IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 1881/DEL/2017 (A.Y. 2013-14)
(THROUGH VIDEO CONFERENCING)

Sumitomo Corporation G-195, Sarita Vihar New Delhi AABCS6011P **(APPELLANT)**	Vs	DCIT (International Taxation) Circle-3(1)(2) New Delhi **(RESPONDENT)**

Appellant by	**Sh. C. S. Aggarwal, Sr. Adv., Sh. Ravi Pratap Mall, Adv**
Respondent by	**Sh. Satpal Gulati, CIT DR**

Date of Hearing	**21.04.2021**
Date of Pronouncement	**09.06.2021**

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 31/1/2017 passed by DCIT, Circle (1)(2), International Taxation, New Delhi u/s 143(3) read with Section 144C (13) of the Income Tax, 1961 for Assessment Year 2013-14.

2. The grounds of appeal are as under:-

Based on the facts and circumstances of the case, the Appellant respectfully submits:

1. That the learned Assessing Officer (Id AO) has erred both on facts and in law, in computing the total income of the Appellant company at Rs.

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73,14,22,028/-, against an aggregate total income declared by assessee amounting to Rs. 69,26,60,776/-. The addition made of Rs. 3,81,61,252/- is highly misconceived and the Hon'ble Dispute Resolution Panel (Ld DRP) has also erred in not directing the said sum to be excluded.

2. That the Ld AO/DRP has failed to appreciate that, the Appellant is a tax resident of Japan and is required to be assessed in accordance with the provisions of Double Tax Avoidance Agreement between India and Japan and the Appellant, since had no Permanent Establishment (PE) in India for supply made to Maruti Suzuki India Limited (MSIL) no income could be held to be taxable in India.

2.1 That the Ld AO/DRP has erred in making addition of Rs. 2,36,88,712/- in respect of an amount stated to be an income attributable for supplies made by Appellant to MSIL (i.e. the estimated and assumed sum) from Japan. The learned AO, has erred in not appreciating that such income, as has been held to be attributable on the supplies made, since was not attributable to its permanent establishment has been misconceived and the addition so made be thus held as untenable which addition deserves to be deleted.

2.2 That the Ld AO/DRP has erred in holding that the alleged profit of supplies of equipment by the Appellant to MSIL are taxable in India despite the fact that title of equipment had passed in Japan and supplies had also been made in Japan and not in India and thus, no income had accrued to the Appellant in India.

2.3 That the Ld AO/DRP has erred in holding, that the Appellant has a PE in India under Article 5 of the Double Taxation Avoidance Agreement between India and Japan ('DTAA' or 'treaty') and such PE was involved in port clearance, local transportation, commissioning and testing of equipment in India. The aforesaid findings are based on no material whatsoever.

2.4 That the Ld AO/DRP has erred in holding, without any basis, that the negotiation and signing of the contract took place in India and thus PE was established without considering the fact that even the contracts were signed outside India and no negotiation took place in India in respect of such offshore supply.

2.5 That the Ld AO/DRP has erred on facts in holding and that to

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without any basis, that the Appellant has entered into integrated contract for supply of equipment and commissioning, and PE was established to undertake the contractual obligation. In-fact the appellant did not carry out any such activity in India in respect of such offshore supplies. Thus, the allegation of the Ld AO/DRP is totally baseless.

2.6 Without prejudice to above, the Ld AO/DRP has erred in attributing 35% of the alleged profit in respect of offshore supplies to the alleged PE of the Appellant in India without seeing actual facts of the appellant, such a conclusion is arbitrary and is untenable.

2.7 That the Ld. AO/DRP has failed to appreciate that the appellant has been contending since AY 1998-99 that no income from offshore supply accrues to it in India in view of section 5 and as such there was absolutely no justification to make any attribution out of its global profit and that too 35% of its global profit overlooking geographical location and other attending facts.

2.8 Without prejudice to above that offshore supply is not taxable in India, the authorities below have erred in not allowing set-off of the brought forward business losses of Rs. 2,36,88,712 against income from supply of equipment to MSIL and further carrying forward the balance business loss Rs. 1,85,52,164.

2.8.1 That the Ld. AO has further erred in not recording any finding and not allowing the setoff of claim of business losses and thus, there was no justification not to have set off business loss and to have further carried forward balance amount Rs. 1,85,52,164.

3. That the Ld. AO/DRP has grossly erred in adopting the amount of capital gain accrued to the appellant at Rs. 7,31,67,675 as against declared capital gain of Rs. 90,93,355 as declared in return of income, thus, enhancing the income by Rs. 6,40,74,320.

3.1 That the Ld. AO though computed the capital gain of Rs. 7,31,67,675 has erred in adopting the said sum at Rs. 1,50,72,540 which was really the tax calculated on such income.

3.2 That the Ld. AO/DRP erred in computing capital gain on sale of equity shares of Indian company, SML Isuzu Ltd by considering fair market value of shares as Rs. 393 per share as per rule 11 UA (1) (c) (ii) instead of Rs.

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383.43 per share being the agreed sale price as per the share purchase agreement entered between the appellant and Isuzu Motors Ltd, Japan without any basis or any provision under the Act thus, enhancing the sales consideration at Rs. 62,56,09,233 instead of Rs. 61,03,74,932.

3.3 That the Ld AO/DRP erred in computing capital gain by considering total sales consideration at JPY 1,01,34,40,086 instead of JPY 90,94,58,648 being the sale consideration already agreed vide the sale purchase agreement entered between the assessee and Isuzu Motors Ltd, Japan thus, enhancing the sales consideration by JPY 10,39,81,438.

3.4 Without prejudice above, the Ld. AO/DRP has erred in adopting incorrect the conversion rate (from INR to JPY) for sales consideration resulted into higher addition in capital gain.

3.5 Without prejudice above, the Ld. AO/DRP as provided under statute was required to adopt Telegraphic Transfer Buying Rate to convert the capital gain (from JPY to INR) whereas he has adopted incorrect rate as per rule 115A.

3.6 Without prejudice to above, the Ld. AO/DRP erred in not allowing the set off of the brought forward long term capital losses of Rs. 7,31,67,675 to the appellant against the capital gain so computed and further carrying forward the balance capital loss.

4. That the DRP has erred in passing a non-speaking order while dismissing the grounds relating to capital gain referred in para 3.2 to 3.5.

5. That the learned AO has erroneously stated that the reasons mentioned in the order may be treated as satisfactory for initiating penalty proceedings under section 271 (1)(c) of the Act for furnishing inaccurate particulars of income and concealment of particular of income with respect to the additions made.

6. That the Ld. AO has erred in not allowing full credit of TDS as claimed by appellant at the time of filing return of income. The credit of TDS allowed at Rs. 4,58,48,500 instead of Rs. 7,11,65,180 is based on no justification, thus, the AO be directed to give entire credit of Rs. 7,11,65,180.

7. That the Ld AO has further erred in levying interest u/s 234B of the Act of

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Rs. 1,67,89,416

8. That the Ld AO has further erred in levying interest 234C of the Act of Rs. 76,23,106.

The above grounds are independent and without prejudice to each other."

