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

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.560/Del/2022
Assessment Year: 2018-19

Huawei Technologies Co. Ltd., Administration Building, Bantian, Longgang District, Shenzhen 518129, P.R. China, China	**Vs.**	ACIT, Circle- Int. Taxation, Gurgaon
PAN :AACCH2982B		
(Appellant)		**(Respondent)**

Appellant by	Sh. Ajay Vohra, Sr. Advocate Sh. Anshul Sachhar, Advocate Sh. Tavish Verma, Advocate
Respondent by	Sh. Gangadhar Panda, CIT(DR) Sh. Sanjay Kumar, Sr. DR

Date of hearing	12.01.2023
Date of pronouncement	

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeal, at the instance of the assessee, is directed against the final assessment order dated 28.02.2022 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (for short 'the Act') pertaining to

assessment year 2018-19, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. Grounds raised by the assessee are as under:

1. That on the facts and in the circumstances of the case and in law, the Learned Assessing Officer (`A0') erred in passing the impugned assessment order dated February 28, 2022 under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (‘Ace) pursuant to the directions of the Hon'ble Dispute Resolution Panel —1 (hereinafter referred to as `the Hon'ble **DRP')** in assessing the income of the Appellant at INR 4,19,22,61,900/- as against the returned income of INR 51,76,97,370/- reported by the Appellant in the return of income (`ROP).

2 That on the facts and in the circumstances of the case and in law, the assessment order dated February 28, 2022 passed **by** the Learned AO is unsigned and hence is bad in law and void-ab-initio.

3 Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Learned AO erred in passing the impugned Assessment Order while not appreciating the correct factual position and legal principles brought on record by the Appellant. Further, the Learned AO / the Hon'ble DRP erred in making / not rejecting the allegations, incorrect observations, assertions and inferences on the basis of mere conjectures and surmises, which are both factually incorrect as well as legally untenable and therefore, the impugned Assessment Order had in law and void ab-initio.

Appellant alleged to constitute a Permanent Establishment in India.

4 That on the facts and circumstances of the case and in law, the Learned AO has erred in holding Huawei Telecommunications (India) Company Private Limited (`Huawei India') to be a Permanent Establishment (PE') of the Appellant in India under the provisions of Article 5 of Double Taxation Avoidance Agreement between India and China (India-China Tax Treaty').

4.1 That on the facts and circumstances of the case and in law, the Learned AO has grossly erred in holding that Huawei India constitutes a 'Fixed Place PE' of the Appellant in India under Article 5(1) of the India-China Tax Treaty owing to following incorrect assumptions/ inferences:

- That in the earlier assessment years till the assessment year 2009-10, the relevant part of the statement of senior employees, analysis of survey documents, analysis of agreements and analysis of submission clearly establish that how the business of the Appellant is carried out in India with the help of their employees who regularly work from the premises in India belonging to Huawei India and thereby creating "Fixed Base PE". (Para 8.1)

- Huawei China has been carrying on business in India and has been sending employees to India. (Para 8.1)

- The employees of the Appellant performed these activities from the office premises belonging to Huawei India. (Para 8.1)

- Huawei India and the expatriates of Huawei China operating from the premises of Huawei India are virtual projection of the Huawei China in India. (Para 8.2)

- The Appellant had shown Huawei India's address as the local address for correspondence and later on wanted to hide its local address in India. (Para 8.1)

4.2 That on the facts and circumstances of the case and in law, the Learned AO has grossly erred in holding that Huawei India constitutes a 'Installation PE' of the Appellant in India under Article 5(2) of the India-China Tax Treaty owing to following incorrect assumptions/ inferences:

- The Appellant is undertaking marketing, installation and commissioning and other activities (incorrectly assumed that these activities are carried by Huawei China within India). (Para 8.1)

- That the employees of the Appellant have visited India to perform activities / supervisory activities relating to the installation projects (incorrectly assumed that these activities are carried by Huawei China within India) which have lasted for more than 183 days, thereby creating Installation PE' in India. (Para 8.3.3)

4.3 That on the facts and circumstances of the case and in law, the Learned AO has grossly erred in holding that Huawei India constitutes a 'Service PE' of the Appellant in India under Article 5(2) of the India-China Tax Treaty owing to following incorrect assumptions/ inferences:

- That employees of the Appellant have rendered services in India, other than in the nature of technical services, and that such services have continued in India for more than 183 days, thereby creating 'Service PE' in India. (Para 8.1)

4.4 That on the facts and circumstances of the case and in law, the Learned AO has grossly erred in holding that Huawei India constitutes a 'Dependent Agent PE' of the Appellant in India under Article 5(4) of the India-China Tax Treaty owing to following incorrect assumptions/ inferences:

- The process of joint bidding done by the Appellant and Huawei India does result into Dependent Agency Permanent Establishment ('DAPE') under Article 5(4) of the tax treaty. (Para 8.1)

- The business of the Appellant in India is being conducted with active involvement of the employees of Huawei India. Such employees of Huawei India along with employees of the Appellant have jointly prepared bidding documents for contracts, negotiated and concluded the contract on behalf of the Appellant with its Indian customers. (Para 8.2.1)

- Huawei India is economically, technically and financially all dependent upon Huawei China. Therefore, Huawei India also constitutes the agent other than an agent of independent status of Huawei China. The results into the creation of the Dependent Agent PE as per the articles of the tax treaties and business connection as per the provisions of Explanation 2 to Section 9(1)(i) of the Income-tax Act, 1961. (Para 8.2.1)

- The Appellant has authorized Huawei India for dealing with important matters relating to negotiations, correspondence, holding meetings etc. Huawei India is involved in all important business matters relating to Indian operation. (Para 8.1)

- The Indian company as a matter of routine was securing orders on behalf of the Appellant and was also concluding contracts. (Para 8.1)

- The employees of Huawei India form part of the sales teams of the Appellant, such employees have habitually secured orders in India, wholly or almost wholly for the Appellant. (Para 8.1)

- Huawei India and expatriate employees of Huawei China were actively involved in all the main activities which include almost entire gamut of the business of Huawei China in India. (Para 8.2)

- The copies of the documents are printed in India. People come from China to sign these documents in India. Subsequently, these documents are submitted to the Indian customers. (Para 8.1)

- The Appellant has given power of attorney in favor of its employees for signing the contracts, conducting negotiation and executing all necessary matters in relation to its projects in India. (Para 8.2.1)

- Various documents in the form of agreements/ purchase orders/ copies of contracts found at the premises of Huawei India prove the active involvement of the employees of Indian company in the conclusion of contracts on behalf of the Appellant. (Para 8.2.1)

- Huawei India had no independent business activities but it was set up only to aid the Appellant's business in India and hence practically it was working for the Appellant in India. (Para 8.3.8)

Revenues from supplies made to India attributed to alleged PE

5 Without prejudice, on the facts and circumstances of the case and in law, the Learned AO has erred in attributing income from supply of products (made on an off-shore basis) to India to the alleged PE of the Appellant in India.

5.1 That on the facts and in the circumstances of the case and in law, the Learned AO erred in proposing and the Hon'ble DRP further erred in confirming the action of Learned AO in assessing the total income of the Appellant under the provisions of the Act and India-China Tax Treaty without appreciating that income of the Appellant (other than the income offered to tax under the **ROI for** the year under appeal):

(a) had not accrued/ arisen in India under section 5(2) of the Act;
(b) could not be deemed to have accrued/ arisen in India under section 9 of the Act; and
(c) was not taxable in India under the provisions of the Act and / or Tax Treaty.

5.2 That on the facts and circumstances of the case, the Learned AO and Hon'ble **DRP erred in holding that Huawei** India creates Business Connection in India under section 9(1)(i) of the Act due to following reasons:

- The Appellant is in the business of supplying telecom equipment's to telecom operators in India;
- It is in this business since 2003;
- The telecom equipment's supplied by the Appellant are invariably installed and commissioned by Huawei India; and
- The Appellant has been regularly receiving income from Indian customers on account of supply of such equipment.

5.3 That on the facts and circumstances of the case and in law, the Learned AO as well as the Hon'ble DRP erred in not appreciating that since no part of activity relating to sale of telecom network equipment and terminal equipment was carried in India, the Appellant

could not constitute **Business Connection in India. Above conclusion by Hon'ble DRP is** against the jurisprudence **laid by jurisdictional Hon'ble Delhi High Court in case of** Ericsson **AB [343 ITR 470] and Special Bench of Delhi ITAT in case of Nokia Networks OY [94 taxmann.com 111].**

5.4 That on the **facts and in the circumstances of the case and in law, the Learned AO has erred in proposing and the Hon'ble DRP further erred in not appreciating that the documents** relied by the Learned AO to reach the **aforementioned conclusion relates to past year(s) and hence, cannot be relied upon to allege/ hold that the Appellant constitutes a PE in India for the year under consideration.**

5.5 That on the facts and circumstances of the case and in law and considering the decision of the Hon'ble Delhi High Court in Appellant's own case for past year(s), the Learned AO erred in proposing **and the Hon'ble DRP further erred in confirming the action of Learned AO** of allocating 70% **of the total supplies to hardware component and 30%** towards software in the telecom and terminal equipment. **The subject allocation done** arbitrarily and, on an ad-hoc basis by the Learned AO and confirmed by **the Hon'ble DRP is incorrect** and contrary to material furnished on record.

5.6 That on **the facts** and circumstances **of the case and in law, the Learned AO erred in not appreciating** the fact that **in Appellant's own case pertaining to AY's 2005-06 to 2008-09, the Hon'ble Delhi** HC dismissed the Department's appeal against the order passed by the Hon'ble ITAT wherein the **Hon'ble ITAT specifically negated the above approach taken by Revenue authorities to arbitrarily allocate a portion of total supply revenues towards hardware and software.**

Attribution of profit from supplies made to the alleged PE

6. That on **the facts and circumstances of the case and in law, the Learned AO, while placing reliance on the assessment orders passed for the previous years in the Appellant's own case, has erred in considering the operating margin at 2.51%, has further erred in adoptingthe attribution of 20 per cent of global profits as the same was made by placing on ruling of Special Bench of Delhi ITAT in case of Nokia Networks OY [96 TTJ** 1] **which has now been negated by Hon'ble Special Bench vide order dated June** 5, 2018 [94

taxmann.com 1 1 1]. **Further, the Learned AO and Hon'ble DRP has erred in not appreciating that even if for** argument's sake it is presumed that activities such as signing, negotiation etc. were undertaken in India, the same are preparatory and auxiliary in nature and would not result in constitution of PE and/ or attribution of income in India.

6.1 Without prejudice to the above, on the facts and circumstances of the case and in law, the Learned AO as well as the Hon'ble DRP erred in arbitrarily proceeding to attribute 20 per cent of profits to the alleged PE which is arbitrary and excessive given the purported functions basis which PE has been alleged. This arbitrary allocation is purely based on mere surmises and conjectures, contrary to the correct facts and evidences brought on record by the Appellant.

6.2 Without prejudice to the above, on the facts and circumstances of the case and in law, the Learned AO as well as the Hon'ble DRP erred in not appreciating and following the principles laid down by Hon'ble Supreme Court in case of Ishikawajma Harima Heavy Industries Ltd. v. DIT [288 ITR 408] and Hon'ble Delhi High Court in case of Ericsson AB [Supra] wherein it was held that since no part of activity relating to sale of equipment was carried in India, the question of attributing any income from these sales to the alleged PE does not arise.

6.3 That on the facts and circumstances of the case and in law, the Learned AO as well as the Hon'ble DRP erred in not appreciating that no portion of profits, if any, accruing to Appellant from offshore sale of terminal equipment to Indian customers can be attributed to the alleged PE in India given the nature of product and modalities of off the shelf offshore sales undertaken.

6.4 Without prejudice to above, the Learned AO as well as the Hon'ble DRP erred in not appreciating that the support services provided by Huawei India or the alleged PE have been remunerated at arm' length price. Consequently, no further income could be attributed and assessed to tax in India in view of the principle laid down by Hon'ble Supreme Court in case of DIT (International Taxation) v. Morgan Stanley & Co. (284 ITR 260).

6.5 Without prejudice to the above, on the facts and circumstances of the case and in law, the Learned AO as well as the Hon' ble DRP erred in not appreciating and following the principles laid down by Hon'ble Delhi High Court in case of Adobe Systems Incorporated (**76 taxmann.com** 297) and not allowing deduction for support service fee received by **Huawei India** for business support services provided in India (which have been primarily

alleged to constitute DAPE of the Appellant in India) while computing taxable income assessable in the hands of the alleged PE of the Appellant in India.

Taxation of revenues from supply of software

7 That on the facts and circumstances of the case and in law, **the Learned AO has** grossly erred in arbitrary allocating 30% of total supplies made towards 'software' in an arbitrary manner and taxing the same as 'Royalty' under Article 12 of the India-China Tax Treaty or under section 9(1)(vi) of the Act.

7.1 Without prejudice, on the facts and circumstances of the case and in law, the Learned AO has grossly erred in not appreciating the fact that the predominant character of the supply transaction is sale of equipment alongwith software and therefore, revenues from supply of software forming an integral part of the equipment cannot constitute 'Royalty' under Article 12 of the India-China Tax Treaty or section 9(1)(vi) of the Act.

7.2 Without prejudice, on the facts and circumstances of the case and in law, the Learned AO has grossly erred in holding that allocated software revenue is for use of a 'copyright' and not of a 'copyrighted article'.

7.3 That on the facts and circumstances of the case and in law, the Learned AO as well as the Hon'ble DRP erred in not following the decision of Jurisdictional Hon'ble Delhi High Court in the Appellant's own case i.e. DIT v. M/s Huawei Technologies Co. Ltd.: ITA No. 562 to 565 of 2016 and other precedents viz.Nokia Networks OY (Supra) and Ericsson A.B. (Supra) and Infrasoft Ltd. (ITA No. 1034/2009) etc., supporting the Appellant's above contentions.

7.4 Without prejudice to the above, the Learned AO erred **in** not following the Hon'ble Supreme Court ruling in the case of Engineering Analysis Centre and Ors. v. The Commissioner of Income Tax [Civil Appeal no. 8733-34 **of** 2018] wherein it has been held that software embedded in telecom products does not fall within the definition of royalties.

7.5 Without prejudice to above, even it is held that the revenues from supply of software along with the hardware is taxable as Royalty under the provisions of Act and / or Tax Treaty, then the same being effectively connected with the alleged PE can at best be taxed on net basis as 'Business Profits' under Article 7 of the India-China Tax Treaty.

Incorrect income considered

8 Without prejudice to the above, on the facts and circumstances of the case and in law, the Learned AO erred in considering the following :

- Profits attributed to the Appellant's PE to be taxed as business income as INR 4,32,18,688 instead of INR 4,25,84,960.
- Income from sale of software taxed as royalty and income in the nature of fees for technical services as INR 4,14,90,43,213 instead of INR 4,14,96:76,940.

Incorrect Levy of surcharge and education cess

9 That on the facts and circumstances of the case and in law, the Learned AO erred in levying surcharge and education cess on software income taxedas royalty liable to tax at the rate of 10% as per Article 12 of India-China Tax Treaty.

Levy of interest and penalty

10 That on the facts and circumstances of the case and in law, the Learned AO erred in levying interest under Section 234B of the Act.

11 That on the facts and circumstances of the case and in law, the Learned AO erred in proposing to initiate penalty proceedings under section 270A of the Act.

The grounds of appeal herein above are independent and without prejudice to each other.

3. Ground nos. 1, 2 and 3 are general in nature, hence, do not require adjudication.

4. In ground nos. 4, 5 and 6 along with their sub-grounds, the assessee has challenged the decision of departmental authorities in holding existence of fixed place Permanent Establishment (PE), installation PE, service PE, dependent agent PE and attribution of profit to the PE.

