IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA Nos. 2683 to 2688/DEL/2015
[A.Ys 2002-03 to 2007-08]

Hitachi High Technologies Singapore Pte Ltd ASA & Associates, CAs 81/1, Third Floor, Adchini Aurobindo Marg, New Delhi	Vs.	The Dy. C.I.T Circle - Gurgaon, International Taxation New Delhi

PAN: AABCH 7717 H

(Applicant) (Respondent)

Assessee By : Shri Ajay Vohra, Sr. Adv
Shri Anand Sachar, CA
Shri Neeraj K. Jain, Adv
Shri Karan Jain, CA
Shri Ramit Katyal, CA

Department By : Shri Sanjay Puri, PCIT, Udaipur

Date of Hearing : 04.09.2019
Date of Pronouncement : 17.09.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This is a bunch of appeals by the assessee preferred against the common order dated 30.03.2015 framed u/s 143(3) r.w.s. 144C(13)/254 of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short]. Since common issues are involved in all the above appeals pertaining to same assessee, these are being disposed off by this common order for the sake of convenience and brevity.

2. The representatives of both the sides argued on the facts of assessment year 2002-03 with an understanding that in all other years, the underlying facts in issues are identical. On such concession, the representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

3. Facts, as culled out from the records, show that the appellant-company, incorporated under the laws of Singapore, is a wholly owned

subsidiary of Hitachi High-Technologies Corporation (HHT), a company incorporated under the laws of Japan. The appellant is engaged in trading operations across ASEAN countries and also carries out sourcing and trading operations in respect of various products and equipments. In the year August 1988, the assessee established a Liaison Office ('LO') in India [earlier known as Nissei Sangyo (Singapore) Pte Ltd] for rendering preparatory and auxiliary services, including market research and liaison activities. Branches of the LO were set up in Delhi, Bangalore and Mumbai; however, the branches of LO at Bangalore and Mumbai were subsequently closed. In July 2007, Hitachi Singapore established a Branch Office in India.

4. Survey operation under section 133A of the Act was carried out at the premises of the Branch Office of the appellant on 24.04.2008 and statements of the employees were recorded. Statements of the employees prompted the Assessing Officer to initiate proceedings u/s 147 of the Act for assessment years 2002-03 to 2007-08.

5. During the course of reassessment proceedings, the assessing officer had, *inter-alia,* alleged that LO was engaged in executing/negotiating contracts for the appellant in India and was not

merely undertaking preparatory and auxiliary activities and, therefore, the LO was Permanent Establishment ('PE') of the appellant in India in terms of Article 5 of the India Singapore Double Taxation Avoidance Agreement ('DTAA').

6. On treating the LO as a PE of the appellant, a draft assessment order was framed u/s 144C of the Act order dated 31.1.2009 for assessment years 2002-03 to 2007-08 and the income of the appellant was computed in the hands of the PE [LO] by applying the Global profit margin of the appellant to the sales made in India and attributing 50% thereof to the PE in India as under:

Assessment year	Assessed income	Tax demand	Interest under section 234A and 234B of the Act
2002-03	14,65,468	5,97,911	6,41,259
2003-04	37,24,345	15,64,225	14,42,997
2004-05	1,42,42,854	58,39,570	46,13,260
2005-06	1,61,83,140	67,67,789	45,34,419
2006-07	1,60,21,945	67,00,377	36,85,208
2007-08	2,05,53,037	85,95,280	47,27,404
Total	**7,21,90,789**	**3,00,65,152**	**1,96,44,547**
Total tax and interest demand			**49,709,699**

7. The appellant filed objections before the Dispute Resolution Panel against the draft assessment order. The appellant also filed applications under Rule 9 of the DRP Rules to place on record additional evidence. The DRP vide direction dated 27.09.2010, upheld the observations of the assessing officer.

8. Consequently, the assessing officer passed final assessment orders dated 26.10.2010 for assessment years 2002-03 to 2007-08 wherein total income of the appellant was computed in the hands of the PE (LO) by applying the Global profit margin of the appellant to the sales made by it in India and attributing 50% thereof to the PE in India. Total income was computed as under:

Assessment year	Assessed income	Tax demand	Interest under section 234A and 234B of the Act
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2007-08	2,05,53,037	85,95,280	47,27,404
Total	**7,21,90,789**	**3,00,65,152**	**1,96,44,547**
Total tax and interest demand			**49,709,699**

9. The assessee carried the matter before the ITAT, and the Tribunal vide order dated 07.06.2013, in ITA Nos. 12 to 17/DEL/2011 set aside the order passed by the assessing officer/ DRP and restored the matter to the DRP with directions to pass speaking order. The relevant findings of the Tribunal read as under:

"On due consideration of the facts and circumstances, we find that the impugned order of the learned DRP is running into six pages, out of that the Learned DRP has reproduced the grounds of objections raised by the assessee and thereafter in paragraph 4 in 10-15 lines, it has noticed the submissions of the assessee in brief. We find that the assessee has filed objection under each ground running into more than 10 pages. Learned DRP has not looked into the objections of the assessee analytically. The assessee has alreadyy filed an application for permission to lead additional evidencee. It remained undecided. Considering the non-adjudication of the application for permission to lead additional evidence and non-consideration of various objections of the assessee, we are of the view that Learned DRP failed to decide the objections of the assessee by a speaking order. Hon'ble Punjab & Haryana High Court in the case of Road Master Ind. India reported in 303 ITR 138 has emphasized on the .importance of assigning reasons while adjudicating any controversy. Hon'ble High Court has made reference to a large number of judgment of Hon'ble Supreme Court. It is advantageous to take note of the relevant finding of the Hon'ble Punjab & Haryana High Court which read as under:

"7. In Travancore Rayons Ltd. *v.* Union of India *AIR 1971 SC 862, Hon'ble the Supreme Court observed:*

...The Court insists upon disclosure of reasons in support of the order on two grounds: one, that the party aggrieved in a proceedings before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power." (p. 866)

8. In Mahabir Prasad Santosh Kumar *v.* State of UP *AIR 1970 SC 1302, Hon'ble the Supreme Court while quashing the cancellation of the petitioner's licence by the District Magistrate, observed.*

Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the appellate authority has no material on which it may

determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just." (p. 1304)

9. In Woolcombers of India Ltd. *v.* Woolcombers Workers' Union *AIR 1973 SC 2758, Hon'ble the Supreme Court quashed the award passed by the Industrial Tribunal on the ground that it was not supported by reasons and observed :*

", . .The giving of reasons in support of their conclusions by judicial and quasi-judicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious, unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations. Second, it is a well-known principle that justice should not only be done but should also appear to be done. Unreasoned conclusions may be just but they may not appear to be just to those who read them. Reasoned conclusions, on the other hand, will have also the appearance of justice. Third , it should be remembered that an appeal generally lies from the decision of judicial and quasi judicial authorities to this Court by special leave granted under article 136. A judgment which does not

disclose the reasons will be of little assistance to the Court...." (p. 2761)

The same view was reiterated in Ajantha Industries vs CBDT *AIR 1976 SC 437 and* Siemens Engg. & Mfg. Co. of India Ltd. *v.* Union of India *AIR 1976 SC 1785.*

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12. In Testeels Ltd. *v.* N.M. Desai, Conciliation Officer *AIR 1970 Guj. 1, a Full Bench of Gujarat High Court speaking through P.N. Bhagwati, J. (as his Lordship then was) made a lucid enunciation of law on the subject in the following words:—*

> *"The necessity of giving reasons flows as a necessary corollary from the rule of law which constitutes one of the basic principles of the Indian Constitutional set up. The administrative authorities having a duty to act judicially cannot therefore decide on considerations of policy or expediency. They must decide the matter solely on the facts of the particular case, solely on the material before them and apart from any extraneous considerations by applying pre-existing legal norms to factual situations. Now the necessity of giving reasons is an important safeguard to ensure observance of the duty to act judicially. It introduces clarity, checks the introduction of extraneous or irrelevant considerations and excludes or, at any rate, minimises arbitrariness in the decision making*

process.

Another reason which compels making of such an order is based on the power of judicial review which is possessed by the High Court under article 226 and the Supreme Court under article 32 of the Constitution. These Courts have the power under the said provisions to quash by certiorari a quasi-judicial order made by an Administrative Officer and this power of review can be effectively exercised only if the order is a speaking order. In the absence of any reasons in support of the order, the said Courts cannot examine the correctness of the order under review. The High Court and the Supreme Court would be powerless to interfere so as to keep the administrative officer within the limits of the law. The result would be that the power of judicial review would be stultified and no redress being available to the citizen, there would be insidious, encouragement to arbitrariness and caprice. If this requirement is insisted upon, then, they will be subject to judicial scrutiny and correction."

11. In view of the above discussion, we are of the view that the order of the Learned DRP is not sustainable. It is set aside on remitted back to the Learned DRP for readjudication. All the appeals of the assessee are allowed for statistical purposes."

10. In the re-adjudication proceedings, the DRP framed its order on 27.03.2015 pursuant to the directions of the Tribunal but final assessment order was passed by the Assessing Officer on 30.03.2015 framed u/s 143(3) r.w.s 144C(13)/254 of the Act.

11. The appellant is before us against this order.

12. The ld. counsel for the assessee argued vehemently and bifurcated his submissions into four parts, which needs to be adjudicated by us and for the sake of convenience, the same are categorised as under:

i) While readjudicating on the directions of the ITAT, the DRP has exceeded the directions.

ii) In framing the final assessment order, the Assessing Officer has put the assessee in a more worse position than it was before filing appeal.

iii) There is no PE of the appellant

iv) Since there is no PE of the appellant, no profit can be attributed.

13. We will now address the issues raised by the ld. counsel for the assessee one by one.

I WHETHER THE DRP HAS EXCEEDED THE DIRECTIONS ISSUED BY THE TRIBUNAL.

14. We have already extracted the relevant findings of the Tribunal. It can be seen from the findings of the Tribunal that the Tribunal was concerned with non adjudication of the application for permission to lead additional evidences and objections disposed of by the DRP were not by a speaking order and, accordingly , set aside all these issues and remitted back to the DRP for readjudication. In the readjudication proceedings, the DRP disposed of the objections by a well reasoned order following the directions of the Tribunal which directed the DRP to dispose the objections by a speaking order.

15. The ld. counsel for the assessee vehemently stated that the DRP has enhanced assessment, which it could not do in the second round of litigation. It is the say of the ld. counsel for the assessee that additional evidences were already placed before the DRP in the first round of litigation and some of the evidences were once again filed but the DRP failed to deal with the additional evidences in spite of specific directions of the Tribunal. The ld. counsel for the assessee further stated that pursuant to the directions of the Tribunal, it was

incumbent upon the Assessing Officer to adjudicate the matter on the basis of additional evidences to decide whether the LO was involved in transactions involving sale of machines by the appellant in India.

16. The ld. counsel for the assessee strongly submitted that the DRP is not entitled to change the basis of determining the manner of computing the profits attributable to tax in the hands of the alleged PE (LO) in India as computed by the assessing officer vide assessment order dated 26.10.2010. The ld. counsel for the assessee further pointed out that even in doing so, the DRP was bound to issue a show cause notice for enhancement of assessed income of the appellant.

17. It is the say of the ld. counsel for the assessee that it was incumbent upon the Assessing Officer to pass fresh orders keeping in mind the specific findings/ directions given by the appellate authority since the appellate authority cannot grant any authority/ power to the assessing officer that does not vest in the appellate authority itself. The ld. AR further pointed out that disallowance in the set-aside proceedings before the DRP cannot exceed the amount of original disallowance, as the same would tantamount to taking back the relief granted by the assessing officer.

18. The ld. counsel for the assessee vehemently stated that the DRP, during re-adjudication proceedings, does not have any power of enhancement and, therefore, as a consequence of the order of the DRP in re-adjudication proceedings, income of the assessee cannot exceed the income assessed by the Assessing Officer. Thereafter, the ld. AR placed reliance on various judicial decisions stating that the Tribunal does not have any power of enhancement and, therefore, cannot direct the assessing authority to make fresh assessment, which resulted into enhancement of income as compared to that which was assessed at the first stage.

19. Per contra, the ld. DR strongly objected to the submissions made by the ld. counsel for the assessee and vehemently stated it was merely incidental that after following the directions of the Tribunal, the DRP framed a well speaking order and directed the Assessing Officer to frame the final assessment order which has resulted into the enhancement of income. It is the say of the ld. DR that this has happened for the reason that the DRP directed the Assessing Officer to adopt an objective methodology for determining the income attributable to the assessee's PE as against the guesstimate proposed by him in the original assessment.

20. The ld. DR drew our attention to the provisions of section 144C(8) of the Act and pointed out that the DRP has power to confirm, reduce or enhance the variations proposed in the draft assessment order. Therefore, the directions of the DRP are entirely lawful, even if these resulted in taxable income being higher than what was proposed in the draft assessment order. The ld. DR pointed out that the DRP has, in fact, given substantial relief to the appellant when it followed the directions of the Tribunal in passing a speaking order.

21. In so far as the prior notice for enhancement is concerned, the ld. DR pointed out that the ld. CIT(A) is bound to give a notice if he proposes an enhancement to the assessed income. It is the say of the ld. DR that in so far as the DRP is concerned, section 144C(1) merely requires that an opportunity of being heard needs to be given to the assessee on such directions which are prejudicial to the interest of the assessee.

22. The ld. DR further contended that the DRP is not an appellate body. It is a corrective mechanism to guide the Assessing Officer for making error free assessments, particularly in the cases of non residents. The ld. DR further pointed out that during the

readjudication proceedings, the DRP not only intensely engaged with the representatives of the assessee company, but also gave ample opportunity to them before giving directions to the Assessing Officer in the matter of attribution of profit to the assessee's PE in India.

23. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below and with the assistance of the ld. Counsel for the assessee, we have considered the relevant documentary evidences brought on record. We have also perused the judicial decisions relied upon by both the rival representatives. In our considered opinion, the DRP has simply followed the directions of the Tribunal in readjudication proceedings to assist the Assessing Officer in determining the issues raised before the Tribunal in the first round of litigation. We find that in doing so, the DRP has not done any enhancement.

24. Further, we find that the provisions of section 251(2) of the Act are different from the provisions of section 144C(8) & (11) of the Act. The ld. CIT(A) is an appellate authority, whereas the DRP is a continuation of the assessment proceedings where the DRP acts as a corrective mechanism to guide the Assessing Officer for making error

free assessments. The role of a DRP, in our humble understanding, is to assist the Assessing Officer in determining the correct income so that correct tax may be levied.

II <u>IN FRAMING THE FINAL ASSESSMENT ORDER, THE ASSESSING OFFICER HAS PUT THE ASSESSEE IN A MORE WORSE POSITION THAN IT WAS BEFORE FILING APPEAL.</u>

25. Having said all that, the pertinent question which needs to be addressed is as to whether the appellant can be put to worse off positions as a result of filing the appeal before the Tribunal. As mentioned elsewhere, in the first round of litigation, the amount of profit attributable to the appellant for assessment years 2002-03 to 2007-08 was to the tune of Rs. 7.21 crores, whereas after following the directions of the DRP in re-adjudication proceedings, the income has been assessed as under:

Assessment year	[Rs.]
2002-03	1,44,22,125/-
2003-04	3,47,61,421/-
2004-05	46,79,16,411/-
2005-06	30,32,94,442/-
2006-07	21,77,14,621/-
2007-08	19,35,04,059/-

26. We understand that the powers of the Tribunal in disposing of an appeal are set in very wide terms, but, at the same time, we also understand that in the absence of a cross appeal or cross objection by the department, the Tribunal cannot enhance an assessment of an appeal by the assessee. Accordingly, we are of the considered view that the Tribunal is not competent to give a finding which is adverse to the assessee and make the latter's position worse than before. It is not open to the Tribunal to give a finding adverse to the assessee, which does not arise from any question raised in the appeal nor is it open to it to raise any ground which would work adversely to the appellant and pass an order which makes his position worse than it was under the order appealed against.

27. The Hon'ble Supreme Court in the case of State of Kerala Vs. Vijaya Stores 116 ITR 15 has held that in the case of assessee's appeal and in the absence of cross objection or cross appeal from the Revenue, an assessee cannot be worse off as a result of his having carried the matter in appeal before the Tribunal. The Hon'ble Supreme Court observed as under:

> *"The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, must be taken to have acquiesced therein and be bound by*

it. and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in sub-s.(4)(a)(i) above. In other words, in the absence of an appeal or cross-objections by the Department against the Appellate Assistant Commissioner's order the Appellate Tribunal will have no jurisdiction or power to enhance the assessment. Further, to accept the construction placed by the counsel for the appellant on sub-s. (4)(a)(i) would be really rendering sub-s. (2) of s. 39 otiose, for if in an appeal preferred by the assessee against the Appellate Assistant Commissioner's order the tribunal would have the power to enhance the assessment, a provision for cross- objections by the Department was really unnecessary. Having regard to the entire scheme of s. 39, therefore, it is clear that on a true and proper construction of sub-s. (4) (a) (i) of s. 39 the Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross- objections by the Department."

28. A similar view was taken by the Hon'ble Allahabad High Court in the case of Pahulal Ved Prakash 186 ITR 589 wherein the Hon'ble High Court observed as under:

"13. It is pertinent to point out that, before the Income-tax Appellate Tribunal, the assessee alone was in appeal. The Revenue had not filed any appeal or cross-objection. It

is settled that the Income-tax Appellate Tribunal, while dealing with the appeal, in the absence of any cross-appeal or objection, cannot give a finding adverse to the appellant which would make his position worse than it was under the orders appealed against. It is true that the question suggested by the Commissioner is, no doubt, one of law, but the answer to it is, in our opinion, self-evident because the Tribunal has no power of enhancement. See Hukumchand Mills Ltd. v. CIT [1967] 63 ITR 232 (SC). In these circumstances, it would be futile to require the Tribunal to refer the question sought for by the Revenue to this court. Accordingly, no statable question of law arises. The application filed by the Revenue is also rejected."

29. The ld. DR has objected to the aforementioned decisions relied upon by the ld. counsel for the assessee. The ld. DR pointed out that in the case of Vijaya Stores [supra] the judgment was given under the Kerala General Sales Tax Act which was premised on the principle espoused in the CPC that the party which has not filed an appeal in a litigation must be deemed to be satisfied with the decision of the lower authority, and he will not be entitled to seek relief against the rival party.

30. The ld. DR pointed out that when the assessee approached the Tribunal for the first time, the Assessing Officer could not have appealed against his own order and, therefore, the ratio laid down in the case of Vijaya Stores [supra] should not be applied. In support of his contention, the ld. DR strongly relied upon the decision of the Hon'ble Bombay High Court in the case of Ahmadabad Electricity Co. Ltd 199 ITR 351 and pointed out that the full bench decision of the Hon'ble Bombay High Court has considered the judgment of the Hon'ble Supreme Court in the case of Hukumchand Mills Ltd 63 ITR 232. It is the say of the ld. DR that there is no enhancement of income and income has increased merely on following the directions of the Tribunal.

31. We are of the considered view that firstly, the decision in the case of Ahmadabad Electricity Co. Ltd [supra] does not apply to the case in hand because that case involves the admission of additional ground. Secondly, it is incorrect to say that the Assessing Officer could not have appealed against his own order. Even if it was not open for the Revenue to prefer appeal before the ITAT against the order of the DRP, the ratio laid down by the Hon'ble Supreme Court still apply on the facts of the case in hand.

32. Though we agree with the ld. DR that there was no enhancement of income by the DRP, but, at the same time, the assessed income of the year under consideration, having been exhibited elsewhere, clearly puts the assessee in a worse off situation that it was before filing the appeal. If the assessee had not filed any appeal against the total assessed income of all the assessment years under consideration, the income would have been Rs. 7.21 crores only. However, after filing appeal and after readjudication, the total assessed income of all the years under consideration is Rs. 123.16 crores. In all fairness, the entire proceedings should now be restricted to adjudication upon the assessed income of all the years under consideration to the extent of Rs. 7.21 crores.

III WHETHER THE APPELLANT HAD BUSINESS CONNECTION/PE IN INDIA

33. The business segments of appellant during the year were as follows:

- Sale of Equipment to Moser Baer India
- Sale of Equipment Parts, Spares & Consumables to MBI
- Sale of Equipment through Independent Agents

34. We are concerned with only 1 and 2 above.

35. Facts on record show that during the relevant previous years, the assessee was having an office in India which it called Liaison Office [LO]. There is no dispute that this LO was set up in 1988 vide letter dated 24.08.1988. The Reserve Bank of India [RBI] granted permission u/s 29(1)(a) of the Foreign Exchange Regulation Act, 1973 [FERA] for posting a representative in India. This letter shows that permission has been granted with the following conditions :

i) Except for liaison work, the representatives will not undertake any other activity of trading, commercial or industrial nature nor shall enter into any business contracts in his own name without prior permission.

ii) No commission/fee will be charged or any other remuneration received/income earned by the representatives for liaison activities/services rendered by representatives or otherwise in India.

iii) Entire expenses of the reprehensive office will be met exclusively out of the funds received from abroad through normal banking channel. Representative shall not borrow or lend any money from/to any person in India without prior permission.

iv) Representative shall not acquire, hold, transfer or dispose of any immoveable property in India without obtaining prior permission.

36. On June 08, 1999 application for renewal of permission to continue representative office in New Delhi was filed with the RBI and vide order dated 04.01.2000, the RBI granted permission u/s 29(1)(a) of the FERA with the same conditions which are mentioned hereinabove. In February 2007, permission was granted to establish Branch Office [BO] in India. It is pertinent to mention here that the appellant was initially having LO in Bangalore and Mumbai in addition to the office at New Delhi. The LO at Bangalore and Mumbai were closed in the year 2004.

37. As mentioned elsewhere, survey operation under section 133A of the Act was conducted at the premises of the appellant at New Delhi on 24.04.2008 and during the course of survey, statements of the employees alongwith the Deputy Managing were recorded and certain documents were found, mostly email exchanges, between the representatives at LO, tax consultants with employees of Hitachi HighTechnologies.

38. A perusal of these Email exchanges and statements of the employees prompted the revenue to proceed by treating the LO as PE which resulted into attribution of profits.

39. Before us, the ld. AR vehemently stated that the LO was not involved in undertaking any of the activities for sale of equipments to MBI and was acting only as a communication channel in relation to the activities undertaken by Appellant in India.

40. The ld. AR explained the modus operandi stating that once the equipments have been supplied to MBI, demand for spares and consumables is directly communicated by MBI to the Appellant. It is the say of the ld. AR that the appellant, through its Singapore office, maintains regular contacts with its suppliers spread across the world. It was further stated that upon receiving an enquiry from MBI, appellant provides the listed price of relevant parts, spares and consumables, either directly or through the LO and the LO, forwards the price quotation to MBI. The ld. AR continued by stating that thereafter, a Purchase Order was placed on appellant. A copy of PO was delivered to LO for acceptance. Later on, a letter of credit was issued by MBI to appellant without the involvement of LO. Thereafter,

the merchandise is shipped to India. For sale, a commercial invoice is issued by Appellant to MBI. The shipment documents are delivered directly to MBI. As per the Agreement, payment for the equipments is made in foreign currency.

41. The ld. AR further contended that in terms of Article 5(1) of the Indo Singapore Double Taxation Avoidance Agreement (DTAA), the term “permanent establishment” means a fixed place of business through which the business of the (non-resident) enterprise is wholly or partly carried on. It is the say of the ld. AR that in order for a place of business to be considered as a permanent establishment, there must exist a common thread of interest between the place of business and the non-resident assessee. It was pointed out that core business function of Appellant comprises of trading operations across ASEAN countries in respect of various products and equipments. India LO simply acted as a communication channel between Appellant and the customers and was providing logistic support to Appellant or representatives there**of.** No part of the aforesaid core activity/ function of Appellant was carried out in India.

42. The ld. counsel for the assessee pointed out that in terms of Article 5(2) of the DTAA, an 'office' of the foreign enterprise in the other Contracting State is also deemed as Permanent establishment of the foreign enterprise in that State. Even in terms of the aforesaid Article, "an office" can be considered to be PE only if such office meets the requirements of paragraph 1 of that Article, i.e., the business of the foreign enterprise should be carried out from such office in the other country.

43. The ld. counsel for the assessee emphatically stated that the communication activities carried on by LO at India constituted auxiliary/ancillary activities and not the core business functions of Appellant, the India LO cannot be considered as fixed place of business of Appellant in India, in terms of Article 5(1) of India-Singapore DTAA. Strong reliance in this regard was placed on the decision of the Delhi High Court in the case of National Petroleum Construction Company vs. DIT: 383 ITR 648, DIT vs. Mitsui & Co Ltd: 84 taxmann.com 3 and several other decisions.

44. Referring to the permission granted by the RBI, the ld. Counsel stated that the RBI had not pointed out any violation in the nature of activities carried out by LO. The assessing officer, under the provisions of the Act, could not presume enlarged activities being carried out by LO. For this proposition, the ld. counsel for the assessee placed reliance on the decision of the Delhi Tribunal in the case of Nokia Networks OY: 94 taxmann.com 111 (Del).

45. The ld. counsel for the assessee argued at length on the reliance placed on the statements of the employees recorded during the course of survey proceedings. The ld. counsel for the assessee stated that such statements recorded at the time of survey proceedings do not have any evidentiary value in the light of the decision of Hon'ble Madras High Court in the case of CIT vs. S. Khader Khan Son: 300 ITR 157, which was affirmed by the Hon'ble Supreme Court in 210 Taxmann 248.

46. The ld. counsel for the assessee proceeded by stating that the Revenue has picked up answers to selective questions to justify the allegation that the LO was PE of the appellant.

47. The ld. DR, on the other hand, stated that the Assessing Officer has relied on the material found during the survey operation to hold that the assessee had PE in India that was engaged in business activity. It is the say of the ld. DR that the DRP ha mostly relied upon the submissions made by the assessee during the assessment and DRP proceedings to affirm the findings of the AO. It is the say of the ld. DR that at least six employees were working in LO, two of which were key personnel and one was an important executive since all the exchange of emails have been copied to this important executive Leena Cardoza. The ld. DR pointed out that these employees in India office [LO] were engaged in advertisement and marketing, sales promotion, market research and administration. The ld. DR vehemently stated that there are enough evidences on record to show that substantial part of trading business of HTS in India was being carried out from its office in India.

48. Referring to the statements of the employees, the ld. DR pointed out that it was the employees of HTS working in India who were ascertaining customer requirements, doing price negotiation, following up on deliveries and chasing of payments. It is the say of the ld. DR that the appellant is a trading concern and these are core activities in

relation to trading sales made in India. The ld. DR highlighted the relevant parts of the statements of these key personnel taken during the survey operations and concluded by saying that these statements conclusively prove their involvement in trading business of HTS in India.

49. The ld. DR also referred to relevant articles of India Singapore DTAA to demonstrate that the LO was the PE of the appellant in India. It is the say of the ld. DR that the activities of the representatives of the LO cannot be considered as only activities for preparatory or auxiliary in nature. Since the LO is operating since 1988, nature of activities performed by the office of the appellant company in India were admittedly where its employees were engaged in marketing, sales promotion, market research activities. They were actively involved in ascertaining customer requirements, price negotiation, obtaining of purchase orders, following up on delivery of material and payments. Therefore, none of these activities can be termed as having preparatory or auxiliary character or being carried out solely of the purposes of advertising, supply of information, scientific research or similar purpose. Therefore, these do not fall under exclusionary clause of Article 5 for determination of PE in India. Thereafter, the ld. DR

went on to distinguish the facts of the case in hand with the facts of the decisions relied upon by the ld. AR.

50. We have given thoughtful consideration to the rival contentions and have carefully perused the judicial decisions relied upon. The undisputed fact is that the LO is carrying out its activities since 1988 and upto A.Y. 2001-02, such activities were accepted. However, post survey operations, when the email exchanges were unearthed, which resulted into some new facts, prompted the revenue to reopen the assessments of A.Ys 2002-03 to 2007-08.

51. The business segments of the appellant during the year have already been mentioned elsewhere. We find that the Revenue has heavily relied upon the email exchanges and statements of key personnel namely, Mr. Morimasa Gempei, Dy. Managing Director, Shri Jai Prabhakaran, Sales Executive and Ms. Leena Cardoza looking after sales to Moser Baer. The Revenue has also drawn heavy support from the emails of the Tax Consultant Shri Piyush Kaushik, who, in his emails has shown apprehension of the position that the Revenue might take post survey operations. The contents of the emails of Shri Piyush Kaushik clearly show that he was acting as Tax Consultant and advising

the appellant on the probable tax litigation which may arise after survey operations.

52. Before adhering to these issues, it would be pertinent to consider the reasons recorded before reopening of assessment as well as the analysis of survey material and statements which read as under:

> "4. The reasons recorded before reopening of assessment as well as the analysis of survey material and statements is as under:
>
> > "A survey u/s 133A of the I, T. Act, 1961 (Act) was carried out at the office premises of Hitachi High Technologies (Singapore) Pte. Ltd. (Hitachi Singapore/ Company) at 602, 6th Floor, Eros Corporate Tower, Nehru Place, New Delhi on 24.4.2008. Hitachi Singapore, held by Hitachi Corporation Japan, was having presence in India, in the form of liaison office since 1988. The company was also having liaison office In Bangalore and Mumbai; however, the same were closed by 2004. The Hitachi- High Technologies Pte. Ltd. prior to 01.04.2002 was known as Nissei Sangyo (S) Pte. Ltd.
> >
> > A notice u/s 142(1) of the Act was issued on 28.03.2007 for which a letter dated 12.04.2007, a letter from

Deloitte Haskins & Sells, power of attorney holder dated 12.04.2007 was received requesting for adjournment for at least 6 weeks, as the company is In the process of collating the information required to prepare the return. However, there was no response for one year till April, 2008.

From the internet, information was gathered that the company has appointed Sales Manager in India. The survey revealed that branch is headed by an expat General Manager, who Is also the Deputy Managing Director of Hitachi High Technologies Singapore Pte. Ltd. Another Japanese expat and an Indian employee are working as Sales Manager, The Delhi office has three more employees looking after the logistics and sales and marketing work. The company has also appointed two agents for making sales in India.

Hitachi Singapore is **the leading** edge technology specialist and is engaged in **the** business of four key areas, **(i)** Electronic Device System (ii) Life Science (iii) Information System and Electronic Components and (iv) Advanced Industrial Products. In India, the company is selling various products namely, electron microscope, analytical instruments, manufacturing equipments for optical disc and also materia! for optical disc, The

Company is selling these products globally and in India specifically, the major customers are Moser Baer India Ltd., Turbo Energy Ltd. and Honeywell India Pvt. Ltd.

Hitachi Singapore has an established network in the ASEAN Region. It has a dedicated team of professionally trained engineers to provide the customer with custom- made care services. This includes original product part supplies from Japan and after sales support and services. After sales services for Surface Mount Systems (SMP) Hard Disk Manufacturing System and Semi-conductor Manufacturing Products includes; recommendations for maintenance and repairs, operational and maintenance training, spare parts, service contracts, maintenance and overhaul services as well as operational support services, relocation services including logistics and assembly, shut down support services, overhaul and upgrading. The global network of the company offers not only assistance to customers' needs but also commitment to provide advanced customer support. The global network of experts consists of Japan Team and Local Team, who have the technical knowledge and professional experience.

2. During the course of survey, statements of Mr. Morimasa Gempei, Deputy Managing Director of the Company, Mr. Jai Prabhakaran (working since 2005), Sales Executive and Leena Cardoza (working since 1995), looking after the sales to Moser Baer, were recorded. During survey various documents were verified Including the e- mails of the employees and copy of the documents were obtained and inventoried as Annexure A' to T, the copy of these statements as well all the documents were provided to the company before closing the survey.

3.2 An extract **of** statement of Ms, Leena Kardoza, Administrative Executive **of** Hitachi High **Technologies (Singapore)** Pte. Ltd. is reproduced below:-

Ql. Please identify yourself.

A.

B. I am Ms. Leena Kardoza, working with Organization since 15.9.1995.

Q.3 Since you are the oldest employee of this organization in India, you must be aware of the activities of the liaison office and the present branch office. Is there any difference between the activities?

A. The basic activity of the liaison office was liaison work and supporting head office in trading business. The office is providing raw materials for manufacturing CDs, DVRs and other optical media products, parts for turbo impellers etc, exact products can be checked with the sales person. There is no significant change in the business activities of the Indian office after the conversion of the same to a branch office. Activities continue to be same except earlier there was no expat and now we have an expat.

Q.4 In the liaison office, how many persons are working? Also give the name of the employees and nature of activities from 2001 onwards.

A. There were 5 persons plus one expat at the time of closure of the liaison office. Presently in branch office, we have two expat and 4 Indians. Out of this, we are working in sales-one as Sales Manager (Japanese) and two Sales Executives.

8 Whether the Singapore Company had any office in India? If yes, during which period?

A. We had representative offices in Bangalore and Mumbai. Period I do not exactly remember, however Bangalore office function from 1996 to 2003 and Mumbai office was just

opened between 2000 to 2002 but did not function. All the offices were reporting to Mr. Siddiqui, who in turn reports to our head office to Singapore.

Q.20 Why the representative office converted to branch office?

A. I guess for the growth of our Company, it was converted into a branch office.

Q. 21 Do you have any idea about after sales services provided by Hitachi Singapore /or Indian office?

A. No. Usually when the machinery is sold to Moserbaer, the engineers of that particular company like Origin Japan, Shibura Japan etc. come to India to install the machinery and as and when any technical services are required.

Q.22 Annexure "A" containing 93 pages are the copy of emails taken from your laptop. Please confirm the same?

A. Yes -1 agree the same are taken from my laptop.

A 23 I am showing you page 23, and particularly the mail from Mr. Piyitsh Kaushik to Mr. David Wong, which has reference to information by Ms. Leena. Who are Mr. Piyush

25. l am showing page 58 to 62 of Annexure "A ", please state what are these documents?

A. Page 58 is the copy of Debit Note of Service Fee for market research sent to our Japan office and the market report is being sent by Mr. Gempei to Japan office directly. Page 59 to Page 62 is the basis of Indent Commission, which we received monthly from our Singapore office, based on this we issue the Debit Note to our Singapore office. .

Q.26 What is this market research, and since when these services are being provided and who provides the same now and where being provided earlier?

A. I feel market research is basically giving the Indian market survey report to our Japan office. This is being provided by Mr. Gempei now. Earlier, Mr. Siddiqui was giving the market report.

Q.27 lam showing you Annexure "13" containing 58 pages, which are the financial statements of Hitachi-High

Technologies (S) Pte. Ltd. This has information regarding expenses for the year ending 31.03.2003 to 30.09.2007. Please state, whether all the salary expenses incurred by assessee company in respect of various persons working for the company in India are debited into these accounts and also state whether any payments are made directly to any person by Singapore office or Japan office in respect of business of Hitachi-High Technologies (S) Pte. Ltd. in India?

Salary expenses of all the Hitachi High-Technologies, India staff were paid by the company in India and the same has been debited into these accounts.

As far as I know, Hitachi High-Technologies, Singapore or Japan office has not made payments directly in respect of business of Hitachi High-Technologies (S) Pte. Ltd. in India. "

53. The most important mail was from Leena Cardoza to David Wong dated 21.06.2007 which reads:

"We had explained to Mr. Piyush Kaushik clearly that the representative office was actively involved in commercial activities. Then why Shri Piyush Kaushik wants to take this stand.

I feel his forte is law and he wants to take this matter into litigation instead of paying tax and finishing this issue. Once we are into litigation, this will carry on and on and he will make money on every appearance apart from these agreement contracts.

I guess it is not too late in taking comments of E & Y or some other good company whether to pay tax or not. After giving reasons, our representative office was involved in commercial activities."

54. To this,

David Wong replied "You do have a point here."

55. At this stage, it would not be out of place to mention that Leena Cardoza was the oldest employee of the LO and was well aware of the activities of the LO since its inception and was also well aware that the LO was, in fact, engaged in some form of commercial activities. Most relevant answers to the questions given by Leena Cardoza during the course of assessment proceedings read as under:

> *"3 Since you are the oldest employee of this organization in India, you must be aware of the activities of the liaison office and the present branch office. Is there any difference between the activities?*

Ans. The basic activity of liaison office was liaison work& supporting head office in trading business There is no significant change in the business activities of the Indian office after the conversion of the same to a branch office. Activities continue to be the same, except earlier there was no expat and now we have an expat. The office is providing raw material

Q. 13 Regarding the sales made, please state whether the involvement of Delhi office was more prior to May 2007 or is it more after 2007? s'

Ans. Involvement of Delhi office was more prior to May 2007".

56. At this juncture, we have to state that the decisions relied upon by the ld. counsel for the assessee questioning the admissibility of statements recorded at the time of survey proceedings are misplaced. In the case of S. Kader Khan[supra], the Hon'ble High Court held that solely on the basis of statements given by one of the partners of the assessee firm, disclosed income was not assessable as lawful income of the assessee. In that case, statement was given by a partner who was new to the management and was incapable of answering the enquiries made.

57. In that case, the Hon'ble High Court also followed the Circular of the CBDT for arriving at the conclusion that materials collected and statements obtained u/s 133A would not automatically bind upon the assessee. However, in the case in hand, statements of key employees relied upon by the Revenue are well supported by documentary evidences in the form of emails which prompted the Revenue to take a stand that the office of HTS in India was engaged in marketing, sales promotion and market research. Moreover, in the case in hand, income has not been determined on the basis of any banal declaration by any witness but after analysing in detail the activities of the PE in India since its inception.

58. We will now address to the submissions of the ld. counsel for the assessee that activities of the LO fall in exclusionary clause of Article 5 of India Singapore DTAA. There is no dispute in relation to the activities of the office in India which are 'advertisement and marketing, sales promotion, market research and administration'. In our considered opinion, the activities carried out by the appellants LO unquestionably occupy time and attention and labour of men. The appellant company indeed carried on business in India.

59. The concept of 'Business Connection' was explained by the Hon'ble Supreme Court in the case of R.D. Aggarwal and CO. 56 ITR 20. According to the Hon'ble Supreme Court, 'Business Connection", is as under:

> "Involves a relation between a business carried on by a non resident which yields profits or gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits, or gains. It predicates an element of continuity between the business of the non-resident and the activity in the taxable territories: a stray or isolated transaction is normally not to be regarded as a business connection. Business connection may take several forms: it may include carrying on a part of the main business or activity incidental to the main business of the non-resident through an agent, or it may merely be a relation between the business of the non-resident and the activity in the taxable territories which facilitates or assists the carrying on of that business.[1]' (Emphasis supplied)."

60. As mentioned elsewhere, LO in India had atleast six employees engaged in advertisement and marketing, sales promotion, market research and administration activities in India. In our considered opinion, there was clear relation between the business of the appellant and the activities in India, as business of the appellant was

trading and activities of the LO are core activities for a trading business.

61. It is imperative to look into the relevant parts of Article 5 of the India Singapore DTAA which read as under:

India-Singapore DTAA

ARTICLE 5

PERMANENT ESTABLISHMENT

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

2. The term "permanent establishment" includes especially :

(c) an office

7. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include :

(e) the maintenance of a fixed place of business solely for the purpose of advertising, for the

> supply of information, for scientific research, or for similar activities which have a preparatory or auxiliary character, for the enterprise."

62. In the light of the above, all that has to be considered is as to whether the activities were preparatory or auxiliary in nature to fall under the Exclusionary Clause of Article 5(7)(e) of the DTAA which reads as under:

> "Under Article 5(7)(e) of the India-Singapore DTAA, there would be no PE if the place of business is maintained:
>
> > "**solely** *for the purpose of* advertising, for the supply of information, for scientific research, or for similar activities which have a preparatory or auxiliary character"

63. The ld counsel heavily emphasised that since the activities of the LO is of preparatory/auxiliary character, the same falls into the exclusionary Article 5(7)(e) of the DTAA. The ld. Counsel heavily emphasised on "or for similar activities" which have preparatory or auxiliary character. In our understanding of law, the general words 'similar activities' should be read with specific words 'advertising, for the supply of information, for scientific research'.

64. We find that Article 5 of India Singapore DTAA restricts the nature of preparatory or auxiliary activities which can be excluded to determine existence of PE.

65. The Exclusionary Article of India-Singapore DTAA, if read with Exclusionary Article of India USA/India Canada DTAA, would throw more light on the quarrel. The Exclusionary Article of these DTAAs are ad under:

India-Singapore DTAA

> Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include .....
>
> (e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research, or ***for similar activities*** which' have a preparatory'or auxiliary character, for the enterprise.
>
> *India-USA/India-Canada DTAA*[1] Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include...
>
> (e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for

> scientific research ***or for other activities*** which ha/e a preparatory or auxiliary character, for the enterprise."

66. It can be seen from the above relevant exclusionary articles that in India Singapore DTAA, preparatory or auxiliary character, as used in para 7 of Article 5 of India-Singapore DTAA is ejusdem generis to the other terms used therein which means that "similar activities which have preparatory or auxiliary character has to be read as business solely used for the purpose of advertising, for the supply of information, for scientific research or for similar activities.

67. In contrast, formulation in India-USA/Canada DTAA "Other activities" have been mentioned which have to be read as 'Besides advertisement, supply of information and scientific research. This clearly shows that India-Singapore DTAA is restrictive in nature than the exclusionary article of India-USA/Canada DTAA. This means that as per India Singapore DTAA, unless fixed place of business [LO in the case of the appellant] was being used only for the purpose of advertisement, for supply of information, for scientific research or for similar activities which have preparatory or auxiliary character, it could not have been excluded from the definition of PE.

68. The nature of the activities of the LO, if read with the relevant answers to the questions given in the statements recorded at the time of survey, admittedly, the employees were engaged into marketing, sales promotion and market research activities which are sine qua non for a trading business, i.e. the appellant's business. The LO was actively involved in ascertaining customer requirements, price negotiation, obtaining of purchase orders, following up on delivery of material and payments. In our understanding of facts, none of these activities can be termed as having preparatory or auxiliary character keeping in mind that LO was functioning since 1988. The LO was directly participating in core activities of the trading business of the appellant. The only activity in which the LO was not involved was preparing of invoices and receiving payments.

69. The case laws relied upon by the ld. counsel for the assessee have been distinguished by the ld. DR in his written submissions and for the sake of convenience, we extract the relevant submissions of the ld. DR as under:

> "E-Funds IT Solution[2014] 42 taxmann.com 50 (Delhi) (pages 349 **to** 396 of the Assessee's Paper-Book on Case Laws)

i. The facts of this case briefly are: that two companies namely e- Fund Corp. and e-fund Inc. which were incorporated in USA had entered into international transactions with their Indian subsidiary company, *i.e.* e-Fund India. In terms of their agreement, e-Fund India performed back office operations in respect of ATM management, electronic payments, decision support and risk management services rendered by the foreign Companies outside India.

ii. On the facts of this case, the revenue authorities took a position that income of the two foreign companies was attributable to India because they had a PE in India in the form of their Indian associate company i.e. e-Fund India, and should be taxed in India. It was further held by the Revenue that income earned and taxed in the hands of e-Fund India was different from the income attributable to the two foreign companies (in the hands of e-Fund India). Thus, the balance or differential amount, i.e., income attributable to the two foreign companies, which was not included in income earned and taxed in the hands of e-Fund India, should be taxed in India.

iii. The Hon'ble HC however rejected the contention of the Revenue authorities and held that the USA incorporated foreign companies did not have a PE in India and therefore no income was taxable in India.

iv. The facts of the cited case are completely at variance with the facts in the present case. Even the applicable law (of India-USA DTAA) is different from the law applicable here i.e. Article 5 of India-Singapore DTAA. Firstly, in that case, the issue primarily was whether an Indian subsidiary can constitute a PE for a foreign company which did not have any office or factory or workshop in India. The High Court held that merely because a foreign company has a subsidiary in India it does not constitute its PE. Same is not the case here. In the present case of HTS, its very own office in India is being sought to be held as its PE for the reason that it performed business activities which went way beyond what could be described as 'preparatory or auxiliary' character under Article 5 of India-Singapore DTAA.

v. Specific reliance has been placed on para 19 & 20 of the judgment, which emphasizes on the three requirements of Article 5 for holding a fixed place as PE, namely; (/) the existence of place of business at the disposal of the enterprise; *(ii)* the place of business must be of a 'fixed nature' (geographical and temporal permanence); and *(iii)* the enterprise being carried on is required to be 'carried on through the place of business' (with a special emphasis on word 'through').

vi. All of these three requirements are met in the case of HTS; that (i) it had a place of business in India where several of its employees worked and earned their remunerations, (ii) the place was fixed at a

known address i.e. 602, 6th Floor, Eros Corporate Towers, Nehru Place - 110019, and (iii) and during the relevant period, its employees were admittedly "engaged in advertising and marketing, sales promotion, market research, and administration" activities which were way beyond the scope of the activities carried out *'solely for the purpose of advertising, for the supply of information, for scientific research, or for similar activities which have a preparatory or auxiliary character'* as required under the India-Singapore DTAA.

The cited case *law* does not assist the assessee's case.

i. This is also a case of a company incorporated in USA, which had a wholly owned subsidiary in India, namely, Adobe India. The Indian company provided software related Research and Development (R&D) services to its foreign parent. The foreign company did not have any separate business operations in India. The R&D services rendered by Adobe India, were paid for by the foreign company on cost plus basis in terms of an agreement between the two.

ii. For the *relevant* years, the Assessing Officer and the TPO accepted the fees paid by the assessee on cost plus 15 per cent basis as being on ALP and Adobe India's assessment was made accordingly. Subsequently, the Assessing Officer sought to reopen the assessment. The reasons recorded for said purpose were that activities carried out by Adobe India were a part of the foreign company's core business activities and, consequently, Adobe India constituted the foreign company's

PE under article 5(1) of DTAA. The Assessing Officer further reasoned that since the assessee had a PE in India, a part of the profit accruing to the assessee which was attributable to the activities in India was chargeable to tax under the Act.

iii. The Hon'ble HC quashed the reassessment proceedings, by holding that the foreign company did not have any right to use premises or any fixed place at its disposal in India and, thus, right to use test or disposal test was not satisfied for holding that it had a PE in India in terms of article 5(1). Further, even though the foreign company was authorized to audit Indian subsidiary (Adobe India) such a clause in agreement could not lead to inference that it had a Service PE in India in terms of article 5(2)(1). Also, since Adobe India was assessed on its income determined at ALP and, therefore, there was no occasion for Assessing Officer to assume that Adobe India constituted a PE for the USA company under article 5(5) of India-USA tax treaty.

iv. Once again, the facts of the cited case are completely different from the case in hand. Of the specific relevance are para **32** and **33** of the judgment, where the Hon'ble HC after quoting the E-Funds case law (supra), emphasized on the required attributes of a fixed place PE, especially the requirement that the fixed place must be at the disposal of the assessee for it to carry on its business (wholly or partly)

through it. Since these points have been already addressed above, in relation to the E-Funds case, using facts of the assessee's case, these are not repeated here.

v. This case also does not give any support to the present case.

UAE National Petroleum Construction Company [2016] 66 **taxmann.com** 16 **(Delhi)**

i. It was a case of a UAE incorporated non-resident company which had entered into contract with ONGC that entailed designing, engineering, procurement, fabrication of offshore platform and its installation, testing and commissioning at an offshore facility of ONGC. According to Revenue, the income from the said contract was liable to be taxed in India as the Assessee had a PE in India. According to the Assessee, its income from the contract was not taxable under the Act by virtue of DTAA with UAE. Assessee claimed that it did not have a PE in India and further the income from fabrication and supply of platform was not taxable as it pertains to the Assessee's activities outside India.

ii. In this case the assessee had established a Project Office at Mumbai, which was also intimated to the RBI. It was also not disputed that the assessee did carry on part of its business through its Project Office, in the circumstances,

the conditions as spelt out in para 1 and paragraph 2(c) of article 5 of the DTAA were satisfied. According to the High Court, the matter however would not rest here and it was to be seen whether any of the exclusionary clauses of paragraph 3 of article 5 of the DTAA were applicable. In this case, the HC considered clause (e) of paragraph 3 of article 5 of the DTAA which expressly provided that notwithstanding the provisions of paragraph 1 and paragraph 2 of article 5, a PE would not include *'maintenance of a fixed place of business solely for the purposes of carrying on, for the enterprise any other activity of a preparatory or auxiliary character'.* The assessee contended that its Project Office falls within this exclusionary clause.

iii. The HC agreed with the assessee in view of the specific language of the India-UAE DTAA and held that in the context of article 5(3)(e) of the applicable DTAA, the expression would necessarily mean carrying on activities, other than the main business functions, that aid and support the assessee. The HC thus decided that the activity of the assessee's project office in Mumbai would fall within the exclusionary clause of article 5(3)(e) of the DTAA and, therefore, cannot be construed as the assessee's PE in India.

iv. Again, this case too was decided after applying the law that was completely different from the law applicable in the present case of HTS. The language of Article 5(3)(e) in India-UAE treaty is, that

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

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, *any other* activity oj a preparatory or auxiliary cnaracter.

In contrast, the language of corresponding Article 5(7)(k) in India-Singapore DTAA is:

7. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

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

It is easy to see the differing requirement of the Treaty law in respect of the exclusions that can be permitted while holding a fixed place of business as PE on the grounds of preparatory or auxiliary activities.

v) Not only that the case of National Petroleum Construction Company was decided on the different treaty law, it also differed on facts. In that case the High Court noted that the Project Office of the assessee was manned by three employees, who were only engaged in collecting information from ONGC and transmitting the same to the assessee's office in Abu Dhabi and similarly transmitting communications from assessee's office in Abu Dhabi to ONGC. These employees were simple graduates and were not capable for participating in the execution of the work undertaken. They were not even the employees of the project office.

Compared it to the case of HTS, where not only that there were several employees manning the "LO" they were "playing active role in concluding the steals between HTS and some of the Indian customers'

This case also does not come to the rescue of the assessee in the present case."

70. The ld. counsel for the assessee relied upon the decision of the Tribunal in the case of Sofema SA : ITA No. 3900/ Del./ 2002 which was affirmed by the Hon'ble High Court of Delhi and in which SLP was dismissed by the Hon'ble Supreme Court.

71. Reliance was placed on this decision for the fact that no violation was found by the RBI with the activities of the LO. We are of the considered view that this decision is not applicable to the facts of the case in hand. Firstly, in the case of Sofema [supra] though the findings of the survey were basis of assessment order, but same were never shared with the assessee and subsequently, assessment was completed by not giving sufficient opportunity to the assessee. Facts of the case in hand clearly show that the documents impounded in the survey proceedings were very much confronted to the assessee. Whether the assessee violated the conditions of RBI or FEMA is not relevant in determining the LO as a PE under the I.T. Act.

72. For our detailed discussion hereinabove, we are of the considered view that the LO is PE of the appellant.

IV ATTRIBUTION OF PROFIT TO THE PE

73. Article 7 of the India Singapore DTAA states that

> *" The profits of an enterprise of a Contracting State shall be taxable only in mat State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other state but only so much of them as it directly or indirectly attributable to that permanentestablishment."*

74. Article 7(8) of the India Singapore DTAA states that

> "For the purpose of paragraph 1, the term *"directly or indirectly* table to *the* permanent establishment" includes profits arising from transactions in which the permanent establishment has been involved and such profits shall be regarded as attributable to the permanent establishment to the extent appropriate to the part played by the permanent establishment in those transactions, *even if those transactions are made or placed directly with the overseas head office* of the 'enterprise rather than with the permanent establishments".

75. In our considered view, even if the orders were placed directly with the Head Office of the assessee, any profit arising from such transactions can be taxed in India to the extent any part is played by the PE of the assessee in India.

76. Article 7(2) of the India Singapore DTAA requires that the PE of non resident enterprise be treated as a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

77. Thus, the PE, though a distinct and a separate enterprise, is to be treated as an associated enterprise under Article 9 of the DTAA read with sections 92B and 92F of the Act. Therefore, the PE is subject to the provisions of section 92, which require that any international transaction be carried out at Arm's Length.

78. Now the issue is to determine the Arm's Length profit that the appellant's PE would have earned if it had been operating as an independent enterprise in India.

79. The DRP found the work profile of the appellant's PE to be similar to one of the independent agent i.e. ForeVison, used by the assessee to carry out same or similar activities concerning sales in India. The DRP has considered the part details submitted by the assessee itself and after comparing the activities of ForeVision with that of LO, directed the Assessing Officer to use margin percentage of ForeVision as internal comparable.

80. Before us, the ld. counsel for the assessee heavily contended that the DRP/assessing officer has, on adhoc and arbitrary basis, equated functions of LO with an independent agent and on that basis held that the PE (LO) of the appellant ought to have earned commission on sales @ 16.5% without appreciating that the nature of activities carried out and the products dealt with by the independent agent are different from those products in relation to which LO held to be involved in negotiation and conclusion of order in India.

81. The ld. counsel for the assessee drew our attention to the decision of the Hon'ble Supreme Court in the case of DIT vs. Morgan Stanley & Co. [292 ITR 416 (SC)] in which the Hon'ble Supreme Court has h**eld** that the income attribution to the PE has to be done with

reference to analysis of functions performed, assets employed and risks assumed. It is the say of the ld. counsel for the assessee that no opportunity was provided to controvert the basis for taxing the income of Appellant in India. The ld. counsel for the assessee submitted that the computation methodology adopted by the DRP/assessing officer has no basis and is based on conjectures and surmises, as no FAR analysis has been conducted by them in this regard.

82. Referring to the decision of the Hon'ble Supreme Court in the case of Anglo French Textile Company Ltd. vs CIT 23 ITR 101 (SC) and the Hon'ble Calcutta High Court in the case of CIT Vs Bertrams Scotts Ltd.: 31 Taxman 444 (Cal. HC), the ld. counsel for the assessee stated that on a rough and ready basis, since the alleged PE is involved in lesser number of activities, only 10% of global profit percentage, as applied to India sales could at best be attributed as profit attributable to the alleged PE.

83. The ld. counsel for the assessee further furnished a comparative chart of Global Profit on India turnover qua profit attributed to LO by Assessing Officer/DRP which is as under:

Comparison of global profit on Indian turnover qua profit attributed to LO by AO/ DRP						
Assessment years 2002-03 to 2007-08						
Assessment year	Indian turnover (MBIL turnover)	Commission @ 16.5% of Indian turnover taken by DRP	Expenses of LO	Profit attributable to LO as per AO/DRP	Global net profit rate (%)	Profit taking global net profit margin on Indian turnover (100% attribution)
	(A)	(B) = A* 16.5%	(C)	D= (B-C)	(E)	F = (A*E)
2002-03	141,131,193	23,286,647	8,864,522	14,422,125	0.72	1,016,145
2003-04	262,639,470	43,335,513	8,574,092	34,761,421	1.42	3,729,480
2004-05	2,922,938,885	482,284,916	14,368,505	467,916,411	0.96	28,060,213
2005-06	1,914,078,428	315,822,941	12,528,499	303,294,442	1.65	31,582,294
2006-07	1,392,195,828	229,712,312	11,997,691	217,714,621	2.08	28,957,673
2007-08	1,315,186,748	217,005,813	23,501,755	193,504,058	2.79	36,693,710
		1,311,448,141	**79,835,064**	**1,231,613,077**		**130,039,516**

84. The ld. counsel for the assessee pointed out that the role of the LO in the entire value chain is extremely limited as it reflected in the low intensity of functions of the Indian Liaison office and sales made to India third parties. It is the say of the ld. counsel for the assessee that considering the intensity of functions of the Indian liaison, it is in the range of 0.50% to 6.28%, the average being 2.22%, whereas the operating margins resulting from attribution made to the Revenue are in the range of 163 to 3257%, which is not only excessive but absurd.

85. Per contra, the ld. DR strongly supported the findings of the DRP. It is the say of the ld. DR that the DRP proceeded with details submitted by the assessee itself and on finding that the independent agent ForeVision is performing /carrying out same or similar activities, concerning sales in India. The DRP has rightly used average sales commission of 16.5% of the comparable ForeVision and same should be accepted.

86. We have given thoughtful consideration to the rival contentions. The undisputed fact is that to boost sales for Advance and Analytical Systems [AAS] business division, the appellant entered into arrangements with agents in India for specific marketing and promotion and one of such agent was ForeVision.

87. As per terms of the agency agreement, the agents were responsible for:

- Marketing including advertisements, exhibition participation and the necessary sales co-ordination activity
- Follow up assistance services in respect of the PO & letters of credit from customers
- Following up on delivery to customers
- Follow up and assistance in respect of import documentation

- Follow up on credit and collection due from customers
- Installation of equipment through their own engineers
- Test runs (post installation)
- Training of customers' staff
- After sale services, viz., maintaining the machines quality, regular maintenance and support to customers.

88. It is also not in dispute that ForeVision is also doing business with other companies. It is equally true that the DRP/Assessing Officer has not done any FAR analysis of ForeVision qua the appellant's PE [LO].

89. We find force in the contention of the ld. counsel for the assessee that the LO is performing routine and limited functions and is operating in a risk immune environment and considering the intensity of functions, attribution made by the Revenue which ranges from 163% to 2357% is not only excessive but absurd and abnormal.

90. In our considered opinion, when a PE is treated as if it is an independent enterprise, its profits should be determined on the basis as if it is an independent enterprise. Meaning thereby, the profits of the PE should be determined on the basis of what an independent enterprise under similar circumstances might be expected to derive on its own. For this proposition, we draw support from the decision of the

Hon'ble Supreme Court in the case of Morgan Stanley 162 Taxmann 165. In our considered view, looking to the business profile of ForeVision and in the absence of complete details, the same is not a good comparable. In our understanding of the facts and considering that the LO is performing routine and limited functions and is operating in a risk immune environment, the allocation of profit should be done by applying TNMM as most appropriate method.

91. The assessee is directed to furnish necessary details and the Assessing Officer is directed to recompute the attribution of profit to [LO] PE by applying TNMM as most appropriate method. It is made clear that sales through ForeVision and sales to Videocon should not be considered for the purposes of attribution of profits.

92. To sum up:

i) The DRP has done no enhancement and has simply adjudicated upon following directions of the Tribunal which directed the DRP to adjudicate the objections raised by the assessee by a speaking order.

ii) Yes, the assessee has been put in a more worse situation than what it was before filing appeal in the first round of litigation. Therefore, we have held, as mentioned elsewhere that the additions made in the first round of litigation will only be considered which is Rs. 7.21 crores.

iii) Yes. There is a PE in India.

iv) Attribution has to be done by applying TNMM as most appropriate method on the profits attributable to the sales excluding ForeVision and Videocon.

93. Before closing, the representatives of both the sides have referred to several judicial decisions in their respective written synopsis. However, we have only considered those decisions which have some relevance on the facts under consideration.

94. Before parting, we appreciate and thank the assistant given by Shri Sanjay Puri, ld. PCIT, Udaipur representing the Revenue and Shri Ajay Vohra, Sr. Adv.

Next issue relates to charging of interest u/s 234B of the Act.

94. It is the say of the ld. counsel for the assessee that the revenues receivable by it are subject to deduction of tax at source, therefore, the question of payment of advance tax and subsequent levy of interest under section 234B of the Act does not arise at all.

95. Per contra, the ld. DR stated that since the assessee did not file any tax return and made every attempt to conceal income earned in India from getting taxed, and income of the assessee has been brought to tax only after issue of notices u/s 148 of the Act, the plea of income having been subject to TDS is not available to the assessee and hence interest u/s 234B of the Act has been rightly levied by the DRP/Assessing Officer.

96. We have given thoughtful consideration to the rival contentions and have carefully perused the relevant material on record. As per the provisions of section 234B of the Act, an assessee who is liable to pay advance tax under section 208 will be liable to interest under section 234B of the Act, if he fails to pay such tax, or the advance tax paid by him falls short of 90 percent of the assessed tax. In our understanding of the law, an assessee must first be liable to pay advance tax under

the provisions of section 208 of the Act. As per the provisions of section 208 read with section 209(1)(d) of the Act, advance tax payable has to be computed after reducing from the estimated tax liability the amount of tax deductible/ collectible at source on income which is included in computing the estimated tax liability.

97. Under section 195 of the Act, tax is deductible at source from payments made to non-residents. Appellant is a non-resident and thus, tax is deductible at source from the payments made to it under section 195 of the Act. Since tax was deductible at source on all the payments made to Appellant, no advance tax was payable as per the provisions of the Act.

98. The Hon'ble **Delhi High Court** in the case of DIT v. GE Packaged Power Inc. 373 ITR 65 wherein the High Court held that no interest under section 234B of the Act can be levied on the assessee-payee on the ground of non-payment of advance tax because the obligation was upon the payer to deduct the tax at source before making remittances to them.

99. Amendment to the provisions have been brought by the Finance Act, 2012, w.e.f. 1.4.2012 by which a proviso below section 209(1)(d)

of the Act has been added but applicable from A.Y 2013-14. Considering the law on this issue, we direct the Assessing Officer not to charge interest u/s 234B of the Act.

100. In A.Y 2004-05, interest has also been levied u/s 234A of the Act. Such levy is consequential and we direct the Assessing Officer to charge interest after giving appeal effect as per the provisions of the Act

101. In the result, the appeals of the assessee in ITA Nos. 2683 to 2688/DEL/2015 are partly allowed.

The order is pronounced in the open court on 17.09.2019.

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

Dated: 17th September, 2019

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	