* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 24.05.2018

Pronounced on: 21.12.2018

\+ **ITA 621/2017; ITA 627/2017; ITA 628/2017; ITA 629/2017; ITA 671/2017; ITA 674/2017, C.M. APPL.29470/2017; ITA 675/2017, C.M. APPL.29471; ITA 677/2017**

GE ENERGY PARTS INC. ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

\+ **ITA 643/2017; ITA 646/2017; ITA 655/2017; ITA 669/2017 & ITA 685/2017**

GE GENBACHER GMBH & CO. ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

\+ **ITA 644/2017; ITA 652/2017, C.M. APPL.29312/2017; ITA 653/2017; ITA 666/2017 & ITA 837/2017**

GE ENGINE SERVICES MALAYSIA SDN BHD..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

\+ **ITA 645/2017; ITA 654/2017; ITA 657/2017; ITA 668/2017; ITA 684/2017 & ITA 688/2017**

GE PACKAGED POWER INC. ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

\+ **ITA 647/2017; ITA 670/2017; ITA 686/2017 & ITA 687/2017**

GE TRANSPORTATION PARTS LLC ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 648/2017; ITA 649/2017; ITA 660/2017; ITA 661/2017; ITA 678/2017; ITA 679/2017 & ITA 836/2017**

GE ENGINE SERVICES DISTRIBUTION LLC ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 650/2017; ITA 651/2017; ITA 662/2017; ITA 663/2017; ITA 664/2017; ITA 680/2017; ITA 681/2017 & ITA 682/2017**

GE ENGINE SERVICES INC. ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 656/2017; ITA 665/2017; ITA 683/2017 & ITA 838/2017**

GE JAPAN LTD. ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 828/2017, C.M. APPL.35327/2017**

GE ELECTRIC CANADA COMPANY ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 839/2017**

GE AIRCRAFT ENGINE SERVICES LTD..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 840/2017; ITA 841/2017 & ITA 842/2017**

GE AVIATION SERVICE OPERATION LLP ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 843/2017; ITA 844/2017; ITA 845/2017; ITA 846/2017; ITA 847/2017; ITA 848/2017; ITA 849/2017 & ITA 850/2017**

GE AVIATION MATERIALS LP ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 851/2017**

GE CALEDONIAN LTD. ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 852/2017**

GE ELECTRIC POWER SYSTEMS INC. ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 853/2017; ITA 854/2017; ITA 855/2017; ITA 856/2017 & ITA 857/2017;**

GENERAL ELECTRIC CANADA COMPANY ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 858/2017& ITA 859/2017**

GE MULTILIN ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondents

+ **ITA 860/2017; ITA 861/2017; ITA 862/2017; ITA 863/2017 & ITA 864/2017;**

GE PACIFIC PVT. LTD. ..... Appellant

Versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION), DELHI-I ..... Respondent

Through: Mr. Sachit Jolly and Mr. Siddharth Joshi, Advocates, for appellants.
Mr. Ruchir Bhatia, Sr. Standing Counsel, for the respondent.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT
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1. The present statutory appeals, under Section 260A of the Income Tax Act, 1961 (hereafter "the Act") are directed against the order dated 27.01.2017 (hereafter "impugned order") passed by the Income Tax Appellate Tribunal (hereafter "ITAT") in ITA No. 67/DEL/2011 for the AY 2001-2002 whereby the ITAT held that the GE Energy Parts Inc. (hereafter "Appellant") had a fixed place Permanent Establishment (hereafter "PE") and DAPE in India under the DTAA.

2. The appellants in these groups of appeals under Section 260A of the Act comprise the General Electric group of companies: GE Energy Parts Inc ("GEP" hereafter); General Electric International Operations Company Inc. ("GEIOC" hereafter); GE India Industrial Pvt. Ltd and (GEIIPL). All challenge a common order of the Income Tax Appellate Tribunal ("ITAT") which concluded that the appellant PE in India and were, therefore, liable to file income tax returns in the country.

3. GE Energy Parts Inc (GEP) is incorporated in and is a tax resident of the USA. It is engaged in the business of manufacture and offshore sale of highly sophisticated equipments such as gas turbine parts and sub-

assemblies. GEP and the other appellant/assessees are hereby collectively referred to as "GE" or "the assessees", as the context demands. GE sells its products offshore on a principal to principal basis to customers all over the world, including to customers located in India, whereby the title to the goods sold to Indian customers passes from it outside India. GEIOC, another US incorporated company, set up a *liaison* office (LO) in 1991 in New Delhi with permission of the Reserve Bank of India ("RBI" hereafter) only to act as a communication channel *and not carry on any business activity.* GEIIPL is an India incorporated company and is party to the Global Service Agreement (GSA) with GEIOC, for providing limited market support services to GE and its affiliates (including GEPI.). In exchange, it was remunerated on a cost-plus basis. It was assessed to income tax and also subjected to arms' length price (ALP) determination by a Transfer Pricing Officer (hereafter "TPO") who held that the transaction with its associated enterprise (AE) was at arm's length. The GSA forbids GEIIPL from:

> *(a) entering into any contract on behalf of GE Group companies (GEIOC and affiliates);*
>
> *(b) from acting as an agent for any GE Group company (GEIOC and affiliates).*

4. GE International Inc, i.e GEII is a U.S. incorporated entity; it assumes and performs payroll responsibility for expatriates who work in India to support various businesses of the GE Group. GEIOC had on its payroll more than 50 employees and the designation of such employees was mostly as Head India Operations. These assessees contended that employees are deputed to various GE companies and they work as their

employees and they remain on the payroll of GEIOC till their transfer to other entities. In terms of 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. The assessees did not file returns of income for any year.

5. A survey under Section 133A of the Act was conducted on 02.03.2007 in the premises of GEIOC at its AIFACS, 1 Rafi Marg, New Delhi and it was concluded that GEIOC's *liaison* office ('LO") started operating in India from July 01, 1987. It was set up to undertake *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 these premises, other entities, incorporated in India as well as non-resident entities of the GE group were also operating. During the course of survey statement of Shri Rupak Saha, 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 interface between GE, USA and GE,India, was also recorded. During the course of survey, photocopies of various documents were obtained and the same were inventoried as Annexures 'A' to 'G'.

6. The GE group was asked to furnish various information by summons under Section 131 of the Act. The assessee furnished the information through its representative - RSM & Co./Pricewaterhouse Coopers Pvt. Ltd. vide letters 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, 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 employs more than 300,000 people worldwide. GE had been in India since 1902. Its global businesses had a presence in India and the group had become a significant participant in a wide range of key services, technology and manufacturing industries. Employment across India exceeds 12,000. Over 1 billion dollar 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 was one of the largest customers for the IT service industry of India.

7. Based on these observations, the AO continued the reassessment proceedings. The assessees resisted the move to assess them, contending that they were not subjected to income tax laws of India as they had no permanent establishment. The AO by order dated 31.12.2008 held that the appellant has a fixed place PE and DAPE in India. Further, the AO also deemed 10% of the value of supplies made to the clients in India as the profits arising from such supplies and attributed 35% of such profit to the Appellant’s PE in India. These findings were appealed against by the assessees, to the Commissioner of Income Tax [CIT (A)].

8. The CIT(A) upheld the order of the AO with respect to the initiation of proceedings under Section 147/148 of the Act and existence of PE and

attribution of income but allowed appeal on the issue of levy of interest under Section 234B of the Act. Aggrieved by the order dated 30.09.2010, the appellants preferred an appeal before the ITAT.

GE Group submission to the ITAT

9. The Appellant submitted that the technology and not marketing enabled it to be successful in their business – since products are so sophisticated, marketing is a minimal component of the sale. All strategy decisions reside with the applicant outside India – work in India is only limited to providing market inputs and interface. In this case, the LO is only collecting information about potential customers in India and passing on this information to its non-resident businesses; and creating awareness of the business products.

10. Further, the Appellant submitted that mere participation in negotiations or even negotiation of some terms of the contract by employees of non-resident tax payer does not result in a PE unless all terms of the contract are negotiated and finalized by such employees. The OECD Commentary goes on to state that mere attendance/participation in negotiations is regarded as a preparatory and auxiliary activity and, therefore, cannot by itself create a Fixed Place PE. It also urged that no inferences could be drawn with respect to negotiating and finalizing the critical terms of the contract. GE placed reliance on the case of *U.A.E. Exchange Centre Ltd. vs. Union of India and Ors.* (2009) 313 ITR 94 (Del) 10 and submitted that subsidiary activities do not count – even if such activities are necessary for the completion of the contract. It was urged that such a reading would render the core purpose of the clause null

and void. Similar reliance is placed on *National Petroleum Construction Company vs. Director of Income Tax (International Taxation)* 2016 (383) ITR 648 (Del). where it is held that mere participation in negotiations is not sufficient – it is necessary to actually be responsible for the conclusion of negotiations.

Impugned findings by ITAT

11. On appeal, before the ITAT, the assessee-GE's contentions were negatived. The ITAT considered the Indo-US Double Tax Avoidance Agreement ('DTAA') to examine the provisions concerning of 'Fixed Place PE' (Article 5.1 to 5.3) and observed that on a conjoint reading of the relevant parts of Article 5, a PE meant 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. Based upon its analysis of the facts, the ITAT held that GEII's expatriates permanently used its *liaison* office at the premises. It was also held that those expats and GEIIPL employees working under expats were so working and the same was never denied by the assessee. It further stated that the primary, specific and original proven material in the form of survey documents, self-appraisals, manager assessment, etc., and showed that GE overseas concerns were 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.

12. The ITAT held that all conditions for constituting a fixed place PE in terms of paras 1, 2 and 3 of the Article 5 were met with, as the AIFCAS

building was a "fixed place" from which business of GE overseas entities was partly carried on in India and the activities carried out from such fixed place are not of preparatory or auxiliary character. It was also held that Article 5 (4) stated that where a person, other than an agent of independent status to whom Article 5 (5) applies, and fulfils the conditions as set out in the Article 5(4), that person will constitute a PE of the enterprise. It was furthermore held that the first part of Para 5 refers to an agent of independent status and the second part of that para refers to an agent of independent status who is not considered an agent of independent status because of the conditions set out in the said paragraph. Thus, it follows, that the 'person' referred to in para 4 refers to an agent of dependent status 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'. 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. Therefore, ITAT observed that the nature of activities done by GE India, were of a core nature, and they demonstrated its authority to conclude contracts on behalf of GE overseas entities. The ITAT held, therefore, that GE India constituted agency PE of all the GE overseas entities in India.

13. The ITAT observed that the AO was correct in its approach in estimating total income at 10% of sales made in India due to unavailability of year-wise, and entity-wise profits of GE overseas entities for the operations carried out in India. Further, the impugned order held

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. It, therefore, estimated that the 26% of total profit (i.e. 10% of sales) in India, as attributable to the operations carried out by the PE in India, instead of 35% estimated by the AO.

14. The following questions of law were framed for consideration, in all these appeals:

> *(1) Did ITAT fall into error in its findings with respect to existence of a fixed place Permanent Establishment (PE) of the assessee in India?*
>
> *(2) Did ITAT fall into error in concluding that the assessee/appellants separately had an independent agent PE, located in India; and,*
>
> *(3) Whether on the facts and the circumstances of the case and the law, the ITAT was justified in attributing as high as 35% of the profits to the alleged marketing activities and thereafter, attributing 75% of such 35% profits to the alleged PE of the Appellant in India*

Submission of parties

15. It is argued that GE is incorporated in the United States of America ("USA") and its tax resident for the purposes of the DTAA between India and USA. The Appellant is engaged in the business of manufacture and supply of highly sophisticated components and sub-assemblies of gas turbines to various clients all over the world. Similarly, other entities, part of the present batch of appeals are engaged in manufacture and supply of various equipments in the oil and gas, aviation and energy sector. Some

entities are also engaged in rendering offshore services to various clients across the world.

16. Mr. Sachit Jolly, arguing for GE, states that it is an undisputed position that research and development, design, fabrication and manufacture of all equipments are done outside India. It is also undisputed that title to the goods passes outside India. It is also not the allegation or finding by any of the lower authorities that any marketing activity is undertaken by any of the appellants in India. However, the AO found [and the CIT confirmed- as did the Dispute Resolution Panel ("DRP")] and later, the ITAT that a part of the sales function is done in India through expatriates, which are deputed by the appellants along with a team of employees of GEIIPL and, therefore, the office space occupied by such expatriates along with the employees of GEIIPL constitute a fixed place PE. The lower authorities also held that such expatriates along with GEIIPL's employees had authority to conclude contracts on behalf of the appellants and, therefore, constituted Dependent Agent PE ("DAPE").

17. Counsel stated that to conclude the existence of a fixed place (PE) and DAPE, the ITAT relied upon three sets of documents: (a) Appraisal Reports of the expatriates and the employees of GEIIPL; (b) Certain e-mails collected during survey conducted at the liaison office of GE International Operations Company ("GEIOC") in India and statements recorded during survey; and (c) submissions dated 14.11.2008 filed by the appellant before the AO. GE urges that ITAT's findings are incorrect, both on law and facts. As to fixed place PE, it is submitted that in terms of Article 5(1) of the DTAA, a fixed place (PE) is said to exist when a

foreign enterprise has a fixed place at its disposal in India and carries on business through such fixed place in India. However, in terms of Article 5(3)(e) of the India-US DTAA, activities that have a preparatory or auxiliary character for the foreign enterprise as a whole do not constitute a fixed place PE. Therefore, notwithstanding the presence of a fixed place, if the activity carried on through such place of business is preparatory and auxiliary for the foreign enterprise then no PE can be said to exist. In other words, in order to constitute a fixed place PE, both the disposal test and the business function test must be cumulatively specified. In this regard, reliance is placed on *Formula One World Championship v Commissioner of Income Tax* [2017] 390 ITR 199 [affirmed in *Formula One World Championship v Commissioner of Income Tax* CIT 2017 (394) ITR 80 (SC)]; *Director of Income Tax v. E-Funds IT Solution* 2014 (364) ITR 256 [affirmed in *Additional Director International Taxation v. E-Funds IT Solutions Inc.* 2017 (399) ITR 34 (SC) and *National Petroleum Construction Company v. DIT* 2016 (383) ITR 648].

18. It is argued that the expatriates and employees of GEIIPL, no doubt, participated in the negotiation for conclusion of contracts, but never had the authority, whether expressed or implied, to finalize any contract on their own volition. These personnel, even though highly qualified did not have any authority to bind the foreign enterprises. Due to the complex equipment being supplied by the appellants, to understand the technical specifications of the product, issues pertaining to warranty, pricing, time of delivery, etc., technically qualified personnel were required in India to understand the needs of the clients.

19. Mr. Jolly urged that it is a settled law that the onus on proving the existence of PE lies on the Revenue. [Refer *E-Funds IT Solutions Inc (supra)*]. In the present case, the fixed place PE is alleged only in respect of the sales function, which function is a small part of the overall business of research and development, design, fabrication and manufacture all of which happened outside India. Therefore, mere participation of the expatriates and employees of GEIIPL in the negotiations, (without any authority to conclude contracts) which is a small part of the sales function, cannot be said to be the core business activity for the appellants. The revenue, having failed to prove that the personnel in India had the authority to close and conclude contracts on their own volition and accord, could not have proceeded to treat the existence of the personnel as constituting a PE in India.

20. Counsel emphasized that it is settled law that the question whether an activity constitutes preparatory and auxiliary activity or core business function is not to be judged from the viewpoint of importance of the function but from the viewpoint of its role in the overall business of the foreign enterprise. [Refer *UAE Exchange Centre Ltd. v. Union of India* 2009 (313) ITR 94 (Del). In the present case, it is undisputed that research and development, design, fabrication and manufacture of equipments all happened outside India. It is also undisputed that title of the goods passes of the Indian customers outside India and no marketing activity is done in India. Therefore, if a small portion of the sales function, i.e. participation in negotiation takes place inside India, no fixed place (PE) can be set to exist because such activity which is performed in India has preparatory

and auxiliary character for the business as a whole of the Appellants herein. Reliance is placed on *Director International Taxation v. Mitsui & Co. Ltd.* [2017] 399 ITR 505.

21. It is argued that the ITAT in this regard erred in disregarding the OECD Commentary on Model Tax Convention (paragraph 33 on Article 5) which unambiguously states that mere participation in negotiation does not lead to either a fixed place PE or a dependent agent PE ("DAPE"). The view taken by the ITAT is not only contrary to the OECD Commentary but also the UN Commentary on Model Tax Convention (paragraph 24 on Article 5) as well as settled jurisprudence under Indian Contract Law, wherein it is specifically recognized that authority to negotiate is different from authority to conclude contracts and that unless the agent is authorized to conclude all elements (or at least critical elements of the contract), he cannot be said to have the authority to bind the principal. Therefore, even if the OECD Commentary was not considered relevant by the ITAT, it should have referred to the position of law under the Indian Contract Law to interpret and adjudicate on the existence of fixed place (PE) in the present context. Reliance is placed on *Black's Law Dictionary* 10th Edition, (Pgs 350, 1199, 1200); *Major Law Lexicon P.R. Aiyar* 4th Edition 2010, (Pgs 1361 (Vol2), 4530 (Vol4) and *Devkubai N. Mankar v. Rajesh Builders* AIR 1997 Bom 142.

22. Coming next to the question of DAPE it is argued that Article 5(4) of the DTAA between India and USA states that notwithstanding the provisions of paragraphs 1 & 2, where a person acts on behalf of a foreign enterprise in India and he has the authority to conclude contracts on behalf

of the foreign enterprise and he habitually exercises such authority then the foreign enterprise can be set to have a DAPE in India. However, if the activities of the so-called agent in India are preparatory and auxiliary in character then even the authority to conclude contracts does not lead to the formation of a DAPE in India. In other words, the DAPE acts as an alternative to the fixed place PE, i.e., even without the existence of a place at the disposal of the foreign enterprise, a PE can exist if the foreign enterprise carries on core business through a dependent agent in India. In support, Paras 31 and 32 of the OECD Model Tax Commentary on Article 5 are relied upon by Mr. Jolly.

23. It is argued that Article 5(5) further restricts Article 5(4) and states that if the agent in India is not dependent on the foreign principal and the agent acts in ordinary course of business, then no DAPE can be said to exist. Counsel submitted that in present case, the revenue alleges that the same set of expatriates and employees of GEIIPL render services to more than 24 foreign enterprises. This submission of the revenue that these expatriates together constitute dependent agents of 24 entities is self-defeating. In fact, GEIIPL, apart from rendering these services, for which it is compensated on arm's length basis, has 12 different business divisions and they cannot be said to be dependent, whether economical or legal, on the various appellants herein. On that ground alone, the case of the revenue, insofar as the existence of DAPE must fall. Learned counsel relied on *Varian India (P) Ltd. v. Additional Director Income Tax* 2013 (142) lTD 692 (Mum).

24. It is urged by the appellants that in any case, the expatriates and employees of GEIIPL neither had the authority, whether expressed or implied to conclude contracts in India nor was such authority exercised habitually in India. It is urged that the expatriates and employees of GEIIPL participated in negotiations for conclusion of contracts but that by itself did not lead to the conclusion that the said personnel had the authority to conclude contracts in India. The authority to negotiate, without any authority to conclude contracts, cannot be treated as fulfilling the requirements of Article 5(4)(a) of the India USA DTAA. Reference is made to Para 33 of the OECD Commentary on Article 5; Para 24 of the UN Commentary on Article 5 and Protocol to the India-USA DTAA interpreting the term "secure orders").

25. Referring to the appraisal reports it is urged that neither ITAT nor any of the lower authorities have been able to point out a single document, which demonstrates that the expatriates or the employees of GEIIPL had any authority to close and conclude contracts in India. The ITAT has purely based its conclusion on the educational qualifications and designation of the expatriates to infer the role which they may have played in the conclusion of contracts on behalf of the Appellants herein. In fact, none of the expatriates referred to by the lower authorities were in India until AY 2005-06 and, therefore, the reliance on the appraisal sheets of such expatriates for AY 2001-02 to AY 2004-05 is entirely misplaced.

26. Dealing with the material found during survey, reference is made to pages 175-182 of the point by point rebuttal of each e-mail made by appellants before the ITAT. Counsel complains that however, the ITAT,

in the impugned order has not even referred to those submissions. Reliance is placed on the detailed rebuttal made before the ITAT incorporated at Pages 54-64 of the Appeal. For instance, it is urged that the e-mail at Pg.127 of the Survey Documents-1, referred to by the ITAT in the impugned order clearly shows that personnel from Italy, i.e., La Motta, Nicoletti and Paolo negotiated and concluded contracts with prospective clients and Riccardo was merely marked on the correspondence without any authority to negotiate or finalize contracts. Similarly, e-mail at page no.195 of the Survey Documents-I, referred to by the ITAT, -if read with page no. 23 of the Survey Documents-, the proposal, both technical and commercial, were sent by Danila Araniti directly to BHEL on 28.02.2007 which is reflected in the e-mail@ page no.23.Similarly, the statements of Mr. Chandan Jain or Mr. Rupak Saha do not even remotely suggest that the expatriates or the employees of GEIIPL had the authority to conclude contracts on behalf of the appellants herein.

27. It is submitted that the impugned order has obfuscated the authority to negotiate and participate in negotiation, with the authority to conclude contracts. It is apparent from a bare perusal of the submissions filed by the Appellant that the expatriates and the employees of GEIIPL merely provided sales support and participated in negotiation, without any express or implied authority to conclude contracts. Therefore, the reliance placed upon the submissions dated 14.11.2018 is out of context and perverse.

28. It was next argued that pursuant to the Global Services Agreement dated 26.01.2001, GEIIPL was required to render sales support services to

GEIOC and all affiliates of GEIOC including the appellants here. It is also an admitted position that for rendering such services, GEIIPL was remunerated at arm's length. In fact, transfer pricing orders were passed in the case of GEIIPL both pre and post survey and continue to be passed till date and it has never been alleged that GEIIPL has rendered services beyond the scope of GSA. Transfer Pricing orders till AY2013-14 have been passed in the case of GEIIPL and scope of services rendered by GEIIPL has never been doubted by the TPO. If that be the case, it is the submission of the appellant that once the so-called agent is remunerated at arm's length, no further attribution can be made. Counsel relies on *E-Funds IT Solutions Inc. (supra)* and *Honda Motor Company Ltd. v. Commissioner of Income Tax* 2018 (6) SCC 70. It is urged that the undisputed position is that title to the goods passes outside India and, therefore, the profits arising from such sales which accrue outside India cannot be taxed in India since admittedly the sales made to independent third parties (the clients herein like Reliance, BHEL etc.) are at arm's length. Reference is made to *Commissioner of Income Tax v. Hyundai Heavy Industries Ltd.*2007 (291) ITR 482 (SC).

29. It is submitted that ITAT erred in attributing as high as 35% of the profits to the alleged sales function performed in India. As submitted earlier, research and development, design, fabrication and manufacture of equipments all took place outside India. It is also undisputed that title to the goods passes of the Indian customers outside India and no marketing activity is done in India. Therefore, the ITAT erred in confirming the orders of the lower authorities in attributing as high as 35% of the profits

as alleged PE in India. At best, 10-15% of the overall profits could have been held to be attributable to the alleged PE in India. Reliance is placed on *Director of Income Tax v. Galileo International Inc.* 2011 (336) ITR 264 (Del); *Anglo-French Textile Company Ltd. v. CIT* 1954 (25) ITR 27 (SC). It was argued that without prejudice, even if 35% profits are to be attributed to the alleged sales function, admittedly not the entire sales function is carried on in India. A bare perusal of the e-mails which have been relied upon by the Revenue leads to the inescapable conclusions that majority of the sales function is carried outside India. Accordingly, not more than 20% of the 35% profits attributable to the sales function can be attributed to the alleged PE in India. The ITAT, therefore, erred in attributing profits equivalent to 75% of the sales function to the activities done in India.

30. On behalf of the Revenue, Mr. Ruchir Bhatia, learned counsel argued that the lower authorities correctly refused to accept the assessee's contentions that 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. It was pointed out that several activities relating to marketing and sales took place in India. Expatriates from GEII along with employees of GEIIPL constituting the Indian team were mostly involved and participated in the negotiation of prices. These price negotiations took place in India. The Indian customers discussed MOD 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. It was also argued that the revenue authorities 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 under Section 9 of the Act. The AO, therefore, correctly held that all the profits did not accrue or arise to the assessee on 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. Mr. Bhatia stated that the position about the taxability under the Act has not been challenged by the assessee before us inasmuch as it assailed only the existence of PE in terms of the DTAA, more particularly, the activities carried out in India, which were of preparatory or auxiliary character. It was argued 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 GEIIPL constituting 'dependent agent PE'. The learned AR argued that none of the activities carried out by the assessee in India lead to the creation of PE.

31. Mr. Bhatia relied on the ITAT's findings, particularly in Para 27 to submit that facts on record show the following, i.e. that firstly GEII's expats were highly qualified (and some even with double qualifications), worked in India for different business interests of the GE group; their activities were not confined to the business of a particular entity and

secondly, they were heading the operations of GE overseas entities in India. From the description of their job and appraisal reports with the Manager assessment, wherever given, it was clear that these expats were India "country heads" or working at the leading positions, managing business, securing orders and doing everything that was feasible which was needed to carry GE overseas entities' India operations. It was submitted that the assessee did not and could not deny that its business model and GEII's expats' role is similar in respect of all businesses in India. Furthermore, 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.

32. The revenue relied on the following findings and submitted that they are factual, which ought not to be disturbed:

> *"27.4 Now, we will discuss the role of the employees of GEIIPL 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 GEIIPL 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 GEIIPL. 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 GEIIPL 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."

33. It was argued by the revenue that a proper application of the principles enunciated in the authorities show that the assessee regularly sold equipments to its customers in India which were documented and detailed in the course of survey and assessment proceedings. All sales related activities sales are not carried out from outside the country; some important sales activities took place within India. GEHPL employees are intensely involved in those activities. They are involved right through the negotiation process in India. Indian customers discuss the MOU terms and other items with these expats and GEHPL employees. The GE Overseas entities submit their bids in India. The overseas entities would not have been able to make any sales in India without involvement of Indian team constituted by employees of GEHPL along with expatriates heading the relevant team. It is, therefore, held that the appellant has a business connection in India in terms of the principles laid down through various

judicial pronouncement discussed above, in view of the presence of the expatriates who are working for the business of the appellant in India along with employees of GEIIPL. The business activities carried out through GEHPL results into a business connection of the nature referred to in Explanation 2 of Section 9(1)(i) of the Act.

34. It was argued that the activities carried out by the expatriates and the activities of GEIOC, LO are not preparatory or auxiliary in nature as claimed by the appellant. The activities of various GE entities in India, carried out through their expatriate employees, are related to marketing and sales which is a core activity and integral part of any business. Marketing and sales activities of the GE entities in India contribute to the income of the concerned entity. According to the appellants GEIOC, LO acts as a communication channel only and is providing support services. However, all the employees (of the LO) are deputed to different GE entities. Its office space, facilities and staff are being used by GE Overseas entities for their business. The agreement for providing support services by GEHPL to GEIOC and affiliates is with GEIOC which means that GEIOC, LO is providing all the facilities and support in India for the business of GE Overseas entities. For that reason too the benefit of preparatory and auxiliary clause to GEIOC, LO is not available in terms of para 26 of the Commentary on Article 5 of OECD Model Tax Convention as discussed in detail by the AO and affirmed by the lower appellate authorities.

35. It was argued that marketing and sales activities, controlled and monitored by the assessee's expats, which were on its payroll, is a core

management activity. The two premises, from where these activities were undertaken, and the deep and pervasive nature of control, at every stage, leading to finalization of all technical specifications in regard to supply of equipments and customized machinery, its pricing and all material details involved the active and detailed involvement of these expats. If any consultations did take place, it was only a part of the process. Therefore, activities such as scouring the market, development, market strategy (which is specific to each geographic sector having regard to its peculiarities) negotiations, price adjustments etc were integral to contract formation. It could not be termed as mere *negotiation*, with the final "yes" or approval by the overseas entity. The end of the process, i.e the formal approval, might in fact be a ritualistic one, where every part of the meaningful *negotiation phase* took place, or significant parts of it, took place in India. Learned counsel relied upon the Allahabad High Court judgment in *Brown & Sharpe Inc v Commissioner of Income Tax* 2014 (369) ITR 704 in support of his submissions. Reliance was also placed on the Division Bench judgment in *Rolls Royce Plc v Director of Income Tax* 2011 (339) ITR 147 (Del).

36. As regards the assessees' submission with respect to agency PE it was argued that GE India is an agent of independent status and it is both legally and economically independent of the GE Overseas entities. It provided marketing support to GE Overseas entities. Further, GE India performs activities on its own account, independently and without any detailed instructions and control from GE Overseas entities. Reliance was

also placed on AAR ruling in the case of *AI Nisr Publishing* 1999 (239) ITR 879 (AAR).

37. Mr. Bhatia also refuted Mr. Jolly's submission with respect to attribution and argued that the margin of 35% was correct and reasonable.

Analysis and Conclusions:

38. The relevant provision of the DTAA, i.e the Indo-US DTAA reads as follows:

> *"Article 5.1. 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.*
>
> *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)……

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."*

Re: Question No. 1

39. Fixed place permanent establishments ("fixed place PE") are governed by Articles 5(1) to 5(3) of the U.S. – India Double Taxation Avoidance Agreement ["DTAA"]. In the current context, the relevant articles spell out three conditions – which were also considered by ITAT – for the establishment:

(i) The enterprise must have a fixed place of business [Article 5(1) of DTAA]

(ii) The business of the enterprise must be wholly or partly carried on through the fixed place [Article 5(1) of the DTAA]

(iii) The fixed place of business must not be solely for the purposes of advertising, supply of information, scientific research or other activities which have a preparatory or auxiliary character [Article 5(3)(e) of the DTAA]

40. GE's overseas enterprises have a place of business in India, *per* Article 5(1) of the DTAA. The term "place of business" has been understood to mean any premises, facilities or installations used for carrying on the business of the enterprise – does not have to be exclusively used for that purpose [*OECD Model Tax Convention on Income and on Capital, Commentary on Article 5 Concerning the Definition of Permanent Establishment, para. 4 ("OECD MTC")]*, with even a certain amount of space at its disposal is sufficient to cause fixed place of business.[1] Moreover, having space at disposal does not require a legal right to use that place – mere continuous usage is sufficient if it indicates being at disposal. (Ref Para 4.1 of OECD MTC).

41. In the decision in *Formula One*, (supra), the Supreme Court had occasion to deal with what is a permanent establishment. After reviewing several previous authorities and legal commentaries, the court stated as follows:

"The term "place of business" is explained as covering any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. It is clarified that a place of business may also exist where no premises are available or

[1]The para reads as follows:
"4. 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. A place of business may also exist where no premises are available or require for carrying on the business of the enterprise and it simply has a certain amount of space at its disposal. It is immaterial whether the premises, facilities or installations are owned or rented by or otherwise at the disposal of the enterprise…."

required for carrying on the business of the enterprise and it simply has a certain amount of space at its disposal. Further, it is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise. A certain amount of space at the disposal of the enterprise which is used for business activities is sufficient to constitute a place of business. No formal legal right to use that place is required. Thus, where an enterprise illegally occupies a certain location where it carries on its business, that would also constitute a PE. Some of the examples where premises are treated at the disposal of the enterprise and, therefore, constitute PE are: a place of business may thus be constituted by a pitch in a market place, or by a certain permanently used area in a customs depot (e.g. for the storage of dutiable goods). Again the place of business may be situated in the business facilities of another enterprise. This may be the case for instance where the foreign enterprise has at its constant disposal certain premises or a part thereof owned by the other enterprise. At the same time, it is also clarified that the mere presence of an enterprise at a particular location does not necessarily mean that the location is at the disposal of that enterprise.

The OECD commentary gives as many as four examples where location will not be treated at the disposal of the enterprise. These are:

The first example is that of a salesman who regularly visits a major customer to take orders and meets the purchasing director in his office to do so. In that case, the customer's premises are not at the disposal of the enterprise for which the salesman is working and therefore do not constitute a fixed place of business through which the business of that enterprise is carried on (depending on the circumstances, however, paragraph 5 could apply to deem a permanent establishment to exist). Second example is that of an employee of a company who, for a long period of time, is allowed to use an office in the headquarters of another company (e.g. a newly acquired subsidiary) in order to ensure that the latter company complies

with its obligations under contracts concluded with the former company. In that case, the employee is carrying on activities related to the business of the former company and the office that is at his disposal at the headquarters of the other company will constitute a permanent establishment of his employer, provided that the office is at his disposal for a sufficiently long period of time so as to constitute a "fixed place of business" (see paragraphs 6 to 6.3) and that the activities that are performed there go beyond the activities referred to in paragraph 4 of the Article.

The third example is that of a road transportation enterprise which would use a delivery dock at a customer's warehouse every day for a number of years for the purpose of delivering goods purchased by that customer. In that case, the presence of the road transportation enterprise at the delivery dock would be so limited that that enterprise could not consider that place as being at its disposal so as to constitute a permanent establishment of that enterprise.

Fourth example is that of a painter, who, for two years, spends three days a week in the large office building of its main client. In that case, the presence of the painter in that office building where he is performing the most important functions of his business (i.e. painting) constitute a permanent establishment of that painter.

It also states that the words 'through which' must be given a wide meaning so as to apply to any situation where business activities are carried on at a particular location which is at the disposal of the enterprise for that purpose. For this reason, an enterprise engaged in paving a road will be considered to be carrying on its business 'through' the location where this activity takes place."

42. Applying the standard to the facts at hand, the ITAT and the lower appellate authorities found that GE India – is located in the space leased by GEIOC in the AIFACS building. This space was at the constant

disposal of GEIOC as evidenced by specific chambers/rooms and secretarial staff allotted to GE staff, and was used by GE staff for their work. GE has not made new submissions on this specific question in this case. Based on the factual record, it appears that ITAT's factual determinations in this regard are sound and in consonance with the general meaning of the expression PE *vis-à-vis* continuity of space available for GEIOC's activities.

43. GE's activities in India are wholly or partly carried on through its fixed place of business. The term "through which" is to be given a wide latitude – when business is carried out at a particular location at the disposal of an enterprise, it is sufficient to say it meets the "through which" threshold.

44. The ITAT found that the core of the sales activity was done from the AIFACS building ("the premises"). Contrariwise, GE challenged this finding of fact, arguing that there was a difference between sales made from the AIFACS building and the presence of GE India employees at the premises. Its argument is that merely because expatriates and employees were found at the premises, could not lead to the conclusion that the sales were made from that place. GE's argument in this context is unpersuasive. If the premises were not where the relevant business activities occurred, then the location where they did would likely form the fixed place PE. The ITAT determination in this context is reasonable and sound. Insofar as GE has not contested that the premises were indeed used for activities of some form, it is reasonable to assume those activities occurred through the premises.

45. The next issue is a thornier one; i.e whether the presence and availability of the space at the disposal of GE in this case, and the evidence relied on by the lower authorities, could lead one to conclude that it carried on business *through its employees from that place.* GE's contention here is that the activities fall within the description in Article 5 (3), that excludes applicability of Article 5 (1), i.e that the premises are maintained *"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."*

46. The ITAT's finding on this aspect was that the assessee's arguments with respect to the activities being preparatory or auxiliary character were unfounded. The relevant part of the discussion, which is fairly detailed after analyzing several documents and e-mails, and on the basis of survey recovered documents, reads as follows:

> *"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) MANU/DE/0223/2016 : (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 ld. 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 ld. 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 GEIIPL 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 GEIIPL 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

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 GEIIPL) 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 ld. 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 ld. 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 GEIIPL 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 Linked in 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 Division ....He 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 ld. 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 Ricardo 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 Ricardo 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 (GEIIPL)-

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 ld. 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 ld. 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 GEIIPL 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 GEIIPL 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 GEIIPL working since Financial year 2002-03. His designation is 'Sales Manager'. 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 GEIIPL. 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 GEIIPL. His designation is 'Sales Manager'. 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 GEIIPL 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 GEIIPL 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 GEIIPL working since 2001.

ix. Jaimin Shah - He did his Mechanical Engineering. His designation is 'Account Executive'. He is an employee of GEIIPL 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 GEIIPL.

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 ld. 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."

47. Determining whether a practice is preparatory or auxiliary requires asking whether the activity undertaken at the fixed place of business is an essential and significant part of the activity of the enterprise as a whole. In *National Petroleum Construction Company vs. DIT* (IT) (2016) 383 ITR

648 (Del), it was held that activities that are remote from the realization of profits are considered preparatory or auxiliary:

> *"26. The language of sub-para (e) of paragraph 3 of Article 5 of the DTAA is similar to the language of sub-para (e) of paragraph 4 of Article 5 of the Model Conventions framed by OECD, United Nations as well as the United States of America. The rationale for excluding a fixed place of business maintained solely for the purposes of carrying on activity of a preparatory or auxiliary character has been explained by Professor Dr. Klaus Vogel. In his commentary on "Double Taxation Conventions, Third Edition", he states that "It is recognised that such a place of business may well contribute to the productivity of the enterprise, but the services it performs are so remote from the actual realisation of profits that it is difficult to allocate any profit to the fixed place of business in question. Examples are fixed places of business solely for the purpose of advertising or for the supply of information or for scientific research or for the servicing of a patent or a know-how contract, if such activities have a preparatory or auxiliary character".*

Accordingly, it is not simply that an activity is necessary for the completion of a contract– it must be the case that the activities must *per se* be responsible for the realization of profits.

48. Courts have also indicated clear markers for the requisite involvement of Liaison Offices (LO) in the context of auxiliary or preparatory activities. *UAE Exchange (supra)* held that in the context of the transnational remit of funds, the mere processes of downloading cheques and preparing the amount for remitting in India – where the transaction occurred overseas – is auxiliary and preparatory:

> *"However, Article 5 (3) which opens with a non-obstante clause, is illustrative of instances where-under the DTAA*

various activities have been deemed as ones which would not fall within the ambit of the expression „permanent establishment". One such exclusionary clause is found in Article 5 (3) (e) which is: maintenance of fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character. The plain meaning of the word "auxiliary" is found in Black's Law Dictionary 7th Edition at page 130 which reads as "aiding or supporting, subsidiary". The only activity of the liaison offices in India is simply to download information which is contained in the main servers located in UAE based on which cheques are drawn on banks in India whereupon the said cheques are couriered or despatched to the beneficiaries in India, keeping in mind the instructions of the NRI remitter. Can such an activity be anything but auxiliary in character. Plainly to our minds, the instant activity is in "aid" or "support" of the main activity. The error into which, according to us, the Authority has fallen is in reading Article 5 (3) (e) as a clause which permits making a value judgment as to whether the transaction would or would not have been complete till the role played by liaison offices in India was fulfilled as represented by the petitioner to their NRI remitter. According to us, what has been lost sight of, is that, by invoking the clause with regard to permanent establishment, we would, by a deeming fiction tax an income which otherwise neither arose nor accrued in India - when looked at from this point of view, the exclusionary clause contained in Article 5 (3) and in this case in particular, sub-clause (e) have to be given a wider and liberal play. Once an activity is construed as being subsidiary or in aid or support of the main activity it would, according to us, fall within the exclusionary clause. To say that a particular activity was necessary for completion of the contract is, in a sense saying the obvious as every other activity which an enterprise undertakes in earning profits is with the ultimate view of giving effect to the obligations undertaken by an enterprise vis-a-vis its customer. If looked at from that point of view, then, no activity could be construed as preparatory or of an "auxiliary" character."

49. *E-Funds (supra)* held that the mere rendering of back office support to foreign entities does not constitute essential and significant part of the activities of the business as a whole.[2] *DIT v. Morgan Stanley* 2007 (292) ITR 416 (SC) likewise held that back-office activities for an international bank that were occurring in India were auxiliary in relation to the main business of the entity. However, the following observations in *Morgan Stanley (supra)* are also relevant:

> *"Article 5(2)(l) of DTAA applies in cases where MNE furnishes services within India and those services are furnished through its employees. In the present case we are concerned with two activities, namely, stewardship activities and the work to be performed by deputationists in India as employees of MSAS. A customer like MSCo who has worldwide operations is entitled to insist on quality control and confidentiality from the service provider. For example in the case of software PE a server stores the data which may require confidentiality. A service provider may also be required to act according to the quality control specifications imposed by its customer. It may be required to maintain confidentiality. Stewardship activities involve briefing of the MSAS staff to ensure that the output meets the requirements of MSCo. These activities include monitoring of the outsourcing operations at MSAS. The object is to protect the interest of MSCo. These stewards are not involved in day-today management or in any specific services to be undertaken by MSAS. The stewardship activity is basically to protect the interest of the customer. In the present case as held hereinabove MSAS is a service PE. It is in a sense a service provider. A customer is entitled to protect its interest both in terms of confidentiality and in terms of quality control. In such a case it cannot be said that MSCo has been rendering the services to MSAS. In our view MSCo is merely protecting its own interests in the competitive world by ensuring the quality*

[2] *DIT vs. E-Funds IT Solutions (2014)* 364 ITR 256 *(Del)*

and confidentiality of MSAS services. We do not agree with the ruling of AAR that the stewardship activity would fall under Article 5(2)(l). To this extent we find merit in the civil appeal filed by the appellant (MSCo) and accordingly its appeal to that extent stands partly allowed.

17. As regards the question of deputation, we are of the view that an employee of MSCo when deputed to MSAS does not become an employee of MSAS. A deputationist has a lien on his employment with MSCo. As long as the lien remains with MSCo the said company retains control over the deputationist's terms and employment. The concept of a service PE finds place in the UN Convention. It is constituted if the multinational enterprise renders services through its employees in India provided the services are rendered for a specified period. In this case, it extends to two years on the request of MSAS. It is important to note that where the activities of the multinational enterprise entails it being responsible for the work of deputationists and the employees continue to be on the payroll of the multinational enterprise or they continue to have their lien on their jobs with the multinational enterprise, a service PE can emerge.

18. Applying the above tests to the facts of this case we find that on request/requisition from MSAS the applicant deputes its staff. The request comes from MSAS depending upon its requirement. Generally, occasions do arise when MSAS needs the expertise of the staff of MSCo. In such circumstances, generally, MSAS makes a request to MSCo. A deputationist under such circumstances is expected to be experienced in banking and finance. On completion of his tenure he is repatriated to his parent job. He retains his lien when he comes to India. He lends his experience to MSAS in India as an employee of MSCo as he retains his lien and in that sense there is a service PE (MSAS) under Article 5(2)(l). We find no infirmity in the ruling of ARR on this aspect. In the above situation, MSCo is rendering services through its employees to MSAS. Therefore, the Department is right in its contention that under the above situation there exists a service PE in India

(MSAS). Accordingly, the civil appeal filed by the Department stands partly allowed." (at pages 15-16)

18. It has already been seen that none of the customers of the assessees are located in India or have received any services in India. This being the case, it is clear that the very first ingredient contained in Article 5(2)(l) is not satisfied. However, the learned Attorney General, relying upon paragraph 42.31 of the OECD Commentary, has argued that services have to be furnished within India, which does not mean that they have to be furnished to customers in India. Para 42.31 of the OECD Commentary reads as under: "Whether or not the relevant services are furnished to a resident of a state does not matter: what matters is that the services are performed in the State through an individual present in that State."

50. *Jebon Corