

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : C : NEW DELHI
BEFORE SHRI R.S. SYAL, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.671/Del/2011
Assessment Year : 2001-02

GE Energy Parts Inc.,
AIFACS Building,
1, Rafi Marg,
New Delhi.

Vs. ADIT,
Circle-1(2),
International Taxation,
New Delhi.

PAN: AACCG2798N

(Appellant)

(Respondent)

Assessee By : Shri S. Ganesh, Sr. Advocate,
Shri Sachit Jolly, Shri Rashi Dhir,
Shri Gautam Swarup, Shri Sidhartha
Singh & Shri Rahul Sateerja, Advocates
Department By : Shri Sanjeev Sharma, CIT &
Shri Anuj Arora, CIT, DR

Date of Hearing : 19.01.2017

Date of Pronouncement : 27.01.2017

ORDER

PER R.S. SYAL, AM:

This appeal by the assessee is directed against the order passed by
the CIT(A) on 30.09.2010 in relation to the assessment year 2001-02.

2. At the outset, it is imperative to mention that there is a batch of 139 appeals by the GE group overseas entities under consideration. The group has chosen the extant as the lead case. It has been fairly admitted that there are four broader issues in all or some of the appeals. Two issues, namely, existence of PE and attribution of profits are common in all the appeals; issue of reassessment is specific to more than one hundred appeals, wherever the orders have been passed u/s 147 read with section 143(3) of the Income-tax Act, 1961 (hereinafter also called 'the Act') ; and the last issue of interest u/s 234B is in relation to some of the appeals for the A.Ys. 2007-08 and 2008-09. Submissions were made by both the sides on all the four issues in this lead case and it was candidly admitted that the other appeals involve *mutatis mutandis* similar issues. In fact, the same arguments were adopted by both the sides and no separate submissions were made for the remaining 138 appeals. As such, we are espousing the instant appeal for consideration and *ex consequenti*, the decision taken on all the four issues will apply to the remaining 138 appeals to the relevant extent.

A. CHALLENGE TO REASSESSMENT

3. The first assail is to the initiation of re-assessment proceedings. Succinctly, the factual matrix of the case is that the assessee is a company incorporated in the United States of America and is also a tax resident of the USA. The assessee is a part of the GE Group, which makes equipments to the customers in India relating to oil and gas business, energy business, transportation business and aviation business. No return of income was filed by the assessee prior to the instant proceedings. A survey u/s 133A of the Act was conducted at AIFACS premises, being the Delhi address of Liaison office (LO) of General Electric International Operations Company Inc. (GEIOC) on 2.3.2007. Certain incriminating material/documents were found, whose photocopies were obtained by the Department. Statements of two persons were also recorded during the course of survey. Certain post-survey enquiries were conducted. On the basis of the material/information gathered during the survey and the post-survey enquiries, the AO issued notices u/s 148 of the Act to 24 entities of the

GE Group incorporated in UK, Japan, USA, Germany, Canada, Italy, Mauritius, Singapore, etc. for different years, including the assessee. Notice u/s 148 dated 27.03.2008 was served on the assessee. A return declaring nil income was filed on 30.06.2008. Relevant parts of the reasons recorded have been reproduced on pages 3-23 of the assessment order, which we will deal with a little later. The assessee, after filing the return, requested the AO on 30.08.2008 to furnish the reasons, which were duly supplied. Objections were filed against such reasons on 4.11.2008, which came to be dismissed by the AO vide his order dated 12.11.2008. It is a matter of record that no writ petition was filed by the assessee against such rejection.

4. Main thrust of the AO's opinion in initiating re-assessment was that the assessee was making sales in India with the involvement of its Permanent Establishment (PE) in India and, accordingly, the profits attributable to such PE were chargeable to tax. In reaching this conclusion, the AO held that the assessee had, *inter alia*, a fixed place PE as well as a dependent agent PE in India. He deemed 10% of the

value of supplies made to the clients in India as the profits arising from such supplies and 35% of such profit was attributed to the PE in India. In a nutshell, 3.5% of the total value of supplies made by the assessee to the customers in India was held to be the income attributable to the PE in India. As total sales made by the assessee in India during the year amounted to Rs.19,98,06,676/-, profit at the rate of 3.5% on the same, amounting to Rs.69,93,234/-, was held to be taxable business income. The assessee's grounds against the re-assessment proceedings failed to convince the Id. CIT(A) as well. Now, the assessee is before us challenging the initiation of re-assessment.

5. We have heard the rival submissions and perused the relevant material on record. Before delving into the legality or otherwise of the initiation of the reassessment proceedings, it is *sine qua non* to note the reasons recorded by the AO before issuing the notice u/s 148, which are as under :-

"A survey u/s 133A of the Income Tax Act, 1961 ("Act") was carried out at the office premises of General Electric International Operation Company Inc., India liaison office ("GEIOC"), located at AIFACS, 1 Rafi Marg, New Delhi-1 10001 on 02.03.2007. The liaison office ("LO") of GEIOC, USA

was started in India from July 01, 1987. The office was set up to undertake the liaison activities. From the information available it is seen that GEIOC has employed various persons and is sending these employees on assignments to GE entities located worldwide. From this premises, other entities, incorporated in India as well as non-resident entities of the GE group are also operating.

2. During the course of survey statement of Shri Rupak Shah, who is employed with GE Capital Services, India as Tax Manager, but having extended responsibilities of tax matters relating to all companies of GE Group in India was recorded. Statement of Shri Chandan Jain, working with GEIOC, who provides Inter face between GE, USA and GE Business in India, was also recorded. During the course of survey photocopies of various documents were obtained and the same were inventorized as Annexures 'A' to 'G'.

3. The GE group (hereinafter: "assessee group/ assessee") was also requested to furnish various information vide summon u/s 131 of the Act issued on 02.03.2007. The assessee has furnished the information through its representative RSM & CO./PricewaterhouseCoopers Pvt. Ltd. vide letter dated 16.03.2007, 09.04.2007, 27.02.2008, 24.03.2008 and 26.03.2008. The GE Group is a diversified technology, media and financial services company with products and services ranging from aircraft engines, power generation, and water processing and security technology to medical imaging, business and consumer financing, media content and advanced materials. GE serves customers in more than 100 countries and employees more than 300,000 people worldwide.

GE has been in India since 1902. All of GE's global businesses have a presence in India and the Group has become a significant participant in a wide range of key services, technology and manufacturing industries. Employment across India exceeds 12000. Over dollar 1billion of exports from India support GE's global business operations around the world. It has sourced products. Services and intellectual talent from India for its global

businesses. It pioneered the concept of software sourcing from India and is one of the largest customers for the IT service industry of India.

Various operating companies of the group in India are as below:

A. FINANCE GROUP

- (i) GE Capital Services India - A Gurgaon based non-banking finance company provides commercial finance in India.
- (ii) GE Countrywide Financial Services - A Gurgaon based non-banking finance company dealing in retail finance.
- (iii) GE Money Housing Finance - A Gurgaon based company having NHB license provides housing loans.
- (iv) GE Capital Transportation Financial Services Ltd. - Deals in truck leasing and construction equipments financing.
- (v) Maruti Countrywide Auto Finance - GE Group has 37% equity in the company engaged in financing of Maruti cars.
- (vi) GE Corporate Financial Services - A newly formed NBFC operating from Gurgaon.
- (vii) GE Strategic India Investment - A NBFC having portfolio equity investment in Indian companies.
- (viii) SBI Cards & Processed Services Pvt. Ltd. - Deals with SBI credit cards and GE owns 40% equity of the company.
- (ix) GE Business Process Services Management Pvt. Ltd. - GE owns 60% equity of the company while balance is held by SBI and processes the SBI transactions in India only.

B. INDUSTRIAL GROUP

- (i) Wipro GE Ltd. - GE owns 51% equity whereas balance is owned by Wipro and is engaged in manufacturing and local distribution of medical diagnostic equipments.
- (ii) GE-BEL Ltd. - The joint venture company of GE (74%) and Bharat Electronics Ltd. (26%) and is engaged in the manufactured and exports of medical equipments.

- (iii) GE Medical Services Pvt. Ltd. - It manufactures products/ engine design and software for export and is also in healthcare business operates in EOU/STEP.

C. POWER SYSTEM

- (i) GE Power Services India Ltd. - Engaged in the business of repair and maintenance of steam turbines and 80% equity owned by GE.
- (ii) BHEL-GE Gas Turbine Services Ltd. - GE is holding 51% equity, whereas the balance is held by BHEL and is engaged in the repair and services of gas turbines and installation of turbines in India.

D. INFRASTRUCTURE

- (i) GE Fanuc Systems - Manufactures industrial machineries.
- (ii) GE Thermometric India - GE owns 75% equity and manufactures various industrial products in Bangalore.
- (iii) GE India Industrial Pvt. Ltd. - It has varied businesses in the sectors of plastic, lighting, energy, power system, transportation etc. Plastic business is in Baroda, energy is in Delhi and Mumbai, transportation business deals with Indian Railways locomotive components. Employees of this company also render services with regard to sales and procurement by the overseas entities. It also provides marketing support to energy division of GE. It manufactures water filtration equipments in Bangalore. It also has a training division which caters to the training of employees of GE in India. It also has business of manufacturing and distribution of industrial X-ray sheets.

E. SERVICES

- (i) GE India Exports - It consists of various companies in STPs and EOUs, engaged in software export. GE has India innovation centres in Hyderabad and Bangalore. It is having cards services divisions in Hyderabad and Bangalore and provides back office support for transaction processing and call centres. The Hyderabad technology centre provides services to GE group.

- (ii) GE India Technology Centre - Located in Bangalore. Provides software/engineering designs for various businesses globally.
- (iii) GE India Business Services Pvt. Ltd. - The payroll of this company is supported by act India. It provides services relating to European treasury, international tax (transfer pricing), documentation and IT support services.
- (iv) GE Global Sourcing Pvt. Ltd. - Operating from AIFACS House in responsible for procurement from India for GE group.

F. The assessee vide letter dated 16.03.2007 in Annexure 10 has submitted a list of divisions of GE businesses, which are not conducted either wholly or partly through GE subsidiaries in India and these are in the following business lines:

- Infrastructure (oil & gas, energy, rail, aircraft engines and aviation financial services).
- Industrial (equipment services)
- Healthcare (Diagnostic imaging, information technology, services and bio sciences)

4. Before discussing the contents of various documents, it is appropriate to state that, GE Group is engaged in various sales activities in India, for which the business heads are generally expats, who are appointed to head Indian operations, with the support staff provided by GE India Industrial Pvt. Ltd. and also by various third parties. These expats are on the payroll of GE International Inc(hereinafter: GEII)but working for various businesses of GE Group. After these brief comments, the contents of various documents are discussed hereunder:

ANNEXURE 'A'

This consists of 125 pages and mostly deals with GE infra division particularly oil & gas.

- Page 1 to 16 is a copy of Memorandum of Understanding (“MoU”) for technology transfer agreement between Bharat Heavy Electricals Ltd. and Nuovo Pignone S.P.A. for centrifugal compressors. The agreement

provides that BHEL and NP had entered into a license agreement, for the transfer of know-how on CCs in 1971 for the licensed territories. The MoU would be effective in 2006 and the same is a draft with various corrections. It is unsigned and various price figures are crossed and new figures are inserted. The presence of this document in the Indian office shows that Mr. Ricardo, head of oil & gas business of GE in India has the role in deciding the prices and negotiating the agreement.

- Page 17 is an e-mail regarding licensing of AD-SYST to sub joint venture.
- Page 18 is a confidential mail from La Motta of GE Infra & Gas to various employees of GE Infra Oil & Gas including Procacci Riccardo regarding the CC licensing to BHEL. This mail refers to "you know the case of BHEL, as we discussed it, and what is reported in the MoU reflects the content of the conversation we had (me, you and Riccardo) in the second half of August, when we were in India negotiating the deal. Then, you gave me confirmation of the way to include AD-Syst with your e-mail on September 28". This mail as an example shows that the negotiating team was in India and this included Riccardo also.
- Page 19 to 31 is again the document titled Memorandum of Understanding for technology transfer agreement between Bharat Heavy Electricals Ltd. and Nuovo Pignone S.p.A. for centrifugal compressors. This is similar to referred in Page 1 to 16 with changes.
- Page 32 and 33 deals with this MoU only.
- Page 34 to 38 is the e-mails relating to GTC-Offer against Reliance Industries Ltd. ("RIL") enquiry. These are written by Rajendra Singh of RIL to Mairano of GE Infra Oil & Gas with copies to various employees of RIL and Procacci Riccardo, Vivek Venkatachalam of GE Infra Oil & Gas, who are based in India. This mail is with regard to sale of gas turbine compressor package for compressor station of RIL, KGT-D-6 Block, Field Development Project.
- Page 39 to 56 is a copy of expression of interest for KG-D-6 Block, Field

Development Project, submitted to RIL by GE Oil & Gas, General Manager and provides information about the products and business of the company. This is unsigned letter.

- Page 57 is a mail from Fabio to Mr. Rajendra with a copy of Venkatachalam and Riccardo regarding pricing of exhaust stack extension.
- Page 58 to 61 is a copy of purchase order for exhaust ducts placed by Hak International Contractors Asia for supply of 14 units of exhaust stack of 30 meter height for a value of USD 5,426,568. This is addressed to Nuovo Pignone S.p.A, Italy. This is also unsigned and a draft order only. The availability of this document evidences the role of Indian office.
- Page 62 to 69 is again the copy of mails relating to Reliance purchase order.
- Page 71 is a copy of mail from Vivek Venkatachalam of GE Infra Oil & Gas, India to Fabio relating to the Reliance order.
- Page 72 to 100 is the documents (technical proposal) with regard to Bina Refinery India to BHEL made on 27.02.2007. The contact name shown as Araniti. Danila.
- Page 101 to 122 is a copy of commercial proposal (proposal No. 06.DW, 1056/F/O) with regard to Bina Refinery Ltd. for BHEL. This is given by Nuovo Pignone S.p.A. It provides the scope of supply and price.
- Page 123 is a forwarding letter to the BHEL regarding the commercial proposal, which mentions that "please note that the present proposal is valid only under the collaboration agreement between Nuovo Pignone S.p.A. and BHEL under finalization between parties.
- Page 124 and 125 also deals with the commercial/ technical proposal only, for which copies are given to Vivek Venkatachalam and Procacci Riccardo of GE Infra Oil & Gas, who are located in India.

ANNEXURE 'B'

This has 107 pages.

- Page 1 & 2 is a copy of e-mail from Sunni Krishnan to Nalin Jain of GE

Transport regarding emerging Indian aircraft/ engine maintenance, repair and overhaul (MRO market). This indicates that Mr. Nalin Jain is looking after the GE's aviation business in India.

- Page 3 to 7 is the commercial notes relating to RIL order.
- Page 8 had a description of team for oil & gas business with Riccardo Procacci as Country Leader India. Various employees shown are J. Lal, Assistant. Vivek Venkatachalam, Regional Manager, New Unit Sales, Ujjawal Kumar, ECLP Market Development, Ashok Rodgi, Deven Shukla Country Manager.
- Page 9 is a page of copy of VISA of Riccardo, which shows that he is employed with GE International Inc., New Delhi.
- Page 10 is a document showing the opportunities for oil & gas business in emerging markets, resulting from the meeting in Florence. .
- Page 11 to 21 is again draft copy of MoU for technology transfer agreement between BHEL and Nuovo. This document has the working for various figures given in the MoU.
- Page 22 to 25 is the documents relating to Nuovo Pignone general terms and conditions for sales.
- Page 26 is a mail from Vivek Venkatachalam to Prat Kumar of GE Infra with a copy to Riccardo regarding talking points on Reliance.
- Page 27 to 31 is a copy of letter of award for gas turbine compressor package, dated 31.07.2006 issued by Hak International Contractors Asia FZE for a price of USD 132,385,553 for supply of gas turbine compressor train 12 units. This is signed by Ankush Jindal and placed on Nuovo Pignone.
- Page 32 pertains to Reliance GCT order.
- Page 33 to 56 relates to BHEL order for Bina Refinery. The price for the engineering designs, materials & testing activities and commissioning etc. is given.
- Page 57 is a copy of mail from Prakash of BHEL to Procacci Riccardo regarding BHEL and NP cooperation for Bina Refinery compressor. A portion of the mail reads as:
‘Please refer to BHEL purchase order on NP for similar job in past. This job was dealt through your service Dept. This time we were informed that

present job shall be dealt with new sales Dept. and prices shall be competitive. However, contrary things happened. With this, we do not see any chances of getting the order.

We draw your attention to the fact that in last two year Euro has appreciated from 45 Rs to 58 Rs while our competitors currency i.e. Japanese Yen is static from last two years at 0.4 Rs.

We once again request you to revise your offer for present job in line with enclosed past similar order either through your new sales Dept. or service Dept. This will have bearing ongoing collaboration discussions of NP & BHEL.”

- Page 58 to 63 is the comments on draft MoU for compressors sent by GE Infra Oil & Gas vide e-mail dated 22.09.2006 (and counter comments from NP, October 16, 2006).
- Page 64 to 72 is a power point presentation relating to EWPL gas pipeline project of Reliance Gas Pipelines Ltd. This also provides the delivery summary.
- Page 73 to 83 is the commercial proposal relating to Bina Oman Refinery.
- Page 84 and 85 is with regard to GE Infrastructure message from John Rice.
- Page 86 is a list of 16 employees of GE Global Sourcing India Pvt. Ltd. This also shows the list of persons who are involved in oil & gas, aviation, rail and power & systems business. The oil & gas business is headed by Riccardo of GEII with two people from GE India International, aviation business is headed Bill Blair and aircraft engines business is looked after by Nalin Jain, an employee of GE India Industrial, Delhi and aircraft business is looked after by Ashish Sonawala. The rail business is looked after Ashfaq Nainar and Ken Pearson, working with GEII and the power systems business is looked after by local Indian employees.
- Page 87 is having the list of GE businesses. In the infrastructure, commercial finance, industrial, healthcare and consumer finance business.
- Page 88 shows the details regarding Haldia statutory closure.
- Page 89 and 90 deals with operations review relating to Haldia project and East West pipeline project. East West pipeline project shows

that installation is to begin in 3rd quarter of 2007 for 10 sites. Haldia and Ahmedabad projects, details available on page 90.

- Page 91 is blank.
- Page 92 deals with SBI accountlessons learned.
- Page 93 is with regard to Haldia documents retention.
- Page 94 and 95 deals with controllership and tax update India.
- Page 96 and 97 deals with the market dynamics and 2007 outlook. This page shows the direct orders and influence orders from various companies working in the oil & gas sector. Key wins included Reliance, IOCL Haldia and PII through Punj Lloyd. The document also shows that in 2007 strong start Dollar 136 million + in the bag and reinforce sales team to improve long term visibility and resources planning.
- Page 98 is a letter from GE Energy Oil & Gas dated 26.06.2006 to Riccardo Procacci for offering him the role as O&G India leader.
- Page 99 to 101 is a status report on 02.02.2007 regarding BHEL-GE Oil & Gas CCs license update and also refers to objectives, risks and terms of agreement.
- Page 102 to 106 is a power point presentation "the seven pillars of growth" and shows the various additions to the Indian team. Page 103 shows the details of sourcing along with the list of suppliers and the sourced volume are 17 million, 35 million and 70 million in 2006 to 2008 respectively. Page 102 shows the requisition engineering COE and number of engineers recruited. Page 104 provides details of various partnerships. Page 106 relating to expand sales teams refers to "develop qualified pipeline of opportunities.....expand customer Base.....two top talent added. The seven pillars of growth refers to:
 - ✓ Expand sales team
 - ✓ Localize ITO support
 - ✓ Partnerships
 - ✓ Local sourcing
 - ✓ Localize service
 - ✓ Leverage local engineering COE
 - ✓ Maximize infra synergies

- Page 107 is the GME profile and compensation worksheet of Riccardo Procacci on 01.02.2007, who is on assignment with GE Infra Oil & Gas.

ANNEXURE 'C'

This contains 49 pages and has the details of employees working in AIFCAS building regarding their names, designation, employing legal entity, employed since, working for the company, job description, reporting manager, incentive compensation, appraisal report and employment letter. In respect of some employees, the information is as below:

- Partha Ranjan Dey is working as Site Leader and reporting to Riccardo Procacci and the job description is sourcing.
- Amit Verma is a Junior Buyer and is engaged in sourcing and reporting to Riccardo Procacci.
- Jagdish Lal is the Secretary and reporting to Riccardo Procacci.
- Pravinna Yagnam Bhat is Executive Assistant and reporting to Prat Kumar.
- Udit Gaurav Kachru is reporting to Ashfaq Nainar and his job description is "manager in country sales for all locomotive products including new locomotives, modernization parts and services and his incentive is based on sales targets".
- Ashok Singh, working as Project Manager and reports to Ashfaq Nainar and his job description is 'proposals for locomotive parts systems and sales'.
- Yashdeep Sule is responsible for sales and marketing for signalling and locomotive.
- Pritam Kumar is reporting to Pierre Camte and his job description is "as market strategy manager for GE Transportation, look for opportunities for products like locomotives, signalling and also suggest strategy to enter the market, come out with product strategy and help sales bid in the projects".
- Himali Arora, Manager Finance, reporting to K. Mcbride.
- Ramkrishna Keshav has rotational assignments of six months each in aviation business.

- Nalin Jain, Sales Director for aviation division reports to William Blair and his job description is "market intelligence and support to head quarters".
- Udit Gaurav Kachru, who is working as Vice President, Enterprise Sales (Reporting to Mr. Pramod Bhasin). In the accomplishments:

"1.0 GECIS Global- BD FP & A

1.a Core member of finance team working on the divestment of GECIS which

was the largest transaction in the ITES in India. (emphasis by this office)

1. b Led the creation of pro forma financials for the new company & resolving specific banker, investor and customer queries on the financial position & strength of the business.

1.c Led creation & the soft audit (Comfort Letter) by KPMG of prior year financials to prepare for IPO requirements

1.d Evaluated potential synergies for first acquisition for act from list candidates including Creditek, (since acquired)."

3.0 India Growth Team - Enterprise Sales (Sep 2005)

3.a Helped define India Enterprises Sales strategy (go-to-market approach & corporate accounts)

3.b Established strong linkages across GE businesses to drive projects

3.c Grew the corporate ES deal pipeline from \$30MM to in excess of \$ 800 MM. Have established cross business teams to address each identified opportunity (Tata Steel, Medicity, RIL Healthcare, Container Corp., Ashok Leyland).

3.d Led the first GE Customer Day in India with Ashok Leyland & eight GE businesses." He also received management award (GECIS Global 2004).

- Anjali Sinha, hired 25 students from 14 management schools as per targets and she is Manager, Human Resources.
- Page No. 49 is a list of employees working in the AIFACS building.

ANNEXURE 'D'

This consists of 52 pages.

- Page 1 to 3 is a copy of lease deal with regard to leasing of house i.e. 4, Panchsheel Marg, Chanakya Purl, New Delhi for Mr. Scott R. Bayman of General Electric Company Inc., liaison office for the period 01.07.2004 to 30.06.2007 for annual rental value of Rs.1 crore.
- Page 4 to 9 is a copy of house lease deed dated 01.07.2005 for leasing of house i.e. D-79, Citi Apartments, Vasundhara Enclave, by Mr. Iqbal Singh to General Electric International Co. Inc. at monthly rent of Rs.6,250/-
- Page 10 is a copy of letter dated 22.08.2003 from RBI, New Delhi for extension of time of the permission u/s 6(6) of the Foreign Exchange Management Act, 1999 to M/s General Electric International Operation Co. Inc.
- Page 11 & 12 is a letter from PricewaterhouseCoopers Pvt. Ltd. relating to change of nodal office from Mumbai to New Delhi with regard to GEIOC liaison office.
- Page 13 is a list of employees of GEIOC, showing names, department, gross salary and constituents thereof. The most of the employees are in the CAS Auditor Department.

- Page 14 mentions the names of three companies i.e. GE International Operation Co. Inc., GE International Inc. and GE India Industrial Pvt. Ltd.
- Page 15 is a letter from RBI regarding extension of time for permission under section 6(6) of FEMA, 1999, for the liaison office of General Electric International Operations Co. Inc., by which the permission is extended up to 31.08.2009.
- Page 16 to 32 is a copy of bank statement of GE International Operations Co. Inc. with Citi Bank for the period 31.12.2006 to 31.01.2007 and shows various withdrawals.

- Page 33 .& 34 is RBI letter dated 01.07.1987 regarding establishing a liaison office of General Electric International Operations Co. Inc. at Bombay & Calcutta for a period of 2 years for the purpose of undertaking purely liaison activities i.e, to act as a communication channel between head office and its customers in India.

- Page 35 to 37 is a copy of lease agreement between AIFACS (All India Fine Arts and Crafts Society), renewing the lease for the period 01.03.2007 to 28.02.2008, by which GEIOC has taken AIFACS building on lease. The rental is Rs.3,139,620/- for all three floors and other space.
- Page 38 to 43 is another house lease deal for obtaining a house for use as a residence for the employee of GEIOC.
- Page 44 to 52 is another lease deal for obtaining a house for use as a residence for the employee of GEIOC.

ANNEXURE 'E'

It contains 125 pages.

- Page 1 & 2 is a copy of e-mail from/to Riccardo Procacci, India Country Leader of GE Infrastructure Oil & Gas relating to PRM Systems project and refers to the strategy relating to the GE business. The mail from La Motta, Giuseppe dated 23.11.2006, is to various persons including Procacci Riccardo, Vivek Venkatachalam of GE Infra Oil & Gas and relates to PRM systems project and BHEL project and the relevant portion, showing the presence of sales team in India reads as below:

"Dear All,

In order to perform our simple evaluation I think what we need is:

- From sales team (Vivek and Riccardo) the potential number of orders year-by-year (number of orders and single amount).....”
- Page 3 has the mail from Prashant Deshpande of L&T Mumbai regarding the enquiry relating to its client IOCL, Baroda; the enquiry was given to Mr. Vivek Venkatachalam, Neeraj Saxena (GEMS, India) and Mr. Procacci relating to reciprocating compressors of hydrogen generation unit for IOCL, Baroda.
- Page 4 to 7 relates to the enquiry of reciprocating compressors for IOCL, Baroda. Page No. 7 is a mail from J.K. Khandelwal, Vice President-Sales & Marketing to Mr. Nicola of GE Infra Oil & Gas and copy to other persons of GE Infra Oil & Gas including Jagdish J. requesting a authority letter indicating M/s General Energy Management Systems Pvt. Ltd., New Delhi as the authorized representative of GE Infra Oil & Gas. It mentions that Nuovo Pignone has regularly participating in the various pipeline projects.

- Page 8 & 11 is a copy of mail from Riccardo Procacci, in which he is introducing himself as the newly appointed GE Oil & Gas. India Country Leader based in Delhi.

- Page 9 & 10 is a copy of mail from Senior Manager of Bharat Pumps and Compressors Ltd., addressed to Rajesh Gupta of GE Infra Oil & Gas with a copy to Vivek Venkatachalam and has details regarding draft of MoU. Rajesh Gupta has forwarded this mail to Riccardo Procacci for his attention.

- Page 12 to 17 are e-mails containing the draft MoU and the various terms and conditions relating to Bharat Pumps and Compressors Ltd. requirements and evidences the involvement of Mr. Procacci, Rajesh Gupta and Vivek Venkatachalam in the business of GE Infra Oil & Gas in India.

- Page 18 to 20 is a copy of mails relating to MoU for Pumps Fort IOCL, Mundra - Panipat pipeline and again shows the involvement of GE Infra Oil & Gas team in India consisting of Riccardo Procacci, Vivek Venkatachalam and Rajesh Gupta. The mail from Rajesh Gupta of GE Infra Oil & Gas on page 20 is very important, which evidences the involvement of the Indian team in deciding the payment terms.

- Page 21 is a copy of mail from Ashish Sethi of GE Infra Energy to Riccardo Procacci.

- Page 22 & 23 is a mail from Riccardo Procacci regarding possible cooperation in the PMRS segment with Nirmal.

- Page 24 to 30 are the e-mail correspondence relating to power of attorney given by GE Infra Oil & Gas to Riccardo Procacci and Rahul V. The power of attorney in Riccardo and Rahul's hands is modified according to the recommendation of the Indian consultant from RSM. It also refers to another power of attorney in the name of Harshita. Copy of mail from Rahul V. Bhalinge dated 27.12.2006 is very important, which is supported by a mail from Rajeev/Panki of RSM appearing at page 24. The mail from Rahul reads as below:

"Team

Pls. see the below comments from RSM (GE Corporate Tax consultants in India). To avoid any Permanent Establishment (PE) risk for the Project Office (PO) they have suggested the necessary changes to our current PoAs

and limit the authorization to merely bank management and representation in from of regulatory bodies. This has been suggested considering that Riccardo P, Rahul B & Harshita S (GEIOC MF - available option) need to be the signing authorities for the bank account and that they are not directly linked to PO operations. Agnese, Fiorella - need to do the following asap:

1. Need to issue fresh PoA to Riccardo, Harshita & myself (backup) as per the comments below
2. Get the PoAs consularized by Indian embassy in Italy..... I just confirmed this from the bank about this new requirement
3. For any additional responsibilities like procurement sale of office equipment, services etc. (business transactions) the suggestion is to only have employees linked directly to the Project Office to have the PoA - we may decide about this once we have the GE resident engineer in Ahmedabad
4. Revoke the current PoAs for Riccardo & Rahul. We will have to expedite the above actions as the 3 PO bank accounts in India are w/o authorized signatories and we are not able to issue any cheques locally. Pls. let me know if there are any more queries...

Thanks

Rahul"

- Page 31 to 85 - me photocopy of excel documents, sent by Barbara to Riccardo, relating to India sales for 2004, 2005 and 2006. The same gives the name of customer, customer number, date of invoice, the place of delivery, order number, amount, region, name of manufacturer etc.
- Page 86 & 87 is an e-mail from Vivek (Venkatachalam) to Ciao Riccardo, which mentions that "*I would want you to make Vittorio understand that we cannot change the payment terms completely.....*".
- Page 88 to 98 pertains to WHRU proposal of Reliance regarding total base scope price and the value of contract is Euro 5,849,293 and mentions the scope of supply, deliveries, various clarifications and the mails are evidence of involvement of Vivek and Riccardo in the deal. Particularly a mail from R. Balaji of Reliance Industries Ltd. (page 93) is important and this reads as below:

" is moving away from various commitments and are talking in different voices. This is not the essence of our agreement. I want GE representatives to come over and discuss the matter and sign-off. Unless that is done GE will do shifting of stances, as they have done now. This has to happen fast, before we issue the Change Order. I can see a lot of changes from what we discussed recently with Mr. Riccardo and Mr. Vivek at DAKC .'

- Page 99 is a attachment 1 (Unit prices for products to LOA) relating to Reliance proposal.
- Page 100 to 104 is a letter of award for waste heat recovery units from Reliance Industries Ltd. dated December 2006 to M/s Nuovo Pignone Spa, Italy.
- Page 105 to 125 deals with the technical services agreement, copy of agreement and the correspondence related thereto. In these documents the role of Vivek Venkarachalam, Riccardo Procacci and Jaimin Shah are clearly brought out. The correspondence also shows that the GE has signed several contracts with Reliance for the Jamnagar expansion and associated plans (this is separate from the pipeline order). Page 124, a mail from Vivek to Rob regarding technical services agreement - request confirmation to the draft agreement, wherein Vivek writes that "I will not be available in office for some days.....Jaimin will coordinate for services".

ANNEXURE 'F'

It contains 27 pages and contains the e-mails relating to GE Infra Aviation business.

- Page I to 6 is a copy of power of attorney granted by Claudio Santiago Ponsa, Vice President of the company Nuovo Pignone Spa to Riccardo Procacci with regard to various acts. It also states that the above powers and functions shall be exercised only within the frame of the policies and directions established by the company management within the LTSA contract - the Arvind Mills regarding Naroda and Santage plant in Ahmedabad. India and for the O&M contract regarding Haldia Petro Chemical Co-generation Ltd. plant.
- Page 7 & 8 is the working of 54 million dollar incremental revenue for GE in next 3 years and revenue from selling compressors (44 million),

revenue from supervision of assembly on foundation at customer facility (6 million) and revenue from supervision of assembly and testing of compressor at the packager facility (4 million).

- Page 9 is a mail from Riccardo Procacci to Ashok of GE Infra Energy, dated 23.02.2007 asking the name of people to be added in the O&G India distribution list. Ashok writes that project related information is - Ashok Rodgi, Balasubramanyan, Sunder Rajan MB (GE Infra, Energy) and V.C. Arunachalam(GE Infra, Energy).

- Page 10 to 14 relates to TSA for GE supplied compressors. This shows that Chaini, Nitin, Gakhar, Ashwin and Jaimin Shah of GE Infra Energy are working for the GE Infra business in India. The purchase orders are issued on GE Oil & Gas LLC, USA, GE Oil & Gas Thermodyn, France and GE Oil & Gas Nuovo Pignone Spa, Italy. The mail states that Jaimin Shah is handling all the recent GE orders. Ravi Kumar of Reliance writes that "*we do not have problem in issuing 3 TSAs for three GE entities*". The copy of mail is also given to Rajesh Gupta of GE Infra Oil & Gas.

- Page 15 & 16 is a mail from/to Nalin Jain, GE Transportation, aircraft engines, sales Director South Asia Pacific.

- Page 17 is a mail from Nalin Jain to William Blair of GE Infra, Aviation, USA regarding Jet-LH partnership. Nalin Jain has address of AIFACS, 1 Rafi Marg, New Delhi, India.

- Page 18 & 19 is a mail from S.N. Chinhara, SAWO, for DGCA to John Calvin regarding renewal of approval of GE Aircraft Engine Services Ltd. Mr. Calvin John of GE Infra Aviation writes that the renewal fee will be paid locally by General Electric representative in India Mr. Nalin Jain. Later on, Mr. Calvin John writes that unfortunately the GE rap in India will not be able to pay the fee.

- Page 20 to 23 regarding the engine for Air India Express.

- Page 24 to 26 is regarding engine No. 874582 and shows the involvement of Nalin Jain of GE Infra Aviation in India.

- Page 27 is the list of employees of GE International Operations Co. Inc., GE International Inc., GE India Industrial Pvt. Ltd. (Training Division), GE India Industrial Pvt. Ltd. (Marketing & Support Division), GE India Industrial Pvt. Ltd. (Transportation Division).

ANNEXURE 'G'

It contains 31 pages .

- Page 1 to 15 is the statutory audit report for the year ended 31.12.2005 of General Electric International Operations Co. Inc. (India Liaison Office). This shows expenses of Rs.367,200,008/- for the year ended 31.03.2005 and expenses of Rs.282,543,488/- for the year ended 31.03.2004.
- Page 16 relates to locomotive PPP with Indian Railways, which provides that GE to provide high margin products (through GE-majority owned facilities) as supply inputs into the PPP.
- Page 17 & 18 gives a list of 2006 key highlights in the business of aviation, rail, oil & gas, energy, EFS, GECAS, commercial finance, consumer finance, healthcare and enterprise in India. The details of customers, activity and size of the deal.
 - ✓ It shows that in aviation segment business of 320 engines for Air India, Indian, Jet Airways, Air Sahara, Spice Jet and Go Air took place.
 - ✓ In the rail sector locomotive parts and 16 marine engines, MMRDA boat project. In the oil & gas sector 17 gas turbines and compressors to Reliance were given.
 - ✓ In energy services for Dabhol, 2 x 9E + steam turbine to Kerbalapitya Sri Lanka and 6 gas turbines to Reliance.
 - ✓ In case of GECAS, aircrafts to Indigo and Go Airlines.
 - ✓ In commercial finance, deal for Sanghi, DLF etc.
 - ✓ In consumer finance, number 2 issuer of credit cards (Surpassed HDFC, 3 million cards).
 - ✓ In healthcare, BGS and Manipal, GE Healthcare approach and various activities for the first time in India.
 - ✓ In the enterprise business Gujarat Desalination, AIIMS and Medicity.
- Page 19 & 20 gives the details of operating plan of OE in India for February, 2007, in the sectors of healthcare, consumer finance, commercial finance, industrial and infrastructure.
- Page 21 to 23 is a copy of e-mail from Aashish Sonawala of GECAS dated 14.02.2007 to Chandan Jain (GE Corporate) on the subject GECAS growth council. Page 22 has estimated financials of GECAS for the years

2006 to 2010. In this sheet the details of revenue, exposure, return on income, return on expenditure and net income are given. The mail also states the requirement of aircrafts by Indian Airlines.

- Page 24 is a mail from Nalin Jain of GE Infra Aviation to Chandan Jain regarding news release-Indian Airlines, CFM sign MRO joint venture agreement. CFM International is a joint venture company. wherein 50% is held by General Electric Company.

Page 25 is a mail from Amar Navin of GE Corporate to Badal Bagri and Chandan Jain of GE Corporate and relates to authority to sign HR related documents for oil & gas. This shows that Anjali Sinha has the authority to sign the HR related documents and she is supporting the HR of GE Oil & Gas. She is also signing the HR documents for GE Transportation - Rail, Aviation and Signalling, Training Division (including corporate growth services and global business solutions).

- Page 26 is blank.
- Page 27 is a mail from Harshita Sabharwal of GE Corporate dated 17.02.2007 to Chandan Jain regarding repatriation of surplus funds in GEIBS. The mail reads as:

"There are surplus funds in GEIBS which need to be repatriated to US .. out of the various options available buy back is the most appropriate from a tax perspective ... Rupak has engaged RSM for this ... first tranche of the transaction needs to be executed by 31st March'07 ... I am working on this .. wanted to keep you informed."

Another mail is from Harshita Sabharwal dated 09.01.2007 to Rupak Shah, Bhalla Manoj of GE Corporate regarding repatriation of surplus fund and reads as below:

"Please refer to our discussions on the above subject in the last Board Meeting. Total surplus funds in GEIBS as on 31/12/2006 INR 1,000 MM
The best option of repatriating the funds will be through a share buy back as it does not have any Income Tax implications. The flow will be as under:
FY 2006-07

Limited to the extent of 25% of paid up capital plus free reserves and number of shares ... this will be INR 250 MM .. to be executed by March'07.

FY 2007-08

Limited to the extent of 25% of paid up capital plus free reserves and number of shares ... this will be INR 450 MM .. to be executed by March/OB.

Total remittance INR 700 MM

Please let us know your views.. it is important that the first tranche can be executed before March'07 as buy back limits for a financial year.'

- Page 28 & 29 is a report from BSR & Co. in connection with the buy back of equity shares by GE India Business Services Pvt. Ltd. The report is dated 26.02.2007.
- Page 30 is a status of CAS audit for the year 2004, 2005 and 2006 for the businesses like healthcare. finance, GE Money, consumer and industrial, infrastructure and capital corporate.
- Page 31 gives a list of 26 legal entities of the GE group operating in India.

POST SURVEY ENQUIRIES

During the course of survey it was found that various employees of GE overseas entities are working in India. Some of these employees are on the payroll of GE International Inc., USA. These are:

- Dan Nalawade
- Riccardo Procacci
- William Blair
- Ashfaq Nainar
- Kenneth Peirson
- Sameer Aggarwal
- Prat Kumar

These persons are working for various direct businesses of the GE group in India, which are neither being conducted through a subsidiary or joint venture company. These persons are India Head of different businesses and

they are being supported by a team of persons, who are employed by either GE India Industrial Pvt. Ltd. or other group concern. The employees working on the payroll of GEIOC are also supporting the various direct businesses of GE group. The assessee was asked to submit the information regarding the above employees particularly the copy of employment (assignment) letters, job responsibilities, self appraisal etc., part of this information was submitted by the assessee vide letter dated 16.03.2007/09.04.2007. A brief of various businesses not conducted through GE subsidiaries in India either wholly or partly (submitted by the assessee as Annexure-10 of letter dated 16.03.2007), is given below:

INFRASTRUCTURE

- Oil & Gas
- Energy
- Rail
- Aircraft Engines
- Aviation Financial Services

INDUSTRIAL

- Equipment Services

HEALTHCARE

- Diagnostic Imaging
- Information Technology
- Services
- Bio Science

The assessee in Annexure-12 of the letter dated 16.03.2007 has submitted a list of third party agents of the group in India for carrying out the business and this reads as below:

3 rd Party Liaison Agents in India	Products/Services Covered	Brief description of allowed activities
Clarke Energy India Private Limited	Jenbacher units and aftermarket parts	Intermediary with customer (deliver proposals to customer etc.). Has no legal

		authority to bind GE.
Quantum Consultants. Private Limited	Wind Generation equipment	Intermediary with customer (deliver proposals to customer etc.). Has no legal authority to bind GE.
General Sales Co. Ltd	Optimization Services - Bently Nevada	Intermediary with customer (deliver proposals to customer etc.). Has no legal authority to bind GE.
PCL Limited	NRPS-IED Products-M&D. Portable Test	Intermediary with customer (deliver proposals to customer etc.). Has no legal authority to bind GE.
Prince Corporation	Power Generation – Parts Repair Services, Field Services.	Intermediary with customer (deliver proposals to customer etc.). Has no legal authority to bind GE.

The assessee in Annexure-11 of the letter dated 16.03.2007 has submitted the job responsibilities of 5 persons namely Pratyush Kumar, GE Infrastructure Leader, India, Dan Nalawade, GE Equipment Services, Kenneth Peirson, GE Transportation, William L. Blair, GE Aviation (Aircraft Engine/ Transportation), Sameer Agarwal, GE Water Process & Technology. The job responsibilities of Ashfaq Nainar, Regional Managing Director, Asia were submitted as Annexure-4 of the letter dated 09.04.2007. The detail of job responsibilities and work attended by Riccardo Procacciis already discussed. Ashfaq Nainar, in his self appraisal dated 09.03.2007 (which was submitted as Annexure-5 of the letter dated

09.04.2007), has given the details of work attended by him for GE business in India.

The assessee in the Annexure-13 to the letter dated 16.03.2007 has submitted the names of employees of GE India Industrial Pvt. Ltd., who are working for other GE group entities/ business in India. These are 43 employees, who are working for other group entities and these are Nand Kumar Dhekne, Sujoy Ghosh, Pramod Joshi, Alpana Khera, Faizi Mohisini, Ninnala Murthy, Jaimin Shah, Baldeep Singh, Shannila Barathan, Ravi Anand, Anand Bansal, Haridas' Menon, Chandan Guha, Anand Awasthy, Ramgopal Yadavalli, Narendran Mannazhi, Ashish Malhotra, Srinivas K. Marella, Tarak B. Chayya, N. Guruprasad, Deven Shukla, Hitangshu Majumdar, Siddhartha Ghosal, Manish Narula, N. Nagraj, Sudipta Saha, Neeraj Bhargava, Shantanu Chakraborty, Shashank Naik, Parag Nag. Srikanth Thorapalli Venugopal, Sanjeev Kumar, Hemlata Singh, Archana Singh, Asim Bose, Geeta Taneja, Suman Nag, Nalin Jain, Sanjeev Kakkar, Mangal Dev, Vivek Venkatachalam, Rajesh Gupta and Amit Verma.

From the information available during the surveyor afterwards. it is clear that various employees of GE India Industrial Pvt. Ltd. are working with the expatriates so as to constitute Indian teams looking after the GE overseas entities businesses. The detail of such employees is also available in Annexure-C, discussed earlier.

The assessee was asked to submit the copy of self appraisal of the 7 employees of the GE group, who are on the payroll of GE International Inc. The same is replied vide para 3.4 of the letter dated 16.03.2007 and self appraisal of Kenneth Peirson was submitted as Annexure-16 of the letter.

6. On the basis of various facts/information collected during the survey and afterwards, it is clear that various GE group entities are carrying out the business in India. The details of such businesses and the sales made by various entities during the period 01.04.2000 to 31.03.2006 (financial year wise) are submitted by the assessee vide letter dated 24.03.2008.

Further information is furnished on 26.03.2008. The group has made sales in the energy, transportation, aviation, oil & gas sectors during all these years. The names of various companies making the sales are available in these letters dated 27.02.2008, 24.03.2008 and 26.03.2008 and are annexed as Exhibit 'A', 'B' and 'C'. Such companies and the line of business relevant to India are summarized as under:

S. No.	Name of the Company	Country	Businesses
<u>ENERGY BUSINESS</u>			
1	GE Japan Limited	Japan	Power Generation
2	GE Power Systems Inc.	USA	...do...
3	GE Jenbacher GmbH	Austria	...do...
4	GE Company	USA	...do...
5	GEWE, GmbH	Germany	...do...
6	GE Energy (USA) LLC	USA	...do...
7	Bentley Nevada LLC	USA	OC/ Equipment
8	GE Harris Energy Control Systems LLC	USA	NBPS
9	GE Canada	Canada	...do...
10	GE Company	USA	...do...
11	GE Energy Parts Inc.	USA	CS/ Equipment/ Services
12	GE Packaged Power Inc.	USA	...do ..
13	GE Energy Parts Inc..	USA	-
<u>TRANSPORTATION</u>			
14	GE Transportation Parts, LLC	USA	.
<u>AVIATION</u>			
15	GE Company	USA	GE Legal Entities - Supplies j
16	GEES Distribution LLC		...do...
17	GE International Inc.	USA	GE Legal Entities - Services
18	Elano	USA	...do...
19	Garrett Aviation Services	USA	...do...

	Inc.		
20	GE Accessory Services - Grand Prairie, Inc.	USA	...do...
21.	GE Structured Services	USA	...do...
22	GE Aviation Materials LP	USA	...do...
23	GE Caledonian Ltd.	UK	...do...
24	GE Engine Services, Inc.	USA	...do...
25	GE Engine Services Malaysia	Malaysia	...do...
26	GE Engine Services McAllen	USA	...do...
27	GE Aircraft Services Ltd.	UK	..do...
28	Tri-Remanufacturing Inc.	USA	...do...
29	GE Aviation Services Operation Pte. Ltd.	Singapore	...do...
30	GE On Wing Support Korea	Korea	..do...
31	MRA Systems Inc	USA	--do...
32	Aircraft Parts Corporation	USA	...do....
33	Unison	USA	..do...
<u>OIL & GAS - PARTS & EQUIPMENTS</u>			
34	Nuovo Pignone Spa	Italy	

The information about oil & gas business, showing by Nuovo Pignone Spa, Italy during F.Ys. 2000-01 to 2005-06 were submitted by Price Waterhouse Coopers Pvt. Ltd. on 27.02.2008.

The information submitted reveals that the GE group entities have made sales of equipment/parts in energy business, transportation business and aviation business. Some of the companies have also rendered services to the customers in India.

6.1 General Electric International Operation Co. Inc., India liaison office (GEIOC), has on its payroll more than 50 employees and the designation of such employees is CAS. The assessee has explained that employees are

deputed to various GE companies and they work as their employees and such employees remain on the payroll of GEIOC till the same are transferred to other entities. As per the application made to RBI and permission obtained, the liaison office was to act as a communication channel between the head office and the customers in India. However, the company instead of undertaking the permitted activities is employing various persons and providing the services of such persons to the GE group entities worldwide. The company performs all the functions relating to such employees, including their employment, payroll administration, the activities relating to deputation etc. and such activities constitutes business activities being carried out in India. The expenses incurred by such office are reimbursed by the head office without any margin. Independent third parties providing such services will certainly earn profits on the activities. The activities indicate that the GEIOC is carrying out business in India through a Permanent Establishment (PE) and the income attributable to such PE is taxable in India. The company has not filed return of income for any year.

7. The business of various GE group non-resident companies in India is being conducted by the expatriate employees of GE Group (who are employed by GE group company and deputed to India as India Head of the specific business like oil & gas, energy, aviation, transportation etc.), with the support and help of employees drawn from GE Indian entities. Such expatriates are responsible and look after the business of GE group as a whole irrespective of the any GE group company making sales in India. The bifurcation of sales by various entities is decided by the GE management, as is evidenced by the Reliance order referred above. These expats and their team have at their disposal a fixed place of business in the form of office premises at AIFACS, 1 Rafi Marg, New Delhi. This office premise is taken on lease by GEIOC from AIFACS (All India Fine Arts and Craft Society) and has been under lease from the period prior to 01.04.2000. The information regarding the employees of GE in India prior to the present expats is not given by the GE group, however, there have been the persons working for such sales throughout the period 01.04.2000 till date. To summarize, the ex pats deputed in India for undertaking the

marketing activities including price negotiation, supervision, administration, sale functions and after sales activities and their team were continuously carrying out the business of various entities of the GE group, which made sales in India from the above stated office premises in Delhi and other places of businesses in India. Since:

- A place of business is available at disposal of the GE group entities in India.
- The place of business was fixed and the business was carried out through that place of business.

Some employees of the GE group Indian entities forming part of the sales team were also carrying out the business through other fixed place of business in the form of other offices of the GE group in India.

In view of the above. it is clear that the various GE group entities, being tax residents of different countries had fixed place PE in India as per the provisions of respective tax treaties. The office as well as the premises used as a sales outlet or for receiving or soliciting orders also constitutes the PE as provided in paragraph 2 of Article 5 of respective tax treaties. The activities of the non-resident GE group entities being conducted from the fixed place of business referred above are not of the preparatory or auxiliary character.

The employees of GE India Industrial Pvt. Ltd. forms the sales teams of the GE entities, such employees along with the expats have habitually secured orders in India, wholly or almost wholly for the non-resident GE group entities. The correspondence discussed above also indicates that such employees have also participated in the price negotiations. The various documents in the form of agreements/purchase orders/copies of contracts also proves the active involvement of the employees of Indian company and expats in the conclusion of contracts on behalf of such non-resident GE group entities, therefore, GE India Industrial Pvt. Ltd. also constitutes the agent other than an agent of independent status of the non-resident GE group entities. 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. The activities of the third parties working for the GE group as mentioned above also may constitute agency PE/ business connection of the GE group entities.

It is possible that in respect of various projects relating to rendering of services/supervisory services, such GE group entities will be considered to have the PE as per the other paragraphs of the Article relating to the PE of the respective tax treaties.

7.1 After having established that various GE group entities were making sales in India with the active involvement of the PE of such entities in India, then, considering the provisions of business profit article of the respective tax treaties, the profits of the enterprise are liable to be taxed in India to the extent attributable to the PE. This rule as well as the rules for attribution of such profits are available in the respective tax treaties India has signed with different countries of which such GE group entities are tax resident.

7.2 Considering the fact that the sales are made to Indian customers on regular basis and such GE group entities are physically present in some form or the other in India and such physical presence has full role in these sales. Therefore, the income accrues or arises to such GE group companies in India. Such income accruing or arising is liable to be taxed in India as per the provisions of Section 5(2) of the Income Tax Act, 1961.

7.3 The PricewaterhouseCoopers Pvt. Ltd. vide letter dated 24.03.2008 has also submitted the list of non-resident GE group companies, who have rendered services in India and the payments are made by Indian companies. The payments received by such companies from Indian resident is income accruing or arising or deemed to accrue or arise in India as per the provisions of Section 5(2) r.w.s. 9(1) of the Income Tax Act, 1961. Even if services are rendered from outside India, such payments will be income deemed to accrue or arise in India as per the

provisions of Section 9(1)(vii) of the Income Tax Act, 1961. Such amounts will also be taxable as fees for technical services or business income depending upon the facts of the case and the respective tax treaty. Such entities are listed under the business head aviation and from S. No. 3 to 17. These companies have not filed return of income, though their income for various assessment years was chargeable to tax in India.

8. The Authorised Representative, PricewaterhouseCoopers Pvt. Ltd. has confirmed that the non-resident entities, of which details are filed vide letter dated 24.03.2008 and 26.03.2008, have not filed return of income in India except in the case of Nuovo Pignone Spa, Italy, which has filed return of income with Income Tax Officer, Ward 1(3), Ahmedabad.

9. The non-resident GE group company, namely GE Energy Part Inc., USA has made a sale of USD 21,83,146/- during F.Y. 2000-01 in India. As mentioned above, the assessee has business connection as well as the PE in India as per the provisions of Article 5 of the tax treaty between both the countries and the income attributable to the PE/ business connection is taxable in India. Since the assessee has not filed return of income in India to that extent the income chargeable to tax has escaped assessment. On the basis of material collected during or after survey operations and discussed above, I have reason to believe that income chargeable to tax has escaped assessment for A. Y. 2001-02. This belief is formed on the basis of fact that assessee has not furnished return of income although its income earned in India during the previous year was chargeable to income tax. Considering the quantum of sales made, I have reason to believe that income chargeable to tax, which has escaped assessment amounts to or is likely to amount to more than Rs.1 lakh for the year.

In this case, not more than 6 years have elapsed from the end of relevant assessment year (i.e. A.Y. 200-0) and income of more than Rs. 1 lakh has escaped, assessment, therefore, the Notice u/s 148 r.w.s. 147 of the Income Tax Act, 1961 satisfies the time limit for issue of notice as provided in Section 149 of the Income Tax Act, 1961.

In this case, as mentioned above, assessee has not filed return of income and no order u/s 143(3) or Section 147 has been made and more than 4 years have expired from the end of relevant assessment year, therefore, the satisfaction of the Addl. Commissioner is required. Therefore, the same is put up for necessary action.”

6. The Id. Sr. AR fervently argued, and rightly so, that the validity of reassessment can be tested only on the basis of the reasons recorded by the AO before issuing the notice u/s 148 and no cognizance can be taken of any other material supplementing or justifying the reassessment. We fully endorse this argument and will restrict ourselves only to the reasons recorded for evaluating the validity of the initiation of reassessment.

I. FACTUAL ASPECTS

7. Following points were raised on behalf of the assessee to contend that the reassessment be set aside, which we will deal with *in seriatim*.

i. No name of the assessee, business transactions and the relevant year appear in the reasons :-

8.1. The Id. AR argued that the reasons recorded by the AO for initiating the re-assessment proceedings in the hands of the assessee neither contain the name of the assessee nor its business transactions.

8.2. We do not find any force in the above contention either *qua* the name of the assessee or its business transactions. It can be seen that the title of reasons contains the name of the assessee and the relevant year, which reads: “Reasons recorded for issue of notice u/s 148 of the Income-tax Act, 1961 in the case of GE Energy Parts Inc., USA for assessment year 2001-02.” It is equally undisputed that in the reasons recorded for other entities and other years, the name of the respective assessee along with the concerned assessment year, prominently appear in their title. Our attention has been drawn towards pages 11 to 13 of the Departmental paper book no.2, which are the three Annexures to the assessee’s letter dated 24.3.2008 addressed to the Addl. CIT, giving year-wise and entity-wise figures of sales in India by the GE overseas entities engaged in Energy business, Transportation business and Aviation business. Such a list has been reproduced on page 20 of the assessment order, which is also a part of the reasons recorded by the AO and supplied to the assessee. Name of the assessee appears at Sl. nos.11 and 13 of this list under the broader category of ‘Energy business’. In

fact, name of the assessee appears not less than six times in the reasons (including two times in the Exhibits, which are part of the reasons).

8.3. Be that as it may, we find that the seven expatriates from GEII, repeatedly referred to in the reasons, were positioned in India to head the business operations of the GE overseas (referring to all the GE Overseas entities collectively, as described by the assessee itself before the AO). They were not deputed for the business of a specific GE group company, but, for the worldwide GE group companies in one of the three sectors, that is, Infrastructure (oil & gas, energy, rail, aircraft engines and aviation financial services); Industrial (equipment services); and Healthcare (Diagnostic imaging, information technology, services and bio sciences). On a pointed query, it was candidly admitted on behalf of the assessee that all the business interests of GE overseas entities involved in the instant batch of 139 appeals were looked after by any of such seven expats and there was no business of GE overseas entities in India left out which was headed by some person other than the above seven. This fact is further corroborated from pages 2 and 3 of the

second paper book of survey documents, which is a communication between P. Riccardo and others including Shah Jaimin and P. Robert. The e-mail on page 2 from Mike Hosford to P. Riccardo, Shah Jaimin and copy to Vivek Venkatachalam, records that: “We will have units from AC (screw compressors and CC’s) NP (Recips) and TD (CC)”. This e-mail shows that the business of GE Group was transacted by expats and other staff from India not for a particular entity, but, on the basis of nature of business. Once a project was acquired, the supplies were, accordingly, to be made by the relevant entities dealing with such products. In the above e-mail, Screw compressors and CCs were to be supplied by AC, Recips by NP and CCs by TD. AC, NP and TD are admittedly abbreviations of the name of three different companies of GE group, who were to make supplies in respect of this contract with Reliance Industries.

8.4. The fact that GE India (representing expatriate employees of GE International Inc. located in India and employees of GE India Industrial Private Limited i.e. GEIPL engaged in providing marketing support services for offshore sales into India, as described by the assessee itself

in correspondence with the AO), were not working for individual GE entities but for one or more of the above three lines of businesses of GE in India in a combined manner, is further proved from page 240 of the survey documents paper book, which reveals the personnel hierarchy of 'Infrastructure business' of GE. At the top is P. Riccardo (designated as Country leader, India). He is from GEII. Then, there are three persons on the level below him, namely, Vivek Venkatachalam, an employee of GEIPL (designated as Regional Manager, New unit sales), Ujwal Kumar (designated as ECLP Market developments) and Dewan Shukla again from GEIPL (designated as Country Manager - Services, Sales). There are other persons in the hierarchy below them. Above discussion belies the assessee's contention that its name or its business transactions do not appear in the reasons.

8.5. It was also argued by the Id. AR that the reasons do not refer to any material relating to the assessment year under consideration leading to the escapement of income. Even if some material exists for a subsequent year, the Id. AR argued that the same cannot be considered

for initiating reassessment for an earlier year. For this proposition, he relied on certain judgments including *CIT vs. Gupta Abhushan (P) Ltd.* (2009) 312 ITR 166 (Del) and *SGS India Pvt. Ltd. vs. ACIT & Anr.* (2007) 292 ITR 93 (Bom). The ld. AR also placed a great deal of emphasis on the fact that seven expats were not positioned in India during all the years under consideration and hence there was lack of sufficiency of reasons for such years in which they were not in India. It was urged that in the absence of any other material evidencing presence of the GE overseas entities in India, it could not be said that any business was carried out in India at least for such years. This was countered by the ld. DR, who took us through some material to decipher that this contention is not correct.

8.6. Having gone through the above referred two judgments, it is patent that there must be some material to indicate that income chargeable to tax has escaped assessment for a particular year. If material in the possession of the AO divulges escapement of income for year 'A', no inference can be drawn, *de hors* some other relevant

material, that similar income escaped assessment for year 'B' as well. In the case of *Gupta Abhushan (P) Ltd. (supra)*, some renovation was carried out in the earlier years and on the presumption that such renovation must have been done in the later years as well, the AO initiated reassessment. The Hon'ble High Court approved the view taken by the Tribunal that the escapement of income by means of renovation carried out in later years was not borne out from the material on record. Similarly, in the case of *SGS India Pvt. Ltd. (supra)*, the assessee incurred research and development expenses in the year one, which were disallowed because of the transfer pricing adjustment and the AO's inference of escapement of similar income for the earlier year, was held to be not sustainable. In our considered opinion, the position as stated on behalf of the assessee is trite, which cannot be interfered with.

8.7. However, on the facts and circumstances of the instant case, we find that these judgments have no application. It is pertinent to note that in the post-survey enquiries, but, prior to the issue of notice, the assessee

group, vide its letter dated 16.3.2007, provided name of seven expats of GEII who were working for GE overseas in India. Such persons, as per their Assignment letters, were deputed in India for looking after the business operations of GE overseas entities in India for a specific period ranging from 2-5 years. The AO has noted in para 7 of the reasons that the information regarding the employees of GE in India prior to the present expats was not given by the GE group, but, there were persons working for such sales throughout the period 1.4.2000 to till date.

8.8. The Id. AR vehemently argued that the AO wrongly recorded in para 7 of the reasons that the information regarding the employees of GE in India prior to the present expats was not given by the GE group. It was stated that such information was never demanded and, hence, there was no occasion of giving it as well. This was opposed by the Id. DR who submitted that several rounds of meetings took place post survey operations between the Department and the ARs of the assessee group and some information including the instant one was orally demanded. This was sought to be fortified by the fact that though, vide summons

dated 2.3.2007, written requirement was made for giving figure of sales of GE entities in India from 1.4.2003 onwards, but, the actual information supplied by the assessee also covered the period 1.4.2000 to 31.3.2003 in addition to the information as required in writing for the period 1.4.2003 onwards, which was orally demanded during such post survey meetings. The Id. DR submitted that the information about the expats working in India prior to the seven expats was also orally demanded as was apparent from the reasons recorded by the AO.

8.9. The moot question which looms large before us is to decide if any information about the employees of GE in India prior to the present seven expats was called for. If the answer is in affirmative and the same was not given, it will lead to an inference that other expats were working in India for the GE overseas entities during the period starting from 1.4.2000 onwards, thereby, *prima facie* constituting PE of such GE entities in India and *vice versa*. In this regard, it is relevant to note that the AO categorically recorded in para 7 of the reasons dated 26.3.2008 that such information was demanded, but, not given by the GE group,

which demonstrated that there were other expats working/making sales of GE Overseas throughout the period 1.4.2000 onwards. The assessee raised objections to the reasons recorded by the AO vide its letter dated 7.10.2008, whose copy is available on pages 1-16 of the assessee's fourth paper book. It is vivid that the assessee did not controvert this fact. The assessee has taken several legal objections against the initiation of reassessment, but did not deny correctness of factual assertions in this regard in the reasons. The Id. AR relied on a para on page 14 of the objections to buttress his contention that the assessee was never called upon to furnish the details of expats for the earlier period. This para reads as under:-

“As is apparent, the role of GEIPL is limited to providing local and routine marketing support services, with all critical functions (including key decision making activities) within the value chain being performed by the Company outside India. The role of GEIPL in the life-cycle of equipment' sale is preparatory, incidental and insignificant. This is because the GE Energy business in operates under a highly head quarter centric approach with the contribution of GEEIPL personnel being limited to providing local inputs/insights without any authority to conclude contracts on behalf of the Company or otherwise bind the Company.”

8.10. A plain reading of this para signifies that there is no denial of the assertion recorded by the AO in para 7 of the reasons in this regard. Notwithstanding the fact that the reasons were recorded on 26.3.2008 and the assessee did not raise any objection about the said aspect of the matter and accepted the separate order passed by the AO rejecting such objections, the assessee did not even challenge this aspect before the AO during the course of assessment proceedings as well.

8.11. At this stage, it is relevant to note that the Hon'ble Supreme Court in *GKN Drive Shafts (India) Ltd. vs. ITO and Ors (2003) 259 ITR 19 (SC)*, has laid down a procedure to be followed upon the issuance of notice u/s 148 of the Act. It has been held that: "The proper course of action for the noticee is to file return, and, if he so desires, to seek reasons for issue of notices. The AO is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by passing a speaking order." In a case before the Hon'ble Bombay High Court in *Crown Consultants Pvt. Ltd. vs. CIT (2014) 362*

ITR 368 (Bom), the assessee, challenging the issuance of notice of reassessment u/s 148, contended that the alleged loan transaction in the reasons was reflected in its financial statements as margin money which it had received from its directors and their family members which was reflected in Schedule 'A' to the balance sheet. The Hon'ble High Court refused to accept this submission as the same was not taken in the objections to the reasons for reopening. In view of this new stand not taken in the objections, but, taken for the first time in writ petition, the Hon'ble High Court held that the assessee cannot take up fresh objections which the AO had no occasion to deal with by laying down that : *`Just as the revenue cannot improve upon its case for reopening before the Court and but must stand or fall by the reasons recorded for reopening the assessment, the same test would be applicable in case of an assessee i.e. it must stand or fall by its objection to the grounds for reopening of assessment. It is not open to the assessee to urge fresh objections before the Court which the Assessing Officer had no occasion to deal with, unless of course the notice to reopen is ex facie without jurisdiction not requiring consideration of any argument such as beyond*

limitation.’ In view of this judgment, it is clear that the assessee cannot raise a fresh objection before the tribunal which was not taken before the AO.

8.12. Adverting to the facts of the instant case, we find that though the AO categorically recorded the fact of expatriates working in India prior to seven expats, the assessee neither challenged the correctness of this fact recorded in its objections before the AO nor before the Id. CIT(A). It is for the first time that the assessee raised this plea before the Tribunal by way of a short note dated 3.6.2014. This shows that the objection was taken for the first time after expiry of six years from the recording of reasons. As this denial is contrary to the factual recording by the AO, which remained unchallenged before lower authorities, we are unable to accept such denial at this later stage in the light of the judgment of the Hon’ble Bombay High Court in *Crown Consultants (supra)*.

8.13. Be that as it may, veracity of such recording by the AO can be inferred from the Id. DR’s submission that the assessee group submitted

information about the sales made by the overseas entities in India for the period 1.4.2000 onwards, for which, again, there was no written requirement. It is further noticed from page 338 of the survey documents paper book, being, a letter from Price Waterhouse Coopers to some person of the GE group at AIFACS Building, 1, Rafi Marg, New Delhi intimating the approval by the RBI of change of nodal office of GEIOC from Mumbai to New Delhi vide its letter dated 8th March, 2000. It is this address which was subjected to survey proceedings in 2007. Page 311 of the survey documents paper book is a copy of the lease agreement for the official premises of the LO which shows that the lease agreement of AIFCAS premises was renewed from 1st December, 2003. The same page indicates that the earlier lease agreement dated 1st March, 1994 came to an end on 28th February, 2003. These two documents corroborate that the premises, subjected to survey proceedings on which business activities of GE overseas entities were found to be carried on, was at their disposal for all the years under consideration. These two documents coupled with the GE group supplying information about the

sales made by the GE overseas entities from the year 2000 onwards tilt the balance in favour of the Department.

8.14. Above discussion boils down that the seven expats worked in India for a period of 2-5 years covering some of the years and for the prior period covered in this batch of appeals, some other expats were working in India for the GE overseas entities in a similar manner.

8.15. To sum up, we jettison the contention of the Id. AR that the reasons for reopening do not refer to the name of the assessee or its business activities for the year under consideration.

ii. No assertion in reasons that any person in India entered into contract on behalf of assessee.

9.1. The Id. AR then contended that there is no assertion in the reasons that any person in India entered into contract on behalf of the assessee and hence the reassessment be set aside on this score. *Au contraire*, the Id. DR took us through the relevant parts of the reasons to falsify the claim of the assessee.

9.2. We do not concur with the submissions put forth on behalf of the assessee in this regard. Some documents found during the course of survey zeroed in the possibility of the GE overseas entities conducting full-fledged business in India, which got fortified from post-survey enquiries divulging more specific information on the business of the assessee carried out from India. Para 4 of the reasons categorically notes that the survey and post-survey enquiries transpired that the GE Group was engaged in various sales activities in India for which seven business heads, viz., Dan Nalawade, Riccardo Procacci, William Blair, Ashfaq Nainar, Kenneth Peirson, Sameer Aggarwal and Prat. Kumar, mostly expats from GEII, were appointed to head Indian operations, with the support staff provided by GEIPL and also third parties. The assessee also submitted part information regarding such employees, being, their Assignment letters, job responsibilities, self appraisal etc. The GE group/assessee, in response to summons dated 02.03.2007, also admitted that all the GE overseas entities in the line of Infrastructure, Industrial and Healthcare had presence in India. It has been noted in para 7 of the reasons that *the expats were deputed in India for undertaking the*

marketing activities including price negotiation, supervision, administration, sale functions and after sales activities and their teams were continuously carrying out the business of various entities of the GE group, which made sales in India from the above stated office premises in Delhi and other places of businesses in India, which constituted PE of such GE overseas entities in India as per para 5 of the respective DTAA and further such activities were not of the preparatory or auxiliary character. The AO, on the basis of such information gathered during the course of survey and post-survey enquiries, came to conclusion vide para 6 of the reasons that various GE group entities, separately named in the Table, which covers all the GE overseas entities under consideration, were carrying on business and effecting sales in India. Details of business and the sales made by such entities during the period 01.04.2000 to 31.03.2006 form part of the reasons by way of Annexure. It is ergo abundantly clear that the AO has clearly asserted in the reasons that GE India carried out full-fledged business activities and made sales in India for all the GE overseas entities. This contention fails.

iii. No assertion in reasons that income escaped assessment because of failure of assessee to disclose fully and truly all material facts

10.1. The Id. AR also challenged the initiation of reassessment by contending that there was no assertion in the reasons that income chargeable to tax escaped assessment because of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Reliance was placed on certain decisions to bring home the point that the reassessment needs to be quashed in the absence of a specific allegation in the reasons about the failure of the assessee to disclose fully and truly all material facts necessary for his assessment. This was strongly rebutted on behalf of the Revenue.

10.2. We are again not persuaded to concur with the argument of the assessee on this issue. It is significant to note at this stage that the assessee did not file its return of income for any of the years under consideration prior to notice u/s 148 of the Act. Para 6.1 of reasons records that the assessee company had not filed return of income for any year. Para 8 further records that the Authorised Representative

confirmed that the non-resident entities had not filed returns of income in India except in the case of Nuovo Pignone Spa, Italy, which filed return of income with Income Tax Officer, Ward 1(3), Ahmedabad.

10.3. The decisions referred to by the Id. AR have been rendered in the context of proviso to section 147, the relevant part of which provides that : `where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assesseeto disclose fully and truly all material facts necessary for his assessment, for that assessment year.' As the assessee had not filed its return of income in first instance before issue of notice u/s 148, there could not have been any way of disclosing fully and truly all material facts necessary for assessment.

10.4. The view canvassed by the Id. AR that the AO failed to record in the reasons that income chargeable to tax has escaped assessment, is

again fallacious. It can be seen that the AO has conclusively recorded that the income of the assessee was chargeable to tax because of the Indian operations of the GE Overseas, which established a business connection under the Act and also PE under the DTAA and the absence of the assessee to file a return of income led to the escapement of income. In addition, para 9 of the reasons, which has not been set out in the assessment order, positively states: *‘The non-resident GE group company, namely GE Energy Part Inc., USA has made a sale of USD 21,83,146/- during F.Y. 2000-01 in India. As mentioned above, the assessee has business connection as well as the PE in India as per the provisions of Article 5 of the tax treaty between both the countries and the income attributable to the PE/ business connection is taxable in India. Since the assessee has not filed return of income in India to that extent the income chargeable to tax has escaped assessment. On the basis of material collected during or after survey operations and discussed above, I have reason to believe that income chargeable to tax has escaped assessment for A. Y. 2001-02. This belief is formed on the basis of fact that assessee has not furnished return of income although*

its income earned in India during the previous year was chargeable to income tax'. Thus, the argument that there is no assertion in reasons that income escaped assessment because of the failure of the assessee to disclose fully and truly all material facts, does not hold water.

11. Foregoing discussion reveals that the following broader points emerge from the reasons recorded by the AO along with the Annexures to such reasons.

- i. Neither the assessee nor any other GE overseas entity, except Nuovo Pignone Spa, Italy, had filed returns of income in India for any of the years under consideration.
- ii. Survey u/s 133A of the Act carried out at AIFACS premises of the LO of GEIOC in Delhi set up to undertake only the liaison activities divulged that other GE overseas entities were carrying on full-fledged business from there.
- iii. The GE overseas entities in the lines of Infrastructure (oil & gas, energy, rail, aircraft engines and aviation financial services); Industrial (equipment services); and Healthcare (Diagnostic imaging, information technology, services and bio sciences) had presence in India.
- iv. The GE overseas entities were engaged in various sales activities in India, through expats from GEII with the support staff provided by GEIPL and also third parties during all the years under consideration and further there was information about entity-wise and year-wise sales made by all of them during the period 01.04.2000 to 31.03.2006.

- v. The expatriates were deputed in India for undertaking the marketing activities including price negotiation, supervision, administration, sale functions and after sales activities of the overall lines of businesses of GE group irrespective of the any specific GE group entity. They constituted PE of GE overseas entities in India and their activities were not of the preparatory or auxiliary character.
- vi. These expats and their teams had at their disposal AIFACS premises, which was apparently declared as a LO of GEIOC.
- vii. Employees of GEIPL along with the expats formed sale teams, which habitually secured orders in India for the non-resident GE group entities. Therefore, such expats and employees of GEIPL also constituted a dependent agent PE.
- viii. The activities of the third parties working for the GE group also constituted agency PE/ business connection of the GE group entities.
- ix. Profit of various GE overseas entities making sales in India with the active involvement of their PEs, was liable to be taxed in India as per Article 7 read with Article 5 of respective DTAA and such income accruing or arising was also liable to be taxed in India as per the provisions of the Act.
- x. The assessee made sales of USD 21,83,146/- during the F.Y. 2000-01 in India. The assessee had business connection as well as PE in India and the income attributable to the PE/ business connection was taxable in India. Since the assessee had not filed return of income in India, income chargeable to tax escaped assessment to that extent.

12. Now the question arises whether the above extracted reasons cited by the AO justify the initiation of reassessment proceedings. Both the sides have relied on certain decisions to drive their respective views.

13. Legal position on this issue is that the AO should have *prima facie* grounds for forming a belief that there is some escapement of income, which is a condition precedent for initiating reassessment. The Hon'ble Supreme Court in *Raymond Woollen Mills vs. ITO (1999) 236 ITR 34 (SC)* has held to this extent by laying down that if *prima facie* some material exists on the basis of which the Department can reopen the case, it is sufficient to initiate reassessment. "*The sufficiency or correctness of the material is not a thing to be considered at this stage.*" The same view has been reiterated again by the Hon'ble Summit court in *ACIT vs. Rajesh Jhaveri Stock Broker (P) Ltd. (2007) 291 ITR 500 (SC)*. The Hon'ble Apex Court held in this later case that: "If the AO has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that income had escaped assessment. The expression cannot be read to mean that the AO

should have finally ascertained the fact by legal evidence or conclusion.....at that stage the final outcome of the proceedings is not relevant.” It further went on to hold that: “*At the initiation stage, what is required is ‘reason to believe’, but, not the establishment of fact of escapement of income.* At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. “*Whether the materials would conclusively prove the escapement is not the concern at that stage.*” The Hon’ble jurisdictional High Court has also laid down similar proposition in several judgments including *Areva T & D, SA vs. Asstt. DIT (2012) 349 ITR 127*. In this case also, no return of income was filed by the petitioner, similar to the case before us. Upholding the initiation of reassessment, the Hon’ble High Court held that: “in any case, it is well settled that at this stage only *prima facie* view is to be taken to determine and decide whether there are reasons to believe that income has escaped assessment. Whether or not any income of the petitioner is chargeable to tax in India, *whether the petitioner has a permanent establishment in India, etc., are matters of merits which are*

to be decided in the assessment proceedings.” Similar view has been taken by the Hon’ble Delhi High Court in *Rolls Royce PLC vs. DIT (International Taxation) (2011) 339 ITR 147 (Del)* upholding the view of the Tribunal in *Rolls Royce PLC vs. DIT 2007-TII-32-ITAT-DL-INTL*, in which case, again, the assessee had not filed its return of income prior to issue of notice and the Tribunal rejected the assessee’s challenge to the initiation of reassessment proceedings by holding that the AO at that stage was required only to form a *prima facie* opinion about the escapement of income, which condition stood satisfied. In an earlier decision, the Hon’ble Delhi High Court in *Reach Cable Networks Ltd. vs. DDIT (2008) 299 ITR 316 (Del)* dismissed the writ petition challenging the initiation of reassessment proceedings in which again the assessee had not originally filed the return of income. In the words of the Hon’ble Delhi High Court in *Convergys Customer Management vs. Asstt. DIT (2013) 357 ITR 177 (Delhi)* : *‘at the time of issuance of notices under section 148, the Assessing Officer is not expected to form any definite or conclusive opinion about the taxability of the disputed*

amounts and that he is only expected to form a tentative or prima facie belief regarding the escapement of income chargeable to tax’.

14. A cursory look at the above judgments fairly brings out that the initiation of reassessment proceedings requires the AO to form a *prima facie* view about the escapement of income. There is no need to conclusively establish at that stage that such and such income escaped assessment. If it emerges from the reasons recorded, which, in turn, are based on some relevant material, that the AO had *prima facie* reason to believe about income escaping assessment, the matter ends there insofar as the initiation of reassessment proceedings is concerned. No fault can be found with the jurisdiction of the AO to initiate reassessment.

15. Adverting to the facts of the instant case, we find that the survey and post-survey enquiries conducted by the AO before issue of notice u/s 148 gave sufficient material for the formation of a *prima facie* belief that the income of the assessee had escaped assessment.

16. The Id. AR, contended that the AO did not *prima facie* prove in reasons the existence of PE of the assessee in India and hence

reassessment be set aside. To buttress such argument, he simply focused on some of the e-mails etc. found in survey, which in themselves did not establish that some revenue generating activity was carried out from India. It is true that such e-mails do not establish the existence of PE in India, but the other e-mails along with the remaining material collected during the course of survey and post-survey enquires, which we will elaborately discuss later, *prima facie*, compel a person, reasonably instructed in law, to form a view about the existence of PE of the assessee and other GE overseas entities in India. As such, we are disinclined to accept the contention of the assessee that the AO was not justified in initiating the reassessment proceedings.

17. It is apt to take note of the fact that the assessee had not filed return of income prior to the issue of notice u/s 148. Explanation 2(a) to section 147 provides that where no return of income has been furnished by the assessee although his total income during the previous year exceeded the maximum amount, which is not chargeable to income-tax, it shall be deemed to be a case where income chargeable to tax has

escaped assessment. Business carried on by the GE overseas entities in India was never disclosed to the Department. Business connection of the assessee in India, as set up by the AO, has not been denied. In that view of the matter and the further fact that the sales were made by GE Overseas in India through GE India, there was income of the assessee chargeable to tax in India for which the return of income ought to have been filed and the benefit of DTAA, if any, could have been claimed as was done pursuant to the notice u/s 148. The fact that the assessee had a PE in India and no return was filed prior to the issuance of notice u/s 148 also brings the case within the fold of Explanation 2(a) to section 147. In view of the foregoing discussion, we are fully satisfied that the AO was justified in initiating reassessment proceedings.

II. TP ADJUSTMENT – NO OTHER INCOME ATTRIBUTION

18.1. The ld. AR contended that for the assessment year under consideration, namely, 2001-02, the provisions of Chapter-X of the Act were *albeit* not applicable, but, in the subsequent years of this assessee and other assesseees, the transfer pricing provisions are applicable *qua*

the international transaction of 'Marketing support services' rendered by GEIPL to GE entities pursuant to agreement with GEIOC. It was put forth that GEIPL intimated the international transaction of rendering Market support services to various AEs, and the AO accepted the same at arm's length price (ALP) without referring it to the Transfer Pricing Officer (TPO) for the determination of its ALP for the AYs 2002-03 and 2003-04. It was further stated that though the AO made a reference to the TPO for determining ALP of the international transaction of rendering of Marketing services by GEIPL for the A.Ys. 2004-05 and 2005-06, but, the TPO accepted the transaction at ALP. For the A.Y. 2006-07, the TPO made certain TP adjustment, but, the Tribunal restored the matter to the TPO for a fresh determination which was still pending. For the A.Y. 2007-08, no TP adjustment was stated to have been made in the hands of GEIPL and the TP adjustment made for the AY 2008-09 was pending consideration before the Tribunal. Copies of the orders passed by the TPO for such earlier years were placed on record. Relying on the judgment of the Hon'ble Supreme Court in the case of *DIT (I.T.) vs. Morgan Stanley & Co. Inc. (2007) 292 ITR 416*

(SC), the Id. AR contended that once a transfer pricing analysis is undertaken, there is no further need to attribute profits to a PE. It was contended that similar view has been taken by the Hon'ble Delhi High Court in *Adobe Systems Inc. vs. Asstt. DIT (2010) 240 Taxman 353 (Del)* and in *DIT vs. BBC Worldwide Ltd. (2011) 203 Taxman 554 (Del.)* For this proposition, the Id. AR also relied on another judgment of the Hon'ble Bombay High Court in *Set Satellite (Singapore) Pte Ltd. vs. DDIT (International Taxation) (2008) 307 ITR 205 (Bom)*. It was thus contended that due to acceptance of the ALP of the international transaction of rendering Marketing services in the hands of GEIPL, no further income could be attributed due to the PE. This argument, in the opinion of the Id. AR, *prima facie* showed lack of reason to believe that income chargeable to tax escaped assessment.

18.2. Sounding a contra note, the Id. DR contended that ALP of payment made by GEIOC for marketing services rendered to GE overseas entities by GEIPL could not be considered as decisive insofar as the attribution of profits to the PE is concerned. He relied on the judgment of the

Hon'ble Allahabad High Court dated 5th August, 2014 in *LG Electronics Inc. vs. Addl. CIT*, in which similar contention raised on behalf of the assessee was rejected after considering the judgment in the case of *Morgan Stanley (supra)*.

18.3. Having considered the rival submissions and perused the relevant material on record, we find that the provisions of Chapter X are not applicable to the A.Y. 2001-02, which is presently under consideration in this appeal. In that view of the matter, this contention raised by the assessee for the A.Y. 2001-02 does not stand any more. However, such an argument merits consideration for other years of this and other assessees.

18.4. Survey was conducted at the LO of GEIOC which had entered into a Global Service Agreement (GSA) with an Indian company, namely, GE India Industrial Pvt. Ltd. (GEIPL) on 16th January, 2001. A copy of this Agreement is available at pages 271-282 of the Paper Book-1. In terms of this Agreement, GEIOC requested GEIPL 'to provide certain services'. The services to be provided by GEIPL under

this agreement have been set out in clause 1 of the Agreement, which states that GEIPL (earlier called GE Power India) shall from time to time provide the following *support services* to GEIOC and its affiliate entities : -

“(i) Identify and seek business opportunities and provide information relating to products and services of GEIOC and its affiliate entities to potential customers in India;

(ii) Arrange appointments and meetings between existing as well as prospective customers and GEIOC/its affiliate entities and provide necessary support in client meetings and discussions;

(iii) Act as a channel of communication between customers and GEIOC/its affiliate entities;

(iv) Investigate and provide information on current trends in business, status of competing products, technological developments, pricing of competitors, Government policies and other development, etc., that would be of interest to GEIOC/its affiliate entities; and to

(v) Provide an effective link between GEIOC/its affiliate entities and various regulatory authorities from time to time on all business matters.”

18.5. Nature of support services to be provided by GEIPL as per this Agreement is inclusive of the services permitted by the Reserve Bank of India to GEIOC at the time of setting up of its LO in India. The permission was granted by the RBI for the purpose of *undertaking purely liaison activities, viz., to act as a communication channel between head office and its customers in India.* This permission was granted subject to the conditions that except the proposed liaison work, *the LO will not undertake any other activity of a trading, commercial or industrial nature* or it shall not enter into any business contracts in its own name without prior permission of the RBI. It was further directed by the RBI that the Liaison Office will not charge any commission/fees for liaison activities and the entire expenses of the LO will be met exclusively out of the funds received from abroad through normal banking channels. It was also directed that the LO shall not borrow or lend any money from/to any person in India without prior permission

and it shall not acquire, hold any immovable property, etc., except by way of a lease for a period not exceeding five years.

18.6. It is clear that GEIPL reported international transaction of rendering 'Marketing services' to GEIOC and other GE overseas entities, which was largely accepted at ALP except for some years, the proceedings for which are still not final. When we consider the scope of 'Marketing services' as per the Agreement in conjunction with the permission granted by the RBI, it comes to the fore that the same are restricted to 'market support services', such as, providing information relating to products and services of GEIOC and its affiliate entities to potential customers in India; providing necessary support in client meetings and discussions; acting as a channel of communication between customers and GEIOC/its affiliate entities; providing information on current trends in business etc. that could be of interest to GEIOC/its affiliate entities; and providing an effective link between GEIOC/its affiliate entities and various regulatory authorities from time to time on all business matters. All these largely fall in the realm of

`liaison activities', which by themselves do not constitute PE in India. The authorities considered the Agreement and other related documents for declaring that the ALP of `Marketing support services' was by and large at ALP. However, it turned out only during the course of survey that the scope of actual services by GEIPL far exceeded the market support services as provided in the Agreement. 43 employees of GEIPL were found to be involved in the actual conduct of business of GE Overseas, effecting sales and acting under the leadership of expats, who were heading various business lines of GE in India. Actual activities carried out in India, far exceeded what was sanctioned by the RBI and such extra activities are of commercial and trading nature, which are exception to the rule of liaison office. In addition, the place of GEIOC was being used as fixed place of business of GE Overseas. Thus it is lucid that the actual functions performed by GEIPL were much more than those prescribed in the Agreement.

18.7. The Id. AR vehemently argued that only the activities approved by the RBI for acting as a liaison office were carried out in India and this

was established from the fact that the permission so granted by the RBI was not revoked. He relied on an order passed by the Delhi Bench of the Tribunal in *Metal One Corporation vs. Dy.DIT (2012) 52 SOT 304 (Del)* in which it has been held that since no violation of RBI condition was shown, the LO was to be presumed to be engaged in the activity as permitted. For the same proposition, he relied on another decision of the Tribunal. This was opposed by the ld. DR

18.8. It is found as an admitted position that the RBI did not revoke the permission to carry on LO nor any adverse action was taken against the GEIOC who was allowed to open an LO in India. Under such circumstances, a question arises if non-action by the RBI should lead to a presumption that only the designated activities sanctioned to the LO were carried on? In normal circumstances, when permission is granted for setting up of an LO, and then renewed by the Reserve Bank of India from time to time, the presumption is that only the sanctioned activities were carried out. If, however, some direct evidence surfaces which shows the actual carrying on of activities at much higher degree in

qualitative terms than those sanctioned, then the RBI's sanction/continuation for an LO loses the character of conclusiveness in this regard. In *Jebon Corporation India, Liaison Office vs. CIT (International Taxation) and Another (2011) 245 CTR 300 (Kar)*, Liaison Office of a South Korean company was found to be carrying on commercial activities of identifying the buyers, negotiating with the buyers, agreeing to the price, procuring purchase orders and forwarding the same to the head office and the follow up activities relating to realization of payments from the customers. Such activities carried on by the LO were not confined only to the liaison work. The assessee took a similar stand as has been taken before us that the RBI's permission prevented the LO from carrying on commercial activities and the fact that no action was initiated by the RBI against the LO, the decision of the authorities that the assessee was having a PE in India, be reversed. Jettisoning such a contention, the Hon'ble High Court held that: "Merely because no action is initiated by RBI till today would not render the findings recorded by the authorities under the IT Act as erroneous or illegal." In view of the direct judgment of the Hon'ble High Court on the

issue, the contrary view taken by the Tribunal does not hold good to this extent.

18.9. Adverting to the facts of the instant case, we find that the survey conducted on AIFACS building showed that GE India was not merely acting as a communication channel, permission for which was also only with GEIOC and not the assessee, but, was actually indulging in commercial activities. This argument of the Id. AR, therefore, fails.

18.10. We come back to the assessee's primary argument for striking down the initiation of reassessment because the arm's length analysis was accepted and no transfer pricing addition was made and hence there could be no further attribution of income to the PE. The trump card of the Id. AR is the judgment in the case of *Morgan Stanley(supra)*, which has been followed in the subsequent decisions referred to by the Id. AR hereinabove. In this judgment, the Hon'ble Apex Court has held that once a transfer pricing analysis is undertaken, there is no further need to attribute profits to a PE. The Hon'ble Supreme Court countenanced the Ruling of the AAR in principle insofar as an AE, that also constituted a

PE, was remunerated at ALP *taking into account all the risk taking functions of the enterprise* (emphasis supplied by the Hon'ble Supreme Court). The Hon'ble Summit Court found that in such cases nothing further would be left to be attributed to the PE. It, however, held that: *“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 tax payer has to be examined as to whether the transfer pricing analysis placed by the tax payer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case.” From the above observations of the Hon'ble Supreme Court in *Morgan Stanley (supra)* itself, it is unambiguously beyond any shadow of doubt that if the transfer pricing analysis does not adequately reflect the functions performed and the risks assumed, there would be a need to attribute profits to the PE for those functions/risks which have not been considered. The Hon'ble Allahabad High Court in the case of *LG*

Electronics Inc. (supra) rejected contention similar to the one made before us after duly noting the judgment in the case of *Morgan Stanley (supra)*. The position which, therefore, follows is that only if the ALP has been determined taking into account all risks and functions of the enterprise, nothing more can be attributed to the PE. If however, the functions or risks etc. actually undertaken are more than those shown, then exception to the rule laid down in the *Morgan Stanley (supra)* gets attracted. There is no dispute in the cases relied by the Id. AR including those of the Hon'ble Delhi High Court in *BBC Worldwide Ltd.(supra)* and *Adobe Systems Inc (supra)* that the ALP therein was determined by considering all the functions and risks actually undertaken and there was no extra function performed or risk assumed by the concerned enterprise warranting any further attribution of income.

18.11. When we revert to the facts of the instant case, it comes out that the ALP of payment made by GEIOC to GEIPL was determined only w.r.t. the apparent services elaborated in the Agreement which are more or less of liaison nature, not leading to the doing of some income

generating activity. But in reality, the actual services rendered by GEIPL to the GE overseas entities under the leadership of expatriates from GEII is alien to the Agreement. Such activities performed by GEIPL beyond the scope of the Service agreement have led to the creation of the PE of the assessee in India. Such services have not been remunerated at all. Since the transfer pricing analysis did not reflect these functions performed by GEIPL, there is *a need to attribute profits to the PE for those functions/risks that have not been considered*. Further, it came to light during the course of the survey and the post-survey proceedings that the premises of the LO of GEIOC was being used as a fixed place PE by the GE overseas entities including the assessee, which fact was never disclosed to the Department. Our attention has not been drawn towards any payment having been made by the GE overseas entities to GEIOC on this account. As this international transaction was not reported at all, there was no question of any transfer pricing analysis of the same. These facts delineate that the instant cases fall under the exception to the rule laid down in *Morgan Stanley* (supra)

as reiterated in *LG Electronics*(supra). We, therefore, reject this contention raised by the Id. AR.

III. SANCTION U/S 151

19.1. On an earlier occasion, the assessee raised an additional ground before the tribunal, reading as under:-

“That on the facts and circumstances of the case and in law, the proceedings initiated under Sections 147/148 of the Act are without jurisdiction because the mandatory sanction required under section 151(2) of the Act has been granted by the Addl. DIT in a mechanical manner and without application of mind.”

19.2. The Bench, vide its separate order dated 10.06.2015, admitted the additional ground. As such, we are now taking up this ground for adjudication on merits.

19.3. The Id. AR contended that the sanction granted by the Addl. DIT u/s 151(2) was without application of mind and, hence, the proceedings flowing from such illegal sanction given in a mechanical manner, be set aside. To buttress this submission, the Id. AR relied on the judgment of the Hon’ble Delhi High Court in *United Electrical Company P. Ltd. vs.*

CIT and Ors (2002) 258 ITR 317 in which notice issued u/s 148 was quashed, *inter alia*, on the ground that the Addl. CIT accorded his approval mechanically and without application of mind. He also relied on the judgment of the Hon'ble MP High Court in *Arjun Singh and Ors vs. Asstt. DIT and Ors. (2000) 246 ITR 363 (MP)* and another judgment dated 14.10.2014 of the same Hon'ble High Court, in which sanction given within 24 hours of time was held to be without application of mind. The ld. AR contended that in the extant case also the sanction was given by the Addl. DIT on the same date on which the reasons were placed before him and hence the reassessment be set aside. These arguments were opposed by the ld. DR, who contended that the sanction was given by the Addl. DIT after due application of mind. He relied on certain material to show that Addl. DIT was fully in touch with all the goings-on in this case much prior to the formal placing of reasons for sanction before him.

19.4. We have heard the rival submissions and perused the relevant material on record. The Addl. DIT though accorded sanction u/s 151 on the same date, but, recorded his satisfaction in the following terms:

“DIT, Range-I, Intl. Tax, New Delhi.

For the reasons recorded by AO, I am satisfied that it is a fit case for issue of notice u/s 148 of the Act. Accordingly, approval envisaged, u/s 151(2) is granted.”

19.5. It is apparent from the recording of satisfaction by the Addl. DIT that the same was not granted in a mechanical manner without application of mind. The satisfaction was accorded ‘for the reasons recorded by AO’. At this juncture, it is imperative to note that the Addl. DIT, who gave the sanction u/s 151 of the Act was already seized of the matter, prior to the issuance of notice u/s 148. This is borne out from the fact that the reasons recorded refer to the information provided by GEIOC, at least, vide its two letters dated 27.2.2008 and 24.3.2008 addressed by the GEIOC to the same Addl. DIT. These letters have been placed at pages 7 and 18 of the Departmental paper book. The material found in survey and post-survey enquiries is admittedly

common to GEIOC and all the GE overseas entities under consideration. This demonstrates the direct involvement of the Addl. DIT in the issue much prior to the placing of reasons before him for sanction. Not only the text of sanction but also the earlier involvement of the Addl. DIT in the proceedings dealing with such reasons, go a long way to prove that he did not act in a mechanical manner. Thus, it is wholly incorrect to state that the sanction was granted by the Addl. DIT without application of mind.

19.6. The facts in *United Electrical Company (supra)* are that the 'reasons' were *de hors* the facts available on record, and there was no information which could provide foundation for the AO's belief that the assessee's transactions with a disputed company were not genuine and its income had escaped assessment. The Hon'ble High Court held that the action of the AO was not sustainable. It was in this background that the Hon'ble High Court found: "*Even the Addl.CIT has accorded the approval for action u/s 147 mechanically. If the Addl. CIT had cared to go through the statement of V.K. perhaps he would not have granted his*

approval which was mandatory in terms of proviso to sub-section (1) of section 151 as the action u/s 147 was being initiated after the expiry of four years from the end of the relevant assessment year.” It is manifest that the facts of that case lie in an entirely different compass *vis-à-vis* the instant case. We are confronted with a situation in which the AO has given detailed reasons running into more than 24 pages which *prima facie* show escapement of income. It is in this background of the reasons and the knowledge of the Addl.CIT of the issue in his official capacity, that he is held to have granted approval u/s 151(2) after applying his mind.

19.7. Similar is the position as regards the other judgment in the case of *Arjun Singh (supra)*. In that case, the Hon’ble High Court did not find any definite material leading to the formation of belief that the income chargeable to tax had escaped assessment. The Hon’ble High Court found that : “*Present is a case where there was no such material or evidence, whatsoever, on the record. The Department failed to disclose any such cogent definite material which can be the basis for*

reasons to believe as per the requirement of law.” It is in this backdrop of the facts that the Hon’ble High Court found that merely vague, unspecific conjectures and surmises styled as ‘reasons to believe’ were forwarded to the CIT and not the alleged three reports on which the AO is said to have based his reasons. “The CIT had no opportunity to apply his mind to the actual materials and, accordingly, sanction accorded by him is vitiated one.” The Hon’ble Court found that the CIT acted mechanically by merely writing on the format ‘Yes, I am satisfied.’ It was incidentally found that the exercise of giving sanction in less than 24 hours of time also went on to indicate that he did not apply his mind at all while granting sanction. Again, we are at loss to appreciate as to how this judgment advances the case of the assessee. The situation before us is not that the Addl. CIT was not provided with actual material and he simply wrote two-three words before giving sanction. Application of mind, as emanating from his noting, gets duly endorsed with his earlier involvement in the matter. The observations of the Hon’ble MP High Court about 24 hours are to be seen in the context in which they were made. This is not a statutorily provided time limit. The

essence of such observations is that the Addl. DIT should not hurriedly accord sanction in a mechanical way but properly examine the facts before giving approval. Criteria for examining validity of a sanction is the genuineness of reasons for re-assessment and application of mind by the authority before granting sanction u/s 151 of the Act. We are satisfied that in the given circumstances, the Addl.CIT committed no mistake in granting sanction u/s 151(2) of the Act. This ground, therefore, fails.

B. PERMANENT ESTABLISHMENT

20. The A.O. examined the taxability of income of GE Overseas under the Act as well as the Double Taxation Avoidance Agreement. He did not accept the contention of the assessee that the sale consideration was not taxable in India as the title in respect of the equipments was transferred outside India and the payments were also received outside India. He held that a lot of activities relating to marketing and sales took place in India. Expatriates from GEII along with the employees of GEIPL constituting the Indian team (GE India) were always involved

and participated in the negotiation of prices. Such negotiations of prices took place in India. The Indian customers discussed MOU terms with the Indian team. These facts, in the opinion of the AO, were clear indicators of the GE India securing orders for GE Overseas. He further found that GE Overseas, by remotely sitting in foreign countries, could not make any sales, without the active involvement of GE India. This was held to be a business connection of GE Overseas in India in terms of section 9 of the Act. The AO, therefore, held that all the profits did not accrue or arise to the assessee in the foreign soil, but part of such profits arising in India, corresponding to the activities carried out in India, was chargeable to tax under the Act. Considering the fact that sales were made to Indian customers on a regular basis and the GE overseas entities were physically present in some form or the other in India and such physical presence had full role in these sales, the AO held that the business connection of GE Overseas was established in India and, consequently, income accrued or arose to them in India. Such income accruing or arising was held to be liable to tax as per the provisions of section 5(2) of the Act. Simply put, the AO has made out a case that the

GE overseas entities were having business connection under the Act as well as permanent establishment under the DTAA in India in all the years under consideration. The position about the taxability under the Act has not been challenged by the assessee before us inasmuch as the ld. AR has assailed only the existence of PE in terms of the DTAA, more particularly, the activities carried out in India, which in his opinion, were of preparatory or auxiliary character.

21. The AO finally held that all the GE overseas entities had PE in India in all the years under consideration in two forms, namely, AIFACS premises of GEIOC, constituting a 'fixed place PE'; 'GE India' comprising of expatriates of GEII and employees of GEIPL constituting 'dependent agent PE'. The ld. AR argued that none of the activities carried out by the assessee in India lead to the creation of PE. We will take up both the types of PE one by one for consideration and decision.

I. FIXED PLACE P.E.

22. In order to test the constitution or otherwise of a 'Fixed place PE' of the assessee in India, we will consider the Double Taxation

Avoidance Agreement with the USA (hereinafter called 'the DTAA'), which applies to 17 entities. In fact, this is the only DTAA which has been relied upon by both the sides in support of their respective arguments. No reference has been made to any other DTAA. It is, therefore, presumed that the language of Article 5 dealing with Permanent Establishment of the other relevant DTAA's is no different from the DTAA. Paras 1 to 3 deal with the fixed place PE. Before examining the rival contentions, we consider it apposite to set out the relevant parts of these paras, as under :-

1. For the purposes of this Convention, the term 'permanent establishment' means a *fixed place of business* through which the *business* of an enterprise *is wholly or partly carried on*.

2. The term 'permanent establishment' includes especially:

(a) a place of management;

(c) an office;

(d) to (l)

3. *Notwithstanding the preceding provisions* of this Article, the term 'permanent establishment' *shall be deemed not to include* any one or more of the following :

(a) to (d)

(e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or *for other activities which have a preparatory or auxiliary character*, for the enterprise.

23. Para 1 of Article 5 provides that the term 'Permanent Establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on. Para 2 gives certain illustrations of the fixed place of business, such as, a place of management, an office, a factory or a workshop etc. Para 3 starts with a *non obstante* clause *qua* paras 1 and 2 and provides that the term 'permanent establishment' shall be deemed not to include five instances, including clause (e), being, activities which have a preparatory or auxiliary character. It is only clause (e), which has been relied upon by the Id. AR for putting forth that the assessee did not have any fixed place PE in India.

24. On a conjoint reading of the relevant parts of paras 1, 2 and 3 of Article 5, it comes out that a permanent establishment means a fixed place of business through which the business of an enterprise is wholly or partly carried on and such fixed place is not maintained for activities of a preparatory or auxiliary character. To sum up, the following three

ingredients must be cumulatively satisfied for bringing a case within the ambit of a fixed place PE :-

- i) There should be fixed place of business;
- ii) Business of foreign enterprise should be wholly or partly carried on from such fixed place; and
- iii) The activities carried out from such fixed place should not be in the nature of a preparatory or auxiliary character.

25. Now, we will see if all these three conditions are satisfied in the instant case.

26.1. The first condition is that there should be a fixed place of business. The term 'fixed place of business' envisages that the place should be at the disposal of the enterprise with some degree of permanence. A place occupied just temporarily does not lead to establishment of a fixed place PE. The enterprise should be in a position to constantly use such place. What is relevant for the purpose is the availability of the place at the disposal of the enterprise irrespective of any ownership, lease or other occupancy rights. So long as a place is

available with some degree of permanence to the enterprise for its use, it satisfies the first condition for constituting a fixed place PE. Further, it is not necessary that such place should be exclusively used for that purpose. OECD Commentary on Article 5 of the Model Tax Convention has discussed in paras 4 to 4.3 that the term 'place of business' covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. Such place of business can also be situated in the business facilities of another enterprise. Para 4.3 gives an example of a fixed place PE, being, an employee of a company, who, for a long period of time, is allowed to use an office of another company. Further, the character of 'fixed' should be attached to such a place, which means that it should be used with a certain amount of permanence. In a nutshell, if a place is used by a foreign enterprise for carrying on its business in India with some sort of regularity or permanence, it satisfies the first condition of a fixed place PE.

26.2. Adverting to the facts of the instant case, we find that GE India also comprising of the expatriates from GEII were permanently using

the LO premises of GEIOC at AIFACS building. It was found during the course of survey, that the expatriates were having specific chambers/rooms allotted to them with their name plates affixed and they were occupying the same. Secretarial assistance and staff was also provided to them by GEIPL/GEIOC. Their laptops, computers and business related documents were in such specifically allotted rooms. The rooms were at the constant disposal of these expats. Though the AIFACS premises was taken on lease by GEIOC, but, the same was also being constantly occupied by these expats, who, though on the pay roll of GEII, were working in India for the GE Overseas entities. Not only that, AIFACS building was also occupied by the employees of GEIPL who were working under the direct control and supervision of the expats, who, in turn, were working for the GE overseas entities. This position also gets vouched from page 248 of the Survey documents PB-I, which is the Attendance sheet of the persons working in AIFACS building at the time of survey, which, *inter alia*, records the names of these expats and some employees of GEIPL working with these expats. The column 'In time' on this document shows the time of entering

office, which, in most of the cases is close to 9 A.M. The fact that these expats and employees of GEIPL working under expats were working in AIFACS building, has never been denied by the assessee. Thus the first condition is satisfied.

27.1. Now we espouse the second condition, viz., business of foreign enterprise should be wholly or partly carried on from such fixed place. This specifies two things. First is that the business of foreign enterprise should be carried on from such fixed place and the second is that the carrying on of business of enterprise need not be wholly from here. Even if business is partly carried on from such fixed place, the same would constitute a fixed place PE.

27.2. It can be seen that the DDIT, prior to issuing a notice u/s 148, required the GE group to furnish employment letters of all the employees of GE overseas group companies working in India along with their appraisal reports. The assessee furnished, vide its letter dated 16.3.2007, a list of employees of GE International Inc., US, who were working in India, namely, Dan Nalawade, Riccardo Procacci, William

Blair, Ashfaq Nainar, Kenneth Pierson, Samir Aggarwal and Prat Kumar. Pages 94 to 115 of the Departmental PB no.1 are the Assignment letters of these seven expatriates. These Assignment letters are dated for the years 2004, 2006 and 2007. Tenure is fixed, namely, five years, three years or two years, as the case may be. Such Assignment letters indicate position of these employees of GEII working in India. We will firstly discuss these expats in the light of their Assignment letters, Self appraisal and Manager assessment, wherever provided.

i. Kenneth Pierson - A copy of the Assignment letter of Kenneth Pierson has been placed at page 104 of the Paper book, which shows his position as 'Sales & Marketing Manager' of GE Transportation with the anticipated start date of assignment as 1.5.2004 and the term of assignment as thirty six months. Kenneth M. Pierson also gave Self appraisal report, whose copy is available at page 190 onwards of the paper book. Under the head 'Accomplishments', he claimed to have maintained a constant focus on organic growth in emerging market. He:

`Led the GS team through key activities – Sales, Cross-approval, Partnership approvals, Marketing and Resourcing.’ Page 192 of the paper book is ‘Manager assessment’ of the Self appraisal of Kenneth M. Pierson. It has been mentioned that: ‘Ken is committed to growing the India signaling business. *Although he missed the orders target for the year, 2006 was a significant year as his team closed \$6M in orders and has positioned the business to winning major deal in 2007.*’ This shows that Kenneth M. Pierson was working as ‘Sales and Marketing Manager’ of GE Transportation. Albeit he got a good number of orders, but, missed the sales order target given to him for the year. His job description has been given on page 209 of the Paper book, which shows that he was to : *‘Build India Global Signalling team including sales, marketing, engineering and project management; Facilitate the sales of Products and systems through the permanent Indian staff; and Manage relationships with various customers and stakeholders including Indian Railways, municipal metro systems and installer partners’.* This points out that Kenneth Pierson, in his capacity of Sales & Marketing Manager,

was given sales target in the normal course of his duties, which he could not achieve.

ii. Ashfaq Nainar - A copy of the Assignment letter of Ashfaq Nainar has been placed at page 114 of the Paper book, which shows his position as 'Transportation Solutions Team Leader' of GE Transportation with the anticipated start date of assignment as 1.7.2006 and the term of assignment as thirty six months. Now, we take up the Self appraisal report submitted by the GE group of Ashfaq A. Nainar to the AO, whose copy has been placed at pages 57 onwards of the Departmental paper book. He has been designated as 'Regional Managing Director - Asia' having area of responsibility of 'all Asia except for China.' It has been mentioned here that he worked: "with various rail-road customers in the region to develop business opportunities.....Responsible for market segmentation analysis and identifying new business opportunities." His job responsibility has further been mentioned to "*Coordinate activities of the marketing and sales teams to develop potential solutions. Identify capacity enhancing solutions for bottlenecks*

in the existing rail infrastructure of the railways.” His further job responsibility has been defined on the same page to: ‘Evaluate the team’s performance against the business goals and objectives. Provide active coaching and mention the team and provide feedback to improve overall team performance’. Page 58 shows that he has: “Excellent customer negotiation and dispute resolution skills”. In Self appraisal report, whose copy is available on page 61 of the paper book, he mentioned under the head ‘Accomplishments’ to have: ‘Led Asia team to \$29M orders & \$20.6 M sales’ by continuing double digit growth.” Under the head ‘Expertise’, it has been mentioned that he: ‘Utilized 13+ years of sales experience and market instincts to enter new growth areas such as commuter and propulsion markets in India.’ Then, there is the ‘Manager Assessment’ on page 63, which shows that he made solid progress in ’06 with Orders \$27 and sales of \$19(\$ 13 + 12%). Details emanating from his Assignment letter, Self appraisal report and Manager assessment speak volumes about his nature of work extending to managing the entire business including sales and marketing, matching with his designation.

iii. Riccardo Procacci - A copy of the Assignment letter of Riccardo Procacci has been placed at page 97 of the Paper book, which shows his position as 'Oil & Gas, India Country Leader' of GE Energy with the anticipated start date of assignment as 1.8.2006 and the term of assignment as five years. Despite specific request by the AO, the GE group neither supplied Self appraisal report nor the Manager's assessment report of Riccardo Procacci. As against the requirement of the DDIT for tendering the Appraisal reports and Manager Assessment of the seven expats and the employees of GEIPL, the assessee furnished such reports in respect of only two employees, namely, Kenneth Pierson and Ashfaq Nainar, which we have discussed above. For the remaining five expats, the assessee submitted that either the appraisal reports were not due or were not completed. This intimation was given by the assessee vide its letter dated 16.3.2007. The AO issued notice after a gap of more than one year from the assessee's above letter on 26.3.2008 and till then such details were not furnished. As no difference in the business model in India has been brought to our notice in respect of all the GE Overseas entities, in our considered opinion, the Revenue rightly drew

the inference that other expats were also doing activities similar to those of Kenneth M. Pierson and Ashfaq Nainar.

iv. William Blair - A copy of the Assignment letter of William Blair has been placed at page 100 of the Paper book, which shows his position as 'Country Director, GE India, Aviation & Rail' of GE Transportation with the anticipated start date of assignment as 1.1.2006 and the term of assignment as thirty six months. His job description is available on page 210 of the paper book. It mentions the scope of responsibilities including: "Organize local aviation team including commercial and military sales leaders, track progress versus customer commitments and develop personnel plans for training and growth; Conduct compliance risk assessments, audits and support training for aviation team members in India; Develop aviation growth strategy for India and obtain HQ support for same." It has been further stated that he will: 'Develop Aviation Growth strategy for Indian and obtain HQ support for same.' This shows that whatever was required to be done at the top level for business of GE Overseas in India, was being done by him. Despite

specific request by the AO, the GE group neither supplied Self appraisal report nor the Manager's assessment report of William Blair.

v. Pratyush Kumar - A copy of the Assignment letter of Pratyush Kumar has been placed at page 111 of the Paper book, which shows his position as 'Leader, GE Infrastructure, Ops-India' of GE Transportation with 1.6.2006 as the anticipated start date of assignment and the term of assignment as five years. Major activities done by Pratyush Kumar have been given on page 205 onwards of the Paper book, which show that he was 'GE Infrastructure Leader in India', reporting directly to the Global CEO of GE Infrastructure with specific role and responsibilities to: "Help GE infrastructure business develop their strategy in India; Align GE solutions with customer need; Put the key success factors in place; Help shape policy to realize opportunities; and Facilitate business development discussions." Page 207 of the paper book shows his major activities, which, *inter alia*, provide that he: "Facilitated dialoge between GE Infrastructure's Energy, Oil & Gas and Water business to develop consistent T&Cs." This shows that Shri Pratyush Kumar was looking

after GE Infrastructure business in India at the apex level, *inter alia*, developing business strategy in India and also finalizing consistent business terms and conditions. Despite a specific request by the AO, the GE group neither supplied Self appraisal report nor the Manager's assessment report of Pratyush Kumar.

27.3. The above facts indicate two broader things. First is that these expats of GEII, who are highly qualified and some have even double qualifications, worked in India for different business interests of GE group and their activities were not confined to the business of a particular entity. Second is that they were heading the operations of GE overseas entities in India. From the Job descriptions and Appraisal reports with the Manager assessment, wherever given, it is crystal clear that the expats were India Country heads or working at the top positions, managing the business, securing orders and doing everything possible that could be done here *qua* the Indian operations of GE overseas entities in India. It has nowhere been denied, and rightly so, that the business model and role of the expats of GEII is similar *qua* all the

businesses in India. This view is further strengthened from the fact that the expats were not confined to a particular GE entity but working for one of its three major business lines, viz., Infrastructure, Industrial and Healthcare.

27.4. Now, we will discuss the role of the employees of GEIPL in assisting the expats in Indian operations of GE overseas entities, as unfolding from the survey documents.

i. Nalin Jain - Pages 247 and 264 of the Survey documents PB contain profile of Nalin Jain duly signed by him which shows his designation in India as 'Sales Director' of GE Transportation, Aircraft engines. 'Job description' has been given as 'Market Intelligence and Support to Headquarters.' He has indicated his 'Reporting Manager' as William Blair, who is one of the seven expats from GEII working in India for GE overseas.

ii. Pritam Kumar - Page 277 of the Survey documents PB is a profile of Pritam Kumar, an employee of GEIPL with the designation of 'Market Strategy Manager'. He is reporting to Pierre Cante.

iii. Yashdeep Sule - Page 280 contains details of Yashdeep Sule, again an employee of GEIPL. His job description is 'Sales and Marketing for signaling and locomotives.' His reporting manager is Pritam Kumar as discussed immediately hereinabove, who, in turn, is reporting to Pierre Cante.

iv. Janak Chaudhary - Page 292 is report of Janak Chaudhary with designation of 'Vice President' and job description of 'Sector analysis for growth in India.' His reporting manager is again some foreign employee.

27.5. Above narration of the nature of jobs carried out by these employees of GEIPL makes it amply clear that they were at the higher positions in the general administration and, more specifically, sales of GE Overseas, reporting directly to the expats, who, in turn, were India country heads or occupying the peak positions in GE Overseas in India.

27.5. Having seen the job responsibilities of the expatriates and employees of GEIPL assisting the expats in the Indian operations of GE Overseas, now let us have a look at some of the e-mails which are part

of the survey documents, which fully justify the respective designations given to them. As noticed earlier, the assessee in its replies to the AO has used two terms, namely, GE Overseas and GE India. Admittedly, GE Overseas has been referred to as all the 'GE overseas entities' collectively and GE India has been referred to as 'expatriate employees of GE International Inc. located in India and employees of GE India Industrial Private Limited i.e. GEIPL engaged in providing marketing support services for offshore sales into India'. Use of the expression GE India *prima facie* shows that firstly, the expats of GEII worked for GE Overseas in India, and secondly, the role played by the employees of GEIPL is more than what has been set out in the Agreement.

27.6. Page 127 of the Survey documents PB-I is an e-mail from La Moita of GE overseas entity to P. Riccardo (GE India) and others which has been styled as 'Confidential.' This e-mail reads : "now the case of BHEL as we have discussed it what is reported in the MOU reflects the content of conversation we had (me, you and Riccardo) in the 2nd half of August, when we were in India negotiating the deal." This e-mail

indicates that Riccardo (GE India) was fully involved in negotiating the deal and was not merely acting as a communication channel.

Page 195 of Survey Documents PB – I is a communication from BHEL to P. Riccardo (GE India) with a “Request to revise your offer for present job in line with enclosed past similar order.” This document shows that P. Riccardo (GE India) was directly making offers and also entertaining requests from customers in India for revising the offer.

Page 82 of Survey Documents PB–I is an e-mail from Vivek Venkatachalam (GE India) addressed to Prontera, etc. (GE Overseas) with a copy to Riccardo Procacci (GE India). This is in respect of Infra, oil and gas business relating to Nuovo Pignone Spa, mentioning that: “Reliance would say that the effective date would fall sometime by end of March 07. In India, the Financial closing is 1st April-31st March and hence they requested us to change the period to 120 days for the WHRU and *we accommodated their request.*” This shows that Shri Vivek Venkatachalam, a part of Indian team, changed the terms and conditions indicating negotiations and decision making taking place in India.

Page 155 of Survey Documents PB–I is a document giving ‘2007 Outlook’, a PPT sent to John Rice (GE Overseas) by Riccardo (GE India). On the left side of this document, there is a mention, *inter alia*, of ‘Reinforcing sales team to improve long-term visibility and resources planning’. On the right side, there is a noting of customer-wise sales made. This has been bifurcated into two parts viz.: “Direct orders” and “Inference orders.” Only “Direct orders” relate to operations in India. Riccardo mentions on the second page of the PPT about key wins of Reliance EWGP, IOCL Haldia and PII. This page also mentions Market dynamics and revenues. He also refers to fierce price pressure and profitability through local sourcing. This document evidences the full-blown indulgence of GE India in running and securing orders for GE Overseas from India.

Page 2 bottom and page 3 of Survey Documents PB–II is an e-mail from Robert Prestwich (GE Overseas) to Vivek Venkatachalam, an employee of GEIPL (GE India): ‘the draft TSA (Technical Services Agreement) for Reliance attached. I guess this needs to be reviewed by your

aftermarket colleagues in India or does it need to go back to someone in Florence'. This e-mail communication shows that the draft agreement sent by Reliance Industries Ltd. to Mike Hosford (GE Overseas) was, in turn, sent to India, namely, Vivek Venkatachalam (GE India), requiring him to get it reviewed from his aftermarket colleagues in India.

Pages 32 and 33 of Survey documents PB-II are certain e-mails between P. Riccardo, Vivek Venkatachalam (GE India) and Dino Catastine (GE Overseas). P. Riccardo writes to Dino Catastine that: "The credibility of the team is compromised. Why changes have been made to what we agreed during the last two meetings and conference calls with RIL without prior consultation with the local team? All communication to RIL must be passed through Vivek. If there is no agreement on the subject let us discuss." Then, Dino Catastine writes to Riccardo saying: 'We didn't change our position with respect to the conference calls we have participated'. Once again he writes to Riccardo and Vivek saying: "Following our phone call, I confirm that, if necessary to close the deal without any other change to our proposal, we

can withdraw our request for a 2% price increase for different payment terms and forward exchange rate instead of spot.” The above e-mails show that Ricardo did not take it charitably when Dino Catastine made some changes *qua* contract with RIL without prior consultation with the GE India and he expressed his anguish by writing that the credibility of the team was compromised. This leaves nothing to doubt that GE India was in full command of the sales activities in India and not allowing GE overseas even to interfere with what they had agreed with the customer in India.

Page 39 of the Survey documents PB-II is an e-mail from Vivek Venkatachalam (GE India) to P. Riccardo (GE India), discussing another customer, namely, Bongaigaon Refinery and Petrochemicals Ltd., requesting Riccardo: “to make Vittorio understand that we cannot change the payment terms completely.....”. This shows that GE India was not even allowing GE Overseas to change the terms and conditions of a contract, what to talk of working as a mere communication channel between the GE overseas and Indian customer.

Pages 101-103 of the Survey documents PB-II are certain related e-mails. First is an e-mail from Gianluca (GE Overseas) to a customer in India (Pump Design Department of IOC) with the subject 'Offer'. It has been written: 'As already advised by Mr. Procacci on October 12, 2006 we confirm as follows...'. This indicates that Procacci, a part of GE India representing GE overseas, was finalizing the MOU with the Indian customer and advising accordingly to the GE Overseas. Then there is an e-mail from Rajesh Gupta, an employee of GEIPL to Pump Design Department of IOC with copy to P. Riccardo, conveying to the client that: "As a special case, we have decided to accept the following payment terms for the subject MOU." This shows that the change was permitted in the terms of MOU by GE India, which was conveyed by Vivek to the customer, with a copy to Ricardo Procacci. This is a pointer towards major activities in connection with orders and finalization of terms and conditions of sales being done by GE India.

Page 104 of the Survey documents PB-II is an e-mail from Pump Design Department to P. Riccardo (GE India) with a copy to Vivek

Venkatachalam (GE India) and Rajesh Gupta (GE India) requesting the Indian team to send the draft of MOU along with complete comments, so that the same could be incorporated in the original MOU. This e-mail shows that the entire correspondence with the customer in India was being done by the Indian team head P. Riccardo.

Page 120 of the same PB-II is an e-mail from R. Procacci (GE India) to Domenico (GE Overseas) with a copy to Vivek Venkatachalam (GE India) reading: 'As agreed we will try to put together a simple business case in order to take the initiative forward to the need level of evolution.....the approach must be as light as possible in order to match the current business strategies and priorities.' This shows GE India (Procacci) advising GE Overseas of the way in which a case is to be put up before the Indian client. Then La Motta (GE Overseas) replies to P. Riccardo, Vivek Venkatachalam (GE India) and others referring to 'Sales Team (Vivek and Riccardo)'. This again discloses that GE India (Riccardo and Vivek) were Sales team and not merely a communication channel as contended.

27.7. Now let us examine the statement of Shri Chander Jain recorded at the time of survey, whose copy is available on pages 1-14 of Survey documents PB. He admitted in response to question No.10 that “GEIOC is a representative office and all such represents of a corporate office of GE in India.” In an answer to question no. 30 as to whether the employees of GEIPL work for GE group entities in its sale servicing business in India, he said that: “there are certain number of people who are engaged by GEIPL towards marketing and sales. If any other person are providing the above services I will provide the information.”

27.8. Shri Rupak Saha, whose statement was also recorded during the course of survey, admitted in response to question no. 9 that he was responsible for tax matters of all companies of GE group and, to this extent, he was supported by GEIOC and other companies having operations in India.

27.9. When we consider all the survey documents in harmony with the Self appraisals, Manager assessments and Job responsibilities given under the signature of the expats and employees of GEIPL working for

GE Overseas entities in India, it becomes absolutely clear that GE India was conducting business of GE Overseas in India and was directly and wholly involved in negotiating and finalizing the contracts. The Hon'ble Supreme Court in *CIT vs. Ahmedbhai Umarbhai & Co. (1950) 18 ITR 472 (SC)* held that: 'the profits attributable to the manufacturing business are said to arise or accrue at the place where the manufacture is being done and the profits which arise by reason of the sale are said to arise at the place where the sales are made'. It is clear from the above that marketing and sales are income yielding activities in themselves and if the core activity of marketing and sale has taken place in India, then profit from sale, accrues or arises in India alone and the same to that extent should be charged to tax accordingly. The above discussion leaves no room to doubt that in the instant case though business of GE Overseas was partly carried out in India but the core of sales activity was done from the AIFACS building, being the fixed place of business. The second requisite also, therefore, stands satisfied.

28.1. The third condition for constituting a fixed place PE, to the extent it is relevant for our purpose, is that the activities carried on from such fixed place should not be of preparatory or auxiliary character. If the activities done from such fixed place fall within the purview of 'preparatory or auxiliary', the fixed place sheds its character of a permanent establishment. The term 'preparatory activity' is understood in common parlance as some job concerned with the preparation of the main task to be undertaken. It is pursued before the taking up of the actual activity. Black's Law Dictionary 7th Edition at page 130 defines the term 'auxiliary' to mean as 'aiding or supporting, subsidiary.' An activity becomes auxiliary if it is in support or aid of the core income generating activity. The Hon'ble jurisdictional High Court in *U.A.E. Exchange Centre Ltd. vs. Union of India and Ors. (2009) 313 ITR 94 (Del)* considered a case in which the activity to be done through the Liaison Office in India was of downloading the data; preparation of cheques for remitting the amount; and dispatching the same through courier by Liaison Office. The Hon'ble High Court designated it as auxiliary to the main activity of the petitioner. The Hon'ble

jurisdictional High Court in a more recent decision in *National Petroleum Construction Company vs. DIT (IT) (2016) 383 ITR 648 (Del)*, considering the earlier decisions in *Morgan Stanley (supra)* and *UAE Exchange Centre (supra)*, has held that activity of preparatory or auxiliary character is *remote from actual realization of profits* and is simply in aid or support of the main activity. In that case, the activities of the liaison office in India were held not to contribute directly or indirectly to the earning of profits by the assessee and the same being of preparatory or auxiliary nature, did not constitute PE in terms of Article 5(3)(e) of the DTAA. The Hon'ble Supreme Court in *Morgan Stanley (supra)* held that back office functions performed in India are the activities of preparatory or auxiliary character, which do not constitute a fixed place PE under Article 5(1) of the DTAA.

28.2. It is discernible from an outline of the above judgments rendered by the Hon'ble Apex Court and the Hon'ble jurisdictional High Court that the test for determining a preparatory or auxiliary activity is not to see if the core activity can or cannot be performed without it. Rather, the test is that such activity merely supports the core activity and does not

per se lead to earning of income. If the activity carried on from a fixed place in India is simply in aid or support of the core income generating activity and is remote from the actual realization of profits, the same assumes the character of a preparatory or auxiliary nature and falls within clause (e) of Article 5(3) to bring the case out of the ambit of a 'permanent establishment'. One thing is clear from all the above decisions cited by the Id. AR that the activities performed by those assesses in India were either done by their liaison offices acting as communication channel strictly as approved by the RBI or were in aid and support of the main activity, not generating any income in themselves.

28.3. Section 2(e) of Foreign Exchange Management (Establishment in India of Branch of Office or Other place of business) Regulations, 2000 defines '*Liaison office*' to mean a place of business *to act as a channel of communication* between the principal place of business or HO and entities in India, *but which does not undertake any commercial/ trading/ industrial activity* and maintains itself out of inward remittances

received from abroad through normal banking channel. From the definition of Liaison office seen in juxtaposition to the above referred judgments, it becomes clear that acting as a communication channel is an activity of auxiliary character and hence does not constitute a PE in India.

28.4. Now, let us examine if the activities carried out in India by the GE overseas entities through GE India are of preparatory or auxiliary character. Main focus of the Id. AR was to establish that the activities done by GE India were of preparatory or auxiliary character. As per the application made to RBI and permission obtained, the LO of GEIOC was to act as a communication channel between the head office and the customers in India. Thus, there remains no doubt that the activities to the extent of communication channel, as sanctioned by the RBI, being of preparatory or auxiliary character, would not constitute any PE in India. However, it has been noticed above that the actual activities carried on from the fixed place of AIFCAS building did not remain confined only

to those of a communication channel as was allowed by the RBI to GEIOC at the time of setting up its LO in India.

28.5. The ld. AR harped on the assessee's reply to the AO's letter dated 14.11.2008 submitting four stages of sales to contend that the activities carried out in India by GE India were merely preparatory or auxiliary. He further relied on the roles and responsibilities of employees of GEIPL etc. supplied by the assessee to Department, pursuant to the judgment of the Hon'ble High Court. Based on such submissions, it was argued that all the activities carried out in India were of preparatory or auxiliary nature and the core activity of earning income was done by GE Overseas outside India.

28.6. We have gone through the aforesaid reply given by the assessee which has been incorporated on page 45 onwards of the assessment order and also the role and responsibilities of the employees of GEIPL etc. working in India, which we will now espouse for consideration. The reply briefly explains the sales process in four stages, viz.,

Stage 1- Pre-qualification;

Stage 2- Bid/no bid and Proposal development;

Stage 3- Bid approval and negotiations; and

Stage 4- Final contract development and approval

28.7.1. The ld. AR contended that for the first stage of 'Pre-qualification', the assessee stated before the AO that GE India's role comprises of assisting GE Overseas in identifying business opportunities/leads. GE India collects and furnishes information pertaining to market trends, key policy changes in the industry, etc. Through these efforts, GE India is able to identify opportunities for GE Overseas. Once GE India identifies a business opportunity, it communicates the potential opportunity to GE Overseas. GE India provides its marketing support services at this stage within the broad framework and strategy formulated by GE Overseas.

28.7.2. It is clear from the above that the assessee admitted the role of GE India (expats of GEII and the employees of GEIPL) in identifying business opportunities, collecting and furnishing information pertaining to market trends, key policy changes in the industry, etc.

28.8.1. For the second stage of 'Bid/no bid and Proposal development', the Id. AR contended that the assessee stated during the course of the assessment proceedings that on receipt of communication from GE India regarding an identified viable business opportunity, GE Overseas analyses the same independently for deciding whether the same is worth pursuing. In case GE Overseas requires any inputs/clarifications/ additional information (as part of its decision making process), it may request GE India to provide the same. GE Overseas examines the opportunity in detail and thus arrives at an independent decision of whether to pursue the identified business opportunity or not. Entire technical and commercial evaluation of the opportunity at this stage is carried out by GE Overseas with inputs from its various functional personnel spanning operations, finance, marketing, etc. In the event, GE Overseas decides to pursue the identified business opportunity, it commences the proposal development process and intimates GE India in this regard. GE India (on receipt of such intimation and under the explicit instructions of GE Overseas) undertakes an interaction with the prospective end-customer so as to

identify customer's requirements/ which are passed on to GE Overseas as inputs in the proposal development process. As part of the proposal development process, GE Overseas may seek inputs from GE India in respect of various aspects such as pricing, preparation of bidding package and other supplementary information.

28.8.2. It is noticed that the assessee has admitted a small role played by GE India. Claim of independent decision taken by GE overseas has been rightly held by the AO as erroneous. Various survey documents, as discussed above, abundantly show GE India playing an important and proactive role in the finalization of the deal and the terms and conditions with customers in India. In reality, the major activities about sourcing of customers and finalizing the deals with them were done by GE India in consultation, wherever required, with GE Overseas. The assessee frankly admitted in the same para that: 'In some instances, the proposal development is jointly run by the GE Overseas and GE India teams.' This is also borne out from page 104 of the Survey documents PB-II, as discussed above, which is an e-mail from Pump Design Department to

GE India and copy to other members of GE India requesting the Indian team to send the draft of MOU along with complete comments, so that the same could be incorporated in the original MOU. Similarly, page 127 of the Survey documents PB-I shows that the MOU with BHEL reflected the conversation what GE India and GE overseas discussed. Thus, there is not even an iota of doubt that GE India was fully involved in proposal development.

28.9.1. The Id. AR submitted for the third stage of 'Bid approval and negotiations', that the assessee stated before the AO that once the proposal/ bid/ tender have been put together as described in Stage 2 above, it is approved by the senior management during the Stage 3 and, thereafter, submitted to the end customer. Subsequently, GE Overseas may carry out negotiations with the customer, which may entail addressing queries, if any, raised by the end-customer, seeking/ providing clarifications regarding work scope, pricing, etc required by the end customer. For the fourth stage of 'Final contract development and approval', the assessee stated that GE Overseas discusses the outcome of the negotiation process internally amongst its various

overseas functional heads/ approving authorities (operations, finance, legal, etc) so as to decide whether or not to go-ahead with the contract on the agreed terms and conditions with the customer. If the negotiated contract terms are approved and accepted both by GE Overseas and the end-customer, the contract documents are prepared and executed/signed by GE Overseas. Local inputs are obtained from GE India at this stage on a need basis.

28.9.2. Here again we find that the assessee's submissions are only partly true. Pages 101-103 of the Survey documents PB –II, as discussed above, evidence GE India finalizing MOU with the Indian customer, Pump Design Department of IOC, and advising accordingly to the GE Overseas. Then, there is a mail showing that the change was permitted in the terms of MOU by the Indian team, which was conveyed by GE India to the customer, with a copy to another member of GE India. GE India was negotiating terms with the Indian customers is also borne out from page 195 of Survey Documents PB–I as discussed above, whereby Indian customer was requesting GE India to revise the offer.

Similarly, page 82 of Survey Documents PB–I, as discussed above, shows that GE India changed the terms and conditions. In the like manner, pages 2 and 3 of Survey Documents PB–II show that the draft agreement by Reliance Industries Ltd. to GE Overseas was sent back to GE India to get it reviewed from aftermarket colleagues in India. Pages 32 and 33 of Survey documents PB-II show that when GE Overseas tried to contact directly with RIL, GE India objected to the same and wanted the entire consultations only through the Indian team, which was positively responded by GE Overseas. Page 39 of the Survey documents PB–II again shows that it is GE India which was negotiating with Indian customers and not allowing GE Overseas even to change the terms and conditions.

28.10. At this juncture, it is significant to note that the assessee is not dealing in off the shelf goods. Sales are made on the basis of a prior contract. In such cases, customer's requirements are first properly understood and thoroughly examined; then commercial and technical discussion meetings take place; then proposals are prepared after

negotiations on technical and commercial aspects taking Indian laws and regulations in consideration. These are all significant and essential parts of sales activity, which have to be necessarily done in India by GE India. Ordinarily, it is not the Indian customer, who would visit GE entities overseas, but it is GE India, who has to have physical presence in India and such presence is through the GE India team.

28.11. It follows from the foregoing discussion that most of the work concerning the first stage of Pre-qualification was admittedly done by GE India; for the second stage of Bid/no bid and Proposal development, albeit the assessee admitted that in some instances, the proposal development was jointly done by the GE Overseas and GE India teams, but we have noticed from the survey documents that the core activities of finding the customers and finalizing the deals with them were done by GE India in consultation, wherever required, with GE Overseas; for the third stage of Bid approval and negotiations and the fourth stage of Final contract development and approval, again we have found that it was GE India who was finalizing and changing the terms and conditions of MOU with the Indian customers and GE Overseas was not even allowed to

change any of the terms and conditions directly without consulting GE India. The mere fact that the contracts were formally signed outside India by GE Overseas does not in any manner undermine the doing of core activity of sales by GE India. It is so for the reason that GE India finds customers in India, understands their requirements, negotiates necessary terms and conditions with them, prepares or helps in preparing MOU and finalizes the deal with them. With the doing of all the above activities, when MOU is prepared in India and the Indian customer signs it first in India and then it is sent to GE overseas for signature, for all practical purposes, it will have to be concluded that core sales activity was undertaken by GE India alone.

28.12. Next leg of the submissions to bolster the argument of the preparatory or auxiliary services rendered by GE India was reference to the Roles and responsibilities of some of the expats and employees of GEIPL etc. supplied by the assessee to Department pursuant to the judgment of the Hon'ble High Court. Based on such details, it was argued that GE India was simply assisting GE Overseas and their role

was not more than that of a support staff to GE Overseas, who, in turn, was taking all the relevant decisions regarding sales in India.

28.13. At this point it is pertinent to mention that the Department collected LinkedIn profiles of some employees of GE group, who in its opinion were carrying on the operations of GE overseas in India. Such details were filed before the Tribunal on an earlier occasion as additional evidence. The tribunal passed a separate order admitting such evidence. On a writ petition, the Hon'ble High Court vide its order dated 21.11.2014 set aside the tribunal order but required the assessee to furnish the details of :`Names, designations, roles and responsibilities of the employees of G.E. Group Companies, who were working in India during the relevant period along with their educational qualifications'. The assessee filed the information, whose copy has been placed before us. Thus, it is clear that this information was given by the assessee after the passing of the assessment order and no Income-tax authority had any occasion to verify its veracity. This information is about the persons engaged in Indian activities of GE overseas companies.

28.14. Now let us see the status of role and responsibilities of some members of GE India team as given by the assessee following the Hon'ble High Court judgment and what transpired from the documents found during the survey and post-survey proceedings but before issuing notice u/s 147.

i. William Blair –

Annexure 5 to the assessee's letter pursuant to the Hon'ble High Court's order explains his roles and responsibilities. It has been written that William, *inter alia*, `had limited involvement in a transaction as he was primarily responsible to overseeing the functioning of his group. ... He was just acting as a communication channel and was responsible for communicating GE overseas entity's position to the Indian customer and transmitting customer's feedback to the GE overseas entity for further inputs. William had no authority to finalize any deal. ... All the pricing and terms and condition decisions were taken by GE overseas entity and he had no role in such decision making. ... William's responsibility was to take prior approval for initiating any dialogue with customers in India.

Further, he had no authority to sign or execute any contract on behalf of GE overseas entity and he never executed any contract with customers in India.’ The above narration of role and responsibilities shows that William was to act as a mere communication channel between the customers in India and GE Overseas. In contrast, when we see his ‘Job description’ given under his own signature in the documents as discussed above, it transpires that he was to: “Organize local aviation team including commercial and military sales leaders; Conduct compliance risk assessments, audits and support training for aviation team members in India; Develop aviation growth strategy for India and obtain HQ support for same.” In other words, he was responsible for all the activities of sales in India and only the requisite support was to be taken from HQ. There is an apparent contradiction between what William said in a document signed by him and the picture of his role which the assessee portrayed after the conclusion of assessment. It goes without saying that the primary document duly signed by William showing his job responsibilities will have precedence over what the assessee stated by way of Annexure after the termination of assessment.

ii. Kumar Pratyush -

Annexure 12 to the assessee's letter pursuant to the Hon'ble High Court's order explains his roles and responsibilities. It has been written that, *inter alia*, : 'Pratyush was not involved in any sales..... was never involved in negotiating deals, terms and conditions and pricing for or on behalf of any GE overseas entity. He was more involved in overall management of client and government relationships including smooth functioning of GE businesses in India'. In contrast, when we see his designation in the Assignment letter as 'Leader, GE Infrastructure, Ops-India' of GE Transportation reporting directly to the Global CEO of GE Infrastructure and the 'job description' given by him in the earlier referred documents of having a specific role to: 'Help GE infrastructure business develop their strategy in India; Align GE solutions with customer need; Help shape policy to realize opportunities; and Facilitate business development discussions', it becomes manifest that the assessee intentionally trimmed his role to justify its stand, which, being contrary to the primary and source documents, cannot be accepted.

iii. Nalin Ashfaq

Annexure 18 to the assessee's letter pursuant to the Hon'ble High Court's order explains his roles and responsibilities. It has been written that, *inter alia*,: `Ashfaq was responsible for providing support to the Transportation DivisionHe was not involved in any parts sales to customers in India. *At the relevant time, he was involved in promoting the business of sale of parts to Railways and developing market strategies. His role was to get into the discussion with Railways for marketing development. Ashfaq had no signing authority*'. This shows that though the assessee candidly admitted in the post assessment letter that Ashfaq was *involved in promoting the business of sale of parts to Railways and developing market strategies*, but it also simultaneously undermined his actual role by saying that he was not involved in any actual sales. This is contrary to the Appraisal report showing his job as also including to: "Coordinate activities of the marketing and sales teams to develop potential solutions.... to Evaluate the team's performance against the business goals and objectives.....'. He has mentioned his `Accomplishments' in terms of sales and orders in India.

Then, there is the 'Manager Assessment' on page 63, which shows that he made solid progress in '06 with 'Orders and sales'. It is discernible from the above discussion that the assessee did not properly state the role and responsibilities of Ashfaq in the letter filed post assessment, on which the Id. AR has relied to canvass that the role played by GE India was only auxiliary and preparatory.

iv. Pierson Kenneth –

Annexure 19 to the assessee's letter pursuant to the Hon'ble High Court's order explains his role and responsibilities. It has been written, *inter alia*, that: 'Kenneth's profile was more of locating opportunity and providing marketing development strategies for the GE overseas entity.... Kenneth had no authority to take any decision with respect to the sale of product/parts in the signaling business. All prices and terms and conditions were negotiated and finalized only by the GE overseas entity. Kenneth being technical person did not have any authority to negotiate any terms of contracts in India.' Now let us have a look at his Assignment letter, which shows his position as 'Sales & Marketing

Manager' of GE Transportation. We fail to comprehend as to what a 'Sales & Marketing Manager' will do without any authority to take any decision w.r.t. sale. Fallacy of the assessee's claim in the post-assessment letter is established from the Self appraisal report of Kenneth, which states that 'He Led the GS team through key activities – Sales, Cross-approval, Partnership approvals, Marketing and Resourcing.' Then there is 'Manager assessment' of the self appraisal of Kenneth M. Pierson. It has been mentioned that: 'Ken is committed to growing the India signaling business, but *missed the orders target for the year*'. This shows that Kenneth Pierson was given sales target, which he could not achieve. Here, it is relevant to note the judgment of the Hon'ble Allahabad High Court in *Brown and Sharpe Inc. vs. CIT & Anr. (2014) 369 ITR 704 (All)* in which the Tribunal, while affirming the order of the CIT (A), relied upon relevant documentary material in arriving at the conclusion that the activities of the liaison office established that it was promoting the sales of the assessee in India and the Assessing Officer was justified in holding that the income attributable to the liaison office was taxable in India. Upholding such a

view, the Hon'ble High Court held that: *'the Tribunal has correctly noted that in the present case, the liaison office was promoting the sales of the goods of the assessee company through its employees, to whom a sales incentive plan was provided for achieving a sales target and the performance of the employees was being judged by the orders secured by the assessee.'* In the instant case also, it is clear that the sales targets were assigned to the expats etc. and Kenneth Pierson, a 'Sales & Marketing Manager', could not achieve the sales target given to him. Going by the *ratio decidendi* of *Brown and Sharpe (supra)*, it is palpable that PE of GE Overseas was established in India.

v. Ricardo Procacci -

Annexure 20 to the assessee's letter pursuant to the Hon'ble High Court's order explains his role and responsibilities. It has been written, *inter alia*, that: *'Riccardo's role was to find out how India would be relevant for Oil & Gas business and also to gather information on the customers in such industry. ... His role was limited to understanding the needs of the customers in India and pass such information to the GE*

overseas entity in Italy. ... At any point of time, he was not delegated any power to take decision on behalf of the GE overseas entity. He was acting as liaison between GE overseas entity and customers in India. His responsibility was to liaise the relationship with Indian customers....Most of commercial negotiations were done by the commercial operation team sitting in Italy... Riccardo never took any decision or negotiated on behalf of the GE overseas entity. ... and he was merely acting as channel between the Commercial team and the Customers'. Here again, the assessee misled by stating wrong facts about the working of Riccardo in the post-assessment letter. His Assignment letter shows his position as 'Oil & Gas, India Country Leader' of GE Energy. We have noticed from the survey documents above that Riccardo was not only negotiating and finalizing the terms and conditions with customers in India but also not allowing GE Overseas to alter any such terms without the consent of GE India. The assessee did not furnish his Appraisal report and Manager assessment despite a specific request by the AO till the completion of assessment.

vi. Nalin Jain (GEIPL) -

Annexure 8 to the assessee's letter pursuant to the Hon'ble High Court's order explains his role and responsibilities. It has been written, *inter alia*, that: 'Nalin's role was to collect the market intelligence and initiate a dialog with the Indian customer to understand their requirements... His role was to pass on the information/queries between the overseas entity and the Indian customer...Nalin has no authority to finalize any deal. He was just acting as a communication channel...All the pricing and terms and condition decisions were taken by GE overseas entity and he had no role in such decision making'. Here again, we find that the assessee did not come out clean. Survey documents show his designation in India as 'Sales Director' of GE Transportation, Aircraft engines. 'Job description' has been given as 'Market Intelligence and Support to Headquarters.' He has indicated his 'Reporting Manager' as William Blair, who is one of the seven expats from GEII working in India for GE overseas entities.

28.15. On a holistic consideration of the entire material before us, *por una parte*, there is primary, specific and original substantiated material relied by the Id. DR in the form of survey documents, Self appraisals, Manager assessment and Job descriptions given under the signature of such persons, showing the doing of core sale activity by GE India, and *por otra parte*, there is somewhat contrary, generalized and unsubstantiated material relied by the Id. AR in the form of the downplayed role of GE India in four stages of sales and job responsibilities stated by the assessee (not by the concerned employees) after the completion of assessment, for a claim that GE India was rendering services to GE Overseas as a mere communication channel and such services were of preparatory or auxiliary character. It goes without saying that the specific, primary, original and substantiated material will have primacy over the generalized and unsubstantiated material. But for the survey action unearthing the specific and primary material divulging the doing of core sale activity by GE India, the reality would have remained under the carpet and the assessee would have continued to harp on its general submissions with downsized roles and

underplayed responsibilities of GE India, to avoid the establishment of PE in India.

28.16. Having seen that how the assessee degraded the designations and lowered the roles and responsibilities of the expats etc. in the statement filed pursuant to the Hon'ble High Court judgment, showing as if they were mere communication channel as against the stark reality of their performing all the core functions in India relating to sales, we will now discuss the details filed by the assessee along with the same letter about some other employees of GEIPL who were engaged in the activities in India. Despite showing all of them as doing mainly the work of mediator, the assessee has also accepted involvement of some of them in core activities, which is as under : -

i. Anand Mohan Awasthy – He is a Mechanical Engineer with Diploma in Finance and is an employees of GEIPL working since Financial year 2000-01. His designation is `Service Manager`. Annexure 1 discusses his roles and responsibilities, being, `Responsible for aftermarket sales

(spares) and services in respect of steam turbines and generators sold by various GE overseas entities in India’.

ii. Anand Bansal– He is in Business Administration/Management and is an employees of GEIPL working since Financial year 2002-03. His designation is ‘Sales Manger’. Annexure 2 discussing his roles and responsibilities provides through the second bullet point that :‘As a part of his job, Anand’s role was to formulate marketing strategy for wind energy related equipments in India, which involved, among other things, determining a marketing strategy that helps distinguish GE products from its competitors, assist potential customers in their study phase and help define their needs for wind energy equipments.’ Bullet point 5 also provides that :‘From 2007 onwards, Anand was supporting BGGTS (Joint venture of GE and BHEL), and was responsible to providing after sale and maintenance support.’

iii. Sharmila Barathan - She is MA in Economics and also did her Masters in International Business. She is an employee of GEIPL. Her designation is ‘Government Affairs’. Annexure 3 discussing her roles

and responsibilities provides through the second bullet point that : `She supports the team of Market Development and assist them through shaping government policies. Her role was to provide recommendations on the integrated energy policies and also to prepare enabling policies to encourage investments in the Energy sector on behalf of GE.`

iv. Scott Bayman – He did his masters in Management and Bachelors in Marketing. His designation is `President and CEO`. Annexure 4 discussing his roles and responsibilities provides through the first bullet point that his: `primary role was to help set-up local support teams in India.` The second bullet point provides that he: `would ask for headcount from HQ to create local teams. He was responsible for growth of GE's businesses in the Indian market. He was also responsible for management of local business affairs, compliance practices, integrity aspects, HR and also had oversight over capital business`.

v. Sujoy Ghosh – He is an Electrical Engineer and is an employee of GEIPL. His designation is `Sales Manger`. Annexure 6 discussing his roles and responsibilities provides through bullet point five that `At that

point of time there was a robust R Table process followed by all GE businesses. Under such R Table process, no person sitting in India could make a proposal to any customer in India without prior approval of GE overseas entities nor could any person sitting in India negotiate or finalize any contract in India.' One thing is clear from the R Table process that there was no blanket bar on GE group employees in India for making proposals or to negotiate or finalize any contract in India. Making a proposal envisages examining the opportunity in detail, undertaking an interaction with the prospective end-customer so as to identify his requirements, studying all the relevant aspects, finding out the technical and financial viability, and then arriving at the ultimate conclusion of the supplying and pricing. The only condition set out under the R Table process on the Indian employees working for GE overseas entities in India was that the approval was required to be sought from the GE overseas before sending the proposal to customers in India. The assessee has itself admitted through stage 2: Bid/no bid and Proposal development of the 'Sales process' that: 'In some instances, the proposal development is jointly run by the GE Overseas and GE India

teams. However, even in such cases, decision making authority continues to remain only with GE Overseas.'

vi. Sanjeev Kakkar - He did his masters in Mechanical Engineering. His designation is 'Sales Director'. He is an employee of GEIPL working since 2000. Annexure 10 discussing his roles and responsibilities provides through the sixth bullet point that: 'As a part of his job, Sanjeev would understand the requirements of clients in terms of equipment required as well as financing required and thereafter, communicate these requirements to the overseas entities.' There is again a reference to R Table process and it has been mentioned that he will not sign or negotiate with any customer in India without any prior approval of the overseas entities. This again shows that he was signing or negotiating with customers in India, but with the approval of the GE overseas. It has been specifically provided in the eighth bullet point that: 'Although Sanjeev and other people sitting in India were part of the negotiating team with customers, however, at no point of time could they commit to any negotiation with respect to terms and conditions or

discount without prior approval from the overseas people listed on the R Table.’

vii. Alpana Khera - She did her Engineering in Instrumentation and Diploma in Marketing. Her designation is ‘Sales Manager’. She is an employee of GEIPL working since 2001. Annexure 11 discussing her roles and responsibilities again refers to R Table process, which implies that signing or negotiating with customers in India was allowed but with the approval of the GE overseas.

viii. Ashish Malhotra - He did his Electrical Engineering and PG Diploma in Marketing. His designation is ‘Sales Manager’. He is an employee of GEIPL working since 2001.

ix. Jaimin Shah - He did his Mechanical Engineering. His designation is ‘Account Executive’. He is an employee of GEIPL working since 2002. Annexure 21 discussing his roles and responsibilities provides through the first bullet point that he :‘was responsible for the aftermarket sales services of equipment’.

x. Vivek Venkatachalam - He did his B. Tech in Chemical Engineering. His designation is 'Executive – Business Operations'. He is an employee of GEIPL.

28.17. Taking above discussion into consideration, more specifically, the primary, specific and original substantiated material in the form of survey documents, self appraisals and Manager assessment etc., there remains no doubt whatsoever that GE Overseas was selling its products in India and the core activities in regard to sale, namely, pre-sale, during-sale and post-sale were being carried out in India by GE India. Notwithstanding the fact that the AO has categorically held that all the core activities regarding sales were done by GE India, which has been confirmed by the Id. CIT(A) as well, the assessee has failed to tender any evidence to show that such a view canvassed by the authorities below is wrong and in fact, such core operations were carried out in India by some other means. Except for lip service that GE Overseas was doing core sale activity and GE Overseas doing only preparatory or auxiliary activities, the assessee did not place on record even an iota of evidence to prove its contention. If we minutely consider the nature of

activities done by GE Overseas and GE India, it clearly surfaces that GE India was doing core marketing and sales activity and GE Overseas was doing only auxiliary activities, in aid and support of the activities of the marketing activities carried out by GE India.

28.18. Moreover, para 26 of the OECD Commentary discussing exemption under sub-para (e), being activities of preparatory or auxiliary nature, clearly provides that : `A fixed place of business which renders services not only to its enterprise but also directly to other enterprises, for example to other companies of a group to which the company owning the fixed place belongs, would not fall within the scope of subparagraph e)'. This part of the Commentary explaining `preparatory or auxiliary activities' makes it clear that if a fixed place of business is used for rendering services to more than one companies of a group, as is a case under consideration, then such services cannot be treated as of preparatory or auxiliary character.

28.19. It is further pertinent to note at this stage that the permission to set up LO at AIFACS building was given by the RBI to GEIOC and not

to the assessee including all GE overseas entities covered in this batch of appeals. Thus, none of the instant assesses had any LO in India. Be that as it may, even the LO of GEIOC has been treated as its fixed place PE and the exclusion claimed on the ground of preparatory or auxiliary activities, has been denied up to the tribunal level. Not only that, even penalty u/s 271(1)(c) on this score has been confirmed by the tribunal on GEIOC and no material has been placed on record to demonstrate that such penalty order has been reversed or modified by the Hon'ble High Court in any manner. In view of the foregoing discussion, it is manifest that the activities carried on by GE India from AIFCAS building were of substantial and core and not merely preparatory or auxiliary.

29. We, therefore, sum up that all the three conditions for constituting a fixed place PE in terms of paras 1, 2 and 3 of the Article 5 are fully satisfied as AIFCAS building is a fixed place from which business of GE Overseas is partly carried on in India and the activities carried out from such fixed place are not of preparatory or auxiliary character. Our

view is also fortified by the judgment in *Jebon Corporation India (supra)*, the facts of which case are similar. In that case also the liaison office was permitted to act as a communication channel and there was a prohibition in doing any trading or commercial activities. A survey was conducted on the premises of the LO which transpired that it was actually carrying on commercial activities of identifying the buyers, negotiating with the buyers, agreeing to the price, procuring purchase orders and forwarding the same to the head office. The Department came to hold that LO was PE under Article 5 of the DTAA and the business profits earned in India through such LO was taxable in India. Contention of the assessee that the buyers were placing orders directly with the head office and making payments directly to the head office and it was the head office which was directly sending the goods to the buyers, was held to be not sufficient for holding that the activity done by the LO was only liaison work. The Hon'ble High Court upheld the view of the Revenue that PE was constituted in such circumstances and business profits earned in India through this liaison office were taxable in India.

30. We find that the reliance of the ld. AR on *DIT VS. E-Funds IT Solutions (2014) 364 ITR 256 (Del)* is misconstrued. In that case, the tribunal held that the activities of e-funds India were not preparatory or auxiliary in character in terms of paragraph 3 of Article 5 and hence PE was created in India. The Hon'ble High Court did not concur with this view by holding that, first and foremost, Article 5(1)/(2) should be applicable but then if the activities fall within parameters of paragraph 3, PE is not created for imposing tax in the second state. It was further held that it did not follow that if activities are not covered in the negative or exclusions set out in paragraph 3, a PE is established or deemed to be established under paragraphs 1 or 2 of Article 5. We fail to comprehend as to how the position stated by the Hon'ble High Court is missing here. It has been discussed above that paras 1 and 2 of Article 5 apply and the activities done by GE Overseas are not covered by para 3(e) of Article 5 of the DTAA.

31. In the like manner, the reliance of the ld. AR on *CIT VS. Sumitomo Corporation (2016) 382 ITR 75 (Delhi)* for contending that no fixed

place PE was constituted, is misplaced. We do not find any relevance of this case to the issue under consideration. In that case, the question was of supervisory PE, in which the tribunal held that assessee had no PE in India and that supervisory services were not connected through any of its other PE in India and that since supervision fee was earned in India, it was taxable under Article 12(2) of DTAA at 20%. The Hon'ble Court approved the view of the tribunal that FTS was liable to be taxed at 20% under Article 12(2) of the DTAA. It is thus clear that this case does not involve the issue as is under consideration in the extant appeals.

32. The ld. AR further contended that para 33 of the OECD Commentary mandating that a person attending or even participating in negotiations does not constitute PE and further unless a person is authorized to negotiate all the elements of a contract (not some of them), he does not constitute PE, applies to preparatory or auxiliary services in the context of Fixed place PE. We are not in agreement with this proposition as has been elaborately discussed *infra* while dealing with Agency PE. It is therefore, held that AIFACS building constituted fixed

place PE of the assessee and all the GE Overseas entities in this batch of appeals.

II. AGENCY PE

33. The AO also held that GE India constituted agency PE. He noticed that GE India was securing orders for GE overseas inasmuch as the documents found during the course of survey revealed that there were requests for proposals, copies of agreements, copies of MOUs and various other papers indicating that the expatriates along with the employees of GEIPL participated in activities relating to the supply of products. Such were raw documents wherein many changes were made, which, in the opinion of the AO, established the participation of the persons for the business of overseas entities in deciding the prices, terms and conditions of the products sold in India. Here, not only one customer of GE, but, many customers in aviation, oil and gas, energy and transportation business were being looked after by these expats. The assessee's contention that there was no agency PE because GE India was an agent of independent status, was turned down. The Id. CIT(A)

echoed the view taken by the AO, against which the assessee is in appeal before us.

34. We have heard the rival submissions and perused the relevant material on record. Agency PE is subject matter of paras 4 and 5 of Article 5 of the DTAA. Relevant parts of para 4, read as under :-

‘4. Notwithstanding the provisions of paragraphs 1 and 2, where a person—other than an agent of an independent status to whom paragraph 5 applies—is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned State if :

(a) he has and habitually exercises in the first-mentioned State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercise through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph;

(b) to (c)’

35. Para 4 begins with a *non obstante* clause keeping aside the provisions of paragraph 1 and 2. These two paragraphs, in turn, deals with fixed place PE to mean a fixed place in the nature of office or factory, etc., through which the business of an enterprise is carried on. Insertion of *non obstante* clause *qua* paras 1 and 2 brings out that there

is no need of a fixed place when agency PE is under consideration. Even if an agent, referred to in para 4, operates from a non-fixed place, he will still constitute PE of the enterprise, if other relevant conditions are satisfied.

36. Next part of para 4 of Article 5 specifies a person who, acting in a Contracting State on behalf of an enterprise of other Contracting State, constitutes PE. Relevant part of para 4 in this context states : “where a person – *other than* an agent of an independent status to whom paragraph 5 applies -” This shows that the ‘person’ to constitute a PE, subject to the fulfillment of other conditions, must be ‘other than’ an agent of an independent status to whom para 5 applies.

37. At this stage, let us note down the prescription of para 5 of Article 5, which reads as under : -

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent, or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise and the

transactions between the agent and the enterprise are not made under arm's length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph.'

38. Para 5 is in two parts. First part provides that an enterprise of a contracting State shall not be deemed to have a PE in the other contracting State merely because it carries on business in that other State through a broker, general commission agent, or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. A plain reading of this part indicates that the enterprise shall not be deemed to have a PE if it carries on business in the other State through certain 'persons' being a broker, general commission agent or any other agent of an independent status, if such persons are acting in the ordinary course of their business. It, therefore, follows that the first part of para 5 refers to agents of independent status who are acting in the ordinary course of their business. When this part is read with para 4, it transpires that if an 'enterprise' of a contracting State carries on business in the other contracting State through the agents of independent status, it shall not be deemed to have a PE in the other

contracting State. To put it simply, an enterprise of the USA shall not be deemed to have a PE in India if it carries on business in India through agents of independent status. Second part of para 5, which is absent in the OECD Model Convention, makes out an exception to the first part. Starting with the word 'However', it states that when the activities of 'such an agent' are devoted wholly or almost wholly on behalf of that enterprise and the transactions between *the agent* and the enterprise are not made under arm's length conditions, he shall not be considered an agent of independent status within the meaning of this para.

39. The Id. AR contended that the second part of para 5 of Article 5 of the DTAA envisages that the activities of an agent must be wholly or almost wholly on behalf of that enterprise. He submitted that the reference to the term 'that enterprise' draws its colour from an enterprise whose PE is sought to be proved. If the activities of an agent in India are devoted to more than one enterprise, such an agent will cease to be an agent constituting PE of the US enterprise in India. He submitted that the Revenue has admittedly made out a case that these expats from GEII

and other employees of GEIPL, etc., were rendering services to multiple entities in one line of business and such activities were not confined to a particular entity. It was, therefore, contended that representation by such individual persons to multiple entities took the case out of the purview of agency PE.

40. This was countered by the Id. DR who submitted that the contention that an agent cannot constitute agency PE of multiple enterprises is fallacious because the other ingredient of part 2 of para 5 clearly provides that the transactions between the agent and enterprise must be at ALP. He submitted that if the transactions between an agent and the enterprise are not at ALP, then, such agent gets covered within the ambit of para 4 of Article 5. In a nutshell, his contention was that if one of the conditions, namely, multiple enterprises or the transactions not at ALP, is satisfied, the person becomes dependent agent constituting PE of the USA enterprise in India. This argument was further elaborated by pointing out that the fact of expats from GEII making sales in India with the help of employees from GEIPL etc. was

never disclosed and further there was no reporting of such an international transaction of making sales by these expats, etc., in India for GE overseas. It was submitted that when there was no reporting of any such international transaction, the question of the same being at arm's length price (ALP) did not arise.

41. We find force in the contention advanced by the Id. AR on this issue. It is an admitted position that the expats were rendering services to multiple GE entities in India. In fact, the Id. DR has successfully contended, while arguing for the validity of initiation of re-assessment proceedings, that the expats were looking after one of the three major lines of business, such as Infrastructure etc., catering to various GE overseas entities. Thus, there remains no doubt that GE India comprising of expats and other employees of GEIPL etc., were not working for a particular enterprise, but, for multiple enterprises dealing in one of the three major businesses of GE group. Reverting to part 2 of para 5 of Article 5, it is clear that the activities of agent should be 'devoted wholly or almost wholly on behalf of *that enterprise.*' The term 'that

enterprise' refers to part 1 of para 5, being, an enterprise of a contracting State. The term 'enterprise of a contracting State' has been defined in Article 3(g) of the DTAA to mean: 'an enterprise carried on by a resident of a Contracting State.' On a conjoint reading of part 2 of para 5 of Article 5 and Article 3(g), it is ostensible that part 2 of para 5 refers to an agent looking after the activities of a single enterprise and not multiple enterprises. The Id. AR has relied on the decision of the Mumbai Tribunal in *Varian India (P) Ltd. vs. Asstt. DIT (2013) 142 ITD 692 (Mum)* in which it has been held that in order to be covered within this part of para 5, it is necessary that the activities of agent must be devoted wholly or almost wholly to one enterprise.

42. Now, we take up the contention of the Id. DR that since the transactions were not at ALP, or for that matter, the international transactions were not even disclosed, the assessee cannot claim not to have an agency PE. There is no doubt about the fact that the transactions of making sales by GE India (consisting of expats and employees of GEIPL etc.) on behalf of GE Overseas were not disclosed

and, as such, question of deeming such transactions at ALP does not arise. The Id. DR is right to this extent. However, we find that the second part of para 5 clearly provides that a person shall not be considered an agent of independent status only if he satisfies both the conditions simultaneously. In other words, when the activities of such an agent are devoted wholly or almost wholly on behalf of an enterprise *and* the transactions between the agent and the enterprise are not at ALP, then, he shall not be considered an agent of independent status. Use of the word 'and' between the two conditions makes it amply clear that the concurrent satisfaction of both of them is a prerequisite for not considering such a person an agent of independent status. If only one condition is satisfied and the other is not, the person is considered as an agent of independent status. In the facts and circumstances of the instant case, although the transactions were not at ALP, but, since GE India worked for multiple entities, it fails to fall within the exception carved out in part 2 of para 5.

43. In spite of turning down the contention of the Id. DR in this regard, we find that the GE India still qualifies as a person in para 4 of Article 5, whose activities constitute agency PE in India. Reason for such a conclusion is that part 1 of para 5 refers to an 'enterprise' carrying on business in the other State through certain 'persons', who are agents of independent status acting in the ordinary course of their business. It, therefore, follows that the three categories of persons, namely, brokers, general commission agent and any other agent are agents of independent status acting in the ordinary course of their business. Thus, part 1 of para 5 refers to agents of an independent status. We have noticed above that part 2 of para 5 is an exception to part 1. When the twin conditions, as noted above, are not satisfied, such an agent of independent status 'shall not be considered an agent of independent status within the meaning of this paragraph.' It is, therefore, obvious that part 2 of paragraph 5, firstly refers to an agent of independent status and, then, says that if the conditions are not satisfied, then, such an agent of independent status 'shall not be considered an agent of independent status'. It is further clarified from the use of words 'such an agent' in

the opening portion of part 2 of para 5, which relates back to an agent of independent status discussed in first part of para 5. The same analogy follows from last few words of part 2 of para 5 which read that he `shall not be considered an agent of independent status *within the meaning of this paragraph.*' Since the second part of the para 5 refers to 'such an agent' and 'an agent of independent status within the meaning of this paragraph', it, therefore, becomes utterly obvious that the exclusion enshrined in part 2 of para 5 is of an agent who is otherwise of an independent status. When we read both the parts of para 5, it follows that whereas the first part refers to an agent of an independent status, the second part carving exception to the first part makes it lucid that upon the fulfillment of the given conditions, such an agent of otherwise independent status shall not be considered an agent of independent status within para 5. To sum up, the first part of para 5 refers to an agent of independent status and the second part of para 5 refers to an agent of independent status who is not considered an agent of independent status because of the conditions set out in this paragraph.

44. A foreign company may appoint or set up a person as an agent in India for its exclusive purpose, who obviously will be called as an agent of dependent status. The position will remain so, even if there are more than one related companies of the same group. Such a person will now be dependent on such more number of related companies of the same group. He will not lose his character of an agent of dependent status simply because he is looking after more than one related companies. Such more than one related companies will be considered as one unit. This position needs to be seen in contrast to an agent of an independent status, whose normal course of business extends to multiple independent customers. The fact that transactions between such an agent of dependent status and multiple related enterprises are or are not at ALP, is not relevant at the stage of establishment of a dependent agent PE in India, which is created solely due to the nature of activities of such an agent for the overseas entity(ies). This aspect assumes significance at the later stage of attribution of income. If the transactions between the agent and such related enterprises are at ALP, there can be no further attribution of income to the PE because the agent got remunerated at

ALP and his income got taxed in India. If, however, the transactions are not at ALP, then, of course, income needs to be attributed to the PE. In any case, the fact of the transactions at or not at ALP gains prominence only when the question of attribution arises and not before that. Establishment of PE is a stage anterior to the stage of attribution of income, which gets concluded by seeing the nature of activities carried on by such a dependent agent in the other contracting State.

45. We again revert to the language of para 4 of Article 5, which states that ‘where a person – *other than* an agent of independent status to whom paragraph 5 applies -’ fulfills the conditions as set out in this para, he will constitute PE of the enterprise. It follows that the person must be ‘other than an agent of independent status to whom paragraph 5 applies.’ The term ‘other than’ an agent of independent status to whom para 5 applies, encompasses not only an agent of independent status covered within second part of para 5, but also a dependent agent as such, who is otherwise not an independent agent acting in the ordinary course of his business. Thus, it is axiomatic the ‘person’ referred to in para 4 refers to

an agent of dependent status as such and also an agent of an independent status who is covered in part 2 of para 5. Exception to the first part of para 5 created in part 2 is restricted only to 'an agent of independent status', who is otherwise 'acting in the ordinary course of his business', but for the time being, his activities are devoted wholly or almost wholly devoted to one enterprise. On the other hand, if there is an agent of dependent status *per se* whose activities are devoted to one or multiple related enterprises, he will be directly covered within the scope of para 4 of Article 5 of the DTAA.

46. Coming back to the facts of the present case, we find that the expats of GEII and employees of GEIPL were appointed to act as agent of multiple GE overseas enterprises. It is nobody's case that they were otherwise acting as agents of independent status working for other third parties in India. This proves that expats and employees of GEEIPL acted as agents of dependent status in the first place itself. Although, the number of GE overseas entities looked after by each of them is more than one, but the fact that such entities were in one of the three broader

lines of businesses of GE group, makes them agents of dependent status *per se*.

47. Facts of *Varian (supra)*, relied by the Id. AR, are distinguishable inasmuch as Varian India had provided services to five AEs for which there were separate agreements and different payments. The Tribunal recorded that the commission income was quite normal and the transactions were at ALP. These facts are absent in the instant case. It is found that the Hon'ble Supreme Court of Italy in *Phillip Morris vs. Amministrazione Finanziaria* (the tax authorities) (copy given at page 37 of Departmental PB-7) has held that: “*a company having its seat in Italy may take on the role of a multiple permanent establishment of foreign companies belonging to the same group and pursuing a company strategy; in such a case, the assessment of the activity carried on by the Italian must be done on a unitary basis and with reference to the programme of the group considered as a whole.*” In this case, the view of an agent having multiple permanent establishments of foreign

companies belonging to the same group, as is the case before us as well, was countenanced.

48. It is further found that para 26 of the OECD commentary discussed *supra*, though dealing with the activities of preparatory or auxiliary nature, also acknowledges that a fixed place of business which renders services to more than one company would not fall in exemption given in subparagraph e) and hence, impliedly, constitute PE. We, therefore, hold that GE India consisting of expatriates of GEII and employees of GEIPL etc., are the persons covered in paragraph 4 acting in India on behalf GE Overseas entities.

49. Having seen that GE India is covered in the earlier part of para 4 of Article 5 of the DTAA, it needs to be seen if the activities carried out by them fall in any of the three sub-paras to constitute PE in India. Though the AO held that the activities of GE India were covered under clauses (a) and (c) of para 4, but the Id. DR has restricted his arguments only to clause (a). We will also confine ourselves to examining the issue of agency PE on the touchstone of clause (a) only.

50. Clause (a) of para 4 of Article 5 of the DTAA provides that the agent: “has and habitually exercises in the first mentioned stage an authority to conclude contract on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph.” A plain reading of sub-para (a) divulges that the agent will constitute PE if he habitually exercises ‘an authority to conclude contracts on behalf of the enterprise’ and his activities are, *inter alia*, not limited to preparatory or auxiliary activities which if carried through a fixed place would not make that fixed place a PE. The expression ‘an authority to *conclude* contracts’ has not been defined in the DTAA. Para 5 of Article 5 of OECD Model Convention also uses the similar expression, namely: ‘an authority to conclude contracts.’ Para 5 of OECD deals with the same subject matter as para 4 of the DTAA with the USA, namely, dependent agent PE. Paras 31-35 of the OECD commentary deal with para 5 of the OECD Model Convention whose language, is similar to para 4 of Article 5 of the DTAA.

51. The Id. AR strongly relied on two sentences from para 33 of the OECD commentary for driving home the contention that no agency PE of GE overseas was constituted in India. First sentence is that “a person who is authorized to *negotiate all elements and details of a contract* in a way binding on the enterprise can be said to have exercised this authority” and the second is that “the mere fact, however, that a *person has attended or even participated in negotiations..... will not be sufficient*, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise.” Relying on these two sentences, it was contended that even if some of the elements of a contract were presumed to have been negotiated by GE India, it would fall short of ‘all elements of a contract’ and even participation in negotiations between GE Overseas and customers in India will not lead to the establishment of an agency PE in India. This argument was strongly refuted by the Id. DR who submitted that India has clarified its position in 2008 on para 33 of the OECD commentary by making it clear that it does not agree with both these sentences from para 33 of the OECD commentary as in its view the mere fact that a

person has attended or participated in negotiations in a State between an enterprise and a client, can, in certain circumstances, be sufficient, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise; and that a person who is authorized to negotiate the essential elements of contract, and not necessarily all the elements, can be said to exercise the authority to conclude contracts. In view of this position of India, the Id. DR contended that para 33 of the commentary, to the extent relied by the Id. AR, should not be considered.

52.1. First, we take up the effect and consequence of India's position on para 33 of OECD Commentary given in 2008 pursuant to OECD calling non-member countries, including India, to state their position on OECD commentary in 2006. Para 3 of Introduction to the OECD Commentary states that the member countries of the OECD (India is not a member), when concluding or revising bilateral conventions "should conform to this Model Convention as interpreted by the commentaries thereon and *having regard to the reservations contained therein.*" It has

further been provided that: “.... their tax authorities should follow these Commentaries, *as modified* from time to time and *subject to their observations thereon*, when applying and interpreting the provisions of their bilateral tax conventions that are based on the Model Convention.”

It is, therefore, comprehensible from para 3 that the OECD commentary is not universally applicable. If a member country of OECD has expressed reservations on any of its parts, then, the Commentary stands modified to that extent in so far as the interpretation of the Conventions of that member country is concerned. Para 30 of the Introduction to the OECD commentary further clarifies that: “Observations on the Commentaries have sometimes been inserted at the request of member countries that are unable to concur in the interpretation given in the Commentary on the Article concerned. These observations thus do not express any disagreement with the text of the Convention, but usefully indicate the way in which those countries will apply the provisions of the Article in question.’”. This para also clarifies that sometimes observations are inserted in the commentary at the instance of some member countries who do not concur with the interpretation given in the

commentary. This, again, clearly decodes that the OECD Commentary is not conclusive in itself. If some member country has reservations on any part of the commentary, it can express so. In such a situation, the interpretation given in the Commentary bows down in favour of the observations given by such country in so far as the Conventions of such a country are concerned.

52.2. Due to the growing influence of non-member countries, the OECD invited some non-member countries to give their position on the OECD Commentary. It is pursuant to this invitation extended by the OECD in 2006 that India gave its position in 2008 on para 33 disagreeing with the observations given in the two sentences. Such a contrary position has a binding effect on all the Conventions which India enters into after that date. It cannot retrospectively apply to the Conventions in existence on that date, unless Convention(s) is/are specifically modified. As a Convention is an agreement between two countries, the same cannot be unilaterally modified by one country declaring its *suo motu* position. It is so because when India entered into a Convention with an OECD member country, it was implied that the

OECD commentary explaining the relevant provisions, picked up from the OECD Model Convention and incorporated in the respective Convention, will be applicable. If India did not change its position by altering the language of the DTAA, then, the presumption to be drawn is that it was agreeable with the OECD commentary to the extent of identical provisions incorporated in its Convention. To put it simply, the reservations given by India in 2008 cannot retrospectively amend its position *qua* the OECD commentary dealing with similar expressions used in DTAA with the USA, which was admittedly entered into much earlier. However, this does not apply to the Conventions entered into after India stating its position on the OECD Commentary, in which case, the position given by India overrides the OECD Commentary to that extent. We are, therefore, not persuaded to accept the contention of the Id. DR that India's position on para 33 of the OECD commentary given in 2008, should be read as a part of the Commentary interpreting the DTAA.

52.3. Notwithstanding the foregoing para, we are not prepared to read each and every line of the OECD commentary as a part of the statute or the DTAA by the doctrine of incorporation. After all, it is only an interpretation of the OECD Model Convention. One should take cognizance of the view given in the Commentary on a holistic basis and not as emanating from individual and selective lines, which, at times, may turn out to be overlapping in nature.

52.4. This brings us back to the paras 32 and 33 of the OECD Commentary dealing with the expression ‘authority to conclude contracts.’ Para 32.1 states that: *‘Lack of active involvement by an enterprise in transactions may be indicative of a grant of authority to an agent. For example, an agent may be considered to possess actual authority to conclude contracts where he solicits and receives (but does not formally finalise) orders which are sent directly to a warehouse from which goods are delivered and where the foreign enterprise routinely approves the transactions.’* It is clear from the above para that lack of active involvement by an enterprise may be indicative of grant of authority to an agent. *‘Lack of’* does not mean absence of. It shows that

if the enterprise is not fully involved in the transaction which is concluded by an agent, it will give an inference of the agent having an 'authority to conclude contract' in the name of the enterprise. This position given in para 32.1 is running contrary to the position contained in para 33 on which the Id. AR has heavily relied to the effect that '*all elements and details of a contract*' must be negotiated to constitute an authority to conclude contract in the name of enterprise. Further, the immediately next line following the line on which the Id. AR has relied, reads : '*the fact that a person has attended or even participated in such negotiations could, however, be a relevant factor in determining the exact functions performed by that person on behalf of the enterprise.*' Thus, it is evident that the paras containing commentary on the expression 'authority to conclude contracts in the name of the enterprise' do not have uniformity in the approach. There is some sort of contradiction between them. The essence of the matter is that selective reference to the OECD commentary is impermissible. One should understand and follow the spirit rather than individual lines divorced from the context. As the Id. DR cannot be allowed to solely rely on the

lines forwarding the case of the Department, in the same manner, the assessee can also not be permitted to pick up the lines buttressing his point of view. In such a situation, one needs to harmonize the conflicting lines to discover the real purport of the expression.

52.5. When we read clause (a) of para 4 of Article 5 in totality, what comes out is that an agency PE is established if the person habitually exercises an authority to conclude contracts so long as his activities are not of preparatory or auxiliary nature. We have noticed above that the term 'preparatory or auxiliary' refers to such activities which are simply in support of the core income generating activity. They do not comprehend negotiating '*all elements and details of a contract.*' If we accept the argument of the Id. AR as laying down the correct position, then there would have been no need to qualify the expression 'authority to conclude contracts' with 'unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment ..'. This deciphers that the activities of the person leading to the 'authority to conclude' a contract, so as to form an agency PE,

should not be restricted to exemptions for the constitution of a fixed place PE, such as, preparatory or auxiliary etc. It means that the activities of such a person should be of core nature and not merely subsidiary to the main activities, which obviously rules out negotiating *all elements and details of a contract*. Reading clause (a) in totality gives a clear idea of constituting a PE when the activities of the person, other than an agent of independent status, are not of preparatory or auxiliary nature. It does not require doing of each and every aspect of the contract, howsoever minor. Our view gets fillip from the judgment of the Hon'ble Supreme Court of Italy in *Phillip Morris (supra)* in which it has been held that: “the *participation* of representatives or employees of a resident company *in a phase of the conclusion of a contract* between a foreign company and another resident entity may fall within the concept of authority to conclude contracts in the name of the foreign company, even in the absence of a formal power of representation”. Having discussed *supra* the nature of activities done by GE India, which are of core nature and not merely preparatory or auxiliary, we hold that they clearly indicate its authority to conclude contracts on behalf of GE

Overseas. It is, consequently, held that GE India constituted agency PE of all the GE Overseas entities in India.

53.1. Now, we take up the contention of the Id. AR that if the activities carried out from the fixed place do not lead to conclusion of contracts in India, then no fixed place PE is constituted. This was stated by referring to the line from para 33, reading: “Since, by virtue of paragraph 4, the maintenance of a fixed place of business solely for purposes listed in that paragraph is deemed not to constitute a permanent establishment, a person whose activities are restricted to such purposes does not create a permanent establishment either.” He correlated this contention with two sentences from para 33 of the OECD commentary supporting his case and submitted that no PE is constituted even under Article 5(1) read with 5(3) of Indo-US DTAA if all elements and details of a contract are not negotiated from the fixed place in India. *Au contraire*, the Id. DR submitted that the requirement to conclude contracts as set out in clause (a) of Article 5(4) of the DTAA is relevant only for the issue of dependent agent PE and not a fixed place PE.

53.2. We do not agree with the contention of the Id. DR. It is obvious from Article 5(1) read with Article 5(3) of the DTAA that the term fixed place PE means a place of business through which the business of an enterprise is wholly or partly carried on and the carrying on of the business does not include the activities specified in the exempted categories, such as, doing of any preparatory or auxiliary activity. This shows that core activity of business, in contrast to the preparatory or auxiliary activity, must be done from such place so as to constitute a fixed place PE. Concluding contracts is always a core activity, which is more than a mere preparatory activity. If the fixed place is not involved in such core activities, but is confined only to carrying on preparatory or auxiliary activities, then it will not constitute fixed place PE.

53.3. We are not convinced with the proposition set up by the Id. AR as well that if all elements and details of a contract are not negotiated from the fixed place in India, then no PE is constituted under Article 5(1) of the DTAA. Paras 1-4 of Article 5 of the OECD Model Convention deal with fixed place PE and its parallel in the USA - DTAA

are paras 1-3 of Article 5. Para 5 and 6 of Article 5 of the OECD Model Convention deal with agency PE and their counterpart in the USA - DTAA are paras 4 and 5 of Article 5. Paras 31-35 of the Commentary deal with agency PE as per Article 5(5) of the OECD Model Convention. On the other hand, preparatory or auxiliary activities, etc., have been discussed in paras 23-30 of the OECD commentary. When para 33 of the OECD commentary represents discussion on agency PE, it is too much to argue that the same should be read for fixed place PE as well. One needs to understand the rationale behind making reference to para 4 in para 5 of Article 5 of the OECD. It has been done to indicate that the habitual exercise of an authority to conclude contract in the name of the enterprise shall constitute PE only if the activities of the agent are not limited to those mentioned in paragraphs 4 i.e., of preparatory and auxiliary character. Reference to para 4 of fixed place of business has been made simply to avoid repetition of the activities listed in clauses (a) to (f) in the language of para 5. Instead of specifically referring to all the above activities, the OECD Model Convention has incorporated them by making a reference to paragraph

4(4) in it. Nothing more than that should be read from it. Similar is the position *qua* the USA - DTAA. Be that as it may, we have already repelled the contention of the ld. AR on applicability of the two sentences from para 33 of the Commentary as the only necessary conditions to constitute Agency PE. *Ex consequenti*, such a reference in the context of a fixed place PE also fails.

C. ATTRIBUTION OF INCOME

54. Having held that various GE overseas entities were making sales with the active involvement of their respective PEs in India, the next question is attribution of income to such PEs, which is chargeable to tax in India.

55. The AO required the assessee to make available year-wise India specific accounts of GE Overseas. Financial statements of all the entities for all the years were not submitted. An inability was expressed on the ground that in some countries the accounts were not maintained and they were covered in the group schemes. In the absence of such information of entity level profits, the AO opined that working of actual

entity-wise and year-wise profit was not possible. It was observed *qua* the three entities for which the assessee furnished information, that there was no regular trend in the profits and even GE Japan had closed its trading business from the year 2002-03. For the other two entities also, there were no reasons for the losses. Even notes to accounts, integral part to the financial statements, were also not submitted, that could have thrown some light on the losses/low profitability. The AO, therefore, took the view that the profitability statements of these entities for various years could not be used for attributing profits to Indian PE. Having regard to Rule 10 (iii), the AO came to hold that the income of non-residents was to be determined by: “any such other manner as ... may deem suitable.” Taking guidance from sections 44BB and 44BBB, the AO estimated profit @ 10% of sales consideration to the customers in India. Inspired by the decision of the Delhi Bench of the Tribunal in *Rolls Royce PLC vs. DDIT 2007-TII-32-ITAT-DEL-INTL*, in which case 35% of the total profit was held to be pertaining to marketing activities, the AO applied the same percentage to work out the income chargeable

to tax in India. First appeal did not allow any relief. That is how, the assessee is aggrieved against such attribution of income.

56. We have heard the rival submissions and perused the relevant material on record. It is noticed that the exercise of attribution of income by the AO is in two parts, viz., calculation of total profit from the sales made by GE overseas entities in India, which, in the instant case, has been worked out at 10% and second, attribution of such profit to marketing activities, which the AO has taken at 35% of 10%. As regards the first component, being, the estimation of profit on the sales made in India, we find that the AO specifically required the assessee to furnish year-wise entity-wise profits of GE overseas entities for the operations carried out in India. Either such information was not given or a part of the information given did not help in deducing the correct amount of profit. In such circumstances, the AO was left with no alternative, but, to estimate income on some rational basis. He invoked the provisions of Rule 10(iii) and estimated profit at 10% of sales made in India. Rate of 10% was applied by drawing strength from sections

44BB and 44BBB, which, in turn, are special provisions for computing profits and gains in connection with the business of exploration, etc. of mineral oils/operation of aircraft in the case of non-residents. In our considered opinion, the approach of the AO in estimating income at 10% of sales made in India, in the given circumstances, is perfectly in order and does not require any interference.

57. As regards the second component of the share of marketing activities in the total profit, the AO applied 35% by taking assistance from the decision taken by the Delhi Bench of the Tribunal in the case of *Rolls Royce (supra)*. The said order of the Tribunal stands affirmed by the Hon'ble Delhi High Court in *Rolls Royce PLC vs. DIT(IT) (2011) 339 ITR 147 (Del)*. Delhi Bench of the Tribunal in *ZTE Corporation vs. Addl. DIT (2016) 159 ITD 696 (Del)* has also attributed 35% of the profits attributable to marketing activities in India. We find force in the arguments advanced by the Id. AR that there can be no hard and fast rule of attribution of profit to marketing activities carried out in India at a particular level. In fact, attribution of profits to PE in India is fact based,

depending upon the role played by the PE in the overall generation of income. Such activities carried out by a PE in India resulting in generation of income, may vary from case to case. Attribution of income has to be in line with the extent of activities of PE in India.

58. Adverting to the factual matrix of the case, the assessee demonstrated before the AO by way of a chart on pages 87-90 of the assessment order that the nature of activities done by Rolls Royce in India were more than those done by GE overseas entities. Similar chart has also been given showing difference in the activities carried out by ZTE Corporation in India *vis-à-vis* the assessee. From such a comparative analysis, we are satisfied with the contention advanced by the Id. AR that the activities carried out by Rolls Royce and ZTE Corporation in India are not similar to those done by the PEs of GE overseas entities in India. While discussing above the nature of activities performed by GE India in generating sales of GE Overseas in India, we have elaborately taken note of the lead role played by GE India and GE overseas playing only a supporting role. In such

circumstances, we cannot approve attribution of whole of 35% of the profits relating to sales and marketing to the PE in India. Considering all the relevant facts and adopting a holistic approach, we hold that GE India conducted core activities and the extent of activities by GE Overseas in making sales in India is roughly one fourth of the total marketing effort. Ergo, we estimate 26% of total profit in India as attributable to the operations carried out by the PE in India. Therefore, as against the AO applying 3.5% to the amount of sales made by the assessee in India, we direct to apply 2.6% on the total sales for working out the profits attributable to the PE in India.

D. INTEREST U/S 234B

59. The ld. AR contended that interest u/s 234B has been wrongly charged from some of the GE overseas entities which are in appeal before the Tribunal in relation to the assessment years 2007-08 and 2008-09. The same was requested to be cancelled. To support his contention, the ld. AR relied on the judgment rendered by the Hon'ble Delhi High Court in one of the GE overseas entities which has since

been reported as *DIT (IT) vs. GE Packaged Power Inc. (2015) 373 ITR 65 (Del)*. It was stated that the AO levied interest u/s 234B in all the appeals starting from AY 2001-02 till 2008-09. The appeals for the assessment years 2001-02 to 2006-07 were routed through the CIT (A), who deleted such levy of interest. The deletion of interest was confirmed by the Tribunal. In further appeals by the Revenue, the Hon'ble High Court in the aforesaid case also upheld the deletion of interest u/s 234B. This was opposed by the Id. DR who referred to an earlier judgment of the Hon'ble Delhi High Court in *DIT (IT) vs. Alcatel Lucent USA Inc. (2014) 264 CTR 240 (Del)* in which levy of interest was approved. The Id. DR submitted that the facts of the instant case are similar to *Alcatel Lucent USA Inc. (supra)*.

60. We are not inclined to accept the contention advanced on behalf of the Revenue in this regard. The Hon'ble Delhi High Court in assessee's own group cases involving identical facts has approved the cancellation of the levy of interest u/s 234B for the assessment years 2001-02 to 2006-07. Facts relating to the A.Ys. 2007-08 and 2008-09 instantly

before us, are, admittedly, similar to such facts considered and decided by the Hon'ble Delhi High Court. When there is a judgment of the Hon'ble jurisdictional High Court directly in assessee's own case and the facts and circumstances for the later years are similar, there can be no question of applying the *ratio decidendi* of another judgment laying down a different proposition. It is more so, when the earlier judgment was also considered by the Hon'ble High Court in a later decision in assessee's own case. In view of the foregoing discussion and respectfully following the precedent in assessee's own case for the immediately preceding assessment years, we are satisfied that the interest u/s 234B has been wrongly charged for the A.Ys. 2007-8 and 2008-09. The same is hereby cancelled.

61. Before parting, we record our deep appreciation for illuminating arguments put forth on behalf of both the sides on the issues in the appeal. Further we want to make it clear that the *ratio decidendi* of all the decisions relied on by both the sides has been duly taken into consideration while passing this order. However, we have desisted from

specifically referring to certain cases relied on by both the sides in the present order either due to their irrelevance or repetitive nature.

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

The order pronounced in the open court on 27.01.2017.

Sd/-

[SUCHITRA KAMBLE]
JUDICIAL MEMBER

Sd/-

[R.S. SYAL]
ACCOUNTANT MEMBER

Dated, 27th January, 2017.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.