3. The assessee Company is a company incorporated as per the rules of Japan, and is engaged in the business of supply of equipments for various projects and also executed erection and commissioning of equipment at the various project sites in India. The assessee filed its return of income in India thereby declaring an income of Rs.45,48,94,340/-. Subsequently, the assessee revised return on 27/3/2015 declaring taxable income of Rs.69,26,60,857/-. In the revised return of income, the assessee offered Rs.23,71,30,394/- being supervisory fees which had not been earlier included on the ground that it has no supervisory PE in India and the PE received being integral part of supply is not taxable in India. The Hon'ble Delhi High Court vide its order dated 16/11/2015 in Assessment Year 1992-93 to 1996-97 accepted the contention of the assessee and held that the assessee did not have any PE for supervisory activities and income is taxable under Article 12(2) of the India- Japan DTAA. In such circumstances to maintain this and to avoid unending litigation, the assessee company offered the said sum of Rs.23.71 crore to tax under Article 12(2) of the DTAA. The return was selected for scrutiny assessment. The Assessing Officer issued a draft assessment order dated 18/3/2016 under the provisions of Section 144C of the Income Tax Act thereby proposing to make following variation to the return income of the assessee:-

Particulars		Amount (in Rs.) as per revised return of income	Amount (in Rs.) as assessed
A	Business Income		
	Income from	-1,27,500	1,27,500

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	various projects as per return of income		
Add:	Income from foreign supplies (Profit attributable to supplies of equipment by the 'A' to MSIL)	Nil	3,39,28,632
	Total business income from Project and supplies	Nil (Loss of Rs.1,27,500 carried forward	3,38,01,132 (without allowing any set-off
B	Fee for Technical Services		
	Supervision fee	68,63,32,947	68,63,32,947
C	Long Term Capital Gain	Nil (LTCG of Rs.90,93,355 was set off against brought forward losses)	15,072,540 (without allowing any set-off)
D	Interest income (taxable @ 10% under DTAA)	64,55,329	64,55,329
	Total Assessed income as per draft assessment order	69,27,88,276	74,16,61,950

The Assessing Officer duly accepted the position on taxability of the supervision fee as per Article 12(2) of the Indo-Japan DTAA in line with the Hon'ble Delhi High Court decision in the earlier years. However, the Assessing Officer proposed the addition for supply income of Rs. 3.4 crore and long term capital gain of Rs. 1.5 crore (wrongly added tax on capital gain in total income assessed instead of assessed capital gain as per Ld. AR) to compute total income of Rs. 74.16 crore. Aggrieved by the draft assessment order, the

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assessee filed objections before the Dispute Resolution Panel (DRP). The DRP vide order dated 28/11/2016 gave certain directions to the Assessing Officer. The Assessing Officer vide order dated 31/1/2017 computed the income as follows:-

Income from Business			
A	Income from Various Projects as per return of Income		
	Add:	Income from foreign supplies (219,03,57,134x 3.09/100x35/100)	(1,27,500/-)
		Total Business Income from Projects & Supplies	Rs. 2,36,88,712/-
		Total Income at Normal Rates @ 42.024% including surcharge and edu cess.	Rs. 2,35,61,212
B	Supervision Fees		
		Supervision Fees as per return (to be taxed @ 10% under DTAA)	Rs. 68,63,32,947
		Long Term Capital Gain (As discussed in Para 5) (to be taxed @ 21.012%)	Rs. 1,50,72,540
		Interest Income (Taxable @10% under DTAA)	Rs. 64,55,329/-
		Total Income	Rs.73,14,22,028/-
		Rounded off u/s 288	Rs. 73,14,22,030/-

Thus, the assessee company is assessed at total income of Rs. 73,14,22,030/-

4. Being aggrieved by the Assessment Order, the assessee filed present appeal before us.

5. The Ld. AR submitted that the assessee company i.e. M/s Sumitomo Corporation, Japan is a foreign company and is tax resident of Japan. For the AY 2013-14, it had filed its return of total income on 29.11.2013, declaring an income at Rs. 45,48,94,340/-, however revised the same on 27.03.2015 offering its taxable income at Rs. 70,17,54,131/-. In the revised return, the

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assessee had offered to tax (as had been offered in preceding year too) 'supervision fee', which is a sum of fee in the original return of income filed on 29.11.2013 and had been claimed as not taxable in India. The said sum of returned income is not in dispute and is not the subject matter of the instant appeal. The return of income filed by the assessee was selected for scrutiny and the ACIT by a draft order of assessment dated 18.03.2016 passed u/s l44C(l) of the Act, computed the total income of the assessee at Rs. 74,16,61,950/- as against the returned income of Rs. 70,17,54,131/-. The Ld. AR submitted that the Assessing Officer while computing the total income of the assessee at Rs. 74,16,61,950 in his draft order, had made following additions:

(i) Rs. 3,38,01,132/-, as income from foreign supplies as per the last para of item 4 of his order.

(ii) Rs. 7,31,67,674.59, as long-term capital gain which sum has been taxed @ 21.012%.

The Ld. AR pointed out that the Assessing Officer has computed tax on such income at Rs. 1,50,72,540/as against nil tax payable, as the assessee had unabsorbed capital loss of Rs. 18,93,13,933/- as per return of income which is not under dispute but no set-off was allowed by the Assessing Officer. In fact, on the basis of capital gain computed by the assessee, the tax aggregates to Rs. 18,73,211/-. This tax had been computed only for the purposes of calculation, despite the fact no tax was payable due to set-off against brought forward capital loss). Against the draft order of assessment, the assessee had filed its objections' on 27.04.2016 u/s 144C(2) of the Act before the DRP.

6. The Ld. AR submitted that the assessee is being aggrieved from the aforesaid directions and findings, and as such, is in appeal before the Bench. In the appeal so filed, the assessee has raised as many as 8 grounds of appeal.

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7. As regards to Ground No. 2, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8 and 2.8.1 relating to addition of Rs. 3,38,01,132/- in respect of income from offshore/foreign supplies and that of not allowing setting off of business loss against such income, the Ld. AR submitted that before the DRP, in the objections, in respect of addition made of Rs. 3,39,28,632/- on account of income from offshore supplies (which is not taxable in India in absence of PE for such supplies in India), the assessee contended that the adjustments made for income from foreign supplies is wholly unwarranted and is legally untenable. The Ld. AR further submitted that the Assessing Officer erred in holding that the profit from supplies of equipment, supplied by it from Japan to Maruti Suzuki India Limited (MSIL) in India are taxable in India, despite the fact that the title in the equipment and supplies so made stood transferred outside India and no activities were carried out in India and as such no income had accrued to it in India in respect of such an alleged income. The Ld. AR further contended that it has no PE in India for such supply. The Ld. AR submitted that the findings recorded in para 3.4 of the draft order that the assessee had entered into integrated contract for supply of the equipment and commissioning of the same is without any basis, completely misconceived and are erroneous. The Ld. AR submitted that the assessee does not undertake any activity of installation and commissioning of equipment supplied and was providing supervision services of the installation and commissioning to MSIL. Thus, the Ld. AR contended that in so far as the supplies made, no profit had accrued to it in India as it had not undertaken any activity of installation and commissioning of equipment supplied and was independently and separately providing supervision services of the installation and commissioning of such equipment, which is taxable under Article 12(2) of Double Taxation Avoidance Agreement (DTAA) and has also been so separately taxed in return of income. The Ld. AR submitted that the assessee had no PE in India under Article 5 of the Double Taxation Avoidance Agreement between India and Japan and that supplies of equipment to MSIL has not been made in India. Alternatively and without prejudice, the Ld. AR further contended that even if it is held that the

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assessee has a PE in India then too, no amount of alleged profit could be taxed in India since no such alleged profit could be attributed to such PE in India as per Article 7 of the DTAA and that the Assessing Officer has erred in holding that 50% of the estimate of the assessee's profit is attributable to the alleged PE, which is without any basis.

8. The Ld. AR submitted that in so far as the inclusion of profit from offshore supplies made is concerned, same is no more res-integra. The facts of the present case are similar to the earlier years which are also verified by the Assessing Officer in the assessment order. The Ld. AR submitted that in respect of the inclusion of the estimated profit, the Tribunal in its consolidated order dated 01.07.2019 pertaining to the A.Ys 2001-02 to 2003-04, 2007-08, 2010-11, 2011-12 and 2012-13 has held in para 9 that the goods were sold from outside India. The Ld. AR submitted that the name of Maruti Udyog Limited - MUL has changed to Maruti Suzuki India Limited - MSIL. It has been held by the Tribunal in its order as under:

> *"9. In the present case the goods were sold to MUL from outside India. Thus, the risk and title were also transferred outside India and no transaction took place in India. The custom clearance, inland transportation were also done by the MUL on its own and assessee at no stage involved in the said activities. There was no PE involved in the sale. In fact supervision was done after the supply of equipments. The revenue could not establish that the assessee is having fixed place PE or supervisory PE. The ratio laid by the Hon'ble Apex Court in case of M/s Ishikawaiima Harima Heavy Industries Ltd. (supra) is applicable in the present case. Therefore. Ground Nos. 1 to 1.4 and 2 to 2.1 of the Revenue's appeal is dismissed."*

The Ld. AR submitted that the aforesaid findings had been recorded by the Tribunal in its order while dealing with the appeals filed by the revenue as well as by the assessee related to the A.Y. 2001-02 and for subsequent assessment years, as is evident from the caption of the order of Tribunal. In view thereof, the Ld. AR submitted that the addition made by the Assessing Officer and

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partially directed to be sustained by the DRP is totally untenable and deserves to be deleted in as much as no such addition has been held sustainable. The Ld. AR reiterated that the assessee does not have PE in India. It has made no supplies from India. It is undisputed fact that the assessee, a foreign company has been making supplies from outside India and as such, since no income has accrued to it in India, said income could not be brought to tax. The findings of the DRP that the assessee is also engaged in installation and supervision, is wholly misplaced. It is undisputed fact that the assessee is not engaged in any installation. It is however not denied that it was making supervision of installation and had received supervision fee separately which is offered to tax in return of income and is an undisputed fact. Further the finding of the DRP that the transactions of offshore supply and installation and supervision by it, were closely interlinked and continuous is wholly irrelevant factor. The transactions of supplies made are independent and separate with the supervisory fee for MSIL. The consideration for supplier and supervision is also separate. In fact, the Assessing Officer himself has not brought to tax any such alleged profit from supplies made to MSIL from A.Y. 2014-15 onwards. This is evident from assessment order for A.Y. 2016-17. The Assessing Officer had framed an assessment on 24.12.2018, even before the Tribunal has pronounced its judgment on 01.07.2019, for the aforesaid assessment year, where he did not himself bring to tax any such sum. The Assessing Officer has specifically mentioned in its order:

> *"3. The assessee is a company incorporated as per the rules of Japan, and is engaged in the business of supply of equipments for various projects & also executed erection & commissioning of the equipments at the various project sites in India.*
>
> *4.The reply of the assessee as well as the audited financial results have been perused and no adverse inference could be drawn. "*

The Ld. AR further added that in the draft order of assessment in para 3.2 it has been admitted by the Assessing Officer that the facts of the case are identical to those in the preceding years and the submissions of the assessee

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are almost on the same lines as in the preceding years except placing further reliance on the decisions in the case of Ahmed Bhai Umarbahi 18 ITR 372 (SC).

9. Without prejudice to the aforesaid and in the alternative the Ld. AR submitted that 'even' if for the sake of an argument it is held that the assessee is liable to be assessed in India in respect of an alleged offshore supplies made by it from Japan to MSIL in India, it is alternatively submitted that the estimation of profit of 35% as against 50% of global profit assessed by the Assessing Officer is wholly arbitrary and is based on no valid material. In fact, the Ld. AR submitted that it was the burden of the Assessing Officer to demonstrate with evidence that the assessee's global profit included 35% of the estimated profits from offshore supplies made to MSIL is attributable to India operations. The assessee has not carried out any operation in India for supplies and operations relating to supervision services have been already offered to tax. The Ld. AR submitted that the DRP in its directions have accented the contention of the assessee that the estimate made by the Assessing Officer of 50% of global percentage of profit is arbitrary. Having so held, the Ld. AR submitted that the DRP directions committed an error of law when it has estimated the profit percentage at 35% of global profit by citing an order of Tribunal in the case of Rolls Royce. It is apparent that such a finding is a vitiated finding in law and is wholly unsupported by any material.

10. In view of the aforesaid facts, the Ld. AR submitted that the issue involved in the appeal is squarely covered by the orders of the Tribunal and the findings recorded by the Assessing Officer for the succeeding assessment years. This is evident from the table placed at page 343 of the PB for the A.Ys 2014-15, 2015-16 and 2016-17, whereby, there is no dispute in case of offshore supply of equipment. The assessee had also placed on record the order of assessment for A.Y. 2016-17 to establish that no addition has been made by the Assessing Officer himself for the A.Y. 2016-17. The assessee, however,

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submits that the Hon'ble High Court of Delhi in the case of NPCC reported in [2016] 66 Taxman.com 15 has also held that income could be assessed to tax in India, where offshore supplies have been made and assessee does not have a PE in India. Similar is the findings of the Hon'ble Uttarakhand High Court in the case of M/s Samsung Heavy Industries Ltd. reported in 42 Taxman.com 140.

11. The Ld. DR submitted that the assessee is tax resident of Japan. The assessee claimed that no income could be held to be taxable in India since PE did not exist in respect of supply made to MSIL (Maruti Suzuki India Limited). The Assessing Officer attributed a sum of Rs. 2.36 Crore as income towards supply of material to MSIL. The Assessing Officer's findings are summed up as under:-

- Composite contract where the scope of the contract included supply, transportation, supervision of installation, commissioning and testing of equipment at the site of MSIL

- Responsibility and risk associated in such supply does not cease outside India

- PE was involved in all the aforesaid activities

- Close interaction with MSIL could take place only after the PE was established

- Technical personnel from HO frequently visited PE and site of MSIL to gather specifications and accordingly, supply the equipment.

- Negotiation and signing of the contract took place in India

The Ld. DR further submitted that the DRP observed that the circular relied upon by the assessee was withdrawn in 2009. The DRP held it to be a case

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of composite contract as against simple transaction of offshore supply. Further, the Tribunal held in the case of the assessee for AY 2001-02 and other AYs that *"In the present case the goods were sold to MUL from outside India. Thus, the risk and title were also transferred outside India and no transaction took place in India. The custom clearance, inland transportation were also done by the MUL on its own and assessee at no stage involved in the said activities. There was no PE involved in the sale. In fact supervision was done after the supply of equipments. The revenue could not establish that the assessee is having fixed place PE or supervisory PE. The ratio laid by the Hon'ble Apex Court in case of M/s Ishikawajima Harima Heavy Industries Ltd. (supra) is applicable in the present case."*

The Ld. DR pointed out that while deciding the issue of attribution of income in respect of offshore sales to MSIL, the attention of Tribunal for the respective years was not invited to the clauses of the agreement entered for the purpose of the supply of equipment. Further, it is also worthwhile to highlight that the assessee claimed that each PO is independent and not a part of composite contract. In the light of the same, the Ld. DR prayed that each and every invoice needs to be examined before arriving at the conclusion regarding the exact nature of transaction in question. One such invoice placed by the assessee in the paper book may be duly considered by the tribunal before deciding the case in hand. The Ld. DR submitted that the submissions in respect of the particular invoice does showcase that it is not a plain vanilla case of sale/purchase but the terms and conditions as per the agreement do provide for the rejection of equipment supplied by the assessee. If the equipment itself can be rejected even after its installation, in such a scenario, how one can take a position that sale was completed outside India. The Ld. DR prayed that the bench may also ask for the complete set of agreement and invoice in respect of the other supplies made during the year. The Ld. DR submitted that at page no. 80 of the paper book contains the list of equipment supplied by the assessee to MSIL. A particular item at sr. no. 4 mentions the

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Title of PO as "**Design, manufacture and supply of cross bar type..... Press Line**". This shows that the assessee is required to supply the equipment only after its design and manufacturing as per the given requirements of the client. Further, the assessee submitted copy of PO (PO No. 245563) in respect of only one item which is appearing at serial no. 7 of the list. Perusal of the invoice and related agreements shows that the equipment was manufactured as per the specifications provided by the client. The Ld. DR further pointed out at Page no. 83 and 84 of paper book and submitted that these documents shows "technical part" which spells out the scope of work. It is provided that the equipment is to be manufactured as per the specifications detailed out in the tender. Further, page 86 of the paper book (refer clause 10.3,10.4& 10.5) contains the clauses which spell out the treatment in case of rejection of equipment/goods. It also provides that even if the goods stand inspected by the purchaser at project site, the purchaser retains the right to reject such goods. Furthermore, clause 14.2 deals with situation of defect in the material and its replacement within 12 months from the date of commissioning or 24 months from the last date of shipment. Clause 20.5 further deals with replacement of goods in the situation of damage to the same. The presence of aforesaid clauses on "rejection of equipment" and its replacement puts the case on different footing. In this regard, it may be relevant to take note of the decision of Hon'ble Delhi High Court in the case of Ericsson A.B. dated 23/12/2011 (ITA 504/2007, ITA 507/2007, ITA 508/2007,ITA 511/2007, ITA 397/2007). The relevant extracts of the decision are reproduced as under:

41. We, find that the terms of contract make it clear that acceptance test is not a material event for passing of the title and risk in the equipment supplied. It is because of the reason that even if such test found out that the system did not conform to the contractive parameters, as per article 21.1 of the Supply Contract, the only consequence would be that the Cellular Operator would be entitled to call upon the assessee to cure the defect by repairing or replacing the defective part. If there was delay caused due to the acceptance test not

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being complied with, Article 19 of the Supply Contract provided for damages. Thus, the taxable event took place outside India with the passing of the property from seller to buyer and acceptance test was not determinative of this factor. ***The position might have been different if the buyer had the right to reject the equipment on the failure of the acceptance test carried out in India....”***

The court concluded that the taxable event took place outside India with the passing of the property from seller to buyer and acceptance test was not determinative of this factor. The court also added that the position might have been different if the buyer had the right to reject the equipment on the failure of the acceptance test carried out in India. This shows that the clause of rejection of equipment is determinative factor in deciding the transfer of title. If the supplied good to Indian client stands rejected, how it can be considered as completed outside India.

12. Based on the aforesaid clauses in the agreement in respect of the submitted invoice, it is evident that the assessee continued to undertake the risk of rejection of the supply, therefore, the transfer of ownership will not change the legal position that off-shore supply is taxable in India. It is a case where the functions in the nature of technical supervision have been performed by the assessee company in India. Further, while performing the supervisory functions, the intangible asset in the form of technical know-how has been put to use. Therefore, there is a need to attribute further profits to the PE for those functions/risks as discussed above that have not been considered. The Ld. DR prayed that the assessee must provide/submit complete set of agreement and invoice in respect of the other supplies made during the year to ensure that all supplies are governed by similar terms and conditions of the agreement as discussed above.

13. The Ld. DR further pointed out that the assessee has shown business income from BBMB project. This shows that the permanent establishment does

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exist for BBMB project. Article 7 of the treaty with Japan does allow to tax the profits of the enterprise to the extent which is directly or indirectly attributable to that permanent establishment. Effectively, the treaty invokes the "Force of attraction". This means that if the entity has PE in respect of one project but the same has been used indirectly for other project, then, the source country has a right to tax profits of such other project even if no PE exists directly for that project. The relevant extracts of the article 7 are reproduced as under:-

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

14. Further, the treaty clarifies that with reference to paragraph 1 of Article 7 of the Convention, it is understood that by using the term 'directly or indirectly attributable to the permanent establishment', profits arising from transactions in which the permanent establishment has been involved shall be regarded as attributable to the permanent establishment to the extent appropriate to the part played by the permanent establishment in those transactions. It is also understood that profits shall be regarded as attributable to the permanent establishment to the above-mentioned extent, even when the contract or order relating to the sale or provision of goods or services in question is made or placed directly with the overseas head office of the enterprise rather than with the permanent establishment.

In view of the above, the Ld. DR prayed that the attribution made by the Assessing Officer in respect of supply made to MSIL may be upheld. The Ld. DR submitted that this submission may be duly considered in addition to the assessment order of the Assessing Officer.

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15. In rejoinder, the Ld. AR submitted that aforesaid contention that are point no. i, ii & iii of para 5 raised by the Ld. DR does not emanate from the order of the Assessing Officer, nor the Assessing Officer adopted such basis to make addition. The Ld. AR further submitted that before the Tribunal, revenue can support the order of the Assessing Officer but cannot make out a new case. Aforesaid submission of the assessee is supported by following judicial precedents:

i. The Mumbai Bench of the Tribunal in Ms. Aishwarya K. Rai 121 ITD 204 (Mum) held that the learned D.R. can support the action of the A.O. with any arguments and that he can rely on any case law in support of the A.O's cast but he cannot make out any new case which was not the subject matter of consideration by the A.O. or the first appellate authority. It further held that to find fault in the assessment order is outside the; domain of the argument of the Ld. DR., as such powers vests with the Commissioner u/s 263 for revising any order which is erroneous and prejudicial to the interests of Revenue.

ii. Mumbai Special Bench of the Tribunal in Mahindra & Mahindra Ltd. Vs DCIT (2009) 313 ITR AT) 263 (SB), held that, in our considered opinion the Ld. DR. has no jurisdiction to go beyond the order passed by the A.O. He cannot raise any point different from that considered by the AO or the CIT(A). His scope of arguments is confined to supporting or defending the impugned order. He cannot set up an altogether different case. If the Ld DR is allowed to take up a new contention de hors the view taken by the AO that would mean the Ld. DR .stepping into the shoes of the CIT exercising jurisdiction u/s 263. We, therefore, do not permit the Ld. DR to transgress the boundaries of his arguments. Similar view has been taken in following cases:

iii. Kwal Pro Exports vs ACIT (1008) 297 ITR (AT) 49

iv. ITO v. Anant Y. Chavan [2009] 126 TTJ (Pune) 984.

v. Ericsson AB v. Deputy Director of Income Tax [2012] 25 taxmann.com 466

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16. The Ld. AR further submitted that the assessee M/s Sumitomo Corporation, Japan a foreign company, is tax resident of Japan. The assessee had supplied equipment from Japan to Maruti Suzuki India Limited (MSIL), and such equipment were supplied offshore and hence are not taxable in India, since the title in the equipment and supplies so made stood transferred outside India and no activities were carried out in India in respect of offshore supplies and as such no income had accrued to it in India in respect of such offshore supplies. The Ld. AR submitted that the assessee does not undertake any activity of installation and commissioning of equipment supplied and was separately providing supervision services of the installation and commissioning of such equipment, which is taxable under Article 12(2) of Double Taxation Avoidance Agreement (DTAA) and has also been so separately taxed in return of income. Further, for offshore supplies, the assessee had no PE in India under Article 5 of the Double Taxation Avoidance Agreement between India and Japan as the supplies of equipment to MSIL has not been made in India.

17. The Ld. AR submitted that on the similar facts and circumstances, and under similar agreements (Purchase orders), the assessee was supplying equipments to M/s MSIL in past also, and while considering the taxability of offshore supplies made to MSIL, the Tribunal in its consolidated order dated 01.07.2019 pertaining to the AYs 2001-02 to 2003-04, 2007-08, 2010-11, 2011-12 and 2012-13, has held in para 9 that income arising from offshore supplies is not taxable in India. The Ld. AR further submitted that the facts and terms of the PO's for all pertaining to offshore supplies to MSIL are identical to the preceding years from A.Y. 2001-02 to 2012-13. This submission is borne out from the draft assessment order, where in para 3.2, the Assessing officer has stated that:

> *"3.2. The submissions of the assessee have been considered and are not found acceptable. The facts of the case are identical to those in the preceding years and the submission of the assessee are almost on the same lines as in*

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the preceding years except placing further reliance on the decisions in the case of Ahmed Bhai Umarbahi 18 ITR 372 (SC)."

In such circumstances, grounds raised in the memo of appeal in respect of taxability of income arising from offshore supplies is covered in favour of the assessee by the order of the Tribunal for preceding assessment years in the case of the assessee itself, and hence the addition made is liable to be deleted.

18. The Ld. AR submitted that in subsequent assessment years for the A.Ys 2014-15, 2015-16 and 2016-17 in the similar facts and circumstances, there is no dispute in case of offshore supply of equipment to MSIL, and the same is also evident from the order of assessment for Assessment Year 2016-17 wherein no addition has been made by the Assessing Officer for the A.Y. 2016-17. In view thereof, once the revenue itself has accepted that such supplies made offshore is not taxable in India, addition made in this year is unsustainable in law. At this stage, reliance is placed on the judgment of the Hon'ble Apex Court in the case of CIT vs. Excel Industries Ltd. 358 ITR 295 wherein it was found that the Revenue had accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Hon'ble Bombay High Court but without any success, and on such facts the Hon'ble Court has held that the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the tax payers' money in pursuing litigation for the sake of it. While recording such finding, the Hon'ble Court relied on the judgment in the case of Radha Soami Satsang Saomi Bagh vs. CIT [1992] 193 ITR 321 (SC) wherein following passage from *Hoystead* v. *Commissioner of Taxation*, 1926 AC 155 (PC) was relied:

"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have

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no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken."

19. The Ld. AR submitted that in this case also once the issue has been decided in favour of the assessee by the Tribunal and in fact revenue itself has not appealed the same in A.Y. 2005-06, 2006-07, 2008-09 and 2009-10 before and also no addition in relation to the same have been made by Assessing Officer in the subsequent assessment years 2014-15, 2015-16 and 2016-17, thus the Ld. DR cannot be permitted to bring new aspect for the first time in the appeal before the Tribunal. In view thereof, once, the Assessing Officer himself has accepted that facts are similar to earlier years, and in the subsequent assessment years, the Assessing Officer himself has accepted that offshore supplies made to MSIL is not taxable in India, the addition made in this year is unsustainable in law.

20. In so far as the contention of the Ld. DR that terms and conditions as per the agreement do provide for the rejection of equipment supplied by the assessee and once the equipment itself can be rejected even after its installation, in such a scenario, the sale was not completed outside India, the Ld. AR submitted that such a condition is wholly fallacious and misconceived. The Ld. AR submitted that in this case, acceptance of equipment is not the essence of contract, but time is the essence of contract. Further, under the agreement, the seller is entitled to correct the non-confirming goods, and hence it is not a case of acceptance of goods by the Indian buyer which is the essence of the contract. Further in respect of delay, the purchaser is entitled for the

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liquidated damages as provided in clause 11 of the PO. In such, circumstances, it is not a case where the purchaser has the right to reject the equipment per se, on the contrary, as per clause 10.4 of the purchase order for offshore supply, in the event of rejection of non-confirming goods, the seller shall be allowed to correct the nonconformities. In such circumstances, the Ld. AR submitted that in this case the property in the goods passes to the purchaser outside India and hence the offshore supplies are not taxable in India.

21. Further, the Ld. DR has placed heavy reliance on the judgment of the Hon'ble Court in the case of Director of Income Tax vs. Ericsson A.B (ITA 504/2007, ITA 507/2007, ITA 508/2007, ITA 511/2007, ITA No. 397/2007). The Ld. DR submitted that aforesaid judgment is inapplicable, as in that case, there was a clause in the agreement which provide for the acceptance test. Further, in the aforesaid case, the Hon'ble Court held that acceptance test is not a material event for passing of the title and risk in the equipment supplied as the only consequence of non-acceptance would be that the purchaser would be entitled to call upon the assessee to cure the defect by repairing or replacing the defective part, and same is the case here in the case of the assessee appellant as though there is a provision in the agreement of rejection of the non confirming goods, however the seller is entitled to correct the non confirming goods. The Ld. AR submitted that the Ld. DR has omitted to consider the aforesaid vital terms of the agreement, and hence reliance placed on the observation of the Hon'ble Court that the position might have been different if the buyer had the right to reject the equipment on the failure of the acceptance test carried out in India , is misplaced. The Ld. AR further relied upon the judgment of the Hon'ble High Court in Mahavir Commercial Company Vs. CIT, 86 ITR 147 wherein following principle was enunciated:

> *"Even though the property in the goods may pass to the buyer when the documents are handed over, the buyer may yet retain the right to examine and repudiate the goods but this right generally which a buyer has in c.i.f.*

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contract does not by itself indicate that the property in the goods has not passed to him. This supposed incongruity was sought to be explained per curiam in Kwei Tek Chao v. British Traders and Shippers Ltd. (1954) 2 K.B. 459. that if property passed when the documents are transferred that property is subject to the condition that the goods should re-vest in the seller if on an examination by the buyer he finds them not to be in accordance with the contract. It is not necessary to consider this aspect because in any case the ascertainment of the obligations under the contract will determine to what extent the transfer of property is subject to a condition or if the property passes conditionally whether the ownership left in the seller is the reversionary interest in the property in the event of the conditions subsequent operating to restore it to him. In any case where the performance of some condition is imposed upon the buyer but is not made a condition of the transfer of the property, the property once passed is not revested in the seller by the buyer's subsequent default."

22. The Ld. AR further submitted that Article 7(1) of the DTAA between the India and Japan, clearly provide that the profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. The Ld. AR submitted that it is an admitted fact that the assessee has no PE in India through which supplies have been made i.e. in absence of existence of PE in India, no income could be brought to tax in India.

23. In respect of the argument of the Ld. DR that there is a permanent establishment for BBMB project, and Article 7 of the treaty with Japan allow to tax the profits of the enterprise to the extent which is directly or indirectly attributable to that permanent establishment as such, the treaty invokes the "Force of Attraction" and accordingly if the entity has PE in respect of one project but the same has been used indirectly for other project, then, the

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source country has a right to tax profits of such other project even if no PE exists directly for that project. The Ld. AR submitted that such an argument is again misconceived and has been raised first time before the Tribunal and hence deserves to be rejected. Further, there is no direct or indirect connection with offshore supplies made to MSIL with the BBMB project and income of offshore supplies cannot be brought to tax in India.

24. In respect of estimation of profit of 35% as against 50% of global profit assessed by the Assessing Officer, the Ld. DR has also not given the basis or material for adopting such percentage. In fact, the Ld. AR submitted that it was the burden of the Assessing Officer to demonstrate with evidence that the assessee's global profit included 35% of the estimated profits from the offshore supplies made to MSIL is attributable to India operations. Hence, the estimate made is arbitrary.

25. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that as per the agreement between the MSIL, the assessee does not undertake any activity of installation and commissioning of equipment supplied and was providing supervision services of the installation and commissioning to MSIL. As regards the supplies made by the assessee, no profit had accrued to it in India as it had not undertaken any activity of installation and commissioning of equipment supplied and was independently and separately providing supervision services of the installation and commissioning of such equipment, which is taxable under Article 12(2) of Double Taxation Avoidance Agreement (DTAA). The same is separately taxed in return of income by the assessee. The assessee had no PE in India under Article 5 of the Double Taxation Avoidance Agreement between India and Japan. The supplies of equipment to MSIL were not made in India. As regards to the inclusion of profit from offshore supplies made is concerned, same is no more res-integra. In fact, the facts of the present case are similar to the earlier years which are also verified by the Assessing Officer in the assessment order.

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In respect of the inclusion of the estimated profit, the Tribunal in its consolidated order dated 01.07.2019 pertaining to the A.Ys 2001-02 to 2003-04, 2007-08, 2010-11, 2011-12 and 2012-13 has held in para 9 that the goods were sold from outside India. the Tribunal held as under:

> *"9. In the present case the goods were sold to MUL from outside India. Thus, the risk and title were also transferred outside India and no transaction took place in India. The custom clearance, inland transportation were also done by the MUL on its own and assessee at no stage involved in the said activities. There was no PE involved in the sale. In fact supervision was done after the supply of equipments. The revenue could not establish that the assessee is having fixed place PE or supervisory PE. The ratio laid by the Hon'ble Apex Court in case of M/s Ishikawaiima Harima Heavy Industries Ltd. (supra) is applicable in the present case. Therefore. Ground Nos. 1 to 1.4 and 2 to 2.1 of the Revenue's appeal is dismissed."*

Though the Ld. DR tried to dispute certain factual aspect as stating that the present year is distinguishable from the preceding years, but no such distinguishing facts were pointed out by the Ld. DR during the hearing as the contentions of the Ld. DR that all the Purchase Orders and invoices were not presented before the Assessing Officer appears to be incorrect as all those Purchase Orders and Invoices along with the conditions and terms of the agreement between the MSIL were before the Assessing Officer as seen by us in the paper book. In fact, the same was noted by the Assessing Officer as well as by the DRP in their respective orders. Thus, it is undisputed fact that the assessee, a foreign company has been making supplies from outside India and as such, since no income has accrued to it in India, said income could not be brought to tax. The findings of the DRP that the assessee is also engaged in installation and supervision, is wholly misplaced. Further, it is undisputed fact that the assessee is not engaged in any installation and the assessee at no point denied that the assessee was making supervision of installation and had received supervision fee separately which is offered to tax in return of income.

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Further the finding of the DRP that the transactions of offshore supply and installation and supervision by it, were closely interlinked and continuous are also based on the wrong footing by the Ld. DR as the same are totally separate from each other and there was no interlink or continuation between the offshore supply, installation and suprevision. The transactions of supplies made are independent and separate with the supervisory fee for MSIL. The consideration for supplier and supervision is also separate. In fact, the Assessing Officer himself has not brought to tax any such amount from supplies made to MSIL from A.Y. 2014-15 onwards. This is evident from assessment order for A.Y. 2016-17. The Assessing Officer had framed an assessment on 24.12.2018, even before the Tribunal has pronounced its judgment on 01.07.2019, for the aforesaid assessment year, where he did not himself bring to tax any such sum. The Assessing Officer has specifically mentioned in its order:

"3. The assessee is a company incorporated as per the rules of Japan, and is engaged in the business of supply of equipments for various projects & also executed erection & commissioning of the equipments at the various project sites in India.

4.The reply of the assessee as well as the audited financial results have been perused and no adverse inference could be drawn. "

In the draft order of assessment in para 3.2, the Assessing Officer observed that the facts of the case are identical to those in the preceding years. Therefore, the Assessing Officer as well as the DRP was not correct in making addition in respect of income from offshore/foreign supplies and thereby no allowing setting off of business loss against such income. Ground Nos. 2, 2.1, 2.3, 2.4, 2.5, 2.5, 2.6, 2.7, 2.8 and 2.8.1 are allowed.

26. As regards to Ground Nos. 3, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6 and 4 relating to addition of Rs. 7,31,67,674/- pertaining to computation of long-term capital gain on transfer of shares to a non-resident, the Ld. AR submitted

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that in so far as the computation of capital gain made by the Assessing Officer in the draft order, the same was also objected to in the objections filed before the DRP. The assessee had computed capital gain on the transfer of shares held and owned by it of M/s SML Isuzu Ltd. (Indian company) to Isuzu Motors Ltd., Japan (non-resident) at Rs. 90,93,355/- based upon the terms of the Share Purchase Agreement (SPA) under which the transfer of the shares was made. However, the Assessing Officer had computed such capital gain at Rs. 7,31,67,675/-. The Ld. AR submitted, during the instant financial year, the assessee had transferred 15,91,881 shares for a consideration of Rs. 61,03,74,932/- payable in Japanese Yen 90,94,58,648 as agreed in Share Purchase Agreement (SPA) dated 25.11.2011. However, the Assessing Officer had adopted the sale consideration thereof at Rs. 62,56,09,233/-. The Ld. AR demonstrated from the comparative chart placed at page 182 of the paer book and pointed out that while computing capital gain the Assessing Officer had adopted sale consideration at Rs. 393.00 per share as against sale consideration agreed in SAP and accruing to assessee at Rs. 383.43 per share. As a result, thereof, the Assessing Officer adopted an aggregate sale consideration of Rs. 62,56,09,233/as against the sale consideration accruing to assessee at Rs. 61,03,74,932/-. Apart from this the Assessing Officer further adopted conversion rate of yen at Rs. 1.62 per Yen, whereas, the conversion rate on the date of agreement to sell i.e. 25.11.2011 was Rs. 1.49 per Yen as agreed in SPA as the consideration was payable in Yen by non-resident buyer to non-resident seller both resident of Japan. The Ld. AR submitted that the sale was made in Yen in Japan and the amount had been paid in Japan and as such, there arose no occasion to adopt any rate of conversion. The assessee had also filed a comparative chart reflecting the computation of capital gain as computed by the Assessing Officer. The Assessing Officer for computing capital gain, has incorrectly considered the assets transferred i.e. shares at fair market value for computing sale consideration as against the sale price/consideration accruing to it and so received as per SPA. The Assessing Officer has erroneously applied conversion rate, since the shares were sold in Japan for an

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agreed conversion rate in Yen and as such, for the purpose of computation of capital gain, exchange rate prevailing on the date of transfer need not to be adopted since consideration was already agreed in Yen payable by one non-resident to another non-resident in Japan and no remittance was to be made from India to Japan. There is no concept of any fair market value for the purposes of section 48 of the Act. Further, rule 11UA applied by the Assessing Officer for determining the fair market value has not applicability for Section 48 of the Act and also, provision of section 56 is not applicable on the assessee. The Assessing Officer has in any case has erred in not giving set off of long-term capital loss of Rs. 18,93,13,933/- . The Assessing Officer has not given any opportunity of being heard before re-computing the capital gain, thereby not following the principle of natural justice.

27. During the course of pendency of proceedings before the DRP, apart from the objections, the assessee had also furnished its written submissions on 17.10.2016. In response to the submissions made as aforesaid, the Assessing Officer furnished a remand report. In the said report, the Assessing Officer did not adversely comment upon assessee's objection pertaining to offshore supplies made. However, in respect of the computation of capital gain, it was merely commented by him that as the shares were also traded in the National Stock Exchange on the date of transfer, the negotiated prices cannot be considered. He however did not adversely comment in respect of the Share Purchase Agreement (SPA) entered between two non-residents i.e. the assessee and Isuzu Motors Limited, Japan as also the basis to adopt fair market value instead of aforesaid consideration accruing to it as per SPA. He merely stated that 'fair market value' is available as the shares were traded on the stock exchange hence the negotiated price cannot be considered. The Ld. AR submitted that the said observations are wholly arbitrary. The Assessing Officer had failed to comprehend that the assessee has not sold shares in open market but to an identified buyer wherein the price was agreed based on the

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prevailing market price of stock exchange. However, there was a difference in the date of agreement (being 25.11.2011) and date of transfer of shares (being 13.04.012). The Assessing Officer has adopted the fair market value on the date of transfer of shares instead of the price agreed earlier as per SPA. In any case and without prejudice, in no situation the same can be adopted for the purposes of section 48 of the Act. Be that as it may, the fact remains that the assessee had transferred the shares to an unrelated company and had entered into a SPA and as such the consideration accruing under the said agreement could only be adopted to determine the sale consideration and not any hypothetical sum.

28. The DRP however by its directions dated 28.11.2016 in respect of inclusion of Rs. 3,81,38,635/- (Income from offshore supplies) directed the Assessing Officer as under:

> *"The above arguments of the 'A' were carefully considered by us in the light of various judgments and the factual matrix obtaining in this case. The circular cited by the 'A' was withdrawn in 2009. Hence the said circular had no force of guidance.*
>
> *As regards the complexity of the transactions the Panel is of the considered view that the transactions of offshore supply and installation and supervision by it were closely interlinked and continuous. In such circumstances the AO was justified in holding that the A' had a supervision PE.*
>
> *As regards attribution of profits the arguments of the A' and the AO were carefully considered by us. It was gathered from page no. 14 of the paper book para 3.4, that the AO computed the profit attributable to India from the A's business in India as under:- Total sale of the A' Globally = Rs. 2190357134 Net profit of the A' globally = Rs. 232.54 (billion year)*

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Total sale of the 'A' globally Rs. 2190357134

Net profit of the 'A' globally Rs. 232.54 (billion year)

Net profit %+ 3.09

*Hence income from offshore supplies by 'A' to MSIL= 2190357134-3.09*50*

10.0 100"*

The calculation of the Assessing Officer was strongly objected to by the assessee in the course of DRP proceedings. The Ld. AR expressed surprise over the adoption by the Assessing Officer of 50% as the profit attributable to India. According to the Ld. AR, it had no scientific or rational basis. The methodology, as per the Assessing Officer was unknown to law. In this context the Panel examined the position taken by the Assessing Officer. The Ld. AR submitted that the percentage taken by the Assessing Officer had no legal basis is partly accented by the assessee as no reason was given by the Assessing Officer as to how 50% of 232.45 billion yen i.e. 3.09% of the global profit's i.e. 232.45 billion yen was attributable to India. As per the guidelines on attribution of profits, only the profit attributable to the income specific to India on account of offshore supplies was attributable. However, the Ld. AR pointed out that the Assessing Officer attributed 50% of the global net profits for which no satisfactory explanation was given. In our considered view the attribution may be restricted to 35% to meet the ends of justice as per the decision of the Tribunal in the case of M/s Rolls Royce. The objection is disposed off as above.

29. The directions of the DRP in respect of computation of capital gain the DRP has held the Rule 11 UA (1) (c) (ii) of I.T. Rules is applicable for income from other sources but upheld the Assessing Officer's argument that fair market value should be adopted for the purpose of determining the sale consideration, thus, upheld the valuation done by the Assessing Officer as per Rule 11UA. In fact, the DRP has even failed to deal with all the contentions

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raised by the assessee and did not even deal or direct the Assessing Officer to set off the capital gain so computed from the unabsorbed long term capital loss suffered by the assessee of Rs. 18,93,13,933/-.

30. The Ld. AR submitted that the assessee had contended before the DRP that the Assessing Officer has erroneously computed the capital gain on sale of equity shares of Indian company SML Isuzu Ltd. by considering the fair market value of shares as Rs. 393 per share instead of Rs. 383.43 per shares being the agreed sale price as per the share purchase agreement entered between the assessee and Isuzu Motors Ltd., Japan being two unrelated parties. The assessee had specifically contended that the transfer was made under an agreement. In other words, the Ld. AR contended that the assessee had transferred the shares under an agreement entered between the assessee and unrelated parties and as such said sale consideration could not have been disturbed. The Ld. AR at this stage submits that the genuineness of the agreement entered between two unrelated parties could not have been altered. This has been so held by the Apex Court in its judgment reported in 263 ITR 706 in the case of UOI vs. Azadi Bachao Andolan and reiterated in the later judgment reported in 341 ITR 1 in the case of Vodafone International Holdings B.V. vs. UOI (SC). The Ld. AR further contended that it is well settled rule of law that 'given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance'. The Ld. AR contended that the transaction of sale of shares was between two unrelated parties and was negotiated at the rate prevailing at the time the agreement was signed bases rate as per stock exchange duly mentioned in the agreement whereas the Assessing Officer adopted the fair market value rate as on date of transfer of shares quoted at stock exchange @393 per share. The Ld. AR further contended that rate agreed and received as per the agreement shall prevail for determining the sale consideration and rate as on the date of transfer is not relevant for the purpose of Section 48 of the Act. Various contentions raised before the DRP have been stated in the objections.

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31. The Ld. AR specifically contended and without prejudice to the contention that the capital gain offered by the assessee should be accepted as against the capital gain determined by the Assessing Officer that the assessee should be allowed a set off of brought forward long-term capital losses of Rs. 18,93,13,933/-. However, the DRP in respect of determination of capital gain, held and directed as under:

"The taxable long-term capital gains in terms of the above discussion and computation is Rs. 1,50,72,540/- to be taxed @21.012%.

The Panel took into consideration the rival arguments.

It was canvassed in the course of hearing by the AR for the A' that the rule invoked by the AO was misplaced as the said rule was in relation to determination of fair market value for the purpose of section 56 of the Act while the transaction effected bv the A' pertained to section 45 to 55A concerning capital gains of the IT Act. It was also contended by the A' that under the said chanter dealing with capital gains no enabling provision exited which permitted the AO to substitute the stock exchange traded value of shares for the negotiated value of the shares.

The Panel considered the rival contentions. It is true that Rule 11UA(1)(c)(2) of the I.T. Rules, 1962 deals with the determination of fair market value of certain commodities for the purpose of computation of income under the head income from other sources but the fact at the same time cannot be lost sight of that there does not exist any provision u/s 45 to 55A which allows the negotiated rate to be taken as the appropriate and unassailable sale consideration of shares for the purposes of computing capital gains. In the face of the foregoing facts we hold that the action of the AO was unassailable. Accordingly, the ground along with the sub-grounds are dismissed."

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32. The Ld. AR submitted that the DRP has admitted in its order as has been extracted above that the Assessing Officer had adopted the rule 1 11UA(1)(c)(ii) of I.T. Rules which has no application as it applies for the purpose of "income from other sources". The Ld. AR also submitted that, the income chargeable under the head 'capital gains' the same is to be computed by adopting the full value of consideration received or accruing as a result of transfer of capital asset as per Section 48 of the Act. In such a situation the Ld. AR submitted that the] Assessing Officer could not have disregarded the amount which had accrued to the assessee as a result of transfer of shares, which shares were transferred under an agreement as per the amount of consideration determined therein. The Ld. AR thus submitted that the learned Assessing Officer had erred in adopting Rule 11UA(1)(c)(ii) of the Income Tax Rules which is applicable only in respect of section 56 of the Act and is inapplicable where capital gain is to be computed u/s 45 or 48 of the Act as per the present facts. In fact, the present transaction does not fall in any clause of section 56 of the Act. The Ld. AR further pointed out that section 45 specifically provides cases where sale consideration should be adopted at fair market value which does not cover the present case. The Ld. AR further submitted that the DRP thus ignored the provisions of section 48 of the Act where income is computed and in the alternative further erred in not issuing direction to have given set off of with the unabsorbed brought forward capital loss. In fact, the authorities had failed to appreciate that agreement of sell had been made on 25th November 2011 but effectively delivery/transfer was made in April 2012. In such circumstances the rate prevailing in the market as per stock exchange on 25/11/2011 had to be adopted and not on the date, when delivery was given. The Ld. AR submitted however the same is also relevant as per section 48 of the Act. The Ld. AR submitted that the Assessing Officer had committed two errors while computing capital gain at Rs. 7,31,67,674/-, the first one being he had adopted conversion rate percentage TTBR i.e. telegraphic transfer buying rate on the date of transfer @ 1.62. The submission of the Ld. AR is that the agreement of sale had been entered into on 25/11/2011 and as

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such the prevailing rate on the date of agreement had to be adopted. It is because there was no remittances were to be made from India to Japan and as such there is no justification to have adopted the rate of 1.62 since there were no remittances made from India to Japan. The prevailing rate on such date i.e. on 25.11.2011 was 1.49 and not 1.62. Once the consideration was greed in Yen in the agreement, the same cannot be changed. This has made the substantial difference in determination of capital gain. Further while computing the capital gain the Assessing Officer had adopted conversion rate (for converting capital gain in Yen to capital gain in Rs) i.e. telegraphic transfer buying rate at 0.62 instead of 0.6252. The Ld. AR submitted that it is not known as to what is the basis of the Assessing Officer to have adopted 0.62 instead of 0.6252 on the date of transfer of the shares in April 2012. In other words, conversion rate for the purpose of computation of capital gain as per Rule 11UA of Income Tax Rules, 1962 is required to be adopted, the said rate was 0.6252 and as such the computation made by the assessee had been correctly adopted by it.

33. The Ld. DR relied upon the Assessment Order and the directions/order of the DRP.

34. In rejoinder, the Ld. AR submitted that in respect of remaining grounds of appeal i.e. ground 3-8, the submissions have already been made in support. And the revenue in his reply submission has not made any adverse comments or rebuttal, however without prejudice the Ld. AR submits in brief, in respect of such grounds as under:

A. Regarding taxability of capital gains (Ground No. 3)

- The assessee had held 15,91,881 equity shares of an Indian company i.e. M/s SML Issuzu Ltd.

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- 25.11.2011: It had entered into an agreement of sale of all of such shares to M/s Issuzu Motors Ltd. Japan (Pg. 191 -203) @ Rs. 383.42 (see Pg. 193 under definition of 'sale share price' of Paper book numbering)
- Bombay Stock Exchange rate of the aforesaid shares on the prevailing date of agreement was Rs. 383.42 (see Pg. 193).
- The assessee had transferred all such shares in Japan on 13.04.2012, when it had received the consideration in the year 2013-14. On 13.04.2012 stock exchange rate was Rs. 393.00 per share.
- The AO, erroneously invoked Rule 11UA(C)(ii), and applied Bombay stock exchange rate as was on 13th April 2012 instead of adopting sale rate of 383.42, as per the agreement of sale and was also the rate as per BSE. The rate of sale was agreed at 383.42 (see Pg. 193). Rule 11UA(C)(ii) has no application.

The Assessing Officer adopted conversion rate of yen to rupees at Rs. 0.62 as against Rs. 0.62520. The Assessing Officer has apparently committed an error of law besides on facts. He proceeded to adopt market rate on the date of delivery of shares instead of sale consideration accruing on 25.11.2011, which was Rs. 383.42 and had been agreed and also represented market rate as on that date Rule 11UA admittedly has no role to play. Secondly, the correct rate of conversion of JPY was Rs. 0.62520; whereas the Assessing Officer has adopted 0.62. This is apparently incorrect. There is no basis to adopt the rate of 0.62 instead of Rs. 0.62520. Thirdly, there was a brought forward capital loss to be set off of Rs. 18,93,13,933/- which is inclusive of Rs. 15,44,28,976/- for the AY 2005-06 as is evident from the order of assessment for the A.Y. 2005-06.

35. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the assessee computed capital gain on the transfer of shares held and owned by it of M/s SML Isuzu Ltd.

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(Indian company) to Isuzu Motors Ltd., Japan (non-resident) at Rs. 90,93,355/- based upon the terms of the Share Purchase Agreement (SPA) under which the transfer of the shares was made. However, the Assessing Officer had computed such capital gain at Rs. 7,31,67,675/-. It can be seen that during the present financial year, the assessee had transferred 15,91,881 shares for a consideration of Rs. 61,03,74,932/- payable in Japanese Yen 90,94,58,648 as agreed in Share Purchase Agreement (SPA) dated 25.11.2011. But, the Assessing Officer adopted the sale consideration at Rs.62,56,09,233/-. The assessee had filed a comparative chart reflecting the computation of capital gain as computed by the Assessing Officer at page 182 of the Paper Book, from which we can see that while computing capital gain the Assessing Officer had adopted sale consideration at Rs. 393.00 per share as against sale consideration agreed in SAP and accruing to assessee at Rs. 383.43 per share. The Assessing Officer adopted an aggregate sale consideration of Rs. 62,56,09,233/- as against the sale consideration accruing to assessee at Rs. 61,03,74,932/-. Apart from this the Assessing Officer further adopted conversion rate of yen at Rs. 1.62 per Yen, whereas, the conversion rate on the date of agreement to sell i.e. 25.11.2011 was Rs. 1.49 per Yen as agreed in Share Purchase Agreement as the consideration was payable in Yen by non-resident buyer to non-resident seller, both resident of Japan. The sale was made in Yen in Japan and the amount had been paid in Japan. These facts are not at all disputed by the Revenue authorities. While computing the capital gain, the Assessing Officer had adopted conversion rate (for converting capital gain in Yen to capital gain in Rs) i.e. telegraphic transfer buying rate at 0.62 instead of 0.6252. But under which method the same is adopted was not demonstrated by the Assessing Officer in the Assessment Order. It is not known as to what is the basis of the Assessing Officer to have adopted 0.62 instead of 0.6252 on the date of transfer of the shares in April 2012. Thus, the contentions of the Ld. AR that conversion rate for the purpose of computation of capital gain as per Rule 11UA of Income Tax Rules, 1962 is required to be adopted, the said rate was 0.6252 and as such the computation made by the

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assessee had been correctly adopted by it, appears to be just and proper. Thus, we direct the Assessing Officer to adopt the actual rate of conversion i.e. 0.6252 after verifying the same. Thus, we remand back this issue to the file of the Assessing Officer for proper adjudication after verifying the actual rate of conversion and adopt the same as per the observations made by us hereinabove. Needless to say, the assessee be given opportunity of following principles of natural justice. Ground Nos. 3, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6 and 4 are partly allowed for statistical purpose.

36. As regards to Ground No. 5 relating to initiation of penalty proceedings, the same is consequential, hence not adjudicated at this juncture.

37. As regards to ground No. 6 pertaining to full credit of TDS, the Ld. AR submitted that the assessee filed its return of income and claimed credit of TDS of Rs. 7,11,65,180/-. The same is also appearing in Form 26AS of the assessee for Assessment Year 2012-13. The Ld. AR further submitted that all income reported in Form 26AS was duly offered to tax in return of income, the same was not disputed in draft order or final order. However, while computing the income and tax payable based on assessed income, the credit had been allowed by the Assessing Officer only of Rs. 4,58,48,500/-. The Ld. AR submitted with respect that the learned Assessing Officer be directed to grant full credit of TDS along with interest under section 244A of the Act.

38. The Ld. DR relied upon the Assessment Order.

39. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that from perusal of the documents produced before us by the Ld. AR, it can be seen that the amounts reflected towards TDS in Form No. 26AS and the calculation of the Assessing Officer while giving the credit to lesser amount is not proper. Hence, we direct the Assessing Officer to adjudicate this issue properly and grant the claim of the

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credit of TDS after verifying the Form No. 26AS along with interest u/s 244A of the Act. The issue is remanded back to the file of the Assessing Officer for this specific purpose. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Ground No. 6 is partly allowed for statistical purpose.

40. As regards to Ground No. 7 pertaining to interest under Section 234B of the Act, the Ld. AR submitted since the assessee had paid due taxes on its income, and hence no interest u/s 234B of the Act is payable. Further, in case due relief is granted based on merits of the case as well as allowing set-off against brought forward business loss, long term capital loss and full TDS credit, there will not be any liability of tax and consequential interest under section 234B of the Act. The Ld. AR submitted however if it is found that tax exceeded the amount paid by the assessee during the FY including TDS, then only interest could have been levied. The Assessing Officer be directed to verify the facts and be redirect to compute the interest payable u/s 234B of the Act.

41. The Ld. DR relied upon the Assessment Order.

42. We have heard both the parties and perused all the relevant material available on record. This ground is consequential ground, hence we direct the Assessing Officer to verify the facts and compute the interest payable u/s 234B of the Act. Ground No. 7 is partly allowed for statistical purpose.

43. As regards to Ground No. 8 pertaining to interest under Section 234C of the Act, the Ld. AR submitted that the Assessing Officer has levied interest u/s 234C of the Act of Rs. 76,23,106/-. The Ld. AR submitted that the interest under Section 234C is leviable on default in payment of advance tax installment on returned income and not on assessed income. The Ld. AR submitted since there was no default on the part of the assessee in payment

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of advance tax as per returned income, such interest levied is highly erroneous. The Ld. AR submitted that interest u/s 234C of the Act is levied only when the assessee fails to deposit the tax based upon its return of income. As per the return of income tax payable aggregated to Rs. 6,92,78,828 which was duly discharged by TDS. It is not understood on what basis the Assessing Officer had levied the tax u/s 234C of the Act of Rs. 76,23,106/- which was not levied. Further, in case due relief is granted based on merits of the case as well as allowing set-off against brought forward business loss, long term capital loss and full TDS credit, there will not be any liability of tax and consequential interest under section 234C of the Act even on assessed income. Thus, the Assessing Officer has erred levying interest under section 234C on tax payable on the assessed income. It is prayed that the Assessing Officer be directed to delete the levy of interest under section 234C of the Act.

44. The Ld. DR relied upon the Assessment Order.

45. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the interest under Section 234C is leviable on default in payment of advance tax installment on returned income, but in the present case it is done on assessed income. Thus, when there is no default on the part of the assessee in payment of advance tax as per returned income, such interest levied is not justified by the Assessing Officer. The interest u/s 234C of the Act is levied only when the assessee fails to deposit the tax based upon its return of income. But in the present case, as per the return of income tax payable aggregated to Rs. 6,92,78,828 which was duly discharged by TDS. These facts were not disputed by the Ld. DR at the time of hearing. Hence, Ground No. 8 is allowed.

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46. In result, appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the Open Court on this 09th Day of June, 2021.

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated : 09/06/2021
R. Naheed

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

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Date of dictation	09.06.2021
Date on which the typed draft is placed before the dictating Member	09.06.2021
Date on which the typed draft is placed before the Other Member	09.06.2021
Date on which the approved draft comes to the Sr. PS/PS	09.06.2021
Date on which the fair order is placed before the Dictating Member for pronouncement	09.06.2021
Date on which the fair order comes back to the Sr. PS/PS	09.06.2021
Date on which the final order is uploaded on the website of ITAT	09.06.2021
Date on which the file goes to the Bench Clerk	09.06.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	

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