IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "H" NEW DELHI)
BEFORE SHRI I.C. SUDHIR AND SHRI B.C. MEENA

ITA No. 1089/Del/2014
Assessment Year: 2009-10

Hyundai Heavy Industries Co. Ltd., C/o. M/s. Hemant Arora & Co. 1, Tyagi Road, Dehradun. (PAN: AAACH5727Q) (Appellant)	vs.	ADIT, International Taxation, Dehradun. (Respondent)

Appellant by: S/Shri SD Kapila, R.R. Maurya, AR & Neetan Nagpal, CA
Respondent by: Shri Sanjeev Sharma, CIT(DR)

Date of hearing : 13.03.2015
Date of pronouncement: 05 :06.2015

ORDER

PER I.C. SUDHIR: JUDICIAL MEMBER

The assessee has questioned orders of the authorities below on the following ground:

"That on the facts and circumstances of the case and in law, the learned A.O./DRP erred in:

1. Assessing the total income of the appellant at Rs.21,17,72,916 as against the returned income of Rs.4,62,51,710.
2. In passing laconic order u/s. 144C, without application of mind and in contravention of the settled principles of judicial discipline.

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3. Holding that the consideration denominated in U.S. dollars and received by the appellant outside India for supply of spares and tool-kits etc. from Korea on FOB basis, as per the terms of the O & M Contract with GMR, is attributable to the Chennai PE of the appellant.
4. Without prejudice the Ground No. 3, Ld. A.O./DRP erred in attributing the entire gross Revenue of Rs.5,16,57,291 pertaining to supply of spares from outside India for the GMR project to the Chennai PE.
5. Illegally determining the profit of the PE from operations inside India contrary to the show-cause notice dated 20.3.2013 wherein (as in the case other FTWW projects) the appellant was asked to explain as to why such profit should not be estimated at 25 percent of the gross Revenue from the GMR project.
6. In arbitrarily determining the profit from operations Inside India at Rs. 11.23 crores as against gross Revenue of Rs.15.80 crore.
7. Holding that the Mumbai Office constitutes a fixed place PE under Article 5(1) of the DTAA for the purpose of taxing royalties received from its 100% subsidiary Hyundai Construction Equipment India (Pvt.) Ltd. (HCEIPL), Pune.
8. In taxing the appellant's income by way of royalties from HCEIPL as business income under Article 7 of the DTAA read with sec. 44DA of the Act.
9. Taxing the receipt of 'interest' from HCEIPL for delay in payment of royalties as business income instead of taxing it

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as 'income from interest' from a debt-claim under Article 12(2) of the DTAA.

10. Taxing as business income the sum of Rs.1,02,63,772 received by the appellant by way of reimbursement of actual amount of Service Tax paid on behalf of GMR. (Admitted Additional Ground).

11. Without prejudice to Ground No.10, even assuming that reimbursement of Service Tax is business receipt the learned A.O. has erred in not allowing the deduction of the same amount under sec. 43B of the Act."

2. Besides above, the assessee has also moved an application under Rule 11 of the Appellate Tribunal Rules seeking permission to raise following additional ground for the adjudication of the Bench:

> "That on the facts and circumstances of the case and in law, the learned Assessing Officer has erred in levying interest under sec. 234B amounting to Rs.4,58,63,237 of the Income-tax Act, 1961."

2.1 The Learned AR submitted that the issue raised in the additional ground is legal in nature and does not need consideration of fresh material outside the record to adjudicate the issue. The Learned CIT(DR) on the other hand opposed the application.

2.2 Considering the above submission, we concur with the submission of the assessee that the issue raised in the additional ground is legal in nature

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and for adjudication of the same, no fresh material outside the record is required to be considered. We thus allow this additional ground for adjudication of the bench. The issue will be dealt with in the last ground of the order.

3. Ground Nos. 1 and 2 are general in nature, hence, do not need independent adjudication.

4. In ground Nos. 7 to 9, the issue of existence of fixed place PE in Mumbai treating its liaison office as such for the purpose of taxing royalties received from Hyundai Construction Equipment India (P) Ltd. (HCEIPL) has been raised, which will be decided as issue No.1. In the grounds Nos. 3 to 6 , the issue raised as to whether the Assessing Officer is justified in attributing income from supply of spares FOB, Ulsan, Korea as per contract with GMR Power Ltd. will be decided under the heading 'Issue No.2'.

5. Heard and considered the arguments advanced by the parties in view of orders of the authorities below, material available on record and the decisions relied upon.

6. We find that the above ground Nos. 3 to 9 involve following two issues:

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i) As to whether Mumbai Liaison Office is fixed placed PE under Article 5 of DTAA with Korea for the purpose of taxing royalties received from HCEIPL and interest earned on delayed payment of royalty as business income? (Ground Nos. 7 to 9).

ii) As to whether the Assessing Officer is justified in attributing income from supply of spares FOB, Ulsan, Korea as per contract with GMR Power Ltd. ? (Ground Nos. 3 to 6).

7. Issue No.1: The Assessing Officer has dealt with the issue at page Nos. 1 to 3, 6, 10 to 12 of the assessment order. The learned DRP has dealt with the issue at page No. 8 of the order.

8. The relevant facts are that the assessee is engaged in the business of offshore construction and power project. During the year under consideration, the assessee received revenues from the following projects:

Sl.No.	Name of Project	Name of the Company	Scope of work	Revenue for the year 2008-09
1.	Mumbai Uran Trunk Pipeline Project (MUT)	Oil & Natural Gas Corporation Ltd. (ONGC)	EPC contract for complete new oil and gas trunk pipelines on Uran Terminal	Nil
2.	GMR Diesel Generator Power Project (GMR O & M)	GMR	Operations and maintenance	153,721,278

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3.	Hyundai Construction Equipment India Pvt. Ltd. (HCEIPL)	HCEIPL	License to use technology * know how owned by HHI Korea for manufacturing packaging and selling of products by HCEIPL	10,113,047
4.	Small Car TCF Conveyor	Tata Motors Ltd.	Installation commissioning production support and training for main line conveyor	47,824,501
5.	Shifting Project	Tata Motors Ltd.	Shifting of plant from Singur to Gujrat dismantling operations alone	5,993,936
6.	250 UPD	Tata Motors Ltd.	Installation, commissioning, production support & training for main line conveyor	12,948,046
7.	Nissan Motor India Private Ltd. – T & C	Nissan Motor India Pvt. Ltd.	Installation, commissioning, production support & training for main line conveyor	6,800,702

9. At the outset of hearing, the Learned AR submitted that the issue raised regarding the PE has been decided by the ITAT in the assessee's own

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case for the assessment year 2007-08 in ITA No. 5231/Del/2011 and in the assessment year 1998-99 to 2004-05 reported in 31 SOT 482 (Del.) and by the decision of Hon'ble Supreme Court in the assessee's own case reported in (2007) 291 ITR 482 (S.C).

10. The further contention of the Learned AR regarding the receipt from HCEIPL remained that the HCEIPL is 100% subsidiary of the assessee company. HCEIPL has set up plant in Pune for manufacturing construction and earthmoving equipment. It obtained technology and knowhow from the assessee under the agreement dated 20.3.2008. It paid FTS/Royalty to the assessee which has been found to be at arm's length price by the learned TPO. The contention of the assessee remained that it has no PE in India as the technology including training is provided to HCEIPL in Korea.

11. The Learned AR submitted further as under:

i) AO/DRP have confused HCIPL royalty contract with FTS contracts with Tata & Nissan, which are for installation projects. HCEIPL (100% subsidiary of HHI) pays royalty @ 2% on sales of construction equipment manufactured by it under Technology Agreement dated 20.3.2008 (Pg. 122/Vol.-I) (Summary of Pgs. 68-72/AM). DRP is not correct in following its own order that Mumbai LO is fixed PE, which is contrary to past history of the case & jurisdictional High Court in

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BKI Ham (347 ITR 570 Uttra.) However, even assuming the LO is fixed place PE, it has no reole as the receipt of royalty is for direct transfer of technology to HCEIPL (para 6 of DRP at pg. 44/AM). Interest is on delay in payment of royaly by HCEIPL and therefore taxable @ 15 percent under Art. 12 of DTAA, being interest on Debt claim. According to AO, it is business receipt & therefore taxable @ 40%.

ii) Tata & Nissan Installation Projects lasted for period beyond 9 months prescribed in Art. 5(3) of DTAA. The assessee offered it for tax as FTS tax @ 10% of gross receipt. The AO taxes it as business income u/s 44DA read with Art. 7 of DTAA by estimating profit @ 25% of gross receipt. Issue academic. Tax effect same.

iii) No project this year has nexus with Mumbai L.O. The AO has mere cut and paste Assessment orders for earlier years, relating to ONGC projects, which also have not been accepted by Tribunal earlier (Pg. 631G/Vol-IV). There is no ONGC project this year.

iv) Though HHI had claimed expenses of Rs. 94.93 lakhs in respect of MUT contract with ONGC. The claim was withdrawn as all contracts with ONGC were completed in earlier years.

12. The contention of the Learned CIT(DR) remained that the agreement is dated 20.3.2008 and provisions of sec. 44DA will apply if the royalty received is effectively connected to the PE of the assessee. He submitted further that as per Article 14.3(b), an engineer is deputed to supervise the plant which is part of

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technology agreement (pages 122 to 140 of the paper book – Vol.I). As the services are performed at a fixed place and business by the employee of the assessee, the corresponding fee/royalty is effectively connected to PE and can be worked out by applying the fee per man day. He referred page No. 133 of the paper book – I. The Learned CIT(DR) contended that the royalty effectively connected with PE and taxable as per provisions of sec. 44DA can be worked out by deducting expenses incurred on the deputed employee from the royalty attributable to services of employees.

13. The Learned AR rejoined with the submission that the Learned CIT(DR) is now trying to make out an altogether a new case which is not born out of the facts nor is the case of the Assessing Officer/DRP. The case of the Assessing Officer is that Mumbai Liaisoning Office is PE for the purpose of HCEIPL also. This is also endorsed by the DRP holding that facts are same as in the case of old ONGC contract. The Learned AR contended further that it is optional for the HCEIPL to obtain supervising services of an engineer of the assessee company. He referred page Nos. 116 of the paper book – Vol. I wherein the assessee had furnished the "details of expatriates deputed on India FTS Projects". It is clear from that statement that no engineer was deputed to India for HCEIPL project.

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Further, the summary of invoices raised during the year together with copy of relevant invoices submitted to the Assessing Officer clearly show that both the receipts are on account of technology fee and no invoice was raised on account of supervision. He submitted further that there is no concept of "supervision PE" in Korea DTAA. Even if a supervisor is deputed, no PE in India is formed. There is no fixed place "PE" as the supervisor is deputed not for the business of the Korean Company but that of HCEIPL, an Indian company. "Supervision in connection with" a construction/installation PE would constitute PE only if such supervisory activities continue for more than nine months. There is no allegation to this effect either by the Learned CIT(DR) or the Assessing Officer/Learned CIT(Appeals). Hence, the interest on delayed payment of royalty by HCEIPL cannot be taxed as business income under sec. 44DA @ 40%, but @ 15% as per Article 12 of the DTAA with Korea.

14. Considering the above submission, we find that since beginning the Revenue's contention has been that the assessee's Mumbai office is a fixed placed Permanent Establishment (PE) within the meaning of Article 5(1) and 5(2) of the Treaty. The assessee on the other hand has always maintained a position that wherever the projects duration exceeds a period of nine months stipulated in Article 5(3) of the Treaty, it has an installation PE, else it does

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not have any PE in India. The DRP has noted that the assessee had relied upon the principles of generalia specialibusnon derogant and accordingly has taken a stand that Article 5(3) being a more specific provision override Article 5(1) and 5(2). However, the learned DRP found that the above proposition of the Assessing Officer on similar facts has been confirmed by them in earlier years. The learned DRP has noted further that there is no change in assessee's business and the liaison office at Mumbai is a fixed place of business available to the assessee as per assessee's own admission. The learned DRP has upheld the proposition of the Assessing Officer that assessee had a PE in India. In this regard, DRP has followed their decisions for the past years. The contention of the Learned AR on the issue remained that the learned DRP has followed its own orders for the earlier years ignoring the fact that the ITAT had already overruled it. In support, the Learned AR has referred orders of the ITAT for the assessment years 2007-08 and 2008-09 made available at page Nos. 566 and 624 of the paper book.

15. Having gone through the orders of the Tribunal in the case of the assessee itself for the assessment years 2007-08 and 2008-09, as cited above by the Learned AR, we find that the issue of Mumbai Liaisoning Office constitutes PE was in relation to the contract with ONGC and in the

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assessment year 2007-08, the ITAT in para No. 26 at page No. 38 of the order dated 29.5.2012 in ITA No.5231/Del/2010 on the aspect propounded by the Assessing Officer as to whether Mumbai Office constituting a PE or not, the ITAT has noted that for holding that it constitutes a PE, the Assessing Officer had made reference to a large number of correspondence in order to demonstrate that PE was in existence. The ITAT has noted further that the issue regarding existence of PE was not disputed by the assessee and the dispute instead was as to how much profit was attributable to the PE. We thus find that the issue regarding the existence of PE at Mumbai relation to contracted project with ONGC in the assessment year 2007-08 has not been disputed by the assessee and it has been accepted as such by the ITAT. Again in the assessment year 2008-09, the ITAT vide its order dated 30.7.2013 in ITA No.5284/Del/2012 at page No. 19 and in para No. 20 has noted that in ground No.9 of the appeal, the assessee has questioned finding of the authorities below that Mumbai Office constitutes a fixed place PE under Article 5(1) of the DTAA. In para No. 23 at pate No. 20 of the said order, the ITAT has decided the ground following its earlier order for the assessment year 2007-08. The ITAT has reproduced para No. 32 of its order for the assessment year 2007-08 and following the same, has held that the receipts pertaining to designing, fabrication and supply of

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material, the activities carried out outside India is not taxable in India. In view of this finding, the ITAT has held that the other issues raised in the grounds N. 7 to 10 have become infructuous. In nutshell, we find that the issue as to whether Mumbai Liaison Office is fixed place PE in relation to contract with ONGC under Article 5 of the Treaty with Korea has not been disputed by the assessee in the assessment year 2007-08 before the ITAT and the same has been followed in the assessment year 2008-09 in the order of the ITAT in this regard.

16. In view of the above discussion, we find that the authorities below has simply followed its orders for earlier assessment years on the issue of treating the Mumbai Liasioning Office as PE. However, to decide the issue as to whether Mumbai Liaisoning is PE for the purpose of HCEIPL as well for the purpose of taxing royalties received from HCEIPL and interest earned on delayed payment of royalty as business income, verification of the above aspects of the facts/contentions raised by the Learned AR is required to be made afresh to meet out the ends of justice. We thus set aside the matter to the file of the Assessing Officer to decided the issue raised in ground Nos. 7 to 9 afresh after affording opportunity of being heard to the

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assessee under the above stated background. The ground Nos. 7 to 9 are thus allowed for statistical purposes.

17. Issue No. 2: The Revenue's stand remained that bifurcation of income from GMR Project in item of "inside India" and "outside India" is not correct. The contention of the assessee is that it is the last tenth complete year of the contract and the findings of the Assessing Officer/DRP are not only contrary to the terms of the contract but it is also contrary to the tax treatment approved by the ITAT ever since assessment year 1999-00. The further contention of the assessee remained that there was no dispute that operations and maintenance services rendered by the assessee are "technical services", which were effectively connected with the Chennai PE. Though, the PE maintained accounts which were duly audited, the assessee could not furnish all the bills, vouchers etc. for its claim of expenses. It was because the assessee has wound up the Chennai PE by the time the assessment proceedings were taken up. It was the reason that the Assessing Officer vide order dated 20.3.2013 required the assessee to show-cause notice as to why income should not be taxed as business profit under sec. 44BA.

Summary of Disputed issues:

Particulars	Interest income	Business income	GMR Contract	GMR contract	GMR	GMR Project

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		GMR				
	HCEIPL Pune	O&M income of Chennai PE declared by assessee	Income of PE – Indian operations – as per A.O.	Income from Offshore supply as per assessee	Offshore Supply-income assessed	Income declared Income assessed
	(interest income)					
Income	4,736,065	55,744,993	112,284,805	NIL	100% of gross receipt of Rs.5,16,57,291	5,57,44,993 16,38,42,098
Tax deducted	7,10,410 826/Vol.V	4,591,785 114/Vol.1(197 order) 821-825/Vol-V	4,591,785	-		

18. The assessee admitted that during the year, it had Permanent Establishment (PE) in India in relation to GMR contract. MUT contract was with ONGC and GMR Project was with Vasai Power Corporation Ltd. Besides, the assessee had also entered into contract with SCEIPL, TATA Motors Ltd. and Nissan during the year. The assessee has shown income from fee for technical services under sec. 115A from contracts with SECIPL, TATA Motors and Nissan Motors. Under the GMR Project, the assessee was required to provide services relating to design, engineering, procurement, fabrication, construction, manufacture, transport, demonstration, testing, commissioning and startup of the units and facilities in respect of a 200 Mg. capacity diesel engine based power generating facilities consisting of four units of 50 Mg. near basing bridge, Chennai.

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19. The assessee submitted that the GMR contract was an old contract running from assessment year 1998-99 and since assessment year 1998-99, the assessee has been claiming part of receipts from GMR contract on account of operations carried outside India, to be not taxable in accordance with the provisions of sec. 5(2) read with sec. 9 of the Act and also Article-7 of the DTAA. It was pointed out that the issue with regard to taxability of Revenue from operations carried outside India, in respect of this year contract, has been a subject of dispute with the Revenue right from the assessment year 1998-99 and has travelled up to the ITAT and has also been decided in favour of the assessee i.e. the appellate authorities have confirmed the same to be not taxable in India. It was pointed out that for the assessment years 1998-99 to 2004-05, the ITAT vide its order dated 29.5.2009 (31 SOT 482) held that income from offshore operations cannot be brought to tax in India. For the assessment years 2005-06 and 2006-07, the then Assessing Officer herself did not tax income from outside India operation in the light of the decision of Hon'ble Supreme Court in the case of assessee itself reported in 291 ITR 482 (S.C). For the assessment year 2007-08, the ITAT vide order dated 29.5.2012 has held the revenues from outside India operation as non-taxable in India. The Assessing Officer did not agree

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with the assessee and following its own order for the assessment year 2007-08 has decided the issue against the assessee that Mumbai Liaison Office is a P.E. and is connected with ONGC or GMR Project. The learned DRP has upheld the same.

20. The Learned AR submitted that for GMR (operations & maintenance) contract, consideration received is undisputably for technical services, which were rendered by Chennai PE within India. Yet, the AO arbitrarily and unilaterally taxes business income at 75% of gross receipts, thus contradicting his own show cause notice dt. 20.3.2013, whereby he sough to tax 25% of GMR receipt as business income. There is no allegation that price received from off-shore supply of spares etc is not arm's length price or that it contains any element of service rendered by the PE. Custom Duty & clearance for is reimbursed by GMR *(Pg. 250/Vol.-II)*. As per Cl. 9.1 at Pg. 24 of the contract, assessee pr0cures material and spare parts on behalf of GMR and title to the imported goods pass to GMR on delivery at site. Thus no operation is carried out by the PE in India in respect of imported goods used in the project (Ref. Expl. 1 to Sec. 9(1)(i) read ITAT order for 2007-08 at *Pg. 614/Vol.-IV)*

21. We find that the issue No. 2 consists of the following sub-issues:

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a) Whether the Ld. AO has estimated the income from GMR Power (both for supply of spares from outside India and from operations and maintenances services provided by the Chennai in India) arbitrarily and in utter disregard of the show-cause notice as per order-sheet entry dated 20.3.2013 and the assessee's reply dated 22-25/3/2013?

b) Whether the Ld. AO is justified in ignoring Tribunal's order for earlier years holding that no income for supply of spares from outside India was taxable?

c) Whether in absence of any allegation that the supply of spares was not made at arm's length price or that the price for the goods included any element of service rendered by the Chennai PE in India, there is nothing left for attribution to the PE?

d) Whether the income of Chennai PE from GMR project should not be assessed u/s 44DA read with Sec. 115A in the same manner as in the case of other FTS projects and as show-caused by the AO as order sheet entry dated 20.3.2013?

22. In support of the issue No.2 consisting of the above sub-issues, the Learned AR submitted as under:

GMR Project

GMR Contract (Annexure 6/ Paper Book)

22.1 The assessee had constructed & installed 200 megawatt diesel power plant consisting of 4 units 50 mega watts each for GMR Vasavi Power Corporation Ltd., Chennai (GMR) (a listed Indian Company) in 1997-98. Apart from supply, installation and commissioning of the said plant, the Agreement also provided for maintenance, operations and supply of spares & tools for next ten years after the expiry of initial warranty period. The contract between two unrelated parties, which describes the operator's obligations therein.

22.2. The Contract dated 15.5.1997 for 'Operation and Maintenance', of the Power Plant is in two parts:-

i) Operations & Maintenance services (including supply of locally available parts and material) to be rendered by Chennai PE for which consideration is paid by GMR Ltd. in Indian rupee.

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ii) Procurement and supply of spares and tools from outside India (invoices at pg. 110/Vol.-I read with Annexure A to Sch. 4 for which payment is made in US dollars.

Estimate of Income by the AO/DRP

22.3 The revenue's stand is that bifurcation of income from GMR project in item of 'Inside India' and 'Outside India' is not correct. This is the last complete year of the contract. The findings of the AO / DRP are not only contrary to the terms of the contract, but it is also contrary to the tax treatment approved by the Tribunal ever since A.Y. 1999-2000.

22.4 Further, there is no dispute that the operations and maintenance services rendered by the assessee are 'technical services', which were effectively connected with the Chennai PE. Though, the PE maintains accounts, which are duly audited, the assessee could not furnish all the bills, vouchers etc for its claim of expenses. This is because the assessee had wound up the Chennai PE by the time the assessment proceedings were taken up.

22.5 It is for this reason that the Ld. A.O. issued dt. 20.3.2013 requiring the assessee to show-cause as to why income should not be taxed as business profit u/s 44DA @ 25% of gross receipts from GMR. The Ld. AO ignored the assessee's reply dt. 22-25/3/2013 and allowed 30% of th ecost of material booked. This resulted in taxing more than 70% of the gross receipts the GMR for operation inside India. This unilateral act of the Assessing Officer is in gross violation of principle of natural justice. Further, the Ld. AO has given no reason as to why FTS income from MGR PE should be taxed differently than income by way of projects executed for Tata Motor, Nissan Motors & HCEIPL. The Ld. AO has taxed FTS from those projects u/s 44DA by estimating business income of the PE at 25%, thus taxing it as effective rate of 10% of gross receipt.

22.6 Tax treatment by the Ld. AO is arbitrary and capricious and therefore may be deleted.

22.7 The contract envisages that various parts and components of the Power Plant would have a limited economic life as detailed in the Schedule 5 of the Contract (pl. ref. Cl. 7.3 & Schedule 5). It is measured in terms of number of operating hours.

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22.8 The assessee has to submit the Annual Plan forecasting the requirement of spares, tools and material to be procured and supplied domestically and abroad for every forthcoming financial year. On approval of the Annual Plan by GMR the forecast the year's requirement of supplies is broken down into 12 monthly invoices for procurement and supply of spares & tools etc. ***(Cl. 10 r.w. Schedule IV, V & VA of the Contract)***. The monthly invoices are duly verified by GMR before making payment. Any surplus inventory procured for GMR at the end of a year, it is carried forward and adjusted against requirement forecast for next year. A summary of the terms of the GMR contract is annexed.

22.9 The Custom duty and clearing charges etc. are fully reimbursed by GMR on the basis of invoices raised on the assessee by the C&F Agent ***(Pg. 250/Vol.-II)***. The Revenue has never treated this amount of reimbursement of custom duty, clearing charges and internal transport to the site as income of the PE. There is no dispute on this issue.

Price of spares etc. imported from Korea at arm's length:-

22.10 The revenue has always accepted the value and quantum of the imports of spare parts and tools by GMR. The transactions between GMR & assessee's are clearly at Arm's Length. The price of supply of spare parts, tool kits and other material FOB from Ulsan, Korea clearly does not include any element of service rendered by the PE. Indeed, no such allegation has been made by the revenue. The supply of spares etc. from outside India and income therefrom had never been attributed to the PE till A.Y. 2007-08. However, the Hon'ble Tribunal related it for A.Y. 2007-08 & 2008-09. In this connection, attention is drawn to following:-

i) Show Cause Notice dt. 20.3.2013 - ***Pg. 661/ Vol-IV at Pg. 5 of Compilation.***
ii) Reply dt. 22-25.3.2013 - ***Pg. 646/ Vol-IV at Pg. 7 of Compilation.***
iii) Order sheet of AO on 25.3.2013- ***Pg. 661/ Vol-IV at Pg. 5 of Compilation.***
iv) AO passes Assessment order on 28.3.2013 - ***Pg. 29/Appeal Memo.***
v) Assessee raises objection before DRP - ***Objection 6/Pg. 54/Appeal Memo***
vi) DRP does not consider it - ***Para 7&8 at Pgs. 44-45 of Appeal memo.***

Q. 2(b) Ignoring Tribunal orders for preceding years:-

i) History of Litigation - ***Pg. 201-204/Vol.-II***
ii) Order of ITAT 2007-08 - ***Pg. 566 at 583-584- 619/ Vol.-IV***
iii) ITAT 2008-09 - ***Pg. 631G & 631H/Vol.-IV***
iv) Submissions before AO dt. 25.2.2013 - ***Pg. 548/Vol.-IV***

Q. 2(c) Sales of spares to GMR at ALP.

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i) Uttrakhand High Court judgment - A.Y. 1994-95 & 1995-96. ***Pg. 46/Comp.***
ii) Tribunal order for A.Y. 1994-95 & 1995-96. ***Pg. 41 at 42-44/AM.***
iii) Contract with GMR Vasai Power - Annexure B of Paper Book
iv) Written 'Note' on this issue.
v) For all the elements of services in India, the income of Chennai PE offered to tax.

23. The Learned CIT(DR) made the following submissions:

"May it please the Hon'ble Bench:

The Revenue is in receipt of the revised (concise) grounds of appeal dated 21.10.2014 filed by the assessee. The Revenue does not have any objection for dropping some of the original grounds of appeal by the assessee.

GMR Project alleged "outside India" Revenue:

1. This concern ground Nos. 3 and 4 of the assessee. During the year assessee has provided operation and maintenance services in respect of 200 MW power generation plant of GMR Vasai Power Corporation Ltd. (GMR). During the year assessee has shown receipt of IN R 15,37,21,278 and offered the same to tax. However, it has also invoiced an amount of USDF 1,125,889 (INR 5,16,57,291) to GMR by raising an invoice of USD 94,372 each month for 11 months and USD 87,796 for the month of April 2008. This amount of USD 1,125,889 has not been offered to tax for the reason that supply of spares is made from outside India on FOB basis, as per the terms of O & M contract with GMR. GMR has deducted tax out of these payments (page 110 P.B). The assessee

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had earlier supplied and installed the power plant and has been operating and maintaining the power plant. It has been operating and maintaining the power plan on regular basis pursuant to the Operation and Maintenance Agreement with GMR entered on 15.5.1997.

2. Page 8 of the assessment order notes that it is a conceded fact the assessee's Chennai Project Office (In respect of GMR Contract) constitutes a PE under the provisions of Article 5(3) of the DTAA. Article 5.1, 5.2, 6.3, 6.4 of the Operation and Maintenance Agreement explicitly refers to Project site that constitutes a fixed place PE as per paragraph 1 of Article 5 of the DTAA. Schedule 7 of the Agreement contains information on Manpower for operation and maintenance of the Project that include 4 supervisor of HHI (Hyundai Heavy Industries) and 78 Indian employees.
3. A.O. has discussed the issue first on pages 14 and 15 of the assessment order and then on paragraphs 13.3 to 13.7 (pages 17 and 18 of the assessment order). TP order in regard to GMR Project is discussed on pages 20 and 21 of the order.
4. Considering the agreement as a whole (available in a separate paper book) it is clear that the assessee is operating and maintaining the project facilities of power plant of GMR. The agreement was to expire on the 10 anniversary of the commercial operation date of the last unit to be placed in commercial operation. Article 3.1 mentions General Scope of the work. Assessee (the operator) was to provide all works necessary for the operation and maintenance of the project facilities. The work scope for the operating period is given in Article 3.4 of the agreement.

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The operator is responsible for the operation and maintenance of each part of the project facilities.

5. Based on these facts on record it is clear that the assessee has been physically present at the project site since at least 1997. It is operating and maintaining the plant. There is no dispute that the assessee has permanent establishment in India in respect of this project as per provisions of Article 5 of the DTAA and profits attributable such a PE are taxable in India.

6. The assessee has claimed that consideration denominated in U.S. Dollars and received by it outside India for supply of spares and tool kits etc. from Korea on FOB basis is not taxable and not attributable to PE. It's claim that amount received is on account of offshore sales or activities carried outside India is the version of the assessee and not supported by the agreement with GMR. The assessee has not made any sales to GMR. It imported the spares, if any, on its own account for the purpose of executing the agreement. It has the obligation to provide spares and consumables under the agreement. These spares and consumables are used by the assessee in operation and maintenance of power plant. The assessee uses the spares and tool kits during the course of its business of operation and maintenance of the project. The agreement does not provide that spares are to be sold to GMR. In respect of transaction of spares there are no two parties. Article 6.3 of the agreement obliges the assessee to maintain books and records. The assessee is being a fixed amount per month on account of spares and toll kits in USD irrespective of actual

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purchases and use of spares and tool kits in the maintenance. Pages 250 and 251 of the PB show that assessee is incurring expenses on clearing and forwarding. It is paying customs duty on import of spares. This indicates that the assessee is purchasing/importing spares against fixed payments made by GMR. Spares import by the assessee is for the GMR Project. Its clearing agency is customs clearing the spares. It is importing the spares (of what amount during the year, information on invoices and amount not on record) for the project against which it is receiving the amount from GMR the difference of receipts and expenses is its income and should have been offered to tax.

7. The reliance of the assessee on the order of the Hon'ble Supreme Court in its own case (2911TR 482) does not help its case in this year as that decision was based on the facts in the contract with the ONGC. Assessee has relied on paragraph 11 of the decision (page 230 of PB-II). In that case the sales were directly billed to the Indian customer (ONGC). In this case as mentioned above the assessee did not make any sale to GMR and utilized the spares, if any, for the project. It has not provided any information on the purchases of spare parts, if any, against the amounts received from GMR.

8. Assessee has also relied on paragraph 32 of the Hon'ble ITAT Order for AY 2007-08 (Pages 610- 615 of PB-IV). This observation of the ITA"[Qertained to_illiGC Contract. In case of GMR Agreement there is no fabrication/installation work carried out by the assessee in Korea. The assessee has been paid a lump sum amount decided in 1997 for spares to be used in the project of GMR. There

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were no activities/operations arrived outside India in regard to use of spares. The ratio of this decision is not applicable to the facts during the year.

9. Assessee has also placed reliance on paragraph 24 of the Hon'ble ITAT order for AY 2008-09 (Page 327 of appeal PB). This decision is also with regard to contract with the ONGC and for the reasons stated in paragraph 10, not applicable for GMR project.

10. The claim of the assessee that offshore supplies are not taxable based on decisions in its own case is not relevant as for the facts of the case for this year are concerned. There are no sales leave aside offshore sales. The assessee has only been paid in USD on account of spares and payments to assessee by GMR are its receipts and it could have claimed expenses for purchases made it, if any. In absence of proof of any expenses incurred by the assessee, the AO has righty taxed whole amount.

11. The assessee received monthly fixed amounts from GMR for procuring spares and tool kits for power plant. The spares have been imported and used in the maintenance of power plant. The purchase/import of spares/tools is inextricably and essentially linked to the power plant operation and maintenance and there is no doubt that these activities are carried out in India and through the PE. Any income earned on account of operations carried out in India (irrespective of place of title transfer) is an income deemed to accrue or arise in India (Explanation to section 9(1)(i) of the Act). Similarly, the profits attributable to PE are taxable in India. Taxation of deemed

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income under section 9(1) (i) is not dependent on the transfer of title, if any, but on the business connection and extent of operations in lndia

12. Place of transfer of title (though not proved by the assessee that it was outside of India)l does not affect the taxability of transactions under the Income Tax Act and the DTAA. Transfer of title may be relevant for the purpose of deciding the place of accrual of income but not for the purposes of income deemed to accrue or arise in India. The income attributable to the activities performed/operations carried out in India is taxable in India. The Revenue places reliance on the decisions of the Hon'ble Apex Court in the case of CIT v. Ahmedbhai Umarbhai and Co. [1950] 18 ITR 472 (SC), Anglo French Textile Company Ltd v. CIT [1954] 25 ITR 27 (SC) and Carborandum Co. V. CIT [1977] 108 ITR 335 (SC) in this regard. The Hon'ble Supreme Court in the case of Carborandum Co. (page 343) has held that income accruing or arising from any business connection in the taxable territories - even though the income may accrue or arise outside the taxable territories- will be deemed to be income accruing or arising in such territory provided operations in connection with such business, either all or a part, are carried out in the taxable territories. This principle of apportionment of profit is also authorised by clause (a) of Explanation 1 to section 9(1) (i) of the Act and this principle is also applicable for attributing the profits to a permanent establishment as provided in Article 7 of the DTAA. The Hon'ble SC had ruled in case of the assessee that profits on account of sale that are attributable to Indian PE are taxable in India. Various operations/bundle of activities in connection with purchase and use of spares and tool kits are being

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carried out in India. GMR is not paying for any out of India activities but in regard to operation and maintenance of power plant in Chennai.

Income from Inside **India** activities

13. This concerns (concise) grounds of appeal numbering 5 and 6.

14. Paragraphs 13.3 to 13.11 and then paragraph 13.12 (b) on pages 20 and 21 of the assessment order deals with issue. As against income of INR 5, 57,44, 993 shown by the assessee, the AO worked out income at Rs 11, 22, 84, 805.

15. The assessee had submitted the account statements (pages 26 to 50 of PB-l). The assessee did not produce the supporting bills and invoices for the expenses. On receipts of INR 158,065, 108, the assessee had shown a profit of INR 57, 426, 852 (page 31 of PB-l).

16. In absence of the supporting documents for the expenses, the Revenue strongly relies on the order of the AO that was confirmed by the DRP. The details of extent of expenses incurred by the assessee can be kindly seen from pages 530 to 531 of PB-III which is information on tax deducted at source by the assessee. Assessee has filed copy of ledger accounts; however, supporting documents were not produced by the assessee.

24. The Learned AR rejoined with the following contentions:

Vide written ‘Reply’ dt.29.10.2014, the Ld CIT (DR) has made certain contentions, which are met point-wise in this rejoinder:-

1) **GMR Project:**

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i) DR’s Contention

That sales of spares to GMR is FOB Korea is not supported by the agreement with GMR.

Rejoinder:
This contention is factually incorrect. Please refer clause 10.2 & 10.4 of the Agreement read with Schedules 4, 5& 5A of the GMR Agreement. Most of parts like ‘Piston Rings’ ‘Fuel Pump’ ‘Stuffing Box’ etc. used in the GMR Power Plant have limited economic life and have to be periodically replaced in each of the four 200 megawatt Power plants. At the beginning of every financial year ‘annual procurement plan’ is approved by GMR and 12 equated monthly invoices are raised both for material procured locally and abroad. At the end of the year, necessary adjustment entries are passed by GMR adjusting the closing unused inventory towards next year's annual plan for imports.
Schedule 4 bifurcates “imported portion” and “Local rupee portion”. Schedule 5 gives the list of “repair Kits costs US $ (FOB Ulsan)” and item-wise number of spares and parts required to be unported by GMR. Similar list in respect “Deisel Engines” “FOB Ulsan” is enumerated in Schedule 5A. Thus, the Schedules to the Agreement makes it clear spareparts are exported FOB from Korean port (Ulsan).

ii) **DR’s Contention**

“Page 250-251 of the PB show that the assessee is incurring expenses on clearing and forwarding”.

Rejoinder:
Pages 250-51 (Vol. II) is the copy of clearing & forwarding A/c in the Ledger. The bills raised by C & F Agent on N. Jamnadas & Co. and JM Baxi & Co. are paid and reimbursements are received from GMR. Neither these payment are booked as expense and nor is the reimbursement from GMR is booked as income ever since FY 1995-96. This position prevails this year also. The Ld. AO has accepted this position and has not interfused with it. Thus, the assessee, for the sake of convenience, deals with C & F agents on behalf of GMR.

iii) **CIT (DR):-**

"ITAT orders for AY 2007-08 & 2008-09 is in regard to ONGC contract and are not applicable to GMR contract."

Rejoinder:
Paragraph 20 of Tribunal’s order for AY 2008-09 at Pg 6319/PB IV reads as under:-

"On perusal of order of the Tribunal for the assessment year 2007-08 (supra) on the issue in the case of assessee itself, we find that during the year also MUT pipeline project, MSP platform project of ONGC and GMR (operation and maintenance contract) of GMR power Corporation were continuing since the period relevant to the assessment years 2004-05 or earlier years whereas the project HMI (sub station) of Hyundai Motors India Ltd. has continued from the assessment year 2006-07. In the assessment year 2007-08, the Tribunal has dealt with the issue relating to MUT pipeline project, MSP platform project, of ONGC, and GMR (operation and maintenance contract) projects which are also under consideration in the assessment year in

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question. After discussing the issue in detail the Tribunal has summarized the reasons for not concurring with the AO..."

Finally in paragraph 24, the Tribunal holds:-
"Respectfully following the decision taken therein in para 32 of the said order, we hold that the receipts pertaining to designing, fabrication and supply of material, the activities carried out outside India is not taxable in India. Other issues raised in these grounds have become infructuous. These grounds are accordingly disposed of."

iv) **CIT (DR):-**

Both in terms of the provisions of the treaty or Explanation to section 9 (1) (i) profits are attributable to India. It is not dependent on the transfer of title. Hence, 100% of sale of spares from outside India is taxable in India.

Rejoinder:
The Ld. DR's contention is self contradictory. It is settled law that only that much of profit of the GE is attributable to the PE, which represents the element of service by the PE in India included in the price charged by GE for supply of of spares & parts sold from outside India.

The Chennai PE charges GMR for all its activities in India. Since there is no allegation that the sale price of material exported from Korea is not at arm's length price or that it includes any element of service by the PE in India, no further profit can be attributed to the PE. This has been so decided by the Apex Court in our own case in 291 ITR 482.

There is another reason as to why the addition made by AO is not justifiable. The order sheet entry dated 20.3.2013, reads as under:-

"GMR Project – "you are requested to show-cause why profit may not be estimated @ 25% on GMR project". **(Pg.661/ Vol. IV)**

However, when the Ld. AO realized later that the assessee had declared profit, which was about 30% of gross receipts from GMR (both inside & outside India), he suo-motu and without giving any notice to assessee estimated 100% of gross receipt from sale of spares from outside India and about 70% of the gross receipts of the PE for O &M service inside India as business profit attributable to the PE. This is clearly illegal Ld. D.R.'s reply is silent on this aspect of the matter.

HCEIPL
HCEIPL is 100% subsidiary of the assessee company. HCEIPL has set up plant in Pune for manufacturing construction & earth moving equipment. It obtains technology and know-how from the assessee under an agreement dt. 20the March, 2008. It pays FTS/Royalty to the assessee, which has been found to be at arm's length price by the TPO. The assessee has no PE in India as the technology including training, is provided to HCEIPL in Korea.
CIT (DR) contention:

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"As per Article 14.3 (b), an engineer is diputed to supervise the Plant….. As the services are performed at a fixed place & business by the employees of the assessee the corresponding fee / royalty is effectively connected to PE".

Rejoinder:

The Ld. D.R. has sought to make out an altogether a new case, which is not borne out of facts and nor is this the case of the AO/DRP. The case of the Ld. AO is that Mumbai LO is PE for the purpose of HEIPL also. This is also endorsed by the DRP holding that facts are same as in the case of old ONGC contracts.

Clause 14 (3) of the Agreement reads as under:

"The parties shall jointly formulate a training program for the Party B and shall specify the qualifications of personnel suitable for receiving such training. The Party A shall be responsible for such training in order to ensure the employees of the Party B receive adequate training in the use of the Technology and Know-how for the manufacture, packaging, marketing and sale of the Products. In particular, the Party A shall provide:

(a) Annually 450 man-days of training for the Party B's employees at the Party A's plant in the Republic of Korea provided that the expenses for air-tickets, board and lodging for these employees shall be borne by the Party B; and

(b) Annually 180 man-days of supervision by an engineer provided by the Party A at the Plant provided that the Party B shall bear the expenses of the air-tickets and local transportation for the Party A's engineer and shall pay to the Party A Four Hundred US Dollars (US$400.00) per calendar man-day (including traveling days) which the Party A's engineer is required or requested by the Party B to stay beyond the 180 man-days supervision period."

It is obvious that it is optional for the HCEIPL to obtain supervising services of an engineer of the assessee company. In this connection, please refer to **Pg.116/ PB-1**, wherein the assessee had furnished the "Details of Expatriates deputed on India FTS Projects". It is clear from that statement that no engineer was deputed to India for HCEIPL Project. Further, the summary of invoices raised during the year together with copy of relevant invoices submitted to the AO clearly shows that both the receipts are on account of technology fee and no invoice was raised on account of supervision. **(pgs. 186 & 195of PB/1)**

Further, there is no concept of 'supervision PE' in Korean DTAA. Even if a supervisor is deputed, no PE in India is formed. There is no fixed place 'PE' as the supervisor is deputed not for the business of the Korean company, but that of HCEIPL, an Indian company. "Supervision in connection with" a construction/ installation PE would constitute PE only if such supervisory activities continue for more than 9 months. (Article 5 (3) of the DTAA at Pg.21/ compendium). There is no allegation to this effect either by the Ld. DR on the AO/CIT (A).

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Hence, the interest on delayed payment of royalty by HCEIPL cannot be taxed as business income u/s 44DA @ 40%, but @ 15% as per Article 12 of the DTAA with Korea.

Findings:

25. The claim of the assessee as per the above discussion remained that the offshore supplies are not taxable and Learned AR placed reliance on the decisions of the ITAT in its own case on an identical issue for the assessment years 2007-08 and 2008-09 (supra) decided in favour of the assessee. The contention of the Revenue remained that bifurcation of income from GMR Project in items of "inside India" and "outside India" is not correct. The submissions of the Learned AR remained that it is the last tenth complete year of the contract and finding of the authorities below are not only contrary to the terms of the contract but it is also contrary to the tax treatment approved by the ITAT ever since assessment year 1999-00. The contentions of the Learned CIT(DR) as discussed in detail in the above paragraphs remained that the claim of the assessee that offshore supplies are not taxable based on the decisions in its own case by the ITAT is not relevant so far as the facts of the case for this year are concerned. In the preceding paragraphs, the Learned CIT(DR) has tried to distinguish the facts of the case on the issue during the year. In the rejoinder, the Learned AR has also tried to meet out the contentions of the Learned CIT(DR) that facts of

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the present year are distinguishable from the earlier years on the issue. In the assessment year 2008-09, the ITAT has given its findings on the issue vide para Nos. 20 to 24 of the order reproduced hereunder for a ready reference:

"20. On perusal of order of the Tribunal for the assessment year 2007-08 supra) on the issue in the case of assessee itself, we find that during the year also MUT Pipeline project, MSP platform project of ONGC and GMR(operation and maintenance contract) of GMR power Corporation were continuing since the period relevant to the assessment years 2004-05 or earlier years whereas the project HMI (sub station) of Hyundai Motors India Ltd. has continued from the assessment year 2006-07. In the assessment year 2007-08, the Tribunal has dealt with the issue relating to MUT pipeline project, MSP platform project, of ONGC, and GMR (operation and maintenance contract) projects which are also under consideration in the assessment year in question. After discussing the issue in detail the Tribunal has summarized the reasons for not concurring with the AO that contracts are indivisible and the receipts pertains to pre-engineering services, designing, fabrication, procurement have element of income attributable to PE of the assessee in India vide para No. 32 of the order as under :-

"32. Apart from the above discussion, we summarize the reasons for not concurring with the Assessing Officer that contracts are indivisible and the receipts pertain to pre-engineering services, designing, fabrication, procurement have element of income attributable to PE of the assessee in India :

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a) the ONGC has floated international tender. The assessee has won the tender by giving lowest bid. Prior to filing sealed bid, it is illegal for the bidder to negotiate the bid. Even the department has not levelled any allegation to this effect,. The bidder can mail queries on technical aspect of the tender. Thus, it suggests that transactions of the assessee with the ONGC were at arm's length price and they are not associate concerns of each other.

(k) All receipts for operation inside India have been offered to tax as income in earlier years as well as this year. The entire receipts from the installation work carried out in the offshore site since the arrival of material has been offered to tax."

21. The Tribunal accordingly held that the contracts are divisible. The receipts pertaining to designing, fabrication and supply of material, the activities carried out outside India is not taxable in India. Respectfully following this decision on identical issue in the assessment year under consideration we decide the issue raised in the grounds Nos. 6, 6.1 to 6.3 relating to MUT pipeline project, MSP platform project, of ONGC and GMR (operation and maintenance contract) projects in favour of the assessee with this finding that the outside receipts pertaining to designing, fabrication and supply of material, activities carried out outside India is not taxable in India. So far as taxability of receipts pertaining to HMI (sub station) of Hyundai Heavy Industries Ltd. is concerned the matter is set aside to the file of the AO to examine the issue in relation to these project in view of finding of the Tribunal on the issue in relation to the above stated three projects and decide the issue accordingly after affording opportunity of being heard to the assessee. Ground No. 6 (consisting of ground Nos. 6.1, 6.2 & 6.3) are thus partly allowed.

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Ground Nos. 7,8, 8.1,9,9.1,10

22. In these grounds assessee has questioned action of the authorities below in taxing the entire revenue of Rs. 190812234/- pertaining to outside India operations as income of the assesee. It has been contended by the assesee that the authorities below have erred in taxing the revenue of operation outside India disregarding the principle of attribution envisaged in Article 7(3) and principle of consistency envisaged in Article 7 (5) of DTAA, especially considering the facts that in absence of allegation that the payment by ONGC for operation outside India was not at arm's length or that it included any work carried out for services rendered in India. In ground No. 8.1 the grievance of the assesee remained that even assuming that supplies were necessary for the purpose of activities of the permanent establishment (PE) in India and even if further assuming that the supplies were an integral part, no part of profit on account of off shore activities can be attributed to the PE as undisputedly, all the designated work, designing, fabrication and supply were carried out outside India much before the date of arrival of structure in India. In ground No. 9 of the appeal the assessee has questioned finding of the authorities below that Mumbai office constitutes a fixed place PE under article 5(1) of the DTAA. In ground No. 9.1 the action of the authorities below have been questioned whereby they have applied Article 5(1) to the facts of the case as against the specific provisions of Article 5(3) which as per the assessee is applicable to its case. In ground 9.2 the finding of the authorities below that PE stood constituted from the date of the notification of the award and not from the date when the installation activities commenced has been questioned. In ground No.10 the action of the authorities below in not following the principles of consistency also by Article 7(5) of the India Korea DTAA by adopting the new formula for estimating the income of the assessee for operation carried inside India, has been questioned.

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> 23. We find that the issues raised in these grounds have been covered by the Tribunal in the case of assesee itself for the assessment year 2007-08 (supra) relevant para No. 32 of the order of the Tribunal has been reproduced hereinabove.
>
> 24. Respectfully following the decision taken therein in para 32 of the said order, we hold that the receipts pertaining to designing, fabrication and supply of material, the activities carried out outside India is not taxable in India. Other issues raised in these grounds have become infructuous. These grounds are accordingly disposed of".

25.1 We thus find that there is no dispute that existence of PE was there during the year and the year under consideration was last year of completing the contract. It is a well established proposition of law that the authorities below have to follow the decision of ITAT on an identical issue and the ITAT has to maintain consistency in its approach on an identical issue under the similar facts adopted in earlier years. Since the Learned CIT(DR) has disputed this claim of the assessee that during the year facts on the issue are similar to earlier years and the Learned AR has also tried to meet out the efforts of the Learned CIT(DR) distinguishing the facts of the case on the issue during the year, we are of the view that before following the order of earlier years on the issue by the ITAT, it is necessary to ascertain that the facts relating to the issues raised in ground Nos. 3 to 6 in the appeal for this

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year are similar to the facts of the earlier years i.e. assessment years 2007-08 and 2008-09. We accordingly set aside the matter to the file of the Assessing Officer to ascertain that facts like performance of the assessee as per the terms of contract with GMR and others regarding operation and maintenance of the project and supply of spare and tool kits from Korea, Offshore Sales or activities claimed to be carried outside India, etc. as well as income from inside India activities on the issues during the year, are similar to the facts of the earlier years i.e. 2007-08 and 2008-09 after verifying the above submissions of the parties in this regard and affording opportunity of being heard to the assessee in view of materials available on record. If the Assessing Officer after verification finds that the facts of this year on the issues raised in ground Nos. 3 to 6 are similar to the facts of the earlier years on the issues then he is directed to decide the issues following the decision of the ITAT in this regard for the assessment years 2007-08 and 2008-09 and of the Hon'ble Supreme Court in the case of assessee reported in 291 ITR 482. The ground Nos. 3 to 6 involving the issue No.2 are thus allowed for statistical purposes.

Ground Nos. 10 & 11:

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26. It is regarding deduction of service tax. The assessee need to explain that no expenses in relation to service tax are debited in the profit and loss account. At page No. 644 of P.B-IV, assessee has filed information on service tax. The matter is thus set aside to the file of the Assessing Officer to decide the issue afresh after giving opportunity to the assessee to explain that no expenses in relation to service tax are debited in the profit and loss account. The ground Nos. 10 & 11 are accordingly allowed for statitstical purposes.

Additional Ground:

27. Interest under section 234B of the Act

27.1 The learned AR contended that the issue is covered by the decision of Hon'ble jurisdictional High Court of Uttrakhand in the case of Maersk's Shipping – 334 ITR 79 and the decision of Hon'ble Delhi High Court in the case of Alcatel – 264 CTR (Delhi) 240 is not applicable. He submitted further that the appellant is a foreign company and during the year was in receipt of income for its outside India and inside India activities from TATA Motors Ltd., Nissan Motors Ltd., HCEIPL and GMR. All receipts of the assessee were subject to deduction of tax at source as fee for technical services at 10% as prescribed under sec. 115A except those from GMR, on which that was deducted in accordance with the order obtained under sec.

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197 of the Act for lower deduction of tax. The assessee also received interest income on which also tax was duly deducted at the rate of 15% in accordance with Article 12 of the DTAA as entered into between India and Republic of Korea. He submitted further that for the assessment year under consideration, the provisions of sec. 234B are attracted only when the assessee, who is liable to pay advance tax under sec. 208 of the Act has failed to pay such tax. Since the entire income of the assessee was subject to tax deducible at source and tax was deducted at source was the payer, there was no liability to pay advance tax under sec. 208 of the Act and in absence of any liability to pay advance tax, the provisions of sec. 234B of the Act could not be invoked. The learned AR pointed out further that interest under sec. 234B amounting to Rs.4,58,63,237 cannot be levied in the light of the decision of the ITAT in the assessee's own case for the asst. Year 2007-08 in ITA No. 5231/Del/2010 on identical issue.

27.2 The learned CIT(DR) contended that interest under section 234B of the Act would be payable if the tax payable works out more than TDS done in case of the assessee. In that case, the assessee was liable to pay advance tax and failure to pay the same results into charging of interest under section 234B of the Act.

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27.3 The learned CIT(DR) submitted further that in this case, the assessee had obtained an order under section 197 of the Act and GMR was directed to deduct tax @0.48% based on this order. Hon'ble Delhi High Court in the case of Jacobs Civil Incorporated and others in paragraph 6 of the decision has held that interest under section 234B is chargeable after establishing that the payee has role in such a lower or no deduction of tax. In the present case, assessee has full role in lower deduction of tax, as it had obtained order section 197 of the Act at lower rate and provided to GMR. In such a case, the payer GMR was not at fault and no order under section 201(1) can be passed in that case as they deducted tax as per order under section 197 of the Act. As the tax was not paid correctly and there was a shortfall in payment of tax, therefore, the interest under section 234B is payable by the assessee.

27.4 Considering the above submissions, we find that the an identical issue has been decided in favour of the assessee by the Delhi Bench of the ITAT in the case of assessee itself for the assessment year 2007-08 (supra). We thus, set aside the matter to the file of the A.O. to decide the issue afresh in view of the decision of the ITAT on the issue for the assessment year 2007-08 which is based on the decision of Hon’ble jurisdictional Uttrakhand High Court in the case of CIT vs. Sedco Forex International

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Drilling Co. Ltd.- 264 ITR 320 (Uttrakhand), after affording opportunity of being heard to the assessee. The additional ground is accordingly allowed for statistical purposes.

28. In result, the appeal is allowed for statistical purposes.

The order is pronounced in the open court on 05.06.2015

Sd/-	Sd/-
(B.C. MEENA)	(I.C. SUDHIR)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 05 /06/2015
Mohan Lal

Copy forwarded to:
1) Appellant
2) Respondent
3) CIT
4) CIT(Appeals)
5) DR:ITAT

ASSISTANT REGISTRAR

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