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

BEFORE SHRI LALIET KUMAR, JUDICIAL MEMBER AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA NO. 1282/MUM/2009		**A.Y : 2004-05**
General Motors Overseas Corporation, 2711 Centerville Road, Wilmington, DE 19808, United States of America **PAN : AAACG7603A** (Appellant)	vs.	Asstt. Commissioner of Income Tax (International Taxation) – 3(1), Mumbai.(Respondent)

ITA NO. 2787/MUM/2014		**A.Y : 2008-09**
General Motors Overseas Corporation, 2711 Centerville Road, Wilmington, DE 19808, United States of America **PAN : AAACG7603A** (Appellant)	vs.	Dy. Director of Income Tax (International Taxation) – 3(1). (Respondent)

ITA NO. 1986/MUM/2014		**A.Y : 2009-10**
General Motors Overseas Corporation, 2711 Centerville Road, Wilmington, DE 19808, United States of America **PAN : AAACG7603A** (Appellant)	vs.	Dy. Director of Income Tax (International Taxation) – 3(1). (Respondent)

ITA NO. 381/MUM/2018		**A.Y : 2010-11**
General Motors Overseas Corporation, 2711 Centerville Road, Wilmington, DE 19808, United States of America **PAN : AAACG7603A** (Appellant)	vs.	Dy. Director of Income Tax (International Taxation) – 3(1). (Respondent)

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Assessee by : S.K. Aggarwal Advocate For Assessee
Revenue by : Avinish Tiwari DR for Revenue

Date of Hearing : 03/03/2020
Date of Pronouncement : 06/03/2020

O R D E R

PER LALIET KUMAR, JUDICIAL MEMBER

The appellant has filed the above noted appeal feeling aggrieved by the order passed by the Commissioner (Appeals) on 28.11.2008 on the following grounds :-

"Income assessed as "Fees for Technical Services"

1. The learned CIT(Appeals) erred in fact and also in law in partially confirming the view of the AO holding that the amount invoiced by the appellant to General Motors India Ltd. ('GMIL') under the Management Provision Agreement dated December 26, 1995 is chargeable to tax as "Fees for Technical Services" in so far as it is pertains to the amount attributable to services rendered by Vice President Manufacturing.

2. The learned CIT(Appeals) erred in fact and in law in not considering the argument of the Appellant that the AO had not provided reasonable opportunity to the Appellant to submit the documentary evidence and to present the facts of the case.

3. The learned CIT(Appeals) erred in fact and in law in confirming the action of the AO in computing tax by applying the provision of Section 44D of the Act in complete disregard to the facts of the Appellant's case and also the provisions of the Double Tax Avoidance Agreement with USA ["the DTAA"].

4. The learned CIT(Appeals) also erred in fact and in law in completely ignoring the provisions of Article 12 Para 6 of the DTAA in levying tax as "Fees for Technical

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Services", while holding that the Appellant has permanent establishment in India and the said services are attributable to the said permanent establishment.

Adjustment under Section 92 of the Act :

5. The learned CIT(Appeals) erred in confirming the action of the AO in invoking the provisions of Section 92 of the Act and adding 10% mark up on the invoices billed by the appellant to GMIL.

6. The learned CIT(Appeals) erred in fact and in law in confirming the action of the AO in making the above adjustment without giving any reasoning and without dealing with the arguments advanced by the Appellant.

7. Without prejudice to the above, the learned CIT(Appeals) erred in not accepting the argument of the Appellant that the AO erred in not providing any evidence that the transaction entered by the appellant with GMIL is not at arm's length.

8. Without prejudice to the above, the learned CIT(Appeals) erred in not accepting the argument that the AO erred in not providing any basis for mark up at 10% to the amount involved by the appellant to GMIL.

Reversal of invoices raised in the earlier years

9. The learned CIT(Appeals) erred in rejecting the contention of the Appellant that the amount of US$ 2,19,132.16, being the invoices raised in the earlier years, offered to tax in earlier assessment years and reversed during the year is required to be reduced from the total income.

Interest under Section 234B of the Act

10. The learned CIT(Appeals) erred in not accepting the claim of the Appellant that no interest under Section 234B of the Act was payable by the Appellant as the entire income of the Appellant was subject to withholding tax."

Brief background

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I. The Appellant is a company incorporated in and tax resident of United States of America ('USA'). It is engaged in the business of providing management and consulting services solely to the group entities worldwide.

II. The Appellant entered into a **Management Provision Agreement ('MPA')** dated December 26, *1995* effective from April 16, 1994 with **General Motors India Limited ('GMIL')** . **GMIL** is engaged in the business of manufacture, assembly, marketing, and sale of motor vehicles and other products in India. GMIL has a separate 'technical information and assistance agreement' with M/s Adam Opel AG.

III. Under the **MPA,** the Appellant was to provide executive personnel in connection with development of general management, finance, purchasing, sales, service, marketing and assembly/ manufacturing activities to GMIL. Further, as per clause 4 of the **MPA**, GMOC was to charge salary and other direct expenses related to such personnel from GMIL.

IV. To ascertain the tax liability, if any, of such amounts receivable under the **MPA**, the Appellant filed an application before Authority of Advance Ruling (AAR).

V. it was the submission of The AR that AAR vide its order dated August 19, 1997 specifically negated that the amounts constitute fee for technical services ('FTS') but held that GMOC (referred to as *XYZ* in the ruling) constitutes Permanent Establishment ('PE') in India and any amount received by it will be taxable as business profits under **Article 7** of the India-USA Tax Treaty ('DTAA')

VI. *It was the contention of the AR that o*ut of expatriates mentioned above, during the subject year only following two personnel were assigned to GMIL under the provisions of **MPA.**

President and Managing Director - Mr. Aditya Vij; and

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Vice President manufacturing - Mr. Satyasree Veerpaneni

VII. In relation to above, the Appellant raised invoices for US$ 284,288.28 on GMIL. In view of the ruling delivered by AAR, such amounts were disclosed as business receipts in the Return of Income (RoI). Further, given that these amounts as invoiced to GMIL were on "cost as incurred basis", therefore in absence of any profit element, no business income was computed in the ROI (return of Income) filed.

VIII. Accordingly, the Appellant filed it ROI for the subject year 2004-05 on 30 October 2004 declaring an interest income of Rs. 2,291 under normal provisions of the Act.

IX. After filing the return of income by the assessee, the assessing officer had issued the notices under section 143 (2) and 142 (1) Of the Act and the assessee was called upon to file the copy of the service agreement of the Deputationist vide order sheet entry dated 20 February 2006. However despite that, the representative of the assessee had not filed the service agreement of the employees on deputation.

X. The assessing officer left with no other option, had taxed the entire receipt of USD 28428828 as business income under article 7 of Indo US DTAA on gross basis. It was further noted in paragraph 8 of the assessment order that "**no profit on this receipt has been shown by the assessee claiming the same as reimbursement of cost". Further it was mentioned that as per Article 7 of the treaty, the income of PE is to be computed in accordance with domestic law as provided in paragraph 3 of Article 7.**

XI. Feeling aggrieved by the order passed by the assessing officer, the assessee preferred an appeal before the Commissioner (Appeals). However the CIT(A) had also decided the issue against the assessee. The finding recorded by the Ld. CIT(A) in paras 6 to 9 of the order dealing with

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the contention of the assessee in the order impugned before us were as under:

"6. During the appeal proceedings, appellant further submitted the designation & work profile of Mr. Aditya Vij (President and Managing Director) and Mr. Satyasree Veerapaneni (Vice President Manufacturing) as under.

"1. Mr. Aditya Vij
Qualification : Chartered Accountant and MBA
Designation : President and Managing Director
Work Profile : As per the MPA between GMIL & GMOC work profile of President & Managing Director is as under :

"President and Managing Director – will be Chief Executive and Operating Officer of GMI and will be responsible for overall management and direction of GMI operations. The President and Managing Director will be formally appointed to such office by GMI and will discharge his or her powers and duties from that office.

2. Mr. Satya Veerapaneni
Qualification : B. Tech.
Designation : Vice President (Manufacturing)
Work Profile :
As per the MPA between GMIL & GMOC work profile of Vice President (Manufacturing) is as under :
"Vice President of manufacturing Engineering – will be responsible for overall management of GMI facilities to manufacture and assemble products of GMI according to required standards and for production of such products according to those standards."

7. It was submitted that the services rendered by above persons deputed to India are in the nature of managerial services and not in the nature of technical or consultancy services. It was further contended by appellant that as per article 12 of the India-US double tax avoidance agreement, the services provided by employees deputed to India are not in the nature of "fees for included services". From the definition of "fees for included

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services", it will be observed that fees for included services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

8. The appellant further contended that the services provided by Mr. Aditya Vij and Mr. Satya Veerapaneni can be considered as fees for included services only if they 'make available' technological knowledge, experience, skill, know-how or process, which enable the person obtaining the services to apply the same. But in the case of appellant company, no expertise or know-how has been 'made available' to the Indian company by reason of rendering the said services. In this connection the appellant relied on the following decisions :

1) Raymond Ltd. v. Deputy Commissioner of Income Tax (86-ITD-791)
2) Intertek Testing Services India Pvt. Ltd. (AAR 760 of 2007)
3) ISRO Satellite Centre [ISAC] (AAR 765 of 2007)
4) De Beers India Minerals Pvt. Ltd. (297 ITR 176)
5) M/s. Cushman & Wakefield (S) Pte. Ltd. (218 CTR 238)

8.1 The appellant further submitted that GMIL has a separate "Technical Information & Assistance Agreement" with M/s. Adam Opel AG, a company incorporated in Germany. As per the said agreement, M/s. Adam Opel AG is to provide technology license and technical assistance, technical personnel and training to the employees of GMIL to produce vehicles at GMIL's production facilities in India and distribute those vehicles in the Territory, as per the engineering standards and designs established thereof by Adam Opel AG.

8.2 As per the aforesaid agreement, Adam Opel AG is to receive inter alia royalty and fees for services rendered from GMIL.

9. I have perused the fact of the case and also analysed para 2 and 4 of MPA. Further I have also analysed article 12 of the India-US treaty and various case laws submitted by appellant. Also, I have also gone through the Advance Ruling given in the case of the appellant wherein the services

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rendered by the expat at the post of Managing Director and Vice President (Manufacturing) was examined and after examining the said services, it was held that the services rendered by the expat is managerial services. In my view, the services rendered by the expat deputed by GMOC to India cannot be held as in the nature of fees for included services as per Article 12 of Indo-US DTAA since it does not make available any technological, experience, skill, know-how or process, which enable the person obtaining the services to apply the same. However, that payment has to be taxed under the head business income. Further, in the case of Vice President (Manufacturing), he is qualified, well experienced technical personnel. His services were made available to the Indian subsidiary. His technical experience was utilized by the Indian subsidiary in its day today production activities. Hence, the payment will come under the purview of fees for included services."

XII. Feeling aggrieved by the order passed by the CIT(A), the assessee is in appeal on the grounds mentioned hereinabove. In fact , grounds raised by the assessee in all the assessment years are common. Therefore, we are taking the appeal No. 1282/M/09 as the lead case with the consent of both the parties and deciding the appeals by passing a composite and common order in all the appeals mentioned in the cause title.

SUBMISSIONS OF THE AR

XIII. **Firstly,** learned AR submitted that once a finding has been given by the Authority for Advance Ruling (AAR) in respect of the services rendered by the President, Managing Director, Vice President of Marketing, holding that the services rendered by these persons would not fall within the definition of fees for included services (FIS in short) then, the lower authorities and the Tribunal are precluded from taking a contrary view and decision of the AAR is binding on the tribunal. In support of the above said contention, the

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Ld.AR had drawn our attention to para 2, 5 , 29 and 30 of the order passed by the AAR wherein it was held as under:-

a) **Responsibility, duties and qualification of the personnel assigned under MPA —** *refer* ***para 2 and 5 on page 41 to 42 of paper book***

*"**2** ... . Under the management provision agreement, the applicant is to make available executive personnel **for development of general management, finance and purchasing, service, marketing and assembly/manufacturing activities.** The agreement indicates the responsibilities and duties of each of the five resident expatriates under the said agreement as under.*

(i) President and managing director *-Will be the chief executive and operating officer of "AB" and will be responsible for overall management and direction of "AB" operations. The president and managing director will be formally appointed to such office by "AB" and will discharge his or her powers and duties from that office.*

(ii) Vice-president of marketing-Will be responsible for development and administration of AB's dealer network, sales and marketing of "AB" products and service.

(iii) *Vice-president of finance - Will be responsible for managing all the financial operations of 'AB".*

(iv) Vice-president of manufacturing engineering - Will be responsible for overall „management of "AB" facilities to manufacture and assemble products of "AB" accordin to required standar,csnrr̄id for production of such̄prōdu̇cts according to those standards;

(v) Vice-president of supplier development and materials management - Will be responsible for managing the purchasing and "AB" materials, including development of local suppliers.

5. The bio-data of the five expatriate personnel which need not be extracted here in full, indicate that four of them are bachelors in electrical, industrial, mechanical/electrical engineering and two of them also possess degrees in business administration whereas the fifth one has a degree only in business administration."

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"29 .... It is true that four out of five of the deputationists are engineers. But these are days in which even engineers have to qualify in management skills. The authority has no information or material on record to indicate that the employees were rendering services of a nature falling beyond the terms of the agreement. **In the circumstances, the authority has no option but to conclude that the services of the nominees of "XYZ" are "managerial" and not "technical or consultancy" services within the meaning of Article** 12. The authority, however, leaves it open to the concerned authorities, in appropriate proceedings, to examine the factual position and take appropriate action if they find that the factual situation is otherwise.

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*30.In the result, the Authority finds, on the facts available to it, that the **services of the five nominees of `XYZ' are not covered by the expression 'included services' in art. 12. The consideration received by `XYZ' for these services is therefore, assessable not under art. 12 but as business profits under art. 7 r/w 5(2)(1) of the DTAA. There was some discussion before the authority as to the manner in which the business profits attributable to the PE(i.e the services) should be computed and whether in computing such profit and deduction of expenses incurred to earn them is permissible or not. The Ld. counsel stated that he was not praying for a ruling on that aspect and that he would be satisfied with a ruling on the first question set out in the application . The authority therefore refrain from going into the question of expressing any view thereon."***

XIV. The Ld.AR had also drawn our attention to section 245 S of the Income Tax Act,1961. This section provides that ruling of AAR passed in case of an applicant is binding on Income tax authorities in respect of such applicant. The relevant extract of the section is reproduced hereunder:

"245S. (1) The advance ruling pronounced by the Authority under **section 245R shall be binding** only—

(a) on the applicant who had sought it;

(b) **in respect of the transaction in relation to which the ruling had been sought;** and

(c) **on the Commissioner, and the income-tax authorities subordinate to him,** in respect of the applicant and the said transaction.

(2) The advance ruling referred to in sub section (I) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced."

As demonstrated above, given that all the above conditions are satisfied in instant case, the AAR ruling was binding on tax authorities and the Ld. AO and CIT(A) were bound to follow the same. Therefore, on this count also the order passed by Ld. AO and the CIT(A) to the extent it confirms the addition made by Ld. AO is not sustainable in law.

XV. The Ld.AR had also relied upon the following decisions in support of his contention that the decision of the advance authority is binding on the tribunal:-

A. Decision of Hon'ble Supreme Court in the case of Columbia Sportswear Company reported in 5 Taxmann.com. 470

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B. Decision of Hon'ble Jurisdictional High Court in the case of Prudential Assurance co Ltd reported in 191 Taxman 62

XVI. Secondly, it was submitted by the Ld. AR that the revenue had been examining the activities of the assessee for the last many years and there is no change in facts. Therefore the principle of consistency should be followed by the lower authorities. Our attention was drawn to the decision in the case of Radhasoami Satsang, reported in 193 ITR 321 (SC) *and* Bharat Sanchar Nigam Ltd. (183 of 2003)

XVII. Thirdly, it was submitted by the Ld.AR that as per the provision of the DTAA , the technology was not made available by the assessee to the Indian company and therefore the assessee cannot be held liable for taxation for FIS. It was submitted that ***make available*** is a sine qua non for the purpose of invoking the FIS and in the absence of making available the technology, FIS cannot be charged/assumed. Learned AR in support of the above contention had filed the written submissions to the following effect :

" 15.4. Without prejudice to the above, the Appellant wish to submit that the amounts charged by GMOC under the MPA were not in nature of FTS either under the Act or the DTAA. In support, it is reiterated that under the MPA, the Appellant had only assigned personnel to GMIL and not rendered any services *per se.* In support, attention is invited to the clause 8 of the MPA. Relevant extract is reproduced below for your Honor's ease of reference. *(Refer para 8 on page 6 of Convenience Set)*

"No guaranty or warranty of any nature is expressly or impliedly extended by GMOC with respect to the provision of services, personnel, information, or other assistance under this Agreement. Further, GMOC will not be liable to GMT or anyone else for direct, consequential, or other damages of any kind or nature arising out of or alleged to result from the furnishing of such services, personnel, information, or other assistance."

Basis the above, it cannot be alleged that the amounts received was in relation to rendition of any services constituting FTS under the Act and/ or DTAA.

15.5. Moreover, reference is invited to para 8(d) above, wherein it has been reproduced that AAR in its ruling had held that the amounts to be received by GMOC are not in

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nature of FTS under Article 12 of the DTAA.

In view of the above, it is again reiterated that the amounts received by the Appellant under MPA from GMIL were not in nature of the FTS. Without prejudice to the above, the detailed analysis of chargeability of the aforesaid amount as FTS under the Act/DTAA has been provided hereunder.

Under the Act

15.6. Under the Act, definition of FTS is provided under explanation 2 to section 9(1)(vii). The relevant extract has been reproduced below:

"For the purposes of this clause, fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) ***but*** *does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or* ***consideration which would be income*** *of* ***the recipient chargeable under the head "Salaries". "***

15.7. The aforesaid definition provides following two exceptions to the definition of FTS:

a) consideration for any construction, assembly, mining or like project undertaken by the recipient; or

b) consideration which would be income of the recipient chargeable under the head "Salaries" in the hands of the recipient.

Thus, in case any of the aforesaid conditions above are satisfied, the amount received/ receivable would not be chargeable as FTS under the provisions of the Act.

Applicability of ***exception (b) above in instant case***

15.8. In the instant case, as already submitted above GMOC charges GMIL for salary and other direct costs of the personnel assigned to latter. Thus, salary for such personnel is paid by GMOC and corresponding amount is charged from GMIL. Such amounts paid by GMOC to assigned personnel is chargeable to tax in hands of such personnel as income chargeable under the head 'Salaries'. The Appellant also withheld taxes on such payments under section 192 of the Act and deposited the same with Indian Government. Further given that such salary arises on account of services rendered in India, the same were offered to tax by such personnel as Salary income in their India tax return.

15.9. Thus, exception (b) above is applicable in instant case. In support, reference is invited to following judicial precedents.

- Morgan Stanley Asia (Singapore) Pte (ITA No. 8595/Mum/2010) (Mumbai-Tribunal). The relevant extract of the judgment is reproduced below for your reference. *(Refer page 45 of Convenience Set)*

"10 ...It *is a fact that there is contractual agreement between MSAS and assessee, which clearly provides that salary is paid by assessee on behalf of MSAS and the same is recharged by assessee to MSAS. According to our view, the amount*

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received/receivable by assessee is in the nature of reimbursement of cost incurred by assessee on behalf of MSAS ***because the same cannot be brought within the definition*** *of FTS as defined in explanation to section* ***9(1)(vii) of the Act provided in exception.*** *The exception provided clearly stated that the income of* ***the*** *recipient chargeable under the head salary' in view of the expenses will not be considered as falling under the definition of FTS. The payment by MSAS being a pure reimbursement of salary cost incurred by the assessee is in the nature ofpayment of salary which is covered under exception mentioned in explanation 2 to section 9(1) (vii:) of the Act and therefore, the same cannot be regarded as FTS given in the definition of the term of FTS but as salary in the hands of the deputed employee only."*

The aforesaid view is also upheld by various judicial precedents reproduced under ***Annexure*** *A.*

In view of the above, given that the payments made by the GMIL were taxable in the hands of the personnel under the head 'Salaries' the aforesaid exception was applicable in instant case. Thus, amounts charged by GMOC cannot be regarded as FTS under the Act.

Under the DTAA

15.10. Without prejudice to the above, it is submitted that since GMOC is a tax resident of USA, it is entitled to be governed by provisions of DTAA to the extent more beneficial. In view of the same and before proceeding further, the Appellant has reproduced here under Article 12 of DTAA for ease of reference.

'fees for included services means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

a)...or

b) ***make available technical knowledge, experience, skill, know-how processes,*** *or consist of the development and transfer of a technical plan or technical design."*

15.11. As per the aforesaid definition, any service can be construed as FTS if it cumulatively fulfils the following two conditions:

a) It is in the nature of technical or consultancy service; **and**
b) It makes available technical knowledge, experience etc. to the service recipient.

Thus, service not fulfilling any of the aforesaid conditions cannot be construed as FTS under the DTAA.

15.12. With respect to condition (a) above, it is submitted that payments made by GMIL under MPA cannot be termed to be in nature of technical and consultancy service. The aforesaid definition of FTS covers only technical and consultancy services. Unlike the Act and/ or other tax treaties entered into by India, word 'managerial' is not covered under the DTAA. Thus, in case services rendered are managerial in nature, the same cannot be construed to be in nature of FTS under the DTAA. This view is also supported by various judicial precedents reproduced *under* ***Annexure B.***

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15.13. Further, as per clause 2 of the MPA, the executive personnel to be provided were to render services connection with development of general management, finance, purchasing, sales, service, marketing and assembly/ manufacturing activities. Such services were 'managerial' in nature only. This fact has been accepted by the AAR also in its ruling rendered in case of Appellant itself. The relevant extract of the AAR is again reproduced hereunder. *(Refer para 29 on page 54 ofpaper book).*

'The Agreement sets out the duties of these employees which seem to cover (except probably in one case, viz., the Vice President of Manufacturing Engineering) only duties of management of various kinds - overall, sales, finances and purchases. It is true that four out of five of the deputationists are engineers. ***But these*** *are days* ***in*** *which even engineers have to qualified, in management skills. The Authority has no information or material on record to indicate that the employees were rendering services of a nature falling beyond the terms of the agreement.* ***In the circumstances, the Authority has no option but to conclude that the services of the nominees of `XYZ' are 'managerial' and not 'technical or consultancy'*** *services within the meaning of* ***article*** *12."*

In view of the above and no contrary fact being brought on record by the Ld. AO it is submitted that the services rendered were 'managerial' services and thus not taxable as FTS under DTAA.

15.14. Further, with respect to applicability of condition (b) above, it is submitted that the Appellant fervently believes that this condition also is not satisfied in the instant case. However, as already submitted above, given that condition (a) and (b) above are to satisfied on cumulative basis and as discussed above condition (a) is not satisfied herein, the Appellant has not provided detailed submission on non-applicability of condition (b). In case required by your Honours, the Appellant would be pleased to file further submissions in this respect.""

XVIII. The Ld.AR relied upon the following decisions of the tribunal in support of his contention:-

A. Co-ordinate Bench of Mumbai Tribunal in the case of Essar Oil Ltd reported in 7 SOT 216

B. Co-ordinate Bench of Delhi Tribunal in the case of Rolls Royce Indl Power (I) Ltd in ITA no 1410 / Del/2007 dated 5.10.2010

C. Co-ordinate Bench of Mumbai Tribunal in the case of Wockhardt Ltd reported in 10 taxmann.com 208.

XIX. In respect to Ground nos. 3 and 4, it was submitted that lower authorities have erred in taxing the assessee on the gross receipts rather than on net profit basis. Our attention was drawn to Article 7(3) of the DTAA

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of INDO- US in support of this contention. Further the Ld.AR drew our attention to the finding recorded by the tribunal in the matter of Rolls Royce Indl Power(supra). It was the submission of the Ld.AR that in accordance with article 7 (3) of the treaty and also in view of the pronouncement of the coordinate bench, the assessee is required to be taxed on net basis rather than on gross basis . Further the AR in the written submissions had submitted as under in this respect:-

15.15. As per Article 5(1) of the DTAA, **PE** means a fixed place of business through which the business of an enterprise is wholly or partly carried on. In relation to this, the Appellant would like to submit that the personnel were generally assigned on long term basis to GMIL under the MPA.

15.16. It is submitted that one of the assignees namely Mr. Satyashree Veerponeni was present in India for 6 years from financial year (FY) 2003-04 to FY 2009-10. It is thus submitted that the Appellant constituted a PE in India under provisions of Article 5.

15.17. Further, on a combined reading of Article 5 and 7 of the DTAA it is evident that taxable income of the taxpayer having a PE in India is to be computed on net basis as per provisions of Article 7 of the DTAA.

15.18. The position that Appellant constitutes a PE in India and that the consequent profits are taxable under Article 7 of the DTAA has been held in the AAR ruling passed in case of Appellant itself. As stated above, this position has also been accepted in past year assessment order(s) *(Reference is invited to pages 61 to 72 of paper book).* Relevant extract of assessment order for AY 2001-02 is also reproduced hereunder for ease of Your Honour's reference.

"Since the issue regarding the existence of Permanent Establishment has already been decided by the Hon'ble Authority for Advance Ruling (242 ITR 208), the income of the assesse from the activities carried on in India as per the management provision agreement is taxable as business income."

15.19. Without prejudice to the above and even in case it is assumed (without admission) that the payments made by GMIL under MPA qualifies as FTS, the Ld. AO erred in not appreciating that provisions of Article 12(6) would be applicable in instant case. For ease of reference, the relevant extract of Article 12(6) is reproduced hereunder. *(Refer page 13 of paper book)*

"The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for included services, being a resident of a Contracting State, carries on business in the other Contracting State, in which the royalties ***or fees for included services*** *arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties or fees for included services are attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 15* ***(Independent*** *Personal Services), as the case may he shall apply."*

15.20. As per the aforesaid Article, in case receipts in nature of FTS arise through a PE in India, then provisions of Article 7 are applicable (and not Article 12).

15.21. In support, reliance is placed on the judgement rendered by jurisdictional Mumbai ITAT in the

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case of Morgan Stanley International Incorporated [2015] 53 taxmann.com 457. The relevant extract of the judgement is reproduced hereunder. *(Refer para 8 on page 66 of Convenience Set).*

"Para 6 of Article 12 makes it amply clear that taxability of 'royalty' and fees for included services' shall not apply, if the resident of the contracting state (USA) carries on the business in other contracting states (India) in which FIS arises through PE situated therein, then in such case the provisions of Article 7 i.e "Business Profits" shall apply. In other words, if there is a PE, then Royalty or FIS cannot be taxed under Article 12, albeit only under Article 7 of the DTAA."

In view of the above and even in case it is assumed that the payments received by GMOC were FTS in nature, given that the same were attributable to Appellant's PE in India, the same will be taxable under provisions of Article 7.

15.22. Further, as per Article 7 of the DTAA, the Appellant is allowed to compute its income after giving impact to all the expenses incurred in earning the business receipts. In this respect, reference is again invited to judgement rendered by jurisdictional Mumbai ITAT in the case of Morgan Stanley International Incorporated (supra). The relevant extract of the judgement is reproduced hereunder. *(Refer para 8 on page 66-67 of Convenience Set)*

"Thus, in our conclusion, the payment made by the Indian entity to the assessee on account of reimbursement of salary cost of the seconded employees will have to be seen and examined under Article 7 only, that is, while computing the profits under Article 7, payment received by the assessee is to be treated as revenue receipt and any cost incurred has to be allowed as deduction because salary is a cost to the assessee which is to be allowed. Accordingly, the AO is directed to compute the payment strictly under terms of Article 7 and not under Article 12 of the DTAA."

15.23. In view of the above and given that the amounts charged by GMOC were on 'cost to cost basis', therefore no income is taxable in the hands of GMOC. In support, reference is invited to the following:

a. As per the extant regulations, the MPA was approved by Ministry of Industry ('MO!'). The approval letter issued by such ministry categorically acknowledged that the amounts to be charged by GMOC under the MPA would be equivalent to costs of the personnel assigned. Relevant extract is reproduced hereunder *(refer para 2 on page 41 of paper book).*

" 2... ....The provision for management services was approved by the Ministry of Industry while approving the proposal for the setting up of the joint venture. The letter of approval said:

"D. Management services : It is noted that 'XYZ', a wholly owned subsidiary of 'B', USA, would be providing management services on a cost-as-incurred basis by deputing maximum of five of their employees to the joint venture, for a period up to three years, for providing management and technical service to the joint venture and would also train the personnel of the joint venture so that the service of the employees of the foreign collaborators could eventually be replaced by the Indian personnel. ..."

Grounds 5 To 8

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XX. In support of these grounds, it was submitted by the Ld.AR, that the TPO for the subsequent assessment year that is for assessment years 2008 – 09 and 2009 – 10 , had considered the issue of markup and it was held by the authorities that as assessee had merely reimbursed the cost, therefore no markup of 10% can be permitted on the payment made by the assessee. For that purposes, the Ld.AR had also filed the written submissions, and in the submissions it was submitted as under:

""16. In this respect, the Appellant wish to submit as under.

16.1. At the outset and as already highlighted above, the Appellant wish to reiterate that the amounts received were on account of cost to cost reimbursement of expenses equivalent to the costs incurred by it in relation to personnel assigned to GMIL *(refer clause 4 of the MPA on page 85-86 ofpaper book read with letter dated March 31, 20161page 3-4 of Convenience Set).* In this respect, the Appellant had also prepared and filed Transfer Pricing report and Form 3CEB to indicate Arm Length Price (ALP) of the transactions undertaken under MPA.

16.2. Further, the Appellant would again like to bring attention on the fact that MPA was pre- approved by MO! and thus the Appellant could not have made payments in excess of what was provided in the terms approved by MOl.

16.3. However, in the Assessment Order the Ld. AO completely disregarded these contentions of the Appellant. It is further highlighted that the Ld. AO did not provide any opportunity in this respect to the Appellant. The Appellant came to know about such adjustment on receipt of assessment order. Further your Honour's would also appreciate that the Ld. AO did not refer the matter to TPO for computation of ALP in respect of transactions undertaken under the MPA but imputed a mark-up of 10% on reasonable basis (without giving any basis).

16.4. The Appellant would like to reiterate that no service per se were provided by GMOC under MPA except for the assignment of the personnel. In view of the same, the cost to cost reimbursements did not call for any mark-up in the instant case.

16.5. Moreover, as said above in para 11.2, the Ld. AO is bound to follow the principle of consistency while passing its order. In this context, the Appellant would again like to bring your Honour's attention on the fact that the Appellant has been filing its Rol in India since financial year 1995-96 on similar facts and such returns have been a subject matter of assessment by tax authorities and cost to cost nature of aforesaid receipts has been duly accepted all throughout *(refer page 61 to 72 of paper book wherein past assessment orders have been attached)* Basis the same, the order of Ld. AO seems to be erred in law.

16.6. Moreover, in future years similar transactions were referred by the tax officer to the file of TPO. In such years, after going through the submissions filed by the Appellant and examining the matter, the TPO had accepted the cost to cost nature of the transactions and agreed with the contention of the Appellant that no mark-up is required to be imputed in such cases.

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16.7. With respect to above, reference is again invited to order(s) passed by TPO in Appellant's own case for AY 2008-09 to AY 2010-11 (Reference is invited to pages 80 to 82 of paper book already filed). Relevant extract of TPO order for AY 2010-11 is also reproduced hereunder for ease of Your Honour's reference. *(Refer page 82 of paper book)*

"Considering the facts and circumstances of the case, the assessee's submission and documents furnished and the economic analysis carried out by this office, the value of international transactions with AE are not being disturbed "

16.8. Under similar circumstances, jurisdictional Mumbai ITAT in the case of Morgan Stanley Asia (Singapore) Pte Ltd. (1TA No. 8595/Mum/2010) has also held that cost to cost reimbursements of salary and other direct cost does not call for any mark-up.

XXI. It was thus submitted that these grounds are required to be allowed in favour of the assessee.

XXII. The Ld.AR for the assessee had submitted that the assessee is not pressing ground No. 9 and therefore the same may kindly be dismissed as not pressed.

XXIII. In respect of ground No. 10, it was submitted that the issue is covered in favour the assessee by virtue of the decision of the Jurisdictional High Court as well as of Delhi High Court . The assessee had also filed the written submissions in support of the ground 10 to the following effect:

18. With respect to aforesaid grounds it is submitted as under:

18.1. Provisions of section 234B of the Act are not applicable to the present case. The Ld. AO and/ or Hon'ble CIT(A) erred in not appreciating that no interest under Section 234B of the Act was payable by the Appellant as the entire income of the Appellant was subject to withholding tax.

18.2. Interest under section 234B of the Act is leviable for default in payment of advance tax. The relevant provision of section 234B of the Act as applicable for subject year(s) is reproduced herewith for your reference:

"234B. (1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or,where the advance tax paid by such assessee under the provisions of section 210 is less than ninety per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under

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subsection (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax".

18.3. As evident from above, the provisions of section 234B are attracted in the following two circumstances:

Where in any financial year, taxpayer who is liable to pay advance tax under section 208 has failed to pay such tax; and

- Where the advance tax paid by such taxpayer under the provisions of section 210 is less than 90 percent of the assessed tax.

- 18.4. The use of the words such taxpayer in the second limb above shows that the same also applies only to an assessee who is liable to pay advance tax under section 208. Therefore, the charge of interest under section 208, pre-supposes a liability to pay advance tax under section 208 of the Act.

18.5. As per section 208 of the Act, a taxpayer would be liable to pay advance tax only if the amount of advance tax payable by him under Chapter XVII of the Act exceeds Rs 5,000. The method of computation of advance tax under Chapter XVII is specified under section 209 of the Act [as applicable for subject year(s)] in the following manner:

- Under section 209(1)(a), taxpayer is required to first estimate his current income and calculate income-tax thereon at the rates in force in the financial year.

- Further, under section 209(1)(d), the income-tax as calculated above has to be reduced by the amount of **income-tax which would be deductible at source during the financial year under any provision of the Act**

18.6. Accordingly, a taxpayer would be liable to pay advance tax under section 208 only if the tax on the current income, as computed under section 209(1)(a), as reduced by the amount of income-tax which would be **deductible at source,** were to exceed Rs 5,000.

18.7. Without prejudice to the Appellant's contention that it is not liable to tax in India/ no income taxable in India, it is submitted that the Appellant being a non-resident entity in India, tax is deductible at source on any income taxable in India in accordance with the provisions of section 195 of the Act. In view of the above, it is submitted that the provisions of section 234B has no application to captioned matter(s).

18.8. Reliance in this respect is placed on following judgments:

- **DIT vs Ngc Networks Asia [2009]** 222 **CTR 85 (Born HC)] *(Refer** page 52 of Convenience Set)*

-8. We are in respectful agreement with the view taken In the case of CIT v. Sedco Forex International Drilling Co. Ltd. (supra), by the Uttaranchal High Court. We are clearly of the opinion that when a duty is cast on the payer to pay the tax at source, on failure, no interest can be imposed on the payee assessee."

- GE Packaged Power Inc [2015] 56 taxmann.com 190 (Delhi- HC)
- DIT(IT) v WNS Global Services (UK) Ltd [2013] 32 taxmann.com 54 (Born HC)
- DIT(JT) v Chiron Bearing Gmbh & Co. (UK) Ltd [2013] 29 taxmann.com 199 (Born HC)

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• Sedco Forex International Drilling [2004] 134 taxman 109 (Uttaranchal HC)

18.9. It is further submitted that Finance Act, 2012 has brought an amendment in section 209 of the Act by providing that the taxpayer would be liable for payment of advance tax in respect of the income which has been received without deduction of tax at source. **However, this amendment is prospective and is effective only from April 1, 2012.** Accordingly, the said amendment is also not applicable to the subject year(s).

SUBMISSIONS OF REVENUE

2. *Per contra,* the learned DR relied upon the order passed by the Assessing Officer and also the Tribunal and our attention was drawn to the Memorandum of Management Provision Agreement wherein the functions of the President, Managing Director, Vice President of Manufacturing Engineering, Vice President of Marketing, Vice President of Supplier Development and Material Management were given. For the sake of convenience, we are reproducing hereinbelow the functions of the above stated authorities at pages 84-85, which are to the following effect :-

i) President and Managing Director - will be the Chief Executive and Operating Officer of GMI and will be responsible for overall management and direction of GMI operations. The President and Managing Director will be formally appointed to such office by GMI and will discharge his or her powers and duties from that office.

ii) Vice President of Marketing - will be responsible for development and administration of GMI's dealer network, sales and marketing of GMI products, and services.

iii) Vice President of Finance - will be responsible for managing all the financial operations of GMI.

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iv) Vice President of Manufacturing Engineering - will be responsible for overall management of GMI facilities to manufacture and assemble products of GMI according to required standards and for production of such products according to those standards.

v) Vice President of Supplier Development and Materials Management - will be responsible for managing the purchasing and GMI materials, including development of local suppliers."

2.1 It was submitted that from a bare perusal of the functions performed by these authorities, it cannot be said that the employees were performing the managerial functions. For that purpose, the learned DR drew our attention to para 5 of the order of Assessing Officer, which was to the following effect :-

"5. A perusal of the copy of AAR's ruling filed by Deloitte Haskins & Sells CAs vide their letter dated 13.12.2005 is perused. In brief, it stated as under :

"Unfortunately, the applicant has not produced the service agreements of the deputationists with "XYZ" or "B" which may have given an indication of the nature of the services expected of them. We have only the terms of the management provision agreement to go by."

Further the Hon'ble AAR stated that –

"In the circumstances, the authority has no option but to conclude that the services of the nominees of "XYZ" as "managerial" and not "technical consultancy" services within the meaning of article 12. The authority, however, leaves it open to the concerned authorities, in appropriate proceedings, to examine the factual position and take appropriate action if they find that the factual situation is otherwise.

In the result, the Authority finds on the facts available to it, that the services of the five nominees of "XYZ" are not covered by the expression "included services" in article 12. The consideration received by "XYZ" for these services is, therefore,

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assessable not under article 12 but as business profits under article 7 read with article 5(2)(I) of the DTAA".

After that the Hon'ble AAR again states that "that the Authority would, however, like to reiterate that, in case the authorities find that, in fact, the five nominees of "XYZ", or any of them, are found, in appropriate proceedings, to be rendering "technical or consultancy" services, they will be at liberty to treat the case as one governed by article 12 and invoke the provisions of article 12(1) and (2) to charge them to income tax."

2.2 Further, the learned DR drew our attention to the order of CIT(A) wherein at para 6 to 8, the CIT(A) has dealt with the issue of characteristics of the services rendered by these employees. It was submitted that on appreciation of the documents and evidences available on record, the lower authorities had come to the conclusion that the services rendered by these persons were in the nature of technical services and, therefore, the lower authorities have rightly taxed them as 'FIS'. We are reproducing herein below para 6 to 9 of the order passed by the CIT(A), which is to the following effect :-

> *"6. During the appeal proceedings, appellant further submitted the designation & work profile of Mr. Aditya Vij (President and Managing Director) and Mr. Satyasree Veerapaneni (Vice President Manufacturing) as under.*
>
> > *"1. Mr. Aditya Vij*
> > *Qualification : Chartered Accountant and MBA*
> > *Designation : President and Managing Director*
> > *Work Profile : As per the MPA between GMIL & GMOC work profile of President & Managing Director is as under :*
> >
> > *"President and Managing Director – will be Chief Executive and Operating Officer of GMI and will be responsible for overall management and direction of GMI operations. The President and Managing Director will be formally appointed to such office by GMI and will discharge his or her powers and duties from that office.*

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2. Mr. Satya Veerapaneni
Qualification : B. Tech.
Designation : Vice President (Manufacturing)
Work Profile :
As per the MPA between GMIL & GMOC work profile of Vice President (Manufacturing) is as under :
"Vice President of manufacturing Engineering – will be responsible for overall management of GMI facilities to manufacture and assemble products of GMI according to required standards and for production of such products according to those standards."

7. It was submitted that the services rendered by above persons deputed to India are in the nature of managerial services and not in the nature of technical or consultancy services. It was further contended by appellant that as per article 12 of the India-US double tax avoidance agreement, the services provided by employees deputed to India are not in the nature of "fees for included services". From the definition of "fees for included services", it will be observed that fees for included services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

8. The appellant further contended that the services provided by Mr. Aditya Vij and Mr. Satya Veerapaneni can be considered as fees for included services only if they 'make available' technological knowledge, experience, skill, know-how or process, which enable the person obtaining the services to apply the same. But in the case of appellant company, no expertise or know-how has been 'made available' to the Indian company by reason of rendering the said services. In this connection the appellant relied on the following decisions :

1) Raymond Ltd. v. Deputy Commissioner of Income Tax (86-ITD-791)
2) Intertek Testing Services India Pvt. Ltd. (AAR 760 of 2007)
3) ISRO Satellite Centre [ISAC] (AAR 765 of 2007)
4) De Beers India Minerals Pvt. Ltd. (297 ITR 176)

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5) M/s. Cushman & Wakefield (S) Pte. Ltd. (218 CTR 238)

8.1 The appellant further submitted that GMIL has a separate "Technical Information & Assistance Agreement" with M/s. Adam Opel AG, a company incorporated in Germany. As per the said agreement, M/s. Adam Opel AG is to provide technology license and technical assistance, technical personnel and training to the employees of GMIL to produce vehicles at GMIL's production facilities in India and distribute those vehicles in the Territory, as per the engineering standards and designs established thereof by Adam Opel AG.

8.2 As per the aforesaid agreement, Adam Opel AG is to receive inter alia royalty and fees for services rendered from GMIL.

9. I have perused the fact of the case and also analysed para 2 and 4 of MPA. Further I have also analysed article 12 of the India-US treaty and various case laws submitted by appellant. Also, I have also gone through the Advance Ruling given in the case of the appellant wherein the services rendered by the expat at the post of Managing Director and Vice President (Manufacturing) was examined and after examining the said services, it was held that the services rendered by the expat is managerial services. In my view, the services rendered by the expat deputed by GMOC to India cannot be held as in the nature of fees for included services as per Article 12 of Indo-US DTAA since it does not make available any technological, experience, skill, know-how or process, which enable the person obtaining the services to apply the same. However, that payment has to be taxed under the head business income. Further, in the case of Vice President (Manufacturing), he is qualified, well experienced technical personnel. His services were made available to the Indian subsidiary. His technical experience was utilized by the Indian subsidiary in its day today production activities. Hence, the payment will come under the purview of fees for included services."

2.3 The Ld. DR had further drawn our attention to the Article 7(3) of the DTAA for the purposes of supporting the finding of the lower authorities. It was the contention the Ld.DR that the treaty provisions are plain and simple .It provided that in case the domestic laws provide for

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allowability of deduction , the same would be allowed to calculate the net profit and in the absence of the contrary provisions , no deduction would be allowed for calculating the net profits.

2.4. It was further submitted by the DR that the order of the AAR has not decided any issue rather the authority has left open the issue to be decided by the competent authority in appropriate proceedings. To buttress his argument, the DR drew our attention to paragraph 29 and 30 of the order of the AAR. It was further submitted that even otherwise the order passed by the authorities are not binding on the tribunal and this tribunal being the final fact-finding body is required to adjudicate the dispute raised before the tribunal. Further it was submitted that the judgement relied upon by the assessee are distinguishable on facts and law and are not applicable to the facts of the present case.

2.5. On other grounds the Ld DR relied upon the order passed by the lower authorities.

3. We have heard the rival contentions of the parties and perused the materials on record. The Ld.CIT(A) had granted the partial relief to the assessee as the Ld. CIT(A) after examining the facts and circumstances of the case had came to the conclusion that the President and Managing director of the assessee was only rendering the managerial services, hence was not liable to be taxed under the provisions of DTAA of Indo US treaty, as the services rendered by said managing director were in the nature of managerial and not technical or consultancy services. Infact there is no provision for charging the assessee on account of

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rendering the managerial services as it did not figure in the Indo-US DTAA under Article 12. The revenue is not in appeal against the above finding of fact .

4. The assessee is in appeal in respect of the finding recorded by CIT(A) in respect to VP (Manufacturing) holding that the VP (manufacturing) was rendering the services which were in the nature of technical or consultancy services within the meaning of Article 12 of Indo-Us treaty.

5. The first argument raised by the Ld.AR was that the finding recorded by the AAR was binding in nature. We had already reproduced the submissions of the Ld.AR and Ld.DR in this regard. Our attention was drawn to section 245 S of the Act for this purposes. A bare perusal of section 245S clearly shows that if ruling is given by the AAR, the same shall be binding, in respect of the transaction to the Commissioner and the income tax authorities subordinate to him. Further it is also provided in the provision that the ruling shall not be binding in case there is change in law or facts on the basis of which the finding was given by AAR.

6. We are of the opinion that the ruling given by the AAR though is binding on the Commissioner and income tax authorities subordinate to the Commissioner, however, the ruling given by the AAR is not binding on the Tribunal and is only having a persuasive value for the reason that Income Tax Appellate Tribunal is not an authority coming under the Commissioner . However the dispute would reach to the tribunal, only when the authorities bound by the ruling do not follow the ruling for the valid reasons/ invalid reasons. Hence Tribunal is required to examine the reasons given by the authorities for not following the AAR ruling .

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7. The AAR had mentioned in paragraph 29 and 30 the caveat to the ruling in the following manner:

"29 ..... It is true that four out of five of the deputationists are engineers. But these are days in which even engineers have to qualify in management skills. The authority has no information or material on record to indicate that the employees were rendering services of a nature falling beyond the terms of the agreement. In the circumstances, the authority has no option but to conclude that the services of the nominees of "XYZ" are "managerial" and not "technical or consultancy" services within the meaning of Article 12. **The authority, however, leaves it open to the concerned authorities, in appropriate proceedings, to examine the factual position and take appropriate action if they find that the factual situation is otherwise.**

(emphasis supplied by us by underlining)

30.In the result, the Authority finds, on the facts available to it, that the ***services of the five nominees of `XYZ' are not covered by the expression 'included services' in art. 12. The consideration received by `XYZ' for these services is therefore, assessable not under art. 12 but as business profits under art.*** *7* ***r/w 5(2)(1)*** *of* ***the DTAA. There was some discussion before the authority as to the manner in which the business profits attributable to the PE(i.e the services) should be computed and whether in computing such profit and deduction of expenses incurred to earn them is permissible or not. The Ld. counsel stated that he was not praying for a ruling on that aspect and that he would be satisfied with a ruling on the first question set out in the application . The authority therefore refrain from going into the question of expressing any view thereon."***

(emphasis supplied by us by underlining)

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8. From the perusal of the above said paragraphs, it is abundantly clear that the ruling of AAR was not an absolute and unqualified ruling. The ruling clearly gave the mandate to the authorities to examine the factual situation in appropriate proceedings ,as AAR clearly mentioned in the order that it did not have information or material to show/ examine what services were actually rendered by the employees. The AAR ruling on the services rendered by the VP (manufacturing) , in our understanding , was general non-conclusive finding, rather the power was given to authorities to examine the transaction/ actual conduct of parties .

9. As mentioned hereinabove, the lower authorities have given the show cause notice to the assessee to provide the service agreement and other document to show what actual services were rendered by the VP manufacturing, however the assessee had neither provided the same nor any other evidence explaining scope and ambit of the services rendered by the VP manufacturing. In the absence of any co-operation and supply of the document by the Assessee to AO, Assessing officer was left with no other option but to examine the Management Provision Agreement and also to draw adverse inference against the assessee about the services provided by the VP manufacturing.

10. AO and CIT(A) had examined the MPA , wherein, it was the responsibility of the assessee, as per Covenants in MPA at page 2, to **Make Available** the executive personnel for marketing and assembly /manufacturing activities .Further VP(manufacturing) was responsible for overall management of GMI facilities to manufacture and assemble products of GMI according to required standards and for production of such products according to those standards.

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11. Admittedly the vice president manufacturing was working with the assessee before being sent as expatiate employee in India . It is difficult to comprehend that a person would be given the responsibility of overall management of manufacturing assembly of the products of General Motors without there being any exposure and expertise on the subject. It was obvious that vice president manufacturing was having sufficient knowledge and experience of the technology and its standards used by the assessee in US. The Vice President was not an ordinary engineer but was having sufficient experience, exposure and knowledge about the technology of the assessee and was also having expertise to ensure the implementation of the standards of the assessee in India. In auto mobile industry, assembly of product and standards of company are patented/ protected technology and owner of the standards, charges Royalty for sharing the standards and assembling of products. But in the present case, no Royalty had been charged by the assessee from Indian counterpart, as the assessee had sent its employee under the agreement to India, in whom the technology/ experience for the assembly of product and knowing the standards of company , for setting the bench mark and implementing the standards of assessee in India.

12. The experience of an expert lies in the mind of an expert and if an expert having knowledge and expertise is transferred from one tax jurisdiction to the another tax jurisdiction, then it cannot be said that only the employees were per se transferred and not the technology . In our understanding, the technology /expertise lies in the technical mind of an employee/s not in the company and if key employee/s having the

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requisite knowledge, experience and expertise of technology are transferred from one tax jurisdiction to the another tax jurisdiction, then it is transfer of technology and not transfer of employees. In other words, technology is made available by one entity situated in one tax jurisdiction to another entity situated in another tax Jurisdiction, through the transfer on deputation of its experienced/ expert technical employees. This can also be understood by example , if a pharmaceutical company XYZ which is into manufacturing of drugs and is having scientist AA who had experience to manufacture and develop the medicine BB . Later on AA is shifted to another jurisdiction AAH for developing /manufacturing the medicine BB in accordance with the standards of XYZ company, then it cannot be said that it was merely transfer of BB employees of XYZ rather it would be transfer of technology of XYZ to AAH by transferring the employees.

13. The reliance of on the decision of the Hon'ble Supreme Court in the matter of **Columbia sportswear company(supra)** by the assessee is not correct as it is nobody's case that the AAR ruling is not binding on the Commissioner. Rather the case of the revenue before us was that the AAR had not given any finding on the nature of the services rendered by the vice president manufacturing rather it was left open to the authorities to examine the services rendered by said vice president and decide whether it was FIS or not. Similarly the decision of the Hon'ble Jurisdictional High Court in the matter of Prudential Assurance Co Ltd (supra) relied upon by the assessee is not applicable to the facts before us as the Hon'ble High Court in paragraph 8 had recorded that the ruling pronounced by the authority is binding. However it can be replaced in accordance with the procedure stipulated in law. As

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concluded hereinabove, no conclusion was drawn with respect to the services rendered by the vice president and therefore the finding recorded by the AAR cannot be said to be a finding in the eyes of law as there was no categorical decision by the authorities. On the contrary, the authority has left it open to the wisdom of the other authorities to examine the facts and decide whether the services rendered by the vice president were in the nature of technical consultancy services or not. In the light of the above, we are of the opinion that though the ruling given by the AAR is binding, however, once the AAR has not given any categorical finding or conclusion, then the same cannot be said to be a finding which has a binding effect on the revenue or on the tribunal. We had already made it clear that the assessee was called upon by the lower authorities to produce the evidence by way of service agreement with the vice president but for the reason best known to the assessee, the same had not been produced. In view of the above, we are of the considered opinion, that the ruling given by the AAR in the present case is not binding either on the revenue or on the tribunal.

14. Ld.AR for the assessee had further made the submission that there was no make available of the technology in India by the assessee and therefore the amount remitted by the assessee towards the salary/ reimbursement is not required to be treated under FIS. The Ld.AR had also drawn our attention to memorandum of understanding concerning the fees for included services dated May 15, 1989 and submitted as per paragraph 4 b, the services rendered by the vice president manufacturing should not be considered as fees for included services/ fees for technical services. Our attention was drawn to the decision of

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Delhi tribunal , in the matter of Rolls Royce , 42 SOT 264 (supra) paragraph 44-45 to the following effect:

"40. When we look at Article 7.1, then it is manifest that as the assessee carries on business in India through a permanent establishment situated in India, the "profits" of the assessee may be taxed in India "but only so much of them as is directly or indirectly attributable to that permanent establishment." There is no dispute to the legal proposition that Article 7 speaks of profits and not gross receipts. The Revenue cannot misinterpret Article 7 to substitute the word "receipts" for the words "profits". Profit would always be net of all legitimate expenditure incurred by an enterprise. The Revenue has invoked Article 7.5 for disallowing the entire expenditure. This again, is not justified as even according to Article 7.5, the deduction of expenses of the permanent establishment should be allowed, which are incurred for purposes of business of the permanent establishment including its executive and general administrative expenses so incurred. Now the difference arises in the last three lines of this Article 7.5 which states "which are allowed under the provisions of and subject to the limitations of the domestic law of the other State in which the permanent establishment is situated." Thus where one want to restrict the expenditure, restriction cannot mean converting profits into gross receipts and disallowing the entire expenditure. Therefore, according to his interpretation, Article 7.5 could never envisage a situation where the entire expenditure is disallowed thereby converting the profits into gross receipts. Furthermore as per Section 44D(b) of the Income Tax Act which speaks no deduction in respect of any expenditure or allowance shall be allowed under any of the sub-sections in computing the income by way of royalty or fees for technical services. Now the provisions contained in Section 44D(b) being invoked by the Revenue speaks of no deduction whereas Article 7.5 speaks of allowing of deduction subject to limitation of domestic law. The limitation cannot be read to being no deduction. Therefore, a correct and harmonious interpretation of Article 7.5 with Section 44D(b) would be that this disallowance u/s 44D(b) would not apply wherever Article 7 of the Treaty is being applied. As per Section 90(2) of the Income Tax Act, the provisions of DTAA are to be read over-riding the provisions of Income Tax Act and this issue is not open for debate as the Apex Court has decided this in the case of Union of India v. Azadi Bachao Andolan 263 ITR 706 (SC). The CIT DR in response to this proposition of the

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assessee submitted that this restriction contained in Section 44D(b) is valid as in a normal net profit case the tax rate is higher whereas where Section 44D(b) is applied, then the gross receipt is taxed at 30% as against perhaps 40% rate on net profit. Therefore, there is no prejudice being caused to the assessee by following the restriction contained in 44D(b) in the interpretation of Article 7.5.

41. Applicability of tax on gross receipt versus net profit basis is on the proposition that Article 13.4(c) of the DTAA would prevail over the definition u/s 9(1)(vii) Explanation 2 and as the income of the assessee is not fees for technical services, then in that case the limitation contained in Article 7.5 will not in any case apply as 44D(b) only applies to FTS. In the course of hearing before us, the learned CIT-DR has disagreed with learned AR insofar as Article 13(4)(c) would be applicable to the facts of the case and that even under the DTAA the receipts would not be FTS. Article 13.4(c) reads as under:-

"ARTICLE 13 – Royalties and Fees for Technical Services.

4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5 of this Article, the term "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which:

(a)are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this Article is received; or
(b)are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or
(c)make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design."

46. Now we deal with the judgments cited by CIT-DR Shri Ashwani Kumar in support of his case that the monies received by the assessee are FTS and should be taxed under 44D on gross basis as per rates given u/s 115A of the Income Tax Act. First case cited by him is CBDT v. Oberoi

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Hotels 231 ITR 148 (SC). He submitted that in this case the Oberoi Hotels was not only maintaining but also operating a hotel. Technical expertise was required for the same and the Hotel claimed deduction u/s 80-O of the Income Tax Act. The second case cited by CIT DR is of the Supreme Court in Continental Construction Ltd. 195 ITR 81. Therein again it was held by Supreme Court that the professional services were technical services in nature and the assessee was entitled to deduction under Chapter VIA of the Income Tax Act. The CIT-DR relied upon judgement of the Income Tax Appellate Tribunal in Tri-star Consultants 272 ITR [AT] 88 and stated that professional services were covered within the meaning of fees for technical services and therefore professional services were part of technical services. On Article 13.4(c) of the DTAA the CIT DR submitted that once this agreement of operation and maintenance was terminated, the assessee was obliged to train the personnel of Spectrum which the assessee has run and operated. The CIT DR submitted that the main control over the project was that of the owners and the assessee was only conducting routine operation and maintenance services.

For everything the operator required approval of the owner even though the assessee was treated as independent contractor. He further stated that just because the contract was to run for ten years, it did not mean that it was business income and not FTS. According to him as per clause 8.3(iii) of the contract, the requirement of Article 13.4(c) gets completed once the assessee makes available the technology to the owner at the end of the contract. According to the CIT DR, the AO and CIT(A) were correct in taxing FTS under 44D read with 115A of the Income Tax Act.

48. Since we found that the assessee is liable to tax on net basis, under Art. 26 of the Indo-UK Treaty, the assessee which is a non-resident company and is undertaking the Works Contract is being discriminated against and subjected to tax on gross basis @ 30% by artificially invoking section 44D read with section 115A of the Income Tax Act, whereas a domestic company doing exactly the same works contract would be taxed @ 2% under section 194C of the Act and also would be subject to tax on its net profits without the application of section 44D.

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15. It was submitted that there was no make available of the technology to the Indian counterpart, therefore the assessee is not liable for taxation on fees for included services. If we look into the paragraph 4(b) of the Explanation of Memorandum of Understanding, then it is abundantly clear that the technology will be considered as made available when the person acquiring the service is enable to apply the technology. As stated above, the vice president manufacturing was knowing the technology and was having the experience to implement the standards of the assessee in India and by sending the said vice president in India , in fact the technology was made available in India by the assessee. The execution and implementation of technology in India can be possible even if the person knowing the technology are transferred in India or there is a technological transfer agreement for which the royalties are paid by the Indian counterpart to the assessee. In the garb of sending the technical experts in India, it cannot be permitted to say by the assessee that they were merely employees and the cost is reimbursed by the Indian counterpart to the assessee for the services rendered by such employee. In fact as noted herein above, the technology was transferred through the expert experienced technocrat by the assessee to Indian counterpart and therefore, in our view, the lower authorities were right in arriving at the conclusion that the assessee was liable for fees for included services. The facts of the Rolls-Royce (supra) are clearly distinguishable and not applicable to the present case. It may be useful to mention here that in paragraph 17 of the said decision, the tribunal has mentioned the facts of the said case. In the said case, the assessee has rendered the technical services to Spectrum Power generation Ltd under the operation and maintenance agreement

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entered into 14 March 1995 and under erection, testing and commissioning agreement entered into on 12.12.1994. Further the treaty between the assessee in that case was India - UK treaty.

In our view there was no transfer of technology by sending the expert technical employees of the assessee to in India, as in the present case, rather there was an agreement for erection of power generation plant in India. But in the present case, the employees who are having the technical expertise are not only managing but also ensuring due adherence to the standards of the assessee, by continuously monitoring and mentoring the production. Hence the decision of Rolls Royce is factually distinguishable. Same is the case with regard to other decisions cited by the AR.

16. The third argument raised in support of the first ground by the assessee was the argument of consistency. We have examined the order passed by the assessing officer for the earlier years and we do not find even a whisper or examination of the fact by the assessing officer were done and conclusion was drawn that the services rendered by the vice president manufacturing was in the nature of managerial service. There was complete silence on this issue by the assessing officer and in our view , there is no purpose of perpetuating the illegality/irregularity either by the assessing officer or by the tribunal. There cannot be consistency of decisions but when there is no decision by the revenue for the earlier years, then there cannot be consistency for no-decisions. In view thereof, we don't find any reason to grant the benefit of consistency to the assessee. Accordingly argument of the assessee to

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give the benefit of consistency is devoid of merit and is accordingly dismissed.

17. During the course of argument the assessee has not raised any argument in support of ground No. 2, therefore the same is required to be dismissed .

18. In the result the **Ground 1 and 2** raised by the assessee are dismissed.

Ground No.3 and 4

19. With respect to ground No. 3 and 4, we may at the outset point out that the AAR has not given any finding on this issue as is clear from paragraph 30 reproduced hereinabove with emphasis supplied by us through underlining. The authorised representative appearing before the AAR, had submitted that the assessee does not want any ruling on this issue.

20. The learned AR drew our attention to para 3 of Article 7 of the Indo-US DTAA and submitted that the net profit is required to be taxed instead of the gross profit as was wrongly done by the Assessing Officer and confirmed by the CIT(A). It was submitted that the assessee has only received cost of expatriate employees on reimbursement and there is no profit element. It was submitted that the provisions of Article 7(3) of the DTAA are required to be applied. Further, the learned AR relied upon the decision of our coordinate bench in the matter of *Rolls Royce Indl Power (I) Ltd. (supra)* and Wockhardt Ltd. vs ACIT, [2011] 10 taxmann.com 208 (Mumbai) and our attention was drawn to para 53, 54 and 56 of the order in *Rolls Royce Indl Power (I) Ltd. (supra),* which is the following effect :-

> *"53. In addition to our holding that the assessee is liable to tax on net basis, under Art. 26 of the Indo-UK Treaty, the assessee which is a non-resident company and is undertaking the Works Contract is*

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being discriminated against and subjected to tax on gross basis @ 30% by artificially invoking section 44D read with section 115A of the Income Tax Act, whereas a domestic company doing exactly the same works contract would be taxed @ 2% under section 194C of the Act and also would be subject to tax on its net profits without the application of section 44D. If the case of the assessee is carefully seen, then the tax that has been levied by the AO by mis-interpreting Art. 7.5 of the Treaty and applying section 44D, without allowing the expenditure allowable under sections 29-44 of IT Act, would amount to more than 100% of its revenue. If we see assessment year 2000-01 at page 308, the total cost is 81% of the revenue and the assessee is left with 19% of the revenue to incur indirect cost etc., whereas by invoking section 44D, the Revenue has taxed 30% of gross receipts. So, in effect at least 11% in excess of gross receipts has to be paid by the assessee which is a non-resident company, and which is not the case with a domestic company similarly or identically placed. A domestic company, even if it makes a profit of 19% in the example given above, it will be subjected to 35% tax which will be 6.65% of its revenue as against 30% in the assessee's case. Thus the assessee had been discriminated against and the protection under Art. 26 of the DTAA be provided to the assessee. We have also considered the other aspects of the case that the agreement did not envisage any training of personnel or making available any skill, know-how, development and transfer of any design etc. as envisaged u/s 9(1)(vii) Explanation 2 or Article 13.4(c) of the DTAA between India and UK by the assessee to Spectrum. The training in the pre-operational stage was of the assessee own work force. That was done prior to February 1997 which does not fall within this period. The training as cited by the CIT DR on plant of Spectrum personnel at the second stage was only at the time the contract was go come to an end after 10 years, i.e. February 2007. We do not know whether any such training was actually conducted by the assessee for Spectrum. For the years under our review, i.e. assessment years 1998-99 to 2004-05, there is no provision and the CIT DR has not been able to point out any provision in the contract wherein the assessee was to train Spectrum personnel. In the absence of any such training to be provided, it cannot be said that anything was made available by the assessee to Spectrum. What to talk of training, we have also seen from the contract that there was no personnel envisaged to be present in the facility during its operation by the assessee. There was no close coordination of the personnel of the assessee and Spectrum as was the case before the

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Supreme Court in Continental Construction and Oberoi Hotels. The basic element of passing of technical knowledge, skill to the client is wholly absent in this case. The Ericsson's case proceeded on completely different line wherein in that case 214 ITR page 211 para 2, the case proceeded on the basis that Ericsson was rendering consultancy and technical services to Indian companies in the field of its specialty and receiving remuneration therefor. There was no dispute in that case before AAR that it was fees for technical *services. The dispute was as it was fees for technical services, would it under the Swedish Treaty be taxed on gross basis or net basis. The Swedish Treaty did not contain any provision available for FTS of making available the technical skills to the client. We, therefore, do not see Ericsson's case to have any bearing on the case at hand. Similarly, in the Tri-star's case, the question was completely different where technical services were being rendered and made available to the client and as rightly pointed by Shri Dinodia the question in all the three judgements of Continental Construction, Oberoi Hotels and Tri-star was deduction under Chapter VIA and not interpretation of a deeming fiction envisaged by Section 9(1)(vii) and the interpretation of over-riding provisions under the Double Tax Avoidance Agreement between India and UK. The numerous judgements cited by the assessee clearly point out to the fact that making available technical knowledge, experience, skill, know-how, a process or development and transfer of technical plant of a technical design is essential to fall within the definition of fees for technical services under the Indo-UK Treaty. Respectfully following these decisions, we hold that in any case as per Article 13.4(c) of the Indo-UK Treaty, the assessee has not made available any technical knowledge, experience, skill, know-how, or process or development and transfer of any technical plan, a technical design to Spectrum. We have also carefully considered the matter. Art.26 of the DTAA, sub-clauses (1) and (2) of the same read as under:-*

"Art. 26 – Non discrimination:

1.The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.

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2. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on the enterprises of that other State on the same activities in the same circumstances or under the same conditions. This provision shall not be construed as preventing a Contracting State from charging the profits of a permanent establishment which an enterprise of the other Contracting State has in the first mentioned State at a rate of tax which is higher than that imposed on the profits of a similar enterprise of the first mentioned Contracting State, nor as being in conflict with the provisions of paragraph 4 of Article 7 of the Convention."

54. In view of the above provision taxing of a non-resident U.K. company in a manner which is more burdensome vis-à-vis an Indian company would lead to discrimination. This would also amount to unfavourable treatment being meted out to a U.K. company vis-à-vis the Indian company doing identical business in India. Accordingly the assessee is entitled to protection of Art. 26 of the Indo-UK Treaty and should not have been subjected to tax on gross basis, but on net basis. The net profit was to be determined in accordance with the Indian Income Tax Act provisions for determining profits and gains of business from sections 28 to 43 –B of the Income Tax Act i.e. limits laid down in the domestic law of allowance of expenditure u/s. 30,31,32,36,37,40,43B etc would have to be taken in to account. In our view this is the purport of Article 7.5 read with Article 26 of the DTAA between India and UK.

……

56. In the instant case, the assessee has undertaken a work contract for operation and maintenance of power plant for its owner M/s Spectrum vide contract dated 14.3.1995. For undertaking the work contract, the assessee got a price for producing power by operating and maintaining the power plant. It has not rendered any technical services to M/s Spectrum so as to come within the meaning of FTS. The income so received for executing the work contract did not fall within the definition of FTS u/s 9(1)(vii) Explanation 2 of the IT Act nor as defined in Article 13(4) of DTAA between India and UK. The assessee had also not "make available" any knowledge, skill etc. to M/s Spectrum within the meaning assigned to it under Article 13(4)(c) of the DTAA to FTS under the

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treaty. Accordingly, assessee cannot be taxed on gross basis and Section 44AD has no application to the facts of the instant case. Furthermore, Article 13(4)(c) read with Article 26 of DTAA does not permit the revenue authorities to discriminate against the assessee, a UK registered company and accord it less favourable treatment than a domestic company and therefore, section 44AD cannot be invoked in assessee's case. Thus, looking from any angle, the income received by the assessee from M/s Spectrum was not a fee for technical services, we therefore direct the AO to compute assessee's income and profit and gains of business from operation and maintenance of power plant of net profit and loss basis. We direct accordingly."

21. On the other hand, the learned DR relied upon the provisions of the DTAA and has submitted that the assessee is not entitled to any deduction.

22. We have heard the rival contentions and perused the material available on record. Article 7(3) of the DTAA provides as under :-

3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment, including a reasonable allocation of executive and general administrative expenses, research and development expenses, interest, and other expenses incurred for the purposes of the enterprise as a whole (or the part thereof which includes the permanent establishment), whether incurred in the State in which the permanent establishment is situated or elsewhere, ***in accordance with the provisions of and subject to the limitations of the taxation laws of that State.*** *However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents, know-how or other rights, or by way of commission or other charges for specific services performed or for management, or, except in the case of a banking enterprises, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than toward reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the*

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use of patents, know-how or other rights, or by way of commission or other charges for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices.

Section 44D of the Act provides as under :-

"44D. Notwithstanding anything to the contrary contained in sections 28 to 44C, in the case of an assessee, being a foreign company,—

(a) the deductions admissible under the said sections in computing the income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or with the Indian concern before the 1st day of April, 1976, shall not exceed in the aggregate twenty per cent of the gross amount of such royalty or fees as reduced by so much of the gross amount of such royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property;

(b) no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or with the Indian concern after the 31st day of March, 1976 but before the 1st day of April, 2003;

Explanation.—For the purposes of this section,—

(a) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(b) "foreign company" shall have the same meaning as in section 80B;

(c) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(d) royalty received from Government or an Indian concern in pursuance of an agreement made by a foreign company with Government or

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with the Indian concern after the 31st day of March, 1976, shall be deemed to have been received in pursuance of an agreement made before the 1st day of April, 1976, if such agreement is deemed, for the purposes of the proviso to clause (vi) of sub-section (1) of section 9, to have been made before the 1st day of April, 1976."

From a conjoint reading of the above two provisions, it is abundantly clear that the benefit of Article 7(3) is subject to the limitation provided under the domestic law (44D of the Act). Section 44D of the Act clearly provides that for the purpose of computation of income by way of Royalty, FIS, etc., assessee is not entitled to any deduction. Once the domestic law prohibits allowing any deduction for the purpose of calculating 'fees for technical services/fees for included services', then, the same is not an allowable deduction and, therefore, the Assessing Officer and the CIT(A) were right in holding that the assessee was liable to be taxed on gross basis rather than on net basis. The argument that the provision which is beneficial to the assessee should be applied, i.e. treaty provision rather than the domestic law, is in accordance with Section 90 of the Act. We are afraid that this argument is to be noted but is summarily required to be rejected for the reason that if the domestic law prohibits grant of any deduction, the same cannot be granted. There is no contradiction in the treaty provision or domestic law, rather the treaty provisions provide by incorporation the applicability of domestic laws for computing the profit of the assessee. In view of the above, we do not find any merit in the contention of the assessee. With respect to the applicability of the judgment referred in the case of *Rolls Royce Indl Power (I) Ltd. (supra)*, we are of the opinion that the above said provision of law and the contradictions had not been brought to the notice of the coordinate bench and in this context the

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coordinate bench has passed the order. In our understanding, there is no ambiguity either in the treaty provisions or in the domestic law or in Section 90 of the Act. A plain and simple interpretation is required to be given which commands us to give the deduction to the assessee for the purpose of computing the profit if such deduction is permissible under the domestic law. Since no deduction is permissible under the domestic law, therefore, the assessee is not entitled to any deduction. In the result, ground nos. 3 and 4 raised by the assessee are dismissed.

23. Ground nos. 5 to 8 - In this regard, the learned AR drew our attention to the order passed by the TPO for the subsequent years wherein the TPO has not computed the profit by marking-up 10% on the amount received by the assessee. Further, the analysis of the TPO was not premised on the applicability or otherwise of the method provided under the rules framed under Chapter X of the Act. The authorities below have not benchmarked the transactions on the basis of any comparable instances or otherwise. This dispute is now well settled that the benchmarking of transactions need to be done by using any of the prescribed methods in Rule 10B of the Rules, which in the instant case was admittedly not done by the lower authorities. We are of the opinion that the arguments raised by the assessee in support of ground nos. 5 to 8 are in accordance with the law and we have no hesitation to allow the same. Accordingly, ground nos. 5 to 8 raised by the assessee are allowed. For the above said purpose, we may also rely upon the decision of the TPO for the assessment year 2010-11 which is mentioned at pages 80 to 82 of the order.

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24. Ground no. 10 raised by the assessee pertains to applicability of Section 234B of the Act. In this regard, the Hon'ble Bombay High Court in the matter of *DIT(IT) vs Ngc Network Asia LLC, [2009] 222 CTR 85 (Bombay)* has already decided the issue in favour of the assessee. Therefore, respectfully following the decision of the Hon'ble Jurisdictional High Court in the case of *Ngc Network Asia LLC (supra)* and the decision of Hon'ble Delhi High Court in the case of *GE Packaged Power Inc reported in 56 taxmann.com 190 (Del)* , we allow the ground raised by the assessee. For the purpose of completeness, we are reproducing hereinbelow para 23 of the decision of GE Packaged Power Inc supra, which is to the following effect :-

> *23. For the above reasons, this Court finds that no interest is leviable on the respondent assessees under Section 234B, even though they filed returns declaring NIL income at the stage of reassessment. The payers were obliged to determine whether the assessees were liable to tax under Section 195(1), and to what extent, by taking recourse to the mechanism provided in Section 195(2) of the Act. The failure of the payers to do so does not leave the Revenue without remedy; the payer may be regarded an assessee-in-default under Section 201, and the consequences delineated in that provision will visit the payer. The appeal of the Revenue is accordingly dismissed without any order as to costs.*

25. In the result, the appeal of the assessee is partly allowed.

26. The facts of all the subsequent assessment years are similar to that of assessment year 2004-05 and, therefore, following our decision in the

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case of assessee for assessment year 2004-05, we partly allow the appeals of assessee for assessment years 2008-09, 2009-10 and 2010-11.

27. In the result, all the appeals of the assessee are partly allowed.

Order pronounced in the open court on 6th March, 2020.

Sd/-	Sd/-
(M. BALAGANESH)	(LALIET KUMAR)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Date : 6th March, 2020

Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "I" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai