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

BEFORE SHRI G.S. PANNU, AM AND SHRI RAVISH SOOD, JM

आयकर अपील सं./ I.T.A. No. 2297/Mum/2014

(**निर्धारण वर्ष /** Assessment Year: 2009-10,)

M/s. Linklaters, C/o Deloitte Haskins & Sells, Indiabulls Finance Centre, 32nd Floor, Mumbai - 400013	**बनाम**/ Vs.	DDIT (IT) 3(1), SCINDIA House, 1st Floor, Ballard Estate, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AABFL2160M		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri J.D. Mistry and Shri Niraj Sheth
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Jasbir Chouhan

सुनवाई की तारीख / **Date of Hearing**	:	03/02/2017
घोषणा की तारीख / **Date of Pronouncement**	:	08/02/2017

आदेश / O R D E R

PER BENCH :

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-10, Mumbai, dated 31.10.2013, which arises from the assessment order passed by the A.O u/s 143(3) of the Income Tax Act, 1961, (for short 'Act'), dated 28.12.2011, therein assailing the order of the CIT(A) by raising the following grounds of appeal before us:-

" The appellant objects to the order dated October, 31, 2013 passed by the Commissioner of Income Tax (Appeals)- 10, Mumbai for the assessment year 2009-10, on the following among other grounds:-

Permanent Establishment

1. *The learned Commissioner (Appeals) erred in holding that the appellant had a permanent establishment in India under Article 5(2)(k) of the India-UK Tax Treaty for the entire year.*
2. *The learned Commissioner (Appeals) erred in rejecting the claim of the appellant that no income can be taxed in India since the threshold of 90 days did not exceed during the 12 months period relating to November 2008 to March 2009.*
3. *The learned Commissioner (Appeals) ought to have appreciated that the return of income filed by the appellant declaring income at Rs. 12,543,155/- was without prejudice to the claim stated in grounds no 1 and 2 above and hence the learned Commissioner (Appeals) ought to have adjudicated the plea in the course of the appellate proceedings.*

Computation of Income liable to tax in India

4. *The learned Commissioner (Appeals) erred in upholding the action of the Assessing Officer in treating the entire receipt of GBP 3,302,927 as liable to tax in India.*
5. *The learned Commissioner (Appeals) ought to have directed the Assessing Officer to exclude the income earned during the period November 2008 to March 2009 in the absence of permanent establishment in India in terms of Article 5(2)(k) of the India-UK Tax Treaty.*
6. *The learned Commissioner (Appeals) ought to have directed the Assessing Officer that only fees relatable to the services rendered in India can be taxed as attributable to the permanent establishment in India and under Article 7 of the India-UK Tax Treaty.*
7. *Without prejudice, the learned Commissioner (Appeals) ought to have directed the Assessing Officer to assess the appellant only in respect of fees of GBP 183,354 equivalent to Rs. 13,203,302/- which is relatable to work performed in India.*
8. *Without prejudice to the above, the learned Commissioner (Appeals) ought to have directed the Assessing Officer to exclude fees related to non-Indian projects for services rendered outside India.*
9. *Without prejudice to the above, the learned Commissioner (Appeals) ought to have appreciated that as per Explanation 3 to Section 9(1)(i) only income related to operations carried out in India can be brought to tax and hence no part of income related to operations carried outside India can be brought to tax in India.*

10. The learned Commissioner (Appeals) erred in not applying provisions of Article 7(3) of the India-UK Tax Treaty while adjudicating the issue of attribution of income to the service permanent establishment in India.

11. The learned Commissioner (Appeals) erred in not applying decision of the Mumbai Special Bench in the case of Clifford Chance 33 Taxmann.com 200. The learned Commissioner (Appeals) erred in relying on the decision of the Mumbai Tribunal order dated July 16, 2010 in appellant's own case for the assessment year 1995-96 in upholding the action of the Assessing Officer in taxing entire fees without appreciating the fact that the observation of the Divisional bench in the appellant's case regarding attribution of income was not accepted by the Mumbai Special Bench of the Tribunal in the case of Clifford Chance (Supra).

Fixed Base

12. The learned Commissioner (Appeals) erred in not specifically holding that the appellant did not have a fixed base in India from which the appellant was performing its activities.

13. The learned Commissioner (Appeals) erred in not specifically holding that the use of hotels or the places provided by clients to the appellant's partners and staff cannot be considered as an office of place of work from where the appellant provides services to its client.

Disbursements

14. The Commissioner (Appeals) ought to have specifically directed the Assessing Officer to delete the addition made of Rs. 7,492,280 on account of disbursements.

Interest under section 234B

15. The Commissioner (Appeals) ought to have specifically directed the Assessing Officer to delete interest of Rs. 27,921,562 levied under section 234B.

India – UK tax treaty benefit

16. The Commissioner (Appeals) ought to have specifically held that the appellant is entitled to the benefit of India-UK tax treaty.

Penalty proceedings under section 271(1)(c)

17. The learned Commissioner (Appeals) erred in not quashing the penalty proceedings under section 271(1)(c) of the Income Tax Act initiated by the Assessing Officer."

2 The brief facts of the case are that the assessee is a limited liability partnership incorporated in United Kingdom, offering legal consultancy to its various clients all over the world including India. During the year under consideration the assessee had rendered legal consultancy services in connection with different projects to various concerns, both within and outside India. The assessee filed its return of income as on 30.03.2010, declaring an income of Rs. 1,25,43,155/-. The assessee by way of a **'NOTE'** forming part of the 'Statement of Total Income' filed alongwith its return of income, had therein categorically stated as under:

"NOTES: -

1. *PAN : AABF12160M*
2. *Address: One Sile Street, London, EC2Y S HQ, United Kingdom.*

3. *The assessee claims that it is entitled to the benefit of India-UK tax treaty.*
4. *The Commissioner (Appeals) in earlier years has held that as the 90 days threshold has been breached the assessee firm has PE in India and hence income relating to services rendered in India are taxable under article 7(3) of the India – UK tax treaty. The Tribunal in order for the assessment year 1995-96 has held that in respect of Indian client or Indian projects both services rendered in India and outside India are taxable. The assessee has preferred appeal the Bombay High Court against the Tribunal order dated July 16, 2010. The assessee has also filed a Miscellaneous Application against the aforesaid Tribunal order dated July 16, 2010. Further in view of the conflicting decisions, the Tribunal has formed a Special Bench to deal with the issue regarding portion of income attributable to the service PE in India.*
5. *Under the above circumstances, and relying on Commissioner (Appeals) order in the assessee's own case for the earlier years and view of the decision of Appellate tribunal in the below cases:*
   i. *DDIT Vs. Set Satellite (Singapore) Pte Ltd.- 106 ITD 175 Mum*
   ii. *Airlines Rotables Ltd. UK Vs. Jt. Director of Income Tax - International Taxation 131 TTJ 385 (Mum)*

   the above return is prepared on the basis that income related to the services rendered in India are liable to tax as being directly or indirectly attributable to the permanent establishment in terms of Article 7(3). Further, u/s 9(1)(i) Explanation 1 of the income tax act only income in respect of operations carried out in India is taxable in India.

6. *Without prejudice to the above the assessee submits that the threshold limit of 90 days mentioned in Article 5(2)(k)(i) is not exceeded in any twelve months period between November, 2008 to March, 2009. Hence, the assessee claims that income in respect of services rendered during this period is not liable to tax in India.*

   Further assessee is of the view that the threshold of 30 days provided in Article 5(2)(k)(ii) applies only in the situation where the services are provided to an associated enterprise located in India."

3. The case of the assessee was taken up for scrutiny proceeding and Notices u/ss. 143(2) and 142(1) of the 'Act' were issued to the assessee. That during the course of the assessment proceedings the A.O took cognizance of the fact that the assessee had in its return of income by way of a 'Note' therein categorically mentioned that as the threshold limit of 90 days contemplated in Article 5(2)(k)(i) of the India – U.K. Tax Treaty (for short 'tax treaty') was not exceeded in any twelve months period between November, 2008 to March, 2009, therefore its income in respect of services rendered during the said period were not liable to tax in India. The A.O however being of the view that the return of income had been prepared by the assessee presumably on the basis that it had exceeded the 30 days threshold limit provided in Article 5(2)(k)(ii) of the India-U.K Tax Treaty, and thus on its own had offered the income in respect of services rendered in India for tax, therefore concluded that by so doing the assessee had himself accepted that it had a 'PE' in India during the entire year under consideration. The A.O further being of the view that as the place of accrual of income from services is not the place where the services are rendered, but the place where the services are utilized, therefore for the said

reason scrapped the claim of the assessee that only fees for work done in India amounting to 183,354 GBP was liable to be taxed in India and after taking cognizance of the following amounts :-

Particulars	Amount (in GBP)
Fees for work done in India	183,354 GBP
Fees for work done outside India	31,19,573 GBP
Towards disbursements	1,04,045 GBP
Total	**34,06,972 GBP**

, therein proceeded with and assessed the income of the assessee at Rs. 23,30,69,251/-.

4. The assessee being aggrieved with the assessment order therein carried the same in appeal before the CIT(A). That during the course of the appellate proceeding it was submitted by the assessee that it had offered its income to tax in India only pursuant to the directions of the CIT(A) in its case for the preceding years, wherein it was held that as during the said year as the threshold of 90 days had been breached, therefore the assessee was held as having a Permanent establishment (for short 'PE') in India, and the income relating to services rendered in India were liable to be taxed under Article 7(3) of the India – U.K. Tax Treaty. The assessee further submitted before the CIT(A) that on appeal the Tribunal vide its order passed in the case of the assessee for A.Y. 1995-96 had held that in respect of Indian client or Indian projects, both services rendered in India and outside India were liable to be taxed in India, which order of the Tribubal was however not accepted by the assessee and the same had been assailed by way of an appeal before the **Hon'ble Bombay High Court**, as well as a Miscellaneous

application against the said order was filed with the Tribunal, both of which were pending adjudication. The assessee drawing the attention of the CIT(A) to the 'Note' forming part of the 'Statement of total income' filed alongwith the return of income, thus submitted that offering of the income relating to services rendered by the assessee in India was only pursuant to and prompted by the observations of the appellate authorities in the case of the assessee for the earlier years. The assessee further submitted before the CIT(A) that at Sr. No. 6 of its 'Notes' (supra) forming part of the return of income, it was categorically stated that as during the year under consideration the threshold limits of 90 days mentioned in Article 5(2)(k)(i) was not exceeded in any twelve months period between November, 2008 to March, 2009, therefore the income of the assessee in respect of services rendered during the said period were not liable to tax in India. The assessee averred before the CIT(A) that pursuant to a conjoint reading of Article 5(2)(k)(ii) and Article 10 of the India – U.K. Tax Treaty, as no services were being provided by the assessee to any associated enterprise located in India, it could thus safely be gathered that the provisions of the Article 5(2)(k)(ii) were not applicable to the case of the assessee. The CIT(A) though took cognizance of the claim of the assessee that during the year under consideration as the threshold limit of 90 days in any twelve month period mentioned in Article 5(2)(k)(i) had exceeded only during the period April, 2008 to October,2008, therefore the assessee could not be held to be having a service 'PE' in India for the period November, 2008 to March, 2009, but however being of the view that as the return of income was filed for whole of the accounting year, therefore the claim of the assessee was not tenable. The CIT(A) further observed that as the assessee had on its own offered to tax its income, thus even on the said basis the contention of the assessee that

it had no 'PE' in India under Article 5(2)(k)(i) for the entire year, thus could not be accepted. The CIT(A) thus on the basis of his aforesaid observations held that the assessee had a 'PE' in India for the entire year.

4.1 The CIT(A) after observing that the assessee had a 'PE' in India for the entire year, therein *inter alia* dealt with its contentions, which to the extent the same had been assailed by the assessee before us, are culled out as under:-

(i). The assessee had alternatively submitted before the CIT(A) that the scope and gamut of taxability of its income in India (which contention was raised without prejudice to its claim that it had no 'PE' in India during the period November, 2008 to March, 2009) was liable to be restricted only to the income of 183,354 GBP pertaining to work performed by the assessee in India, as against the entire receipt of 34,06,972 GBP that had been assessed by the A.O. The CIT(A) however did not accept the claim of the assessee, and taking cognizance of the fact that as the said issue had already been decided by the Tribunal against the assessee in its own case for A.Y. 1995-96, therefore rejected the aforesaid claim of the assessee.

(ii). That it was further averred by the assessee before the CIT(A) that the AO had erred in not specifically holding that the assessee during the year under consideration did not have a fixed base in India from which it was performing its activities. The CIT(A) however being of the view that as he had already taken a view that the asssessee had a service 'PE' in India, as well as that Article 15 of the 'tax treaty' was not applicable to the case of the assessee, therefore, the said contention so raised before him was rendered infructuous, and on the said basis dismissed the same.

(iii). The CIT(A) further dealing with the contention of the assessee as regards levy of interest u/s 234B of the 'Act', therein referring to the judgment of the **Hon'ble High Court of Bombay** in the case of: **Director of Income Tax, Bombay Vs M/s. NGC Network Asia LLC (313 ITR 187) (Bombay)**, which was followed by the Tribunal in the case of the assessee for A.Y. 1995-96, therein directed the AO to do the needful as per the directions given by the Tribunal as regards the said issue while disposing of the appeal of the assessee for A.Y. 1995-96.

(iv). The CIT(A) lastly dealing with the challenge of the assessee to the very initiation of penalty proceedings u/s 271(1)(c) in the body of the assessment order, therein being of the view that as the said contention was premature, therefore dismissed the same.

The CIT(A) thus *inter alia* deliberating on certain other issues, including the aforesaid issues which are relevant for the present appeal, thus partly allowed the appeal of the assessee.

5. That before us the assessee has assailed the very finding of the AO that the assessee had a 'PE' in India under Article 5(2)(k) of the India – U.K. Tax Treaty for the entire year, which order of the AO, as observed by us hereinabove, had thereafter been sustained by the CIT(A). The learned authorized representative for the assessee (for short 'A.R.') at the very outset submitted that though the 'fees for work done in India' by the assessee amounting to 183,354 GBP had been offered to tax by the assessee in its return of income for the year under consideration, however in the 'Notes' forming part of its 'Statement of total Income' filed with the return of income, it was duly

clarified that the aforesaid amount was being reflected as income liable to tax in India in light of the observations of the CIT(Appeals) in the case of the assessee for earlier years, wherein it was held that as the 90 days threshold had been breached by the assessee , therefore it was to be taken that it had a 'PE' in India and income relating to services rendered in India were taxable under Article 7(3) of the India – U.K. Tax Treaty. The Ld. AR vehemently submitted that the fact that the income was offered for tax in the return of income only in the backdrop of the findings of the CIT(A) in its own case for the earlier years, was duly clarified and was mentioned beyond any scope of doubt by the assessee at Sr. No. 5 of the 'Notes' (supra) forming part of the 'Statement of Total Income'. It was further submitted by the Ld. A.R that the fact that during the year under consideration the threshold limit of 90 days mentioned in Article 5(2)(k)(i) was not exceeded in any twelve months period between November, 2008 to March, 2009, as a result whereof it was claimed that the income in respect of services rendered during this period was not liable to tax in India, also found a categorical mention at S.No. 6 of the 'Notes' (supra). Thus in the backdrop of the aforesaid submissions, it was averred by the Ld. A.R that the lower authorities had gravely erred in loosing sight of the fact that though the assessee had reflected the 'fees for work done in India' of 183,354 GBP as its income liable for tax in the return of income, but however the reasons for so doing, as were clearly spelt out in the very same 'Statement of total income' along with the claim that the threshold limit of 90 days mentioned in Article 5(2)(k)(i) had not exceeded in any twelve months period between Novermber, 2008 to March, 2009, therefore the income in respect of services rendered during the said period were not liable to tax in India, had most conveniently and rather whimsically been ignored both by the AO as well as CIT(A), leading to drawing of adverse inferences in the hands of the assessee. Thus to be brief and

explicit, it was submitted by the Ld. AR that the circumstances leading to offering of income for tax in the return of income, as well as the fact that the assessee had no service 'PE' during the period Novermber, 2008 to March, 2009, as a result whereof the income arising from services rendered during the said period were not liable to tax in India, was not a new fact, but rather a fact which formed part of the return of income of the assessee. The Ld. A.R therein in order to fortify his contention that the assessee had no service 'PE' during the period November, 2008 to March, 2009, therein took us to Page 39 to 43 of the 'Paper book' (for short 'APB'), which is a table reflecting the day-wise stay of the 5 employees/partners of the assessee who had rendered their services during the financial year 2008-09 in India, which therein revealed that the total stay in India on 'day basis' worked out to 58 days. It was averred by the Ld. A.R that even if the said period was to be computed on the basis of 'Man-days', then also the same worked out at 78 days. It was thus submitted by the Ld. A.R that in neither of the situations the stay of the employees/partners in India during the year under consideration was more than 90 days. The Ld. A.R further submitted that the furnishing of services by the assessee in India was not more than 90 days within any twelve months period between November, 2008 to March, 2009. The Ld. A.R in order to fortify his interpretation of the term "more than 90 days within any twelve months period", therein emphasized that the purposive, conscious and intentional usage of the term 'any' used therein could safely, logically and rather inescapably only be related to the 'Previous year', because the same coincides with the period of which the profit of the assessee is to be assessed. It was thus submitted by the Ld. A.R that the lower authorities had in a whimsical and fanciful manner summarily rejected the claim of the assessee that it had no service 'PE' under Article 5(2)(k)(i) of the India – U.K. Tax Treaty, and had most arbitrarily drawn adverse inferences in

the hands of the assessee. That on the other hand the Ld. Departmental representative (for short 'D.R') submitted that as the assessee had accepted in its return of income that it had a permanent establishment and as such offered its income for tax, therefore it was not permissible for the assessee to now raise a claim contrary to what has been claimed by him in the return of income itself. It was thus further submitted by the Ld. D.R that the CIT(A) had rightly discarded the contention of the assessee that as the threshold limits of 90 days in any twelve month period mentioned in Article 5(2)(k)(i) had exceeded only during the period April, 2008 to October,2008, therefore the assessee could not be held to be having a service 'PE' in India for the period November, 2008 to March, 2009, and thus the income from services rendered during the said latter period could not be taxed in India. The Ld. D.R submitted that the CIT(A) had rightly concluded that the claim so raised by the assessee was not tenable for the reason that as the return of income was filed for whole accounting year, therefore if the assessee is found to be satisfying the parameters for having a service 'PE' in India at any point of time during the year, then it had to be uniformly applied and construed as such for the whole of the year, coupled with the very fact that as the assessee had itself offered its income for tax in the return of income, therefore it could safely and inescapably be gathered that the assessee had accepted that it had a 'PE' in India during the year under consideration.

6. We have heard both the parties, perused the material available on record and have given a thoughtful consideration to the issue before us. We are of the considered view that though it is a matter of fact that the assessee in its return of income for the year under consideration had voluntarily offered the 'fees for work done in India' of 183,354 GBP for tax, which at the first blush would

give an impression that the assessee had accepted that it had a 'PE' in India, but then a perusal of the 'Statement of total income' so filed by the asssessee along with its return of income therein reveals that the assessee had offered the said income for tax in India, only pursuant to and prompted by the observations of the CIT(A) in its case in the preceding years, which thus cannot be taken as a voluntary acceptance on the part of the assessee that it had a 'PE' in India for whole of the year under consideration. We further find from a perusal of the 'Statement of total income' filed by the assessee alongwith its return of income, placed at Page 28 of the 'APB', to which our attention was drawn by the Ld. A.R, that the assessee had categorically and in unequivocal terms stated therein that as the threshold limit of 90 days mentioned in Article 5(2)(k)(i) of the India – U.K. tax treaty had not exceeded in any twelve months period between November, 2008 to March, 2009, therefore the income in respect of services rendered during the said period were not liable to tax in India. We are thus of the considered opinion that in the backdrop of the aforesaid factual matrix, it can safely be concluded that the assessee had never accepted that it had a 'PE' in India during the period November, 2008 to March, 2009, but rather as a matter of fact had in clear and unambiguous terms claimed that as the threshold limit of 90 days mentioned in Article 5(2)(k)(i) of the India – U.K. tax treaty had not exceeded in any twelve months period between November, 2008 to March, 2009, therefore the income in respect of services rendered during the said period were not liable to tax in India. Thus from the aforesaid facts as they so remain, we are of the considered view that the lower authorities had failed to appreciate the facts as emerge from the records which were very much before them, in the right perspective, and thus erred in observing that the claim so made by the assessee during the assessment proceedings was not found to be in conformity with the fact that

the assessee had on its own offered its income for tax in the return of income for the year under consideration. We are of the considered view that the 'Statement of total income' appended by the asssessee along with its return of income, which thus forms part of the return of income filed by the assessee and clearly reveals the state of mind of the assessee, alongwith the circumstances leading to offering of the income for tax, had to be read in totality and in light of the clear and specific notes as are found mentioned therein, before drawing of any inferences in the hands of the assessee. We are unable to persuade ourselves to accept the findings of the lower authorities that the aforesaid claim was raised by the assessee only during the assessment proceedings, and the same was not found to be in conformity with his conduct of offering its income for tax in the return of income for the year under consideration. We would not hesitate to say that a thoughtful consideration of the 'Notes' forming part of the 'Statement of total Income' (supra), in itself sufficiently rebuts the aforesaid observations of the lower authorities. Thus to be brief and explicit, we are of the considered view that the assessee had clearly stated in its return of income that it had no 'PE' in India during any period between November, 2008 to March, 2009, and thus any income earned from any services rendered during the said period were not taxable in India, as well as had clearly in the 'Statement of total Income' filed alongwith its return of income had demonstrated the reasons due to which the income was being offered for tax in the return of income.

6.1 We are of the considered view that though the lower authorities had rejected the claim of the assessee that it did not have any 'PE' during the period November, 2008 to March, 2009, and rather concluded that the assessee had a 'PE' in India during the year under consideration, however we

find that no concrete reasoning which could justify dislodging of the claim of the assessee and support the view so arrived at by the lower authorities is discernible from the respective orders of the lower authorities. That as a matter of fact, the orders of the lower authorities are found to be more haunted by the fact that the assessee had offered its income for tax in India, rather then controverting the contentions raised by the assessee before them in support of its claim. The observations of the lower authorities in concluding that the assessee had a 'PE' during whole of the year, is devoid of any reasoning and is much or less a summary rejection of the claim of the assessee on the basis of misconceived and rather half hearted appreciation of the facts borne from records, which for the sake of clarity are briefly culled out as under:-

ARTICLE 5(2)(K)(i)

BEFORE A.O :

(i). The assessee as observed by us hereinabove had categorically stated in the 'Notes' forming part of the 'Statement of total Income' filed alongwith the return of income, that as the threshold limit of 90 days in any twelve month period mentioned in Article 5(2)(k)(i) had exceeded only during the period April, 2008 to October,2008, therefore the assessee could not be held to be having a service 'PE' in India for the period November, 2008 to March, 2009. The said claim was thereafter raised by the assessee before the A.O during the course of the assessment proceedings, who though took cognizance of the said claim and reproduced the same in the body of the assessment order, but thereafter instead of adjudicating the said claim of the assessee on merits, rather justified the rejection of the same for the reason that the assessee had on its own offered its income for tax in the return of income, which conduct of the

assessee , as per the A.O , proved that it accepted that it had a 'PE' in India during the year under consideration. The A.O still further is found to have justified the existence of 'PE' by assuming that the assessee had exceeded the 30 days threshold limit provided in Article 5(2)(k)(ii) of the India-U.K tax treaty. Thus to be brief and explicit, the contention of the assessee that as the threshold limits of 90 days in any twelve month period mentioned in Article 5(2)(k)(i) had not exceeded during any period between November, 2008 to March, 2009, therefore it could not be held to be having a service 'PE' in India for the said period, had remained unadjudicated on the part of the A.O.

BEFORE CIT(A) :

(1). The CIT(A) while disposing of the appeal wrongly observed as under (Page 7 – Para 16):-

"Even I also find that in the return of income, the appellant had offered to tax the income on the basis that it had service PE in India under Article 5(2)(k)(i) for the entire year"

, which observation of the CIT(A) in light of the clear mention by the assessee in the 'Statement of total income' filed with the return of income, as under: -

"6. Without prejudice to the above the assessee submits that the threshold limit of 90 days mentioned in Article 5(2)(k)(i) is not exceeded in any twelve months period between November, 2008 to March, 2009. Hence, the assessee claims that income in respect of services rendered during this period is not liable to tax in India."

, is thus found to be absolutely perverse and contrary to the facts emerging from the records.

(2). The CIT(A) alike the A.O, instead of adjudicating the claim of the assessee that it had no 'PE' during the period November, 2008 to March, 2009 on the basis of a well reasoned and speaking order, was more prejudiced for the reason that as the assessee had voluntarily offered its income for tax in the return of income, thus it could be concluded that the assessee accepted that it had a service 'PE' in India during the year under consideration.

(3). The CIT(A) discarded the aforesaid claim of the assessee that it had no 'PE' in India during the period November, 2008 to March, 2009, by merely stating that the income tax return is to be filed for whole accounting year, i.e 01.04.2008 to 31.03.2009 in the case of the assessee. We are pained to observe that there is neither any clarity, nor a strong reasoning in the observations of the CIT(A) which could go to justify rejection of the aforesaid claim of the assessee. The contention of the assessee that it had no 'PE' during the period Novemer, 2008 to March, 2009, which we find had been demonstrated at length by the assessee before the CIT(A) on the basis of strong reasonings, coupled with the fact that any interpretation to the contrary as against that adopted by the assessee, would lead to incongruous and illogical results, we find had not been dealt with by the CIT(A) at all. Thus to be brief and explicit, the CIT(A) on the basis of a non-speaking and unreasoned order had rejected the claim of the assessee that it had no 'PE' for the period November, 2008 to March, 2009, and as such no income earned by it from services rendered during the said period was liable to be taxed in India.

ARTICLE 5(2)(K)(ii)

BEFORE A.O :

(i). Though the assessee had categorically claimed in the 'Statement of total income' filed alongwith the return of income, as under:

> *"Further assessee is of the view that the threshold of 30 days provided in Article 5(2)(k)(ii) applies only in the situation where the services are provided to an associated enterprise located in India."*

, however the A.O on its own assumed that the assessee had prepared the return of income on the basis that it had exceeded the 30 days threshold limit provided in Article 5(2)(k)(ii). Thus, the A.O on the basis of perverse observations, which as a matter of fact are contrary to the claim raised by the assessee in its return of income that Article 5(2)(k)(ii) was not applicable in its case, had thus in a whimsical and fanciful manner therein most arbitrarily concluded that the assessee was having a 'PE' in India as per Article 5(2)(k)(ii) of the India-U.K tax treaty.

BEFORE CIT(A) :

(i). The assessee had averred before the CIT(A) that on the basis of a conjoint reading of the provisions of Article 5(2)(k)(ii) r.w Article 10 and Article 3(h), it could inescapably be gathered beyond any scope of doubt that Article 5(2)(k)(ii) would come into play only where the enterprise of a contracting state or the persons involved therein participate directly or indirectly in the management, control or capital of an enterprise of the

other contracting state. It was thus submitted before the CIT(A) that as Article 10 does not refer to related parties resident of same contracting state or a related party resident of a third contracting state, i.e other than India and U.K, therefore it could safely be discerned that the provisions of Article 5(2)(k)(ii) were not applicable to the case of the assesseee. We however find that despite drawing of adverse inferences on the part of the A.O, who on the basis of findings arrived at the back of the assessee had most arbitrarily assumed that the return must have been prepared by the assessee on the basis that it had a 'PE' in India as per Article 5(2)(k)(ii), without affording any opportunity of being heard to the assessee on the said issue, despite clear and categorical averment by the assessee in the 'Statement of total income' filed with the return of income that Article 5(2)(k)(ii) was not applicable in its case, as well as clear rebuttal of the applicability of the same on the basis of exhaustive submissions filed before the CIT(A), the same had however not been adverted to and adjudicated by the latter.

6.2 We are of the considered view that in light of our aforesaid observations, on the one hand the contentions of the Ld. A.R in support of his specific claim that the provisions of Article 5(2)(k)(i) of the tax treaty were not applicable in its case, was not at all adverted to and adjudicated by the A.O, while for the CIT(A) also falling short of words had chosen to reject the said claim of the assessee on the basis of his findings which are not found to be happily worded and can safely be characterized as nothing short of vague observations which had culminated into an unreasoned and a non-speaking order. We find that the contentions raised by the assessee at length before the CIT(A) in support of its claim under consideration had

been put to rest by the CIT(A) on the basis of vague observations and a non-speaking order. We are sad to observe that the CIT(A) instead of meeting out the contentions of the assessee as were raised before him, on merits, had rather characterized the same as 'absurd', and shirked from the statutory obligation of disposing of the same on the basis of a well reasoned and speaking order. Thus the modus operandi so adopted by the CIT(A) in dealing with and disposing of the claim of the assessee and the contentions raised in support thereof, thus does not inspire much confidence. That we are afraid to say that the claim of the assessee that it did not had any 'PE' in India during the period November, 2008 to March, 2009 and the contentions raised in support thereof, on account of a vague and non-speaking order passed by the CIT(A), did neither see the light of the day, nor had been brought to a logical end. We would further for the sake of clarity herein dispel the observations of the lower authorities, who we find instead of adjudicating the claim of the assessee that it was not having a 'PE' in India as per Article 5(2)(k) of the India-U.K tax treaty, on the basis of a well reasoned and speaking order, had rather emphasized more on the fact that from the very offering by the assessee of its income for tax in the return of income for the year under consideration, it could safely be inferred that the assessee had accepted that it had a 'PE' during whole of the year under consideration, we may herein clarify is a self suiting misconception adopted by the lower authorities. We are of the considered view that the lower authorities had gravely erred by failing to appreciate that though the assessee had offered its income for tax in the return of income for the year under consideration, however the same as observed by us at length hereinabove, was required to be considered in the backdrop of the '**Notes**' as were found mentioned in the 'Statement of total

income' filed by the assessee alongwith its return of income, from where it could safely be gathered that the income had been offered for tax by the assessee in light of the observations of the CIT(A) arrived at in its case for the preceding years and certain other judicial pronouncements as did hold the ground at the relevant point of time. We find that though interestingly the fact that the assessee had offered its income for tax has been taken cognizance of by the lower authorities for supporting or rather arriving at adverse inferences in the hands of the assesseee, however most conveniently the fact that the assessee had categorically stated that it had no 'PE' in India for the period November, 2008 to March, 2009 as per Article 5(2)(k)(i), read in light of the reasons on the basis of which such a conclusion was arrived at, as well as the categorical averment of the assessee that the provisions of Article 5(2)(k)(ii) were not applicable in its case, all of which facts were clearly discernible from the 'Statement of total income' filed by the assessee alongwith its return of income, had most conveniently been ignored by the lower authorities in order to facilitate drawing of self suiting adverse inferences in the hands of the assessee. Thus in the backdrop of the aforesaid facts as they so remain, specifically the fact that the assessee had raised exhaustive averments before the lower authorities in support of its contention that it had no 'PE' u/s 5(2)(k) of the India-U.K tax treaty for the period November, 2008 to March, 2009, specifically when such a claim as observed by us hereinabove, was clearly discernible from a perusal of the 'Statement of total income', wherein the assessee had categorically claimed that it was not having a 'PE' for the aforesaid period, either under Article 5(2)(k)(i) or Article 5(2)(k)(ii), and had substantially at length during the course of proceedings before the A.O as well as the CIT(A) therein fortified his

contention, which interpretation and explanation of the assessee to our understanding could not have been summarily rejected and scrapped on the basis of a vague, unreasoned and non-speaking order, which we are sad to observe had as a matter of fact happened in the present case. We have given a thoughtful consideration to the facts of he case and in light of the very fact that the lower authorities had failed to address the exhaustive submissions raised by the assessee before them and pass a well reasoned and speaking order, thus are unable to persuade ourselves to subscribe to such non-speaking orders of the lower authorities. We are of the considered view that in the backdrop of the fact that the lower authorities had failed to address and adjudicate the contentions raised by the assessee before them, and had rather most arbitrarily hushed through the matter, and also not being oblivious of the fact that the claim raised by the assessee that it had no 'PE' in India as per Article 5(2)(k) in itself would require adjudication after perusing and verifying the facts as averred by the Ld. A.R before us, we therefore in all fairness and in the very interest of justice restore the matter to the file of A.O for fresh adjudication. The A.O shall during the course of the set aside proceedings therein adjudicate upon the issue as regards the existence of a 'PE' in India of the assessee during the period November, 2008 to March, 2009, after taking due cognizance of and dealing with the submissions which were raised by the assessee during the course of the original assessment proceedings, as well as during the course of the appellate proceedings. We will mince no words in directing the A.O to adjudicate the issue under consideration after addressing and dealing with all the contentions of the assessee on the basis of a well reasoned and a speaking order. Needless to say, the A.O shall afford reasonable opportunity of being heard to the assessee during the

course of the set aside proceedings, and the assessee shall remain at a liberty to furnish submissions or lead fresh documentary evidence in support of his contentions during the course of the set aside proceedings. The 'Grounds of appeal No(s). 1 to 3' so raised by the assessee are thus allowed for statistical purposes.

7. That as regards the other grounds of appeal, i.e 'Ground of appeal No(s). 4 to 19' so raised by the assessee before us, we are of the considered view that as the substantive issue involved in the present case, i.e as to whether the assessee as per Article 5(2)(k) of the India – U.K. Tax Treaty was having a 'PE' in India during the period November, 2008 to March, 2009, or not, has been restored by us to the file of the A.O for fresh adjudication and the fate of the same will have a substantial bearing on the other grounds of appeal so assailed by the assessee before us, we therefore refrain from adjudicating the said respective grounds of appeal at this stage, and in all fairness and in the very interest of justice restore the same for fresh adjudication to the file of the A.O. The A.O is herein directed that after adjudicating the issue as to whether the assessee had a 'PE' in India, or not, during the aforesaid period, he shall thereafter proceed with and adjudicate the remaining issues emerging from the 'Ground of appeal No(s). 4 to 19' as had been restored by us for the purpose of fresh adjudication to his file. We thus in all fairness, and in the very interest of justice restore the matter to the file of A.O for fresh adjudication of the issues pertaining to and emerging from the 'Ground of appeal No.(s). 4 to 19' so assailed by the assessee before us. The A.O is herein directed to pass a speaking order as regards the issue under consideration, after duly considering all the contentions of the assessee.

Needless to say, the A.O shall afford reasonable opportunity of being heard to the assessee during the course of the set aside proceedings and the assessee shall remain at a liberty to furnish submissions or lead fresh documentary evidence in support of his contentions in support of the aforesaid issues during the course of the set aside proceedings. The 'Grounds of appeal No(s). 4 to 19 so raised by the assessee are thus allowed for statistical purposes.

8. The appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 08/02/2017

Sd/-	Sd/-
(G.S Pannu)	(Ravish Sood)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated : 08.02.2017

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**