5. Briefly facts relating to this issue are, the assessee is a non-resident corporate entity incorporated in Peoples Republic of China and tax resident of that country. As stated, the assessee is engaged in sales of telecom equipments comprising of non-terminal products, i.e., advanced telecommunication network, namely, core and access network equipment, mobile network equipment and data communications equipments etc. to customers in various countries, including India. Further, the assessee also provides technical consultancy services to its subsidiary in India, viz., Huawei Telecommunications (India) Co. Pvt. Ltd. (in short 'Huawei India'). Huawei India is involved in the provision of integration installation and commissioning services in relation to telecom network equipment supply by the assessee from outside India. As observed by the Assessing Officer, these services were provided to Indian telecom operators under independent contracts between Huawei Indian and Indian telecom operators. For the assessment year under dispute, the assessee filed its return of income offering the income received from provision of technical services to Huawei Indian as Fees for Technical Services (FTS) and royalty income on gross basis. It also offered interest on Income Tax Refund as income and paid taxes

at the rate of 10% in terms of Article 12 of Indian-China Double Taxation Avoidance Agreement (DTAA). In course of assessment proceeding, the Assessing Officer noticed that in addition to the income offered in the return of income, the assessee has earned the following revenues from India:

1. Sale of non-terminal products of Rs.12,45,19,580/-
2. Sale of terminal products Rs.1198,20,78,985/-

6. In course of assessment proceeding, when the Assessing Officer called upon the assessee to explain the reason for not offering the aforesaid revenues to tax, the assessee submitted that the revenue earned from sale of equipment is not taxable in India as business profits, since, such sales were effected outside India and the assessee does not have any PE in India. The Assessing Officer, however, did not accept the claim of the assessee. Relying upon the past assessment history of the assessee, the Assessing Officer concluded that Huawei India constitutes a fixed place PE, installation PE, service PE and dependent agent PE. Thus, he held that the entire revenue on account of supply of equipments and handsets is through business connection in India and has taken place through the PEs in India, hence, are effectively connected to the PE.

7. Having held so, the Assessing Officer proceeded to attribute profit to the PE. Referring to Rule 10 and the global accounts furnished by the assessee, the Assessing Officer worked out the weighted average net operating profit to 2.51% and attributed 20% out of such profit to the PE in India. Accordingly, he made addition of an amount of Rs.4,25,84,960/-.

8. The assessee contested the aforesaid addition by raising objections before learned DRP. However, following the decision of the Tribunal in assessee's own case in assessment years 2005-06 to 2008-09 and 2009-10 to 2016-17, learned DRP upheld the Assessing Officer's view, both, on the existence of PE as well as attribution of profit to the PE.

9. Before us, Sh. Ajay Vohra, learned Senior Counsel appearing for the assessee, though, fairly submitted that identical issue has been decided against the assessee in past assessment years, being assessment years 2005-06 to 2016-17, however, he submitted that while deciding the issues in past assessment years, the Tribunal has failed to take note of various submissions made by the assessee on the issue of existence of PE as well as attribution of profit. He submitted, without rendering independent finding on the submissions of the assessee, the Tribunal in

assessment years 2009-10 to 2016-17 has followed its earlier decision in assessment years 2005-06 to 2008-09. Thus, challenging the decision of the departmental authorities on the issue of PE and attribution of profit learned counsel made the following submissions in writing:

"At the outset, it is submitted that the Appellant vehemently denies existence of any form of Permanent Establishment (`PE') in India under the provisions of the India China Double Taxation Avoidance Agreement (`DTAA') and denies existence of any business connection in India under section 9(1)(i) of the Income-tax Act, 1961(` the Act'). As explained during the course of the hearing before this Hon'ble Bench and also submitted as part of submissions before the lower authorities (copies of which are placed as part of the paper book), at the cost of repetition, it is most humbly submitted that the findings / observations made during the course of Survey conducted on the premises of Huawei Telecommunications (India) Company Private Limited (`Huawei India') in February 2009 cannot be considered for the purpose of alleging Permanent Establishment (`PE') across multiple years, including the year under consideration. It is a trite law that existence of a PE and business connection is a fact specific topic and is required to be evaluated basis the facts and conduct of a non-resident company in each Assessment Year (`AY') separately. In this regard, reliance is placed on the following rulings:

a) *Installment Supply* ***(P.)*** *Ltd. v. Union of India (SC) 1962 AIR 53*
b) *Radhasoami Satsang vyas v. CIT (SC) 1962 AIR 53*
c) *Municipal Corporation of City of Thane v. Vidyut Metallics Ltd. & Anr. (SC) Appeal (Crl.) 647-650 of 2002*
d) *CIT v S. Murugappa Chettiar 197 ITR 575 (Kerela High Court)*
e) *Bentley Nevada Inc. [TS-62-ITAT-2022(DEL)]*

At this juncture, it is also pertinent to note that the Appellant did not have any place of business in India, and it did not carry on any business operatiom in India. The telecom equipment was supplied to the Indian telecom operators / customers directly from outside India. Further, title in

telecom equipment was transferred outside India and the consideration for supply of telecom equipment was received outside India.

Further, Huawei India does not constitute Fixed Place PE / Dependent Agency PE / Installation PE / Service PE of the Appellant in India as has been alleged in the impugned assessment order.

Without prejudice to the above, it is respectfuly submitted that assuming and without admitting that the r Appellant constitutes any form of PE in India, no further attribution was required to be made to the alleged PE since the PE had been remunerated at an a's length, as accepted by the Ld. Transfer Pricing Officer ('TPO'). With regard to the issue of attribution, as directed by this Hon'ble Bench, it is most respectfully submission as under:

The Learned Assessing Officer)'Ld. AO') had held 20 per cent of global profits from offshore supply of telecom network equipment was attributable to tax in the hands of the alleged PE in India. In coming to the said conclusion, the Ld. AO/ Dispute Resolution Panel ('DRP') relied on the decision of the Hon'ble Delhi Income Tax Appellate Tribunal ('ITAT') in the case of ***Motorola Inc. vs. DCIT: 95 ITD 269 (Del.)*** *wherein, Nokia Networks Oy was also a party, attribution of 20 per cent was made on account of following:*

- *10 per cent towards signing of supply and installation contracts in India; and*
- *An additional 10 per cent towards network planning and contract negotiations.*

Relevant extracts of the order passed by the Ld. AO/ directions passed by the Ld. DRP for the subject year under consideration, i.e., Assessment Year ('AY') 2018-19 are reproduced below:

<u>Relevant extracts of the assessment order</u>

10.7 The aforesaid services are preliminary and auxiliary in nature and the amount received by Huawei India from providing above services has been subjected to tax in the hands ofHuawei India. Therefore, this amount, which is received in India on account of the overall business connection in India of the sales made by Huawei China, has been subjected to tax in India. In view of this, the attribution of profits arising to the assessee out of the sale/ supply of the network equipment and handsets etc. is done at 20% of the profits. The reply and the details provided by the assessee have been discussed only to assess a

just and reasonable rate of attribution of profit and it does not in any way dilute the finding that on the facts of this case that an attribution of Income is required to be made. This rate of attribution is just and reasonable

10.8 In view of the above I hold that 20% of the estimated profits are attributable in India and taxable in the hands of Indian PE .

Relevant extracts of the DRP directions

4.3 Ground no. 9 to 14 — these grounds are relating to revenue from supply attributed to alleged PE in India.

4.3.1 This issue came before the DRP for AY 2016-17 also. The DRP, considering all the facts and circumstances of the case as submitted by the assessee and the AO order, issued the direction as under:

"i." in this respect, the AO he in para 10 that since, revenues from supply of telecom equipments and mobile handsets i.e the "hardware component" of the telecom equipments and the mobile handsets are taxable in India as 'business profits ', it is imperative to/' determine the profits that should be attributed to the assessee's PE in India. The assessee submitted that no further attribution, needs to be done as the ALP criteria of International Transaction have been studied by TPO in past years. The assessee has further submitted that since no part of activity relating to supply of telecom network and terminal was carried out by the assessee in India, the question of attributing any income to India does not arise.

i Similar contentions have been raised by the assessee during the course of assessment for A Y 2005 06 to 2008-09. In the assessment orders for AY 2005 06 to 2008-09, 20% of estimated Profits have been held to be attributable to Indian PE. These have been upheld by the Hon'ble DRP in respective years and also by the Hon 'ble ITAT Delhi Bench in the AYs 2009-10 and 2013-14, 20% of estimated profits have been held to be attributable to Indian PE In the assessment orders.

ii It has been established that the assessee constituted PE in India. As regards assessee's claim that no further attribution needs to be done as the Arm's Length criteria of international Transaction have been studied by TPO in past years, it is observed that in the current year, no reference has been made to the TPO, hence the argument holds no water anymore and is rejected.

Even otherwise, this issue was discussed in para (iii) on page 8 of the Directions of the Panel for AY 2015-16. This argument is thus rejected. The AO has held that 20%, of the estimated profits are attributable India and taxable in the hands ofIndian PE, as was done in earlier years.

iii. The Panel has considered the issue. In the year under consideration also the AO has attributed 20% of the Global Profit to India as has been upheld by the IT AT and the DRP in the past. The percentage of 20% was adopted in tile preceding years, which were completed pursuant to the survey action. Since, the attribution is based upon the past history of the case which has been upheld by the Hon'ble IT AT after considering all the facts of the case, the DRP upholds the decision of AO on this issue. The objections are rejected."

4.3.2 For the year under the consideration being AY 2018-19 also, the DRP shall not deviate from its earlier observations and direction ns the factual matrix of tire case is same in the instant case and also keeping in view the history of litigation as elaborated above. The assessee's objection in this regard is rejected.

In this regard, during the course of the hearing it was submitted that since Huawbi India which has been held to be Fixed Place PE / Dependent Agency PE / Installation PE / Service PE had been remunerated at arm's length, as has also been accepted by the Ld. Transfer Pricing Officer (`TPO'), no further attribution was required to be made to the alleged PE.

To buttress the aforesaid proposition, the Appellant relied upon the decision of the Hon'ble Supreme Court in in the case of DIT vs. Morgan Stanley & Co. Inc: 292 ITR 416 wherein MSC, a US based company was an investment bank engaged in business of providing financial advisory services, corporate lending and securities underwriting. It entered into an agreement with Morgan Stanley Advantage Services Pvt Ltd (`MSAS'), a wholly owned Indian subsidiary for providing certain support services to MSC. MSAS was set-up to support the main office functions in equity and fixed income research, account reconciliation and IT enabled services such as back-office operations which are preparatory and auxiliary in nature, data processing and support centre to MSC pursuant to the aforesaid agreement. The Supreme Court held that one has to undertake a factual and functional analysis of each of the activities performed by an enterprise to determine whether a PE has been constituted.

On the basis of such an analysis, it was concluded that the activities performed by its subsidiary in India were only back-office operations. Consequently, the second part of Article 5(1) (i.e., business activities of an enterprise are carried out wholly or in part through the fixed place) of the treaty was not satisfied and there was held to be no Fixed Place PE in India.

The Court further held that MSAS does not constitute an Agency PE since MSAS does not have any authority to enter into or conclude the contracts on behalf of MSC in India. However, since MSC is rendering services through its employees to MSAS, therefore, Service PE of MSC is constituted in India.

In respect of attribution of income to the PE, the Court held that if the transactions between the PE and the foreign Associated Enterprise (`AE') are found to have taken place at arms' length prices, then there is no question of attributing any income to the PE. Relevant extracts of the decision are reproduced below:

"33. To conclude, we hold that the AAR was right in ruling that MSAS would be a Service PE in India under Article 5(2)(1), though only on account of the services to be performed by the deputationists deployed by MSCo and not on account of stewardship activities. As regards income attributable to the PE (MSAS) we hold that the Transactional Net Margin Method was the appropriate method for determination of the arm's length price in respect of transaction between MSCo and MSAS. We accept as correct the computation of the remuneration based on cost plus mark-lup worked out at 2.9% on the operating costs of MSAS. This position is also accepted by the Assessing Officer in his order dated 29-12-06 (after the impugned ruling) and also by the transfer pricing officer vide order dated 22-09-06. As regards attribution of further profits to the PE of MSCo where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE. The situation would be different if the transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the PE for those functions/risks that have not been considered. The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represents the value of the profit attributable to his service. In this

connection, the Department has also to examine whether the PE has obtained services from the multinational enterprise at lower than the arm's length cost? Therefore, the Department has to determine income, expense or cost allocations having regard to arm's length prices to decide the applicability of the transfer pricing regulations."

Therefore, considering the principle laid down by the Hon'ble Supreme Court in case of ***DIT vs. Morgan Stanley & Co Inc,*** *(supra) even if Huawei India is considered as a PE (without admitting), an arm's length remuneration to such PE would extinguish any liability in India of the overseas enterprise, viz. the Appellant.*

The aforesaid principle has been reiterated in ***CIT vs. eFunds IT Solution and Ors 399 ITR 34 (SC), Samsung Heavy Industries Co. Ltd. vs. DIT: 426 ITR 1 (SC)*** *and* ***Honda Motor Co. Ltd vs. ADIT: 301 CTR 601 (SC).***

Reference is further made to the recent decision of the Delhi ***ITAT*** *in the ease of* ***DCIT vs. M/s Adobe Systems Software Ireland Ltd.: ITA Nos.5024 to 5029/DEL/2017,*** *wherein the ITAT reiterated the principle laid down by the Supreme Court in the case of DIT vs. Morgan Stanley & Co Inc, (supra) and held as under:*

"Upon careful consideration, we find that nd that the issue of attribution to profit when the transaction has been found to at Arm's Length between foreign party and the Indian AE, then no further attribution is required has already been decided by the decision of the Hon'ble Supreme Court in the case of DIT v. Morgan Stanley & Co. Inc [2007] 292 ITR 416 (SC). This aspect was very much Wore the Ld. CIT(A) and he has dealt with the same as under:-

"As regards determination of profits attributable to a PE in India (MSAS) is concerned on the basis of arm's length principle Article 7(2) is relevant. According to the AAR where there is an international transaction under which a non- resident compensates a PE at arm's length price, no further profits would be attributable in India. In this connection, the AAR has relied upon Circular No. 23 of 1969 issued by CBDT as well as Circular No. 5 of 2004 also issued by CBDT. [Para 29]
Article 7 of the U.N. Model Convention inter alia provides that only that portion of business profits is taxable in the source country which is attributable to the PE. It specifies how such business profits should be ascertained. Under the said Article, a PE is treated as if it is an independent enterprise (profit centre) dehors the head office and which deals with the head office at arm's length. Therefore, its profits are determined on the basis as if it is an independent enterprise. The profits of the PE are determined on the basis of what an independent

enterprise under similar circumstances might be expected to derive on its own. Article 7(2) of the U.N. Model Convention advocates the arm's length, approach for attribution of profits to a PE. [Para 31]

The object behind enactment of transfer regulations is to prevent shifting of profits outside India. Under article 7(2) not all profits of MSCo would be taxable in India but only those which have economic nexus with FE in India. A foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the PE in India. The quantum of taxable income is to be determined in accordance with the provisions of Act. All provisions of Act are applicable, including provisions relating to depreciation, investment losses, deductible expenses, carryforward and set-off losses, etc. However, deviations are made by DTAA in cases of royalty, interest etc. Such deviations are also made under the Act for example: Sections 44BB, 44BBA etc.). Under the impugned riding delivered by the AAR, remuneration to MSAS was justified by a transfer pricing analysis and, therefore, no further income could be attributed to the PE (MSAS). In other words, the said ruling equates an arm's length analysis (ALA) with attribution of profts. It holds that once a transfer pricing analysis is undertaken; there is no further need to attribute profits to a PE. The impugned ruling is correct in principle insofar as an associated enterprise, that also constitutes a PE, has been remunerated on an arm's length basis taking into account all the risk-taking functions of the enterprise. In such cases nothing further would be left to be attributed to the PE. The situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise.

In such a situation, there would be a need to attribute profits to the PE for those functions/risks that have not been considered. Therefore, in each case the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case."

11.The Ld. CIT(A) in this regard held that the argument of the appellant is that if the international transactions between the parent entity (HO) and associated entity (AE) stand accepted at an Arm's length based on FAR analysis, in that case, the question of appropriation of profit to DAPE does not arise. That his argument sans the concept of separate entity approach as provided in article 7 of India Ireland DTAA to distinguish between PE and parent entity (HO). That if the international transactions between India AE and HO have been accepted at an arm's length by TPO, it does not automatically mean that FAR of DAPE stands subsumed in the same. That it is important to distinguish between the

benchmarking analysis for the transactions between HO and associated enterprise (AE) vis-a-vis that of HO and its PE. That it may be important to make a distinction between the FAR of the parent entity (Head Office (HO) in Ireland) and I AR of the DAPE (India). Further, it is also important to note that FAR of the DAPE is distinct from FAR of the associate enterprise (AE) in India. That so, practically, it is a interplay of FAR amongst three entities i.e. parent entity (HO) in Ireland, DAPE in Indian and Associated Entity (AE) in India.

Supreme Court as above in the case of DIT vs Morgain Stanley & Co. (supra). To the same effect is the order of the ADIT v. E-Funds IT Solution Inc. [2017] 399 ITR 34(SC), Honda Motor Co. Ltd vs. ADIT (301 CTR 601)(SC) and of the Hon'ble Delhi High Court in the case of Adobe Systems Inc. v. ADIT [WP(C)2384, 2385, 2390 of 2013] and DIT v.BBC Worldwide Ltd. [2011] 203 Taxman 554(Delhi), once a transfer pricing analysis has been undertaken in respect of the Indian AE, nothing further would be left to he attributed to it as the alleged PE of Adobe Ireland and that, accordingly, would automatically extinguish the need for attribution of any additional profits to the alleged PE.

13.In all these cases, it has found that the transactions have been found to be at Arm's Length by the Transfer Pricing Qfficer in the Transfer pricing order of the AE i.e. Adobe India. This is not disputed by the Revenue. In such a situation, the decision of the Hon'ble Apex Court as above applies on all fours in these cases. The Revenue has tried to distinguish the order of the Hon 'ble Supreme Court decision by firstly referring by submitting that the Adobe India is performing functions which are wider in scope of the agreement entered with the assessee and in the TP study report ofAdobe India. For this purpose, reliance has been placed on the order of the Ld. CIT(A) in this case for AY 2010-11. We find that the above submission by no stretch of imagination can be said to be distinguishing the decision of the Hon 'ble Apex Court from being applicable from the facts of the present case. Very well understanding this proposition, the Revenue itself urged that without prejudice to the above, the judicial decision of the attribution of profit by applying FAR analysis has not been accepted by the Indian Government and the profit has to be ; determined by apply of provisions of DTAA r.w.s. 10A of the Income Tax Rules, 1962. In view of the above, we are of the opinion that the decision of the Hon 'ble Apex Court as above squarely applies in this case. Hence holding that since the transactions between the assessee and its Indian AE has been found to be at Arm's Length in the transfer pricing

adjustment, no further attribution can be made to the PE of the appellant as claimed. Hence, this issue needs to be decided in favour of the assesse."

Without prejudice to the above, it was submitted that the Ld. AO erred in allocating 20% of the global profits to the alleged PE in India basis the decision of the Special Bench of the Tribunal in the case of ***Nokia Networks OY vs. JCIT : 96 TTJ 1.*** *It was contended by the Appellant on without prejudice basis that:*

(i) The aforesaid decision of the Hon'ble ITAT in the case of ***Nokia Networks OY vs. JCIT (supra)*** *was set aside by the Hon'ble Delhi High Court in* ***DIT*** *vs.* ***Nokia Network OY: 25 taxmann.com 225 (Delhi)*** *inasmuch as the High Court directed the ITAT to determine whether any profits may be attributed to tax in India on account of signing, network planning and negotiation of offshore supply contracts in India. During the set aside proceedings, the ITAT in* ***Nokia Networks OY vs. JCIT: 94 taxmann.com 111 (Del)*** *inter-alia held that the activities of signing of contracts, network planning and negotiation are in nature of preparatory and auxiliary activities which does not result in constitution of PE of the assessee in India. Therefore, no profits of the assessee are attributable to tax in India. Relevant extract of the decision are as under:*

"47. Now coming to the paragraphs 2, 3 and 4 of Article 5, it is not the case of any one that the NIPL constitutes any kind of PE under these provisions. Albeit if one goes by clause (e)of Paragraph 4 of Article 5, where it has been categorically provided that the PE shall not be deemed to include a maintenance of a fixed place of business solely either; & for the purposeof advertising; r b) for the supply of information or for scientific research; c) being activities solely of a preparatory or an auxiliary character in the business of the enterprise. This clause clearly excludes any activities solely for preparatory or auxiliary in nature and if one goes by scope of remand by the Hon'ble High Court, i.e.. to see, whether signing, networking planning and negotiation constitutes a PE and also whether profits can be attributed to such activities, then such kind of an activity ostensibly falls within the scope and realm of preparatory or auxiliary in nature, because mere signing, planning and negotiation or networking before supply of goods. are preliminary activities and therefore, under this all pervasive exclusion clause there cannot he any PE which can be deemed either in terms o Paragraph 1 2 and 3 o Article 5. Under he resent DTAA i activities are in the nature ofpreparatory and auxiliary character, then same have been specifically excluded rom being treated as PE. Hence, even if for the argument's sake it is accepted that there can be some kind of fixed, lace

under Article 5(1). then such a place cannot be reel oned as PE because the activities carried out from such a place are in the nature of preparatory and auxiliary. Accordingly, in terms of Article 5(4), there could not be any fixed plate PE under Article 5612 because the activities of the assessee in India were purely ertaiip;iintnet-k)laiining,. negotiation and signing of contracts before off-shore supply of (GSM) equipments and sale of goods have been made off-shore outside India. "

59.Since we have already held that nothing is taxable on account of signing, network planning and negotiation of offshore supply contracts, therefore, there is no question of any attribution of income on account of these activities which are purely related to supply contracts. Accordingly, the issue of attribution which has been remanded back by the Hon'ble High Court has become purely academic."

Accordingly, in view of the above since the activities of the Appellant basis which it was alleged that the Appellant constitutes a PE and attribution of 20 per cent was made, have been held to be in nature of preparatory and auxiliary in nature, PE of the Appellant is not constituted in India. Therefore, no profits Of the Appellant are attributable to tax in India. However, please note that in facts of the Appellant's case, supply contracts entered with Indian customers were negotiated through electronic means or through short visits of the Appellant's personnel at the customer locations in India. Further, all the contracts were accepted and 'concluded' by the Appellant, outside India. The power to negotiate, decide, vary and accept the terms of supply contract on behalf of the Appellant vests in the employees of the Appellant who reside in China. The telecom equipment supply contracts were 'concluded' only when the employees of the Appellant finally accepted the terms of the respective contracts, outside India.

(ii) Considering that equipment supplied by the Appellant was manufactured outside India, no part of the manufacturing profits could be allocated to the alleged PE; having regard to the limited activities carried out by the alleged PE. The attribution, at the highest should be limited to 10% of the global profit as held in ***Anglo-French Textile Co Ltd. v. CIT: 25 ITR 27 (SC) and CIT Vs Bertrams Scotts Ltd.: 31 Taxman 444 (Cal. HC)***

(iii) Without prejudice, where Huawei India is held to constitute a business connection/ PE of the Appellant in India and profits are held to be attributable to activities in India, then, while calculating the profits assessable to tax in

India in the hands of the alleged PE, deduction should be allowed for the payment made to Huawei India for support services.

Reliance in this regard is placed on the decision of Hon'ble Delhi High Court in the case of ***Adobe Systems Incorporated [76 taxmann.com 297],*** *wherein it is held that:*

30. In cases where a subsidiary acts as an agent of its holding company, the income from the activities conducted by the subsidiary for and on behalf of its principal would be assessed in the hands of the principal — that is, the holding company and not in the hands of the subsidiary. The subsidiary would only be liable to pay tax on the remuneration receivable as an agent and such remuneration would clearly be deductible while computing the income in the hands of the holding company.

Reference is further made to the decision of the Delhi ITAT in the case of M/s. ***Ricardo UK Limited vs. DCIT: ITA No.4909/Del./2018*** *wherein the ITAT held that while determining attribution of income to the PE, deduction be allowed to the PE of the remuneration/commission paid to the Indian company (RIPL) for provision of services. Relevant extracts of the decision are reproduced below:*

"14. Even otherwise, when we examine this proposition alternatively by reducing the commission/remuneration paid to RIPL from the profits attributed to the PE, detailed in the table extracted in preceding pant 11 of the order, nothing more will be left to attribute to the PE. This proposition has been held in case of Amadeus Global Travel Distribution S.A. vs. DCIT 113 TTJ 767 (Del.) by the coordinate Bench of the Tribunal which has been affirmed by the Hon'ble Delhi High Court in ITA No.689/2011 & 795-797/2011 by relying upon the decision held in case of DIT Vs. Galileo International Inc. 224 CTR 251 (Del.) wherein it is held as under:

"Reading the above Article 7 of the Treaty it is clear that the profit of an enterprise will be taxable only to the extent as is attributable to that permanent establishment. This is in pari materia with. clause (a) of Explanation I to section 9(1)(i) of the Income-tax Act. Thus where the entire activity of an enterprise are not carried out in a Contracting State where the PE is situated, than only so much of the profit as is attributable to the functions carried through the PE can be taxable in such source State. While dealing with the. question as to what is such part of income as is reasonably attributable to the operations carried out in India, we have held that only 15% of the revenue generated from the bookings

made within India is taxable in India. The same proportion has to be adopted here while computing profit attributable, to the PE. We have also held that since the payment to the agent in India is more than what is the income attributable to the PE in India, it extinguish the assessment as no further income is taxable in India., It is to be noted that even in the first assessment framed by the Assessing Officer, the entire expenses in the form of remuneration paid to AIN. was held as allowable deduction and was reduced while computing the income of appellant If that be the case, the income attributable to PE in India being less than the remuneration paid to the dependent agent, it extinguishes the assessment and requires no further exercise for computation of income. We accordingly hold so and in view of the same the income of the appellant for assessment years 1997-98 and 1998-99 will be 'Nil'."

15. So, we are of the considered view that when we deduct commission/remuneration from the RIPL from the profits attributed to the PE, no taxable income left in the hands of PE. Consequently, addition made by the AO/CIT (A) is not sustainable in the eyes of law.

16. Decision rendered by the coordinate Bench of the Tribunal in case of Amadeus Global Travel Distribution S.A. (supra), affirmed by the Hon'ble Delhi High Court, by relying upon the decision in case of DIT vs. Galileo International Inc. (supra) has been further followed by the coordinate Bench of the Tribunal in assessee's own case bearing ITA No.4906/Del/2010 for AY 2007-08 vide order dated 2610.2020.

17. In view of what has been discussed above, we are of the considered view that when RIPL, a domestic subsidiary company, has already been remunerated at arm's length, no further attribution of profit to PE would be warranted. Even otherwise, by following the order passed by the coordinate Bench of the Tribunal in assessee's own case for AY 2007-08 (supra), when we deduct the remuneration/commission paid to RIPL from the amounts of profit attributed to the PE as detailed in para 11 of this order, no taxable income left in the hands of the PE. Consequently, additions made by the AO and confirmed by Ld. CIT(A) are ordered to be deleted being not sustainable in the eyes of law. Consequently, all the appeals filed by the assessee are hereby allowed."

To the same effect is the decision of the Delhi High Court in the case of ***Director of Income tax*** *vs.* ***Galileo International Inc: 224 CTR 251*** *and* ***Amadeus Global Travel Distribution S.A. vs. DCIT & Anr: 113 TTJ 767.***

In view of the above, after deducting the payments made by the Appellant for the support service fee paid to Huawei India (for provision of support services to overseas Huawei entity) from the revenue attributable to the PE of the Appellant in India, the taxable income (loss) in the hands of the PE is computed as under:

Particulars	AY 2018-19 (in INR)
Returned Income	517,697,370
Tax on returned income	51,769,737
(a) Details of	
Sales of telecom equipment	11,982,078,985
Sales of terminal equipment	124,519,580
Total equipment sales	**12,106,598,565**
100% Profit Attribution to Hardware	12,106,598,565
1) Income from Hardware _	
Profit on sale of hardware (Global profit rates)	303,875,624
Profit attributed to alleged. PE (A) @ 20%	60,835,658
2) *Fee for technicalLLvices /Interest income*	
Already offered to tax in return @ 10% (B)	517,697,370
Less : Payment made to Huawei India (C)	3,400,019,206
Taxable Income (D = A+B-C)	**(2,821,486,178)**
Hardware (at the rate of 43.26%)	
Fee for technical services 10%	51,769,737
Total Tax Payable	51,769,737
Less: Taxes Deducted at Source	52,382,715
Tax Payable	-612,978

(iv) The losses, if any, computed in preceding years should be carried forward and set off against profits of any of the succeeding years.

The Ld. CIT DR further argued that the question of attribution having already been decided against the Appellant by the Hon'ble ITAT in the appeals for AYs 2005-06 to 2008-09 (ITA Nos. 5253 to 5256 of 2011) and subsequently followed by the Hon'ble ITAT in the appeals for AYs 2009-10 to 2016-17 (ITA Nos. 1500/De1/2014 and others), the same ought not to be followed.

In rebuttal, the Appellant submitted that while arguing the appeals for AYs 2005-06 to 2008-09, the Appellant made no submission on the profits attributed to the alleged PE by the assessing officer in those years. That aspect is duly noted by the Hon'ble ITAT while upholding the orders of the Ld. AO / DRP and dismissing the appeal filed by the Appellant for those years.

Further, for the AYs 2009-10 to 2016-17, the Hon'ble ITAT has merely relied on the order passed by it for AYs 2005-06 to 2008-09 without appreciating that the Appellant did not make any submission on the profits attributed to the alleged PE by the Ld. AO and hence, the issue on attribution of profits to the alleged ***PE*** *was not adjudicated by the Hon'ble ITAT. Relevant extracts of the order of the Hon'ble ITAT are reproduced below:*

*"**7** ..... We agree that the assessee can raise this necessary ground before the Tribunal but we are also of the opinion that judicial discipline also demands that we follow ITAT order in assessee's own case, facts being similar. Since ITAT in its common order dated 21.03.2014 has categorically held that ground no.6 by the assessee is dismissed. We follow the same and hold that following the precedent in assessee's own case, this ground is dismissed"*
It is trite law that where no arguments have been canvassed before the Hon'ble ITAT and, therefore, it is humbly submitted that no decision has been rendered by the Hon'ble ITAT on that particular aspect, the order of the Hon'ble ITAT cannot be regarded as a binding precedent qua that issue. Furthermore, even otherwise, the order of the Hon'ble ITAT (even if it is assumed to have dealt with the issue of attribution) being contrary to the law declared by the Hon'ble Apex Court in ***DIT vs. Morgan Stanley & Co. Inc (supra)*** *and reiterated in successive decisions thereafter cannot be followed in the subsequent AYs."*

10. Learned Departmental Representative submitted, the issue is squarely covered against the assessee by the decisions of the Tribunal in past assessment years, up to, assessment year 2016-17. Further, he submitted, the various contentions now taken by the assessee were considered by the Tribunal while disposing of appeals pertaining to assessment years 2009-10 to 2016-17. In

this context, he drew our attention to the grounds raised and submissions made before the Tribunal in these assessment years. Thus, he submitted, when there is no change in the factual position in the impugned assessment year, the Bench is bound to follow its earlier decisions. Further, he submitted, against the earlier decisions of the Tribunal, the assessee has preferred an appeal before the Hon'ble High Court and appeals have been admitted. Therefore, there is no reason to deviate from the earlier decisions of the Tribunal. He submitted, against the appellate order of the Tribunal in assessment years 2005-06 to 2008-09, the assessee had filed a miscellaneous applications raising the plea that issues concerning PE were not properly considered. However, the Tribunal dismissed the miscellaneous applications. Thus, he submitted, in the aforesaid scenario the contention of the assessee that the earlier decisions of the Tribunal should not be followed is unacceptable.

18. We have considered rival submissions and perused the materials on record. As far as the material facts relating to existence of PE and attribution of profit are concerned, they are more or less identical to past assessment years. The dispute between the assessee and the Revenue with regard to existence of

PE and attribution of profit arose for the first time in assessment year 2005-06 and continued in subsequent assessment years. Revenue authorities held that Huawei India constitutes fixed place PE, installation PE, service PE and dependent agent PE. Appeals for assessment years 2005-06 to 2008-09 on these issues came up for consideration before the Tribunal in assessment years 2005-06 to 2008-09. After considering the submissions of both sides the Tribunal while deciding the appeals vide order dated 21st March, 2014 (reported in 44 taxmannn.com 296) held as under:

> *"8. We have heard the arguments of both the sides and perused the material placed before us. As we have already mentioned that the assessee is a company incorporated in China and is engaged in the business of supplying telecommunication network equipment to various customers. In February 2009, survey operation under Section 133A of the Act was undertaken on the office premises of Huawei India. During the course of survey, several documents were found and impounded and statements of various senior executives were recorded. On the basis of documents found and the statement of various persons, the Assessing Officer recorded the finding that the assessee company is having a PE in India with the following observations:—*
>
> > *"8.1 On the basis of various facts/information collected during the survey and afterwards, it is clear that the assessee is carrying out the business in India. The business of the assessee in India is being conducted with active involvement of the employees of Huawei India. Such employees of Huawei India along with employees of the assessee have jointly prepared bidding documents for contracts, negotiated and concluded the contract on behalf of the assessee with its Indian customers. The assessee has given power of attorney in favor of its employees for signing the contracts, conducting*

negotiation and executing all necessary matters for MTNL project in India.

8.2 In view of the above, it is clear that the assessee, being tax residents of China, had fixed place PE in India in form of office premises of Huawei India. The business activities of the assessee being conducted from the fixed place of business referred above forms the core of selling activities and cannot be termed as of the preparatory or auxiliary character.

8.3 The employees of Huawei India forms the sales teams of the assessee, such employees have habitually secured orders in India, wholly or almost wholly for the assessee. The various documents in the form of agreements/purchase orders/copies of contracts also proves the active involvement of the employees of Indian company in the conclusion of contracts on behalf of the assessee. Huawei India is economically, technically and financially all dependent upon Huawei China. Therefore, Huawei India also constitutes the agent other than an agent of independent status of Huawei China. This results into the creation of the dependent agent PE as per the provisions of the tax treaties and business connection as per the provisions of Explanation 2 to Section 9(1)(i) of the Income Tax Act, 1961."

9. The assessee raised the objection before the DRP. However, the DRP rejected the assessee's objection and held that the Assessing Officer is justified in holding that the assessee was having a PE as well as business connection in India. The relevant finding of the DRP reads as under:—

"6.1 The third objection raised by the assessee is that it is not taxable in India under the Act and under the DTAA. It is contended that apart from what is declared by it in the return filed in response to notice u/s 148, the assessee's income has not accrued/arisen in India u/s 5(2) of the Act and the AO has erred in holding that Huawei India is the assessee's PE as well as the business connection in India. It is further contended that the AO also erred in assessing the income of the assessee as constituting PE under the DTAA, i.e. fixed place PE, installation PE, service PE and dependent agent PE.

6.2 The contentions raised by the assessee have been considered. Perusal of the draft assessment order reveals that the same contentions were raised by the assessee during the assessment proceedings also and the AO has elaborately dealt with each of these contentions in the draft order. As per

section 5(2) read with section 9(1)(i) of the Act, the assessee's income can be taxed under the Act only if the assessee has a business connection in India and the income is accruing or arising directly or indirectly through such business connection. Explanations to clause (i) of section 9(1) clarifies that business connection will include a person acting on behalf of non-resident and carrying on certain activities. Thus, the meaning of 'business connection' is very wide and the existence of business connection depends upon the facts of a particular case. In the present case, the telecom equipment supplied by the assessee are invariably installed and commissioned by its wholly owned subsidiary Huawei India and hence, it is clear that the assessee has a business connection in India. Further, the findings as a result of survey u/s 133A revealed that the assessee's business is carried out in India with the help of its employees, who regularly work from the premises of Huawei India, thus constituting Fixed Place PE. The assessee's employees also visit India to perform activities relating to installation projects lasting for more than 180 days, which constitutes Installation PE. The statements recorded during survey also show that the employees render technical services continuing for more than 183 days, constituting Service PE. Further, the process of joint bidding by the assessee and Huawei India constitutes Dependent Agent PE. The AO has also reproduced the relevant extracts from the statements of employees recorded during the survey, which: amply prove the existence of assessee's PE in India. As such, the AO is justified in holding that the assessee has PE as well as business connection in India and its income is taxable both under the Act as well as the DTAA."

10. At the time of hearing before us, the learned counsel for the assessee was unable to controvert thefinding recorded by the Assessing Officer as well as learned DRP. The Assessing Officer has clearly recorded the finding that the business of the assessee in India is being conducted with active involvement of the employees of Huawei India. Such employees of Huawei India alongwith the employees of the assessee have jointly prepared bidding documents for contracts, negotiated and concluded the contract on behalf of the assessee with its Indian customers. He has also recorded the finding that the employees of Huawei India form the sales team of the assessee. Such employees have habitually secured orders in India wholly or almost wholly for the assessee. Various documents found during the course of survey in the form of agreements, purchase orders, copies of contract prove the active involvement of employees of Indian company in the conclusion of contracts on behalf of the assessee. All these facts . recorded by the Assessing

Officer and upheld by the DRP have not been controverted before us. In view of the above, we do not find justificationto interfere with the order of learned DRP in this regard. Accordingly, ground Nos.5 & 6 of the assessee's appeal are rejected."

19. Notably, after the appeals were decided by the Tribunal, the assessee filed miscellaneous applications seeking rectification of the appeal order. While dismissing the miscellaneous application in order dated 24.03.2017, the Tribunal observed as under:

4. We have carefully considered the submissions of both the sides and have perused the material place before us. That the amendment to Section 254(2) has come with effect frOrn 01.06,2016, while these miscellaneous applications are filed by the assessee on 11.02.2015. In our opinion, the limitation provided in Section 254(2) can be made applicable to the applications filed after 01,06.2016 and not earlier. Moreover, the period of limitation is for filing an application and not for its disprisal by the ITAT. Hon'ble Apex Court has considered the identical Issue in the case of Sree Ayyanar Spinning and Weaving Mills Ltd. Vs. CIT - (2008) 301 ITR 434 (SC), wherein Hon'ble Apex Court has held as under :-

> *"Section 254(2) of the Income-tax Act, 1961, dealing with the power of the Appellate Tribunal to pass orders of rectification of mistakes, is in two parts. The first part refers to the suo motu exercise of the power of rectification, whereas the second part refers to rectification and amendment on an application made by the assessee or the Assessing Officer pointing out the mistake from the record. Where the application for rectification is made within four years of the appellate order of the Appellate Tribunal the Appellate Tribunal has jurisdiction to pass the order disposing of the application and cannot reject the application on the ground that four years have elapsed."*

5. In the present case, the order of the ITAT was dated 21st Marcy, 2014. The assessee filed the miscellaneous application on 11th February, 2015. As per section 154(2), , at the relevant time, there was a limitation of four years for filing of the appeal. Thus, the assessee had filed the miscellaneous application well within the time. Accordingly, learned DR's contention that the miscellaneous applications of the assessee are barred by limitation is rejected.

6. Now, coming to the merit of the assessee's contention, at the outset, we may mention that the modification sought for by the assessee is only cosmetic and not substantive. We are of the opinion that the mention of the words that the assessee's counsel has not been able to controvert the finding recorded by the Assessing Officer as well as learned DRP does not mean that the assessee's counsel has not properly argued the matter. it only means that the ITAT was not able to agree with the submission 4f the learned counsel. However, to avoid any misgiving about the ability or sincerity of the learned. Senior Advocate who appeared before us, we deem it proper to modify and replace paragraph 10 of the ITAT's order with the following paragraph:-

> *"10. After considering the facts of the case and submissions of both the sides, we are of the opinion that the learned DRP rightly upheld the finding of the Assessing Officer. The Assessing Officer has clearly recorded the finding that the business of the assessee in India is being 'conducted with active involvement of the employees of Huawei India. Such employees of Huawei India alongwith the employees of the assessee have jointly prepared bidding documents for contracts, negotiated and concluded the contract on behalf of the assessee with its Indian customers. He has also recorded the finding that the employees of Huawei India form the sales team of the assessee. Such employees have habitually secured orders in India wholly or almost wholly for the assessee. Various documents found during the course of survey in the form of agreements, purchase orders, copies of contract prove the active involvement of employees of Indian company in the conclusion of contracts on behalf of the assessee. The above facts clearly support the finding of the Assessing Officer. Therefore, in our opinion, the learned DRP rightly upheld the finding of the Assessing Officer. We do not find any justification to interfere with the same. Accordingly, ground nos. 5 and 6 of the assessee's appeal are rejected."*

7. Subject to nominal modification in paragraph 10 of the order of the ITAT as above, the miscellaneous application of the assessee are rejected."

20. As could be seen from the observations of the Tribunal, both, in the appellate order as well as the order disposing off the miscellaneous applications, a categorical factual finding has been

recorded that the assessee is conducting its business in India with active involvement of the employees of Huawai India. The Tribunal has recorded a finding of fact that employees of Huawai India along with employees of the assessee have jointly prepared bidding documents for contract, negotiated and concluded the contract on behalf of the assessee with its Indian customers. These are clearly discernible from the substituted paragraph 10 incorporated in the order disposing of the miscellaneous applications. Notably, assessee's appeals for assessment years 2009-10 to 2016-17 having identical issues, subsequently came up for consideration before the Tribunal and vide order dated 9th December, 2020, the Tribunal disposed of the appeals. However, due to certain inadvertent mistakes in the appellate order, the Tribunal recalled the order for the limited purpose of adjudication ground no. 6 with its sub-grounds, which are on the issues of existence of PE and attribution of profit and ground no. 7, which is on the issue of taxability of royalty income from sale of software. While considering these issues afresh in assessment years 2009-10 to 2016-17, the Tribunal in ITA No.1500/Del/2014 and others dated 13.10.2022 followed its earlier order and decided both the issues regarding existence of PE and attribution

of profit to the PE against the assessee. The observations of the Tribunal in this regard are as under:

> *"7. In rebuttal in this regard, the Ld. DR submits that while arguing the appeal for Assessment Years 2005-06 to 2008-09, the assessee has made no submission on profit attributed of alleged PE by the Assessing Officer in those years. That aspect has been duly noted by the Tribunal while upholding the order of the AO/DRP and dismissing the appeal filed by the assessee for those years. We note that this reference by the ld. counsel for the assessee is not factually correct as ITAT in its order has nowhere mentioned that this aspect has not been argued or this aspect has not been decided by the Tribunal. In this view of the matter, since the Tribunal in assessee's own case has rejected this ground, ground no.6 alongwith all its sub-grounds raised by the assessee is liable to be dismissed and the same is dismissed as such. For this, we place reliance upon the decision of the Hon'ble Apex Court in the case of Honda Siel Power Products Ltd. vs CIT in Appeal (Civil) No.5412 of 200, order dated 26.11.2007 regarding cannon of following Co-ordinate Bench decision. In this view of the matter, other case laws referred by the Ld. counsel for the assessee are not considered applicable in the particular facts of this case. This is more so when ITAT order has not been reversed by Hon'ble jurisdictional High Court. Moreover, it is also noticed that assessee is already in appeal before the Hon'ble High Court against this order of the Tribunal. No such ground as in this appeal has been raised before Hon'ble High Court. Ld. counsel for the assessee in this regard submitted that there is no estoppel as to law and he can raise this ground before ITAT. We agree that the assessee can raise this necessary ground before the Tribunal but we are also of the opinion that judicial discipline also demands that we follow ITAT order in assessee's own case, facts being similar. Since ITAT in its common order dated 21.03.2014 has categorically held that ground no.6 by the assessee is dismissed. We follow the same and hold that following the precedent in assessee's own case, this ground is dismissed."*

21. From the materials available on record, it is observed that while deciding the issue for the first time in assessment years 2005-06 to 2008-09, the Tribunal has considered all aspects relating to existence of PE as well as attribution of profit and upheld the decision of the departmental authorities. In

subsequent assessment years, viz., assessment years 2009-10 to 2016-17, the assessee had advanced identical arguments as has been advanced in the present appeal. Though, the Tribunal took note of various submissions made by the assessee, however, adhering to the norms of judicial discipline the Tribunal had followed its earlier decision in assessee's own case and decided the issues against the assessee. Before us, though, learned counsel appearing for the assessee has contended that various arguments advanced before the Tribunal in assessment years 2009-10 to 2016-17 were not considered, however, we are not convinced. A careful perusal of the observations of the Tribunal reproduced above would make it clear that the Tribunal after taking note of various submissions of the assessee took a conscious decision to follow its earlier decision. Therefore, the allegation of learned Senior Counsel that various submissions made by the assessee were not considered in assessment years 2009-10 to 2016-17 is without any substance.

22. As noted above, the issues have been consistently decided against the assessee by the Tribunal beginning from assessment year 2005-06 to 2016-17. There is no difference in the factual position permeating through different assessment years,

including, the impugned assessment year. It is relevant to observe, before us, learned counsel appearing for the assessee has submitted that against the decision of the Tribunal for assessment years 2005-06 to 2008-09, the assessee has preferred appeals before the Hon'ble High Court and the appeals have been admitted. Thus, when there are decisions of the Coordinate Bench in assessee's own case on identical set of facts and circumstances upholding the decision of the Revenue Authorities with regard to existence of PE and attribution of profit, as a Bench of equal strength, we are bound by such decisions. Therefore, norms of judicial discipline, decorum and propriety demand that we have to follow the earlier decisions of the Tribunal. In fact, for this very reason, while deciding the appeals for assessment years 2009-10 to 2016-17, the Tribunal had followed its earlier decision. In view of the aforesaid, following the consistent view of the Tribunal in assessee's own case in past assessment years, we uphold the decision of the Departmental authorities on these issues. Accordingly, these grounds are dismissed.

23. In ground no. 7 and its sub-grounds, the assessee has challenged the addition made of Rs.363,19,79,570/- towards royalty on sale of software.

24. Briefly the facts are, following the stand taken by the Assessing Officer in past assessment years, out of the revenue earned from supply/sale of equipments, the Assessing Officer attributed 70% towards hardware and 30% towards software embedded in the hardware. The software component was treated as royalty and brought to tax on gross basis by applying the rate of 10% as per the treaty provisions. Learned DRP rejected assessee's objections on the issue.

25. Before us, it is a common point between the parties that this issue has been consistently decided in favour of the assessee by the Tribunal in past assessment years. Having considered rival submissions, we find, the Tribunal while deciding the issue in assessment years 2005-06 to 2008-09 has deleted the addition by holding that the receipts are not in the nature of royalty. Identical view was expressed by the Tribunal while deciding appeals for assessment years 2009-10 to 2016-17, with the following observations:

> *"8. As regards ground no. 7 with regard to the taxation of software royalty, both parties have accepted that in the assessee's own case for Assessment Years 2005-06 to 2008-09, the Revenue's appeal in this regard was dismissed by ITAT and that Hon'ble Delhi High Court has dismissed the appeal against this order. Other aspects mentioned by both the parties in written submission are held to be not relevant in the light of our above adjudication."*

26. Facts being identical, respectfully following the decision of the Coordinate Bench in assessee's won case, we delete the addition. Ground no. 7 is allowed.

27. In ground no. 8, the assessee has pointed out certain computational mistakes by the Assessing Officer. Having considered rival submissions, we direct the Assessing Officer to examine assessee's claim by verifying the facts and materials on record and decide the issue after providing an opportunity of being heard to the assessee.

28. In view of our decision in ground no. 7, ground no. 9 has become infructuous. Hence, dismissed.

29. Ground no. 10 being consequential and ground no. 11 having not being pressed at this stage, are dismissed.

30. In the result, the appeal is partly allowed.

Order pronounced in the open court on 28th February, 2023

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 28th February, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi