

IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, DELHI

BEFORE SHRI M BALAGANESH, ACCOUNTANT MEMBER &
SHRI VIMAL KUMAR, JUDICIAL MEMBER

ITA No.2033/Del/2025
(Assessment Year: 2018-19)

BOOKING.COM B.V. Oosterdokskade 163, 1011 DL, Amsterdam, The Netherlands, Haryana 122002	Vs.	ACIT, Circle -1(1)(2) International Taxation, Civic Centre, Minto Road, New Delhi – 110002
स्थायीलेखासं./जीआइआरसं./PAN/GIR No: AAGCB2395A		
Appellant	..	Respondent

Assessee by :	Sh. Ajay Vohra, Sr. Adv. Sh. Alok Kumar Sinha, Sh. Devashish Poddar, Ms. Sachi Chugh, CAs
Department by :	Sh. M.S. Nethrapal, CIT, DR

Date of Hearing	14.11.2025
Date of Pronouncement	06.02.2026

ORDER

PER VIMAL KUMAR, JM:

The appeal of the assessee is against the final Assessment Order dated 15.01.2025 of Ld. Assessing Officer/The Assistant Commissioner of Income Tax, Circle (International Taxation-1)(1)(2) u/s 147 r.w.s 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for AY:2018-19.

2. Brief facts of the case are that the assessee did not file its return of income. The case was picked up by the risk management strategy of insight for non-filing of income tax return. On perusal of AIR information and Form 26AS available with system it was observed that assessee during the financial year 2017-18 entered into following transactions:

Sr. No.	Type of transaction	Amount received (in Rs.)
1.	Commission or brokerage	10,39,73,058
2.	Payment to NRI	6,10,15,545
3.	Interest income	1,02,045
4.	Profession/technical fee	19,40,501
5.	Payment to contractor	30,36,661
	Total	17,00,67,810

2.1 In absence of ITR source of funds and the tax liability of income of Rs.17,67,810/- could not be ascertained which remained unexplained. The

assessee was shown caused vide notice u/s 148A(b) of the Act dated 25.03.2022 as to why notice u/s 148 of the Act should not be issued. The assessee did not file any response. Notice u/s 148 of the Act dated 11.04.2022 was issued along with order u/s 148A(d) dated 11.04.2022 of the Act after approval of the competent authority as per Section 149(1)(b) and u/s 151(i) of the Act. The assessee filed return of income for AY: 2018-19 on 18.05.2022 declaring nil income and tax payable nil or nil refund claim. Notice u/s 143(2) of the Act dated 28.06.2023 and notice u/s 142(1) dated 19.01.2023, 28.06.2023, 08.11.2023 and 26.03.2024 along with detailed questionnaire were issued to the assessee. The assessee made compliance electronically vide letter dated 18.12.2023 assessee submitted as under:

“6. The assessee vide letter dated 18.12.2023 had submitted that,

“Booking.com is a tax resident of the Netherlands and is eligible to claim benefits of the India-Netherlands Double Taxation Avoidance Agreement.

Booking.com operates an online reservation system through which participating accommodations (such as hotels, guesthouses, etc.) can make their rooms available for reservation, and through which visitors of its website (such as travelers) can make reservations at such accommodations. After the booking has materialized and the travelers/ bookers have checked out of the accommodation, Booking.com charges commission from the accommodation at an agreed percentage of the amount earned by the accommodation from the travelers. The accommodations can offer their available capacity on the Booking.com website by using a self-service internet tool. The accommodations determine and set their own room price.

When a booker makes a reservation, the transaction occurs directly between the accommodation and the booker. Booking.com acts as an intermediary between the booker and the accommodation and is not a contracting party in the transaction between the accommodation and the booker. This online reservation system (i.e. Booking.com platform) itself is hosted on servers outside of India. Pursuant to this arrangement, Booking.com was in receipt of commission from the Indian accommodations for the subject AY.”

6.1 Further, the assessee has also submitted the reason for adopting its tax position in the ITR of the commission income earned that is not chargeable to tax in India.

“A sample contract based on which such payments were received is enclosed herewith for your ready reference as Annexure I. Para 2.3 of the contract clearly underscores the fact that the commission is payable by the accommodations to Booking.com only in a scenario where booking actually materializes (para 2.3.2). The relevant portion is reproduced hereunder for your ready reference-

“2.3.2 The aggregate Commission per reservation is equal to the multiple of (i) the number of nights stayed at the Accommodation by the Guest, (ii) the booked rate per room per night (excluding sales taxes and such other applicable national, governmental, provincial, state, municipal or local taxes or levies (the “Taxes”)) and such other extra's, fees and surcharges which are included in the offered rate at the time of booking of the room by a Guest on the Platforms (such as breakfasts, meals (half-board or full-board), bicycle rental, late check outs/early check in fees, extra person charges, resort fees, roll-away beds, theatre tickets, service fees, etc.), (iii) the number of booked rooms by the Guest, and (iv) the relevant Commission percentage set out in the Agreement.....”

It is also pertinent to point out para 2.4.2 of the contract which puts the onus of withholding taxes and related compliances on the accommodations - "...2.4.2

The Accommodation is responsible for withholding and reporting relevant taxes (i.e. mentioned above in 2.4.1 under d) applicable to the Commission due to Booking.com according to the relevant tax regulations and the practices and requests of the tax authorities. The Accommodation shall bear and be responsible for the payment and remittance of the taxes applicable to the Commission (payments) and the associated late payment interests and penalties imposed by the tax authority for failing to withhold and report any

taxes applicable to the Commission. If required, the Accommodation shall be solely responsible to negotiate and agree with the relevant tax authorities on the tax treatments of the Commission (payments). The Accommodation shall upon first request of Booking.com provide Booking.com with (photo/scanned-) copies of tax payment certificates/tax exemption certificates upon each remittance of the Commission. The Accommodation represents and covenants that it is duly registered with all relevant tax authorities (including applicable statutory (local) revenue collection authorities) as a hotel or other accommodation provider....

"6.2 Further, the assessee vide letter dated 18.12.2023 has submitted that, "The assessee submits that there is no change in the factual matrix of the Assessee's case as compared to earlier years."

3. Vide letter dated 12.03.2024 assessee submitted that it had earned commission income of Rs.3,96,09,81,782/- from India. A show cause notice dated 26.03.2024 was issued. The assessee filed response dated 26.03.2024 submitting following arguments:

- a. No income chargeable to tax in India
- b. Previous year's precedent should not be followed.
- c. Proceedings U/s 148A/148/147 have been wrongly initiated.

4. On considering the replies ld. AO passed draft assessment order dated 29.03.2024. The assessee filed objections to the draft assessment order on 26.04.2024 before ld. DRP under Section 144C(5) of the Act. Through, order dated 31.12.2024 DRP-1, New Delhi, rejected objections of the assessee and

directed to Assessing Officer/TPO to incorporate findings of DRP and pass final order.

5. On completion of proceedings, ld. AO vide order dated 15.01.2025 made addition of Rs.3,96,09,81,782/- .

6. Being aggrieved appellant assessee preferred present appeal on following grounds:

- “1. That on the facts and the circumstances of the case and in law, the Ld. AO and the Ld. Dispute Resolution Panel ('DRP') have erred in holding that the Appellant's income amounting to INR 396,09,81,782 is chargeable to tax in India.
- 2. That the Ld. AO and the Ld. DRP have erred in holding that the Appellant constitutes a PE - Fixed Place PE and Dependent Agent PE, without any basis, material and on frivolous grounds and irrelevant considerations.
- 3.1 That the Ld. AO and the Ld. DRP have erred in holding that third-party accommodations in India from whom the Appellant earns commission on booking of rooms by the end-users, constitute Permanent Establishment ('PE') of the Appellant in India under Article 5 of the India Netherlands Tax Treaty ('the Tax Treaty'), without any cogent reasons, factual material, or legal basis.
- 3.2 The Ld. AO and Ld. DRP have grossly erred in not appreciating the facts and erroneously stated in the assessment order that the Appellant has travel agents in India whereas, the Appellant does not have any agent in India, and end-users book the rooms directly using its website/ mobile application and also make payment for the room tariff directly to the third party accommodations. The Appellant receives commission from third party accommodation owners only for bookings made through its website/ mobile application.
- 3.3 The Ld. AO and Ld. DRP have erred in applying the facts of other taxpayers to the Appellant's case, while wrongly assuming that the Appellant has travel agents in India. This imaginary fact appears to have been copied from the facts of other assessee companies providing CRS

services without application of mind and ignoring the facts of the case, rendering the assessment order wrong, bad in law and liable to be quashed.

4.1 That without prejudice to the above grounds of appeal, the Ld. AO and Ld. DRP grossly erred in attributing 100 per cent of commission receipt amounting to INR 3,96,09,81,782 to the alleged PE in gross violation of provisions of Article 7 of the Tax Treaty, by invoking Rule 10 of the Income Tax Rules, 1962 ('the Rules) and tax the same as business income of the Appellant in India.

4.2 The Ld. AO and Ld. DRP erred in attributing 100 per cent of commission receipt to the alleged PE which is wrong, bad in law and highly excessive and not commensurate to the activities, wrongly alleged by Ld. AO himself, to assume constitution of PE, in the assessment order.

5. The Ld. AO and Ld. DRP have erred in holding that the transaction giving rise to Assessee's income is carried out in India as online booking system (Application Programming Interface Platform ('APP'), a software system) is spread in India and the Assessee has a Business Connection in India, without providing any legal or factual basis for the same.

6. On the facts and in circumstances of the case and in law, the Ld. AO and the Ld. DRP have erred in not following the ruling of the Hon'ble Delhi High Court in Appellant's own case on similar facts for earlier years wherein the Hon'ble Delhi High Court made adverse observations against the very orders of the past AYs the Ld. AO has sought to rely on and remanded the matter back to him for fresh consideration.

7. Without prejudice to the above and based on the facts and circumstances of the case and in law, the proceedings initiated under section 147 of the Act by the Ld. AO are null and void as notice under section 148A(b) of the Act was not served to the Assessee at the correct email address.

8. Without prejudice to the above and based on the facts and circumstances of the case and in law, the order passed under section 148A(d) of the Act was not digitally signed by the Ld. AO and hence, the proceedings initiated under section 147 of the Act are void-ab-initio.

9. Based on the facts and circumstances of the present case, the proceedings initiated under section 147 of the Act by the Ld. AO are void ab initio as no valid sanction was provided to the Assessee under section 151 of the Act before initiating reassessment proceedings even after multiple requests from the Assessee.

10. That the Ld. AO erred in initiating penalty proceedings under section 270A of the Act on account of alleged underreporting of income by way of misreporting.

11. That the above grounds of appeal are independent and without prejudice to one another.

12. That the Appellant reserves its right to add, alter, amend and/or modify any ground of appeal before or at the time of hearing of this appeal.”

7. Ld. Authorized Representative for appellant assessee submitted that ld. AO ad DRP erred in holding that the assessee's income amounting to Rs.396,09,81,782/- is chargeable to tax in India. Ld. AO and DRP erred in holding that the assessee constitutes a PE fixed place PE and dependant agent PE without any basis.

8. The Appellant, a Netherlands-based company eligible for benefits under the India-Netherlands DTAA (*the DTAA'), operates a Digital Platform for online Accommodations' reservations. The platform is hosted outside India and enables Accommodations (e.g., hotels, guesthouses) all over the world to list room availability and set prices independently using a self-service tool. Key features of the arrangement:

- The Appellant acts as an intermediary/ aggregator between bookers and Accommodations.
- Reservations are concluded directly between the booker and the Accommodations.

- Post-checkout, the Appellant earns commission from Accommodations based on a pre-agreed percentage of the booking value.

9. During the relevant AY, the Appellant received commission income from Indian Accommodations under this arrangement.

Re: Merits of the case (Ground Nos. 3.1 to 3.3)

10. Under Article 7 of the DTAA, business profits of the Netherlands resident are taxable in India only if the Netherlands entity has a Permanent Establishment ("PE") in India and income is attributable to such PE.

11. The assessing officer alleged that the Appellant has fixed place PE in India in the form of dependent agents and Accommodations.

12. For constituting fixed place PE (in India) the foreign enterprise must have (i) identified fixed place in India and ii) such fixed place must be at the disposal of the foreign enterprise and (iii) core business activities of the foreign enterprise must be carried out through such fixed place [Refer: Formula One World Championship Ltd vs. CIT: 394 ITR 80 (SC)].

13. In the case of CIT v. eFunds IT Solution (399 ITR 34), the Hon'ble Supreme Court held that the burden of proving that a PE is constituted lies on

the Revenue, observing in para 10 of the judgement- "The burden of proving the fact that a foreign assessee has a PE in India... is initially on the revenue".

14. In the instant case, the assessing officer apart from making bald allegation, has not led any evidence on record to establish that the aforesaid cumulative conditions for constituting fixed place PE are satisfied.

15. As mentioned above, the Appellant conducts its business of online reservation of Accommodations through a Digital Platform hosted on servers located outside India. The Appellant has no place of business, agent, personnel or equipment in India. Furthermore, no employees of the Appellant have visited India during the relevant previous year; no place is made available to the Appellant at the premises of the Accommodations.

16. The Appellant does not have any dependent agents in India. The Appellant transacts with the Accommodations on principal-to-principal basis; there is no element of agency involved. Even if, Principal- Agent relationship is to be assumed between the Accommodation and the Appellant, considering the flow of funds by the Accommodations to the Appellant (for payment of commission), the Appellant could, at the highest, be constituted to be agency of the Accommodations and not the other way round.

17. The assessing officer has miserably failed to discharge the onus of establishing that the Appellant has fixed place PE in India and to attribute the earning of commission income to such (alleged) fixed place PE (in India).

18. Recognizing the need to tax the digital/ new age economy for which the existing tax framework was considered inadequate, the Government of India introduced the provisions of Significant Economic Presence ('SEP') from the subject AY. As per the provisions of Explanation 2A to section 9(1)(i) of Income-tax Act, 1961 ('the Act'), the significant economic presence of a non-resident in India is deemed to constitute "business connection" in India. SEP was defined to mean transaction in respect of any goods, services or property carried out by a non-resident with any person in India, including provision of download of data or software in India, if the aggregate of the payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed. Notwithstanding the fact that the Appellant does not constitute a SEP in India, however, this threshold wasn't prescribed until AY 2022-23 rendering this inoperable for the subject AY.

19. Moreover, since SEP was enshrined under the Act with no corresponding amendment in the tax treaties, the enterprises governed by the

tax treaties continued to remain outside its ambit since no consequential amendment was made in the tax treaties. Therefore, the Appellant also remained outside the purview of SEP.

20. Meanwhile, vide Finance Act 2020, with a similar intent to tax cross-border digital economy, the Government of India expanded the scope of the Equalization Levy ('EL') provisions. These provisions were indeed applicable to the Appellant and the Appellant duly complied with them so long as the said provisions remained in force.

21. Having regard to the facts of the case and the undisputed position in law, it needs to be held that the existence of fixed place PE in India of the Appellant has not been established and any business thereof, no part of the commission income could be brought to tax in India.

**Re: Assumption of jurisdiction under sections 147 / 148 of the Act
(Ground Nos. 6 to 9)**

22. Assessment under section 147 of the Act was initiated solely based on tax withheld incorrectly by certain Accommodations under different sections of the Act, without any independent application of mind by the assessing

officer. It is evident from a cursory glance of the details of the taxes withheld that most of these are under sections which are not even applicable to payments made to non-residents (e.g., section 194C, 194J, etc.). The recorded reasons in the notice under section 148A(b) of the Act fail to establish how the Appellant's income is taxable under the Act or the DTAA except saying that there are receipts from India and those have been subjected to withholding.

23. There is no linkage between the material on record and the formation of the belief that the income chargeable to tax has escaped assessment. The assessing officer ought to have established such a link between the tangible material/ information relied upon (i.e., taxes withheld by the Accommodations) and the inference drawn that income chargeable to tax has escaped assessment.

24. In the case of *Progress Rail Locomotive Inc. v. DCIT* [2024] 466 ITR 76 (Delhi), the Hon'ble Delhi High Court quashed the reassessment proceedings.

25. Ld. Departmental Representative submitted that it is to state that the above two decisions still hold good and issue of PE and attribution of 15% of income to such PE has been upheld by higher courts in case of Galileo and

Amadeus. Therefore, the ratio of the above cases is applicable to case of MAPL and similarly placed cases; however, attribution of income is a fact-based exercise wherein functions performed, assets deployed and risk assumed determine the quantum of income attribution.

26. Conclusion: In view of above, the assessee-company's protected software or portal offers facility to the clients to login, to furnish some data and then access reports generated after the data is analyzed. Further, the assessee which allows its travel agents/clients to have access to the main Booking Interface System/Processor owned/at the disposal of the group entity, in order to execute/process the requests of the Clients (already having a Ticket through its networks) which is placed at customers' locations in India for processing of Seat Booking, So clearly there is an interface existing and AAR ruling in the case of Master Cards is applicable in this.

27. Notwithstanding this, when department presented the same arguments in one more case called M/s Sabre Decision Technologies International LLC which was into airline booking products, although the angle of PE was argued by the department, Hon'ble ITAT Delhi bench held that the said

transactions are covered under FTS. The relevant provisions are extracted below:

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

4.4.12 The assessee has further given detailed arguments that the consideration for sale of software or computer program does not fall in the definition of Royalty under the section 9(L)(vi) of the Act. A number of judgments have also been given in support of the arguments of the assessee. The AO has given detailed reasons for his decision in the assessment order. The same are not reproduced as the business of the assessee is not to sell software. The business of the assessee is providing advice on decisions to be taken in the airline industry. An electronic platform has been made to enable the interaction of the assessee and his clients. The platform also enables passage of advice to the client. It would be childish to assume that the consideration being paid is for the provision of computer software. The consideration is nothing other than Royalty and this has been further elaborated later in this order.

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

4.5.2 The assessee has stated that FTS means any consideration including any lump sum consideration) for the rendering of any managerial, technical or consultancy services including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient chargeable under the head Salaries.

The assessee has picked up the definition of Consultancy Services from Black's law dictionary as

"The act of asking the advice or opinion of someone (such as lawyer)" or Webster's Encyclopedia states that to consult is to "seek from a presumably qualified personal or an impersonal source advice, opinion, etc." Though the assessee claims that has not provided any advice or opinion to its customers, the statement is without any basis. The assessee is certainly providing solutions to aid decisions to airline clients. The name of the assessee is itself, Sabre Decision Technologies which reflects the business and the website is Sabre air solutions. If solutions which aid decisions do not constitute advice, then nothing can. The payments received by the assessee are therefore, for services absolutely of the nature of consultancy. The mode of delivery of services which is an electronic platform in this case, or the basis of processing the data which results in the information to be delivered, can in no way, change the substance of the information which is in the nature of advice. Therefore, the services also can be categorized as consultancy services and the consideration thereof fall within the meaning of fee for technical services."

28. Again 4.5.4 to 4.6 discusses the entire case laws and what is very important is the analysis which clearly states that these commission payments fall under the definitions of the definitions of FTS or Royalty. So, it is humbly submitted that Hon'ble ITAT can follow the above judgement in M/s Sabre Decision Technologies International LLC and hold the above payments as FTS or Royalty.

29. Ld. Authorized Representative for assessee submitted as under:

a) Filing of RoI is governed by the provisions of section 139 of the Act.

b) Booking.com is not required to file a RoI in India in view of the fact that its receipts in the nature of commission are not taxable in India. It is submitted that in terms of the provisions of the Act and the DTAA, the taxing rights for such commission (being in the nature of business profits) do not rest with India in the absence of a PE in India. Reliance in this regard may be placed on the following judgments:

- Director of Income-tax vs. Sheraton International Inc. (2009) 174 taxmann 84 (Delhi)

- A.B. Hotel Ltd. (Radisson Hotel) vs. Deputy Commissioner of Income-tax, Circle 1(1) (2008) 25 SOT 368 (Delhi)
- Unison Hotels Ltd vs. Deputy Commissioner of Income-tax, Circle 18(1), New Delhi (2012) 23 taxmann.com 460 (Delhi)

c) Tribunals and AARs have repeatedly held that where the receipts from India of a non-resident are not chargeable to tax in India, such a non-resident is not liable to file RoI in India. Reliance in this regard may be placed on the following rulings:

30. The Ld. AR placed reliance on the following judgments: (page 7 to 10)

- i. ACIT, Vs. Rajesh Jhaveri Stock Brokers (P) Ltd. [2007] 161 Taxman 316 (SC)
- ii. ACIT, International Taxation, Vs. Sabre Decision Technologies International LLC [2023] 152 taxmann.com 51 (Delhi- ITAT)
- iii. Master Card Asia Pacific Ltd. Vs. [2018] 94 taxmann.com 195 (AAR- New Delhi)

31. From examination of record, in light of aforesaid rival contention it is crystal clear that assessee is a Netherland based company eligible for benefit under India-Netherland DTAA operates digital platform for online

accommodations reservations outside India and enables accommodation for example hostel guest houses all over the world to list room availability and set prices independently using a self-service tool. The assessee acts as a intermediary/aggregator between bookers and accommodations. Reservations are concluded directly between the bookers and the accommodations. Post checkout assessee earns commissions from accommodation based on a pre-arranged percent of booking value. The ld. AO held assessee having fixed place PE in India in the form of dependant agents and accommodations. The ld. AO had no evidence on the record to establish constitution of fixed place PE. The assessee conducts its business of online reservations of accommodations through a digital platform hosted on servers located outside India, the assessee has no place of business, agent, personnel or equipment of India during the relevant previous year, no place/accommodation was made available to the assessee by any of the hotel or guest houses. Assessee does not have any dependant agent in India. The assessee transacts with the accommodation of principal to principal basis, there is no element of agency involved even if principal agent relationship is assumed between accommodation and the assessee considering the flow of funds by the

accommodations to the assessee in the form of commission does constitute any agency. The ld. AO failed to discharge the onus of establishing assessee having fixed place PE in India and to attribute the earning of commission income to such alleged fixed placed PE in India. Hon'ble Supreme Court of India in the case of Formula One World Championship Limited Vs. CIT 394 ITR 80 (SC) has held for constituting fixed place PE (in India) the foreign enterprise must have (i) identified fixed place in India and ii) such fixed place must be at the disposal of the foreign enterprise and (iii) core business activities of the foreign enterprise must be carried out through such fixed place

32. In view of the above material facts and well settled principle of law it is held that ld. AO and DRP erred in holding that assessee constitute a fixed place PE and Agency PE without any basis and holding that third party accommodation in India from whom the assessee earns commission on booking of rooms by end user constitute PE in India under Article 5 of India Netherland Tax Treaty. Therefore, the final assessment order date 15.01.2025 in pursuance to DRP direction dated 31.12.2024 being illegal are set aside.

The ground of appeal No. 1, 2 & 3.1 to 3.3 are accepted. In view of the above findings the ground of appeal No. 4.1, 5 to 12 have become academic in nature and are left open.

33. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 06.02.2026

Sd/-
(M Balaganesh)
ACCOUNTANT MEMBER

Sd/-
(Vimal Kumar)
JUDICIAL MEMBER

Dated 06.02.2026

Rohit, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI