyzing needs and opportunity for current and prospective clients of the companies, then forwarding of requests from clients to the companies, forwarding of the responses of the companies to the clients. It is evident that RGA India is searching prospective clients for the assessee at a regular basis and thus, habitually securing orders in India for the assessee as well as other group enterprises.

18. Therefore, the assessee has a Dependent Agent PE in India in the form of RGA India and further profits are required to be attributed to the DAPE as stated in paras 1 to 16 above and have been rightly done so by the AO. It is, therefore, humbly prayed that the order of the AO may be upheld."

22. Considered the rival submissions and material placed on record, we observe from the assessment record that assessee is a company incorporated in Ireland and is a tax resident of Ireland. It is a part of RGA Group and undertakes reinsurance business with insurers globally

including India. In terms of its business in India, assessee undertakes reinsurance business with India Life Insurance companies from the inception. From the submissions made before us, the key function in reinsurance is acceptance of risk that the insurance company transfers to reinsurer. The insurance of income accrues in the jurisdiction in which the reinsurer accepts the said risk. In this case assessee is a resident outside India and underwrites such risk based on its capital and assets both of which are outside of India. Further, it is brought to our notice that w.e.f. 01.04.2017 another group entity RGA Life reinsurance company of Canada (in short "RGA Canada"] which got approval from IRDAI on 20.12.2016 for setting up its branch in India. Even though RGA Canada is group entity, however, it is a different entity having branch in India. It is also brought to our notice that assessee did not enter into any new treaty with Indian cedants after setting up of RGAC India branch w.e.f. 01.04.2017. However, all the older reinsurance treaties between assessee and Indian cedants remain with the assessee under which assessee earns premiums from the Indian cedants.

23. The current issue raised by the revenue authorities are that RGA Services (an Indian Entity) which is subsidiary of RGA USA, which was

incorporated on 14.06.2006. The RGA Services provides support services to assessee for its transactions with Indian cedants as well as assessee's operations outside India and other entities of the RGA Group. It is submitted that RGA Services does not have a licence from IRDAI to undertake reinsurance business or even to act as reinsurance broker and the services provided are restricted only to support services to assessee's operation in and outside India and services to other group entities operating outside India.

24. We observe from the record that RGA Services provides various services to the assessee and other group concerns which includes claim support, claim data synopsis, administration support and other ancillary services and it also includes back office. Also it is a back office entity which is only providing support services to assessee and other group entities and their services were compensated by the assessee as well as group entities with cost plus 12.50% of the cost.

25. This is not the first time revenue has raised this issue. However, in the previous Assessment Years also the similar issues were raised and the Coordinate Bench has considered the issue under consideration and decided the issue in favour of the assessee in ITA.No.1022/Mum/2021

for A.Y.2017-18 by following the decision in assessee's own case for the A.Y.2015-16, for the sake of clarity it is reproduced below: -

"5. Considered the rival submissions and material placed on record, we observe that the issues raised by the assessee in the present assessment year are exactly similar to the issues decided by the Coordinate Bench in A.Y. 2015-16. As dealt by the Coordinate Bench relating to issues raised by the assessee are exactly similar to the grounds raised by the assessee in the present assessment year. In our view, the facts and issues are exactly similar, therefore, we are inclined to follow the decision of the Coordinate Bench in A.Y. 2015-16, for the sake of clarity, we are reproducing the issue decided by the Coordinate Bench ground wise except for change in the quantum of addition: -

"3. The assessee before us, RGA International Reinsurance Company (RIRC, in short), is a company incorporated in and fiscally domiciled in Ireland and is admittedly entitled to the benefits of the India Ireland Double Taxation Avoidance Agreement [(2002) 254 ITR (Stat) 245; Indo-Irish tax treaty, in short]. The assessee is engaged in the business of providing reinsurance services, amongst others, to its clients in India, and during the relevant previous year, the assessee has earned the reinsurance commission of Rs 504,37,83,613 from India. What is in dispute before us is the tax implications of the income embedded in these receipts, in India. As we proceed to deal with the tax implications, in India, of the assessee's business of reinsurance, it will be useful to begin by taking a quick look at the nature of the reinsurance business.

4. Reinsurance is an insurance cover for insurance companies, and it constitutes insurance of the risk liability that an insurer has undertaken under a contract of insurance. Under a reinsurance arrangement, the reinsurer assumes, of course, for consideration (i.e. reinsurance premium), the risk, as a whole or in part, covered under a policy issued by an insurance company. The fundamental presumption under which the insurance business functions is that only a fraction of the policies issued would result in claims and the premiums collected on all the insurance policies by an insurance company will be far in excess of such claims, and it is this fundamental presumption because of which the total sum insured by an insurance company is often several times the capacity of the insurance company to pay, and even far in excess of the net worth of the insurance companies. Presumptions, no matter how valid and how realistic, are presumptions nevertheless, and there is a possibility that in a bad year, such a presumption will turn out to be incorrect and the total value of insurance claims may be much more than the premium collected, and if the losses are of a very

large magnitude, even the net worth of the company would be wiped out. That is the risk that reinsurance contracts cover, but there can also be situations in which the insurance companies take the support of reinsurers when they do not have the capacity, or the inclination, to provide an insurance cover entirely on their own. The persons taking such reinsurance are called cedants. The reinsurance of the former category, broadly speaking, is treaty reinsurance, and the reinsurance of the latter category is generally referred to as facultative reinsurance. To protect the interests of the end consumers taking insurance covers from the insurance companies, the regulatory bodies, such as the Insurance Regulatory and Development Authority of India (IDRA), put certain conditions with respect to taking, in a timely and organized manner, such reinsurance coverage, and that is what offers a market to the reinsurance companies in a jurisdiction like India.

*5. The short case of the assessee is that since it does not have any permanent establishment in India, and, therefore, in terms of the provisions of Indo-Irish tax treaty, its business profits, embedded in the reinsurance premium received from Indian entities, are not taxable in India. That claim, however, has not found favour with the authorities below. The Assessing Officer has noted that the assessee company has a group entity in India by the name of RGA India Services Pvt Ltd (***RGA-India***, in short), which is a subsidiary of the Reinsurance Group of America, and that RGA-India has provided a spectrum of vital and primary business functions, i.e. actuarial and underwriting services, which are key functions in the insurance business. It was also noted that the draft underwriting proposal is generated by the RGA India and that there is little decision-making involved post such underwriting activity. It was also noted that RGA India is performing all critical support activities, including marketing support services, claims support services, data synopsis services and other administrative services, and as such RGA India constitutes the fixed place permanent establishment of the assessee company. While the Assessing Officer also held that the RGA India constitutes a dependent agent permanent establishment of the assessee, we need not, for the reasons we will set out in a short while, go into that aspect of the matter in detail. Coming back to the fixed place permanent establishment case of the Assessing Officer, as put to the assessee in the draft assessment order, the assessee raised objection before the Dispute Resolution Panel. It was submitted by the assessee that the assessee does not have any place of business operations in India and that the assessee does not have any premises at its disposal. It was also pointed out that RGA India is a separate legal entity having its own personnel, and the services rendered by RGA India are preparatory and auxiliary in nature, rather than core*

reinsurance services. It was also pointed out that whatever services are rendered by RGA India to the assessee have been remunerated at an arm's length price as such, and that position has been accepted in the transfer pricing assessment. It was also explained that the services rendered by the RGA India and the assessee company are distinct in nature inasmuch as while the former renders support services, the later provides reinsurance services. As regards the software said to be generating a reinsurance proposal, it was explained by the assessee that the assessee does not own that software, nor is its server even located in India. The assessee also placed its reliance on a number of judicial precedents, including E Funds IT Solutions Inc Vs ADIT [(2017) 86 Taxman 240 (SC)], Formulae One World Championship Ltd Vs CIT [(2017) 394 ITR 80 (SC)] Abode Systems Inc Vs ADIT [(2016) 69 taxmann.com 228 (Del)] and DITV s Galileo International Inc [(2009) 336 ITR 264 (Del)]. None of these submissions, however, impressed the Dispute Resolution Panel which confirmed the stand of the Assessing Officer by observing as follows:

> *"6.1 We have considered the facts of the case, the written submissions and arguments of the assessee. The assessee submitted that it does not have a PE in India and the assessee is eligible for beneficial treatment under the IR Treaty. However, on perusal of the facts and circumstances of the case, it emerges that the arguments of the assessee are not tenable on account of the following reasons:*
>
> - *The reinsurance contract is an agreement between the insurer (i.e. Indian cedent) and the re-insurer, whereby a part of the risk gets transferred from one party to another. The party accepting the risk is termed as the reinsurer and the party transferring the risk is termed as the reinsured/ reassured or cedent.*
>
> - *The income of the assessee is being earned from India on a regular and continuous basis since it has entered into contracts with the Indian cedents that are likely to continue for several years. In view of this, there is a clear cut business connection and the income of the Assessee is taxable in India in terms of section 9(1)(i) of the Act.*
>
> - *Further, the assessee is having a regular flow of income from India which further strength the*

argument that the Assessee has a clear-cut business connection in India.

- *Accordingly, the arguments of the Assessee on this account are flawed.*

In such a scenario, the contention that the assessee does not have any operations in India, is not correct since the business of the assessee is to provide reinsurance service to the Indian cedents.

6.2 Further, based on the facts of the case, it is seen that RGA Services performs a spectrum of crucial business activities such as marketing support services, customer relationship management, claims support services, data synopsis services and other administrative support and ancillary services. These services are core business activities in the reinsurance business which gets substantially performed in India itself and thereafter, not much critical functions/ activities remain to be performed outside India except for just signing of the contract. Accordingly, given that core business activities of reinsurance business of the assessee in connection to Indian region are performed through the premises of RGA Services, RGA Services constitute a Fixed Place PE of the Assessee as per Article 5(1) of the IR Treaty.

In view of the above, the objection of assessee is rejected.

6. It is thus the view of the Assessing Officer, which has been approved by the Dispute Resolution Panel, that this subsidiary constitutes a dependent agency permanent establishment (DA-PE) as also fixed place permanent establishment (FP-PE) of the assessee in India. Consequently, in the view of the authorities below, the assessee is liable to be taxed in respect of the business profits, arising out of the reinsurance premium received from the Indian insurance companies, in India. The Assessing Officer has computed 50% of the reinsurance revenue so generated as attributable to the operations in India, and treated its taxability @ 10% of the gross reinsurance revenue. The action so taken by the Assessing Officer has also been confirmed by the DRP, and, accordingly, the Assessing Officer has proceeded to bring the reinsurance revenues to tax in India as business income. The assessee is aggrieved and is in appeal before us.

7. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

8. So far as the fixed place PE is concerned, the case of the Assessing Officer hinges on whether the operations carried out by the RGA India can constitute the assessee's permanent establishment in India. It is not even the case of the Assessing Officer, however, that any premises in India, whether of the RGA or otherwise, was at the disposal of the assessee. It is in this backdrop that we may take note of the following observations made by Hon'ble Supreme Court in the case of **E-Funds IT Solutions Inc***(supra):*

> *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 throughwhich 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:*
>
> *'32. The principal test, 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. For this purpose, it is not necessary that the premises are owned or even rented by the enterprise. It will be sufficient if the premises are put 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.*
>
> *** ** ***
>
> *34. According to Philip Baker, the aforesaid illustrations confirm that the fixed place of business need not be owned or leased by the foreign enterprise, provided that 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.*

35. Interpreting the OECD Article 5 pertaining to PE, Klaus Vogel has remarked that insofar as the term 'business' is concerned, it is broad, vague and of little relevance for the PE definition. According to him, the crucial element is the term 'place'. Importance of the term 'place' is explained by him in the following manner:

"In conjunction with the attribute 'fixed', the requirement of a place reflects the strong link between the land and the taxing powers of the State. This territorial link serves as the basis not only for the distributive rules which are tied to the existence of PE but also for a considerable number of other distributive rules and, above all, for the assignment of a person to either Contracting State on the basis of residence (Article 1, read in conjunction with Article 4 OECD and UN MC)."

36. We would also like to extract below the definition to the expression 'place' by Vogel, which is as under:

"A place is a certain amount of space within the soil or on the soil. This understanding of place as a three-dimensional zone rather than a single point on the earth can be derived from the French Version ('installation fixe') as well as the term 'establishment'. As a rule, this zone is based on a certain area in, on, or above the surface of the earth. Rooms or technical equipment above the soil may qualify as a PE only if they are fixed on the soil. This requirement, however, stems from the term 'fixed' rather than the term 'place', given that a place (or space) does not necessarily consist of a piece of land. On the contrary, the term 'establishment' makes clear that it is not the soil as such which is the PE but that the PE is constituted by a tangible facility as distinct from the soil. This is particularly evident from the French version of Article 5(1) OECD MC which uses the term 'installation' instead of 'place'.

The term 'place' is used to define the term 'establishment'. Therefore, 'place' includes all tangible assets used for carrying on the business, but one such tangible asset can be sufficient. The characterization of such assets under private law as real property rather than personal property (in

common law countries) or immovable rather than movable property (in civil law countries) is not authoritative. It is rather the context (including, above all, the terms 'fixed'/'fixe'), as well as the object and purpose of Article 5 OECD and UN MC itself, in the light of which the term 'place' needs to be interpreted. This approach, which follows from the general rules on treaty interpretation, gives a certain leeway for including movable property in the understanding of 'place' and, therefore, we assume a PE once such property has been 'fixed' to the soil.

For example, a work bench in a caravan, restaurants on permanently anchored river boats, steady oil rigs, or a transformator or generator on board a former railway wagon qualify as places (and may also be 'fixed').

In contrast, purely intangible property cannot qualify in any case. In particular, rights such as participations in a corporation, claims, bundles of claims (like bank accounts), any other type of intangible property (patents, software, trademarks etc.) or intangible economic assets (a regular clientele or the goodwill of an enterprise) do not in themselves constitute a PE. They can only form part of PE constituted otherwise. Likewise, an internet website (being a combination of software and other electronic data) does not constitute tangible property and, therefore, does not constitute a PE.

Neither does the mere incorporation of a company in a Contracting State in itself constitute a PE of the company in that State. Where a company has its seat, according to its by-laws and/or registration, in State A while the POEM is situated in State B, this company will usually be liable to tax on the basis of its worldwide income in both Contracting States under their respective domestic tax law. Under the A-B treaty, however, the company will be regarded as a resident of State B only (Article 4(3) OECD and UN MC). In the absence of both actual facilities and a dependent agent in State A, income of this company will be taxable only in State B under the 1st sentence of Article 7(1) OECD and UN MC.

There is no minimum size of the piece of land. Where the qualifying business activities consist (in full or in

part) of human activities by the taxpayer, his employees or representatives, the mere space needed for the physical presence of these individuals is not sufficient (if it were sufficient, Article 5(5) OECD MC and Article 5(5)(a) UN MC and the notion of agent PEs were superfluous). This can be illustrated by the example of a salesman who regularly visits a major customer to take orders, and conducts meetings in the purchasing director's office. The OECD MC Comm. has convincingly denied the existence of a PE, based on the implicit understanding that the relevant geographical unit is not just the chair where the salesman sits, but the entire office of the customer, and the office is not at the disposal of the enterprise for which the salesman is working."

37. Taking cue from the word 'through' in the Article, Vogel has also emphasised that the place of business qualifies only if the place is 'at the disposal' of the enterprise. According to him, the enterprise will not be able to use the place of business as an instrument for carrying on its business unless it controls the place of business to a considerable extent. He hastens to add that there are no absolute standards for the modalities and intensity of control. Rather, the standards depend on the type of business activity at issue. According to him, 'disposal' is the power (or a certain fraction thereof) to use the place of business directly. Some of the instances given by Vogel in this behalf, of relative standards of control, are as under:

"The degree of control depends on the type of business activity that the taxpayer carries on. It is therefore not necessary that the taxpayer is able to exclude others from entering or using the POB.

The painter example in the OECD MC Comm. (no. 4.5 OECD MC Comm. on Article 5) (however questionable it might be with regard to the functional integration test) suggests that the type and extent of control need not exceed the level of what is required for the specific type of activity which is determined by the concrete business.

By contrast, in the case of a self-employed engineer who had free access to his customer's premises to

perform the services required by his contract, the Canadian Federal Court of Appeal ruled that the engineer had no control because he had access only during the customer's regular office hours and was not entitled to carry on businesses of his own on the premises.

Similarly, a Special Bench of Delhi's Income Tax Appellate Tribunal denied the existence of a PE in the case of Ericsson. The Tribunal held that it was not sufficient that Ericsson's employees had access to the premises of Indian mobile phone providers to deliver the hardware, software and know-how required for operating a network. By contrast, in the case of a competing enterprise, the Bench did assume an Indian PE because the employees of that enterprise (unlike Ericsson's) had exercised other businesses of their employer.

The OECD view can hardly be reconciled with the two court cases. All three examples do indeed shed some light onto the method how the relative standards for the control threshold should be designed. While the OECD MC Comm. suggests that it is sufficient to require not more than the type and extent of control necessary for the specific business activity which the taxpayer wants to exercise in the source State, the Canadian and Indian decisions advocate for stricter standards for the control threshold.

The OECD MC shows a paramount tendency (though no strict rule) that PEs should be treated like subsidiaries (cf. Article 24(3) OECD and UN MC), and that facilities of a subsidiary would rarely been unusable outside the office hours of one of its customers (i.e. a third person), the view of the two courts is still more convincing.

Along these lines, a POB will usually exist only where the taxpayer is free to use the POB:

- *at any time of his own choice;*

- *for work relating to more than one customer; and*
- *for his internal administrative and bureaucratic work.*

In all, the taxpayer will usually be regarded as controlling the POB only where he can employ it at his discretion. This does not imply that the standards of the control test should not be flexible and adaptive. Generally, the less invasive the activities are, and the more they allow a parallel use of the same POB by other persons, the lower are the requirements under the control test. There are, however, a number of traditional PEs which by their nature require an exclusive use of the POB by only one taxpayer and/or his personnel. A small workshop (cf. Article 5(2)(e) OECD and UN MC) of 10 or 12 square meters can hardly be used by more than one person. The same holds true for a room where the taxpayer runs a noisy machine."

38. OECD commentary on Model Tax Convention mentions that a general definition of the term 'PE' brings out its essential characteristics, i.e. a distinct "situs", a "fixed place of business". This definition, therefore, contains the following conditions:

- ***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 means usually 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.'*

12. Thus, ***it is clear that there must exist a fixed place of business in India, whichis at the***

> ***disposal of the US companies, through which they carry on their ownbusiness.*** *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*

9. In the present case also, it has not even been the case of any of the authorities below that any particular premises were at the disposal of the assessee. The DRP has referred to the existence of business connection under section 9(1) of the Indian Income Tax Act 1961, but then that aspect of the matter is wholly irrelevant because in a case in which a double taxation avoidance agreement comes into play, as admittedly, in this case, the provisions of the Income Tax Act 1961 cannot be pressed into service unless these provisions are more beneficial to the assessee. The DRP has simply observed that since the core business activities are conducted by RGA India, RGA India constitutes the fixed place PE. As we we have seen above, unless a particular place is at the disposal of the assessee, that place cannot be said to constitute the PE of the assessee. In any case, the core reinsurance activity is the assumption of risk, and that assumption of risk has been done outside India. There is thus no occasion to attribute reinsurance profit attribution to RGA India. Whatever activities are carried out by RGA India have been duly paid for by the asseseee, and the transfer pricing assessment has accepted that position. Once that position is accepted, there cannot be any further profit attribution for services rendered by the RGA. In view of these discussions, and bearing in mind the entirety of the case, we disapprove the stand of the authorities below, and hold that there was no fixed place permanent establishment on the facts of this case. As regards the existence of the dependent agency permanent establishment, that aspect of the matter, in the light of the coordinate bench decision in the case of **ADIT Vs Asia Today Ltd [(2021) 129 taxmann.com 35 (Mum)],** *is wholly tax-neutral and does not, therefore, need our adjudication. In the said case, we have,* inter alia, *observed as follows:*

> *13. In the light of Hon'ble jurisdictional High Court's judgment in the case of Set Satellite (supra), so far as profit attribution of a DAPE is concerned, the legal position is that as long as an agent is paid an*

arm's length remuneration for the services rendered, nothing survives for taxation in the hands of the dependent agency permanent establishment. Viewed thus, the existence of a dependent agency permanent establishment is wholly tax neutral.

14. An interesting offshoot of this legal position is that, as on now, existence of dependent agency permanent establishment is of no tax consequence. Whether there is a DAPE or not, the taxation is only of the agent's remuneration which is taxed anyway de hors the existence of a DAPE. Such an approach may sound somewhat incongruous from an academic point of view inasmuch as what was considered to be a threshold limit for source taxation ceases to have any relevance for source taxation, and as, on a conceptual note, PE, whether a fixed base PE, DAPE or any other type of PE, provides for threshold limits to trigger taxation in the source state, but then if as a result of a DAPE, no additional profits, other than agent's remuneration in the source country - which is taxable in the source state anyway de hors the existence of PE, become taxable in the source state, the very approach to the DAPE profit attribution may seem incompatible with the underlying scheme of taxation of cross border business profits under the tax treaties, but that cannot come in the way of the binding force of judicial precedents from Hon'ble Courts above. The SLP against this decision is said to pending before Hon'ble Supreme Court but that does not, in any way, dilute binding nature of this binding judicial precedent. In all fairness to the learned Departmental Representative, however, we may take refer to observations in another coordinate bench decision in the case of Delmas France v. ADIT [(2012) 17 taxmann.com 91 (Mum)], to the effect, "Similarly, before accepting DAPE profit neutrality theory, we will still have to deal with learned Departmental Representative's plea that as per the law laid down by Hon'ble Supreme Court in the case of DIT v. Morgan Stanley & Co Inc. [2007] 162 Taxman 165 (SC), the

arm's length remuneration paid to the PE must take into account 'all the risks of the foreign enterprise as assumed by the PE', but then in an agency PE situation, unlike a service PE situation which was the case before the Hon'ble Supreme Court, a DAPE assumes the entrepreneurship risk in respect of which agent can never be compensated because even as DAPE inherently assumes the entrepreneurship risk, an agent cannot assume that entrepreneurship risk. To this extent, there may clearly be a subtle line of demarcation between the dependent agent and the dependent agency permanent establishment. The tax neutrality theory, on account of existence of DAPE, may not indeed be wholly unqualified- at least on a conceptual note". However, in the present case, successive coordinate benches in assessee's own case for different assessment years have upheld the contentions of the assessee and held that once an arm's length remuneration is paid to the agent, nothing further survives for taxation in the hands of the DAPE which, at best, can be brought to tax in the hands of the assessee. In any event, whatever be the academic justification for an alternative approach to the issue, the law laid down by Hon'ble Courts above is to be deeply respected and loyally followed. Respectfully following the law laid down by Hon'ble Courts above and consistent with the stand of the coordinate bench decisions, we uphold the plea of the assessee for the present years as well. We, therefore, hold that even if there is held to be a dependent agency permanent establishment on the facts of this case, as at best the case of the Assessing Officer is, it is wholly tax neutral inasmuch as the Indian agents have been paid arm's length remuneration, and nothing further can, therefore, be taxed in the hands of the assessee.

15. It has not been the case of the revenue authorities at any stage that the remuneration paid to the Indian agent is not an arm's length remuneration for the services rendered by the agents concerned.

There is no material whatsoever before us to show, or even indicate, that the remuneration paid to the agents is not arm's length remuneration. Under these circumstances, we see no reasons to remit the matter to the file of the Assessing Officer, for fresh round of ALP ascertainment proceedings, as prayed by the learned Departmental Representative. The plea of the assessee, as raised in the cross objections, therefore, merits acceptance. Whether there is a DAPE or not, there are no additional profits to be brought to tax as a result of the existence of the DAPE, and, therefore, the question about existence of a DAPE on the facts of this case is wholly academic.

16. Once we hold, as we have held above, that in the light of the present legal position, existence of dependent agency permanent establishment in wholly tax neutral, unless it is shown that the agent has not been paid an arm's length remuneration, and when it is not the case of the Assessing Officer, as we have noted earlier, that the agents have not been paid an arm's length remuneration, the question regarding existence of dependent agency permanent establishment, i.e. under article 5(4), is a wholly academic question. We humbly bow to the law laid down by Hon'ble Courts above. The limited argument before us is that here is a case of dependent agency permanent establishment, and existence of a DAPE, in the light of these discussions, is wholly tax neutral- particularly in the light of the legal position regarding profit attribution to the DAPE. We need not, therefore, deal with the question about existence of a DAPE, as it is an academic exercise with no tax effect involved. The related grounds of appeal are thus infructuous.

10. In view of these discussions, we hold that the assessee did not have a fixed place permanent establishment in India, that the question of assessee having a dependent agency PE is wholly academic in the sense that, as the law stands now, the existence of the DAPE is wholly tax neutral in India. Accordingly, the business profits earned by the assessee on account of the reinsurance

business have no tax implications in India. In view of these findings, all other issues raised in the appeal are academic and call for no adjudication as of now."

6. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2015-16 we allow the ground raised by the assessee."

26. In the above decision, the Coordinate Bench have considered the issue of existence of business connection u/s. 9(1) of the Act and addressed the issue of Fixed Place Permanent Establishment and held that unless a particular place is at the disposal of the assessee that place cannot be said to constitute Permanent Establishment of the assessee. Further, they observed that the core reinsurance activity is assumption of risk and that assumption of risk has been done outside India hence there is no occasion to attribute reinsurance profit attribution to RGA Services. Whatever activities are carried out by RGA Services have been duly paid for by the assessee, and the transfer pricing assessment has accepted that position. Once that position is accepted, there cannot be any further profit attribution for services rendered by the RGA Services and they held that there was no fixed place permanent establishment on the facts of this case. with regard to issue of dependent agency permanent establishment (DAPE), they relied on the decision of ADIT *v.* Asia Today Ltd [(2021) 129 taxmann.com 35 (Mum)] and held

that it is wholly tax-neutral and does not, therefore, need their adjudication. Accordingly, they held that the DAPE is wholly academic in the sense and the existence of DAPE is whole tax neutral in India. From the above decision, we observe that the Coordinate Bench has considered the issue of non-existence of Fixed Place Permanent Establishment and however, not given a clear finding on DAPE.

27. However, before us, Ld. DR made an elaborate submissions and submitted that the earlier decisions have been given on the basis of the 'single taxpayer approach', holding that once an arm's length payment is made to a dependent agent PE, no further profits can be taxed in the hands of foreign enterprise. By relying on the decision of the DIT (International Taxation) *v.* Morgan Stanley & Co. Inc. (supra) he submitted that there are two taxpayers in the source country which are Dependent agent enterprise and Dependent agent permanent establishment (DAPE). He raised certain issues that the dependent agent performs certain functions on behalf of the foreign principal that cause attribution of risks or assets of foreign principal to host country, i.e., country of source country besides performing its own functions for which it is otherwise taxable in India. The Dependent agent is

performing additional functions for and on behalf of the foreign company which are not part of its profile and for which it is not being remunerated by the foreign company. He also raised issue of profits / losses may be attributed to the DAPE by host country based on those assets used, risks assumed and functions performed and the DAPE is entitled to deduction in host country for arm's length compensation / remuneration paid to dependent agent enterprise.

28. Ld. DR submitted that Profits can be attributed to DAPE even if arm's length price has been paid to a Dependent Agent. He objected to assertion that 'once the Indian Dependent Agent is taxed on its own income nothing further would be taxable in the hands of the non-resident foreign company'. He is of the view that the functions performed by the RGA Services are intertwined in the various functions of reinsurance activities which has standalone services offered by the RGA Services which was already compensated. However, as per the OECD commentary on Article 7(2) which requires a total factual analysis on the basis of functions performed, assets used and risk assumed. He submitted that OECD emphasis that profit attributable to the DAPE are separate from the profits attributable to the dependent agent itself.

29. Further, he relied on the decision of DIT (International Taxation) *v.* Morgan Stanley & Co. Inc. (supra) to submit that associated enterprise (also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In this situation 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.

30. From the above submissions, we observe that Ld. DR harping on the functions performed by the RGA Services which may be integral part of the reinsurance business wherein the reinsurer may analyse various functions before or after taking reinsurance business which may include claim support, actuarial services, administration and other support services and settlement services which may be part and parcel of the whole insurance business.

31. Ld. DR is of the view that the RGA Services not only provides services but also shares the assets and risk which were not being considering in the TP analyses. We are finding it difficult on this line of argument that the main functions of a reinsurance business is assuming

the risk which the main insurer transfers. The whole object of assuming risk is the main business of the reinsurer. From the record we observe that RGA Services offers all sorts of functions and services relating to execution of the reinsurances processes without assuming any risk. Even the tax authorities including Ld. DR has not brought on record any material to show that RGA Services has assumed any risk or invested any assets in executing the reinsurance functions.

32. Further, we observe that the RGA Services does not have any license from IRDAI to undertake reinsurance business or even to act as a reinsurance broker. It shows that RGA Services can never be allowed to function as a reinsurer or broker in India. It could only offer various functions in the line of reinsurance business. What is relevant to be an agent is the agent should be in a position to replace the principle in executing any contract and should be having the similar level playing role or rights in execution of such contracts, the issue of dependent or independent is different aspect of analysis. First, the other person is eligible to function as an agent or not as a broker, in the given case RGA Services does not have any recognition in India to conclude any contract in line of reinsurance. Therefore, it can never be allowed to act

as an agent in India, not even assume or conclude contract on behalf of the principal i.e., the assessee.

33. Further, we observe that even Ld. DR has not brought on any material to show that RGA Services has utilized its assets or assumed any risk in this line of reinsurance business. Merely because its whole functions are depend on the services which will be utilized by the Foreign principal does not make it as an dependent agent.

34. For example, the claim of the tax authorities is like the directors of the company are agents of the company and all the functions of the directors are conducted on behalf of the company. The question is, whether the directors can claim that the profits generated by the company are mainly depends upon their existence and functions. Therefore, the profit earned by the company should be attributed to the directors also. It can't be true, because the Directors are properly remunerated to the functions performed by them. They do not have any right over and above the agreement with them or the statutory provision given in Articles of Association. They do not have anything to claim more than the agreed terms. Therefore, even though dependent agent i.e. Directors have performed all the duties still they do have any

right on the profits earned by the company. Similarly, in the given case RGA Services have performed various function in line of reinsurance business. However, has not taken any risk or invested any assets other than executing the various functions in line of reinsurance of which they were properly compensated by the assessee and transfer pricing assessment has accepted that position.

35. As discussed above, RGA Services is not capable to act as an agent considering the fact they do not have the licence to function as a reinsurance or broker from the IRDAI and also the reinsurance agreements were signed outside India. The provisions of DAPE does not apply to the present case. The various arguments made by the Ld. DR fails in this case, considering the fact that nowhere it is brought on record to show that RGA Services has invested any assets or assumed any risk. Therefore, we are inclined to reject the various submissions made by Ld. DR and allow the grounds raised by the assessee.

36. In the result, appeal filed by the assessee is allowed.

ITA.NO. 2330/MUM/2022 (A.Y. 2019-20)

37. Coming to the appeal relating to A.Y. 2009-10, since facts in this case are mutatis mutandis, therefore the decision taken in A.Y. 2018-19 is applicable to this assessment year also. Accordingly, main grounds raised by the assessee are allowed.

38. Assessee has raised additional ground for the A.Y. 2019-20 which is in respect of not granting the TDS credit claimed by the assessee of ₹.10,31,84,280/-.

39. Considered the rival submissions and material placed on record. Considering the overall merits on the submissions made by the assessee we are inclined to remit this issue back to the file of Assessing Officer with a direction to verify the records submitted by the assessee on merit and as per law. It is needless to say that assessee may be given a proper opportunity of being heard. In the result the issue under consideration is remitted back to the file of Assessing Officer for statistical purpose.

40. In the result, appeal filed by the assessee is allowed for statistical purpose.

41. To sum-up, appeal filed by the assessee in ITA.No. 803/Mum/2022 for the A.Y. 2018-19 is allowed and appeal filed by the assessee in ITA.No. 2330/Mum/2022 for the A.Y. 2019-20 is allowed for statistical purpose.

Order pronounced in the open court on 06th September, 2023.

Sd/-	**Sd/-**
(RAHUL CHAUDHARY)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 06/09/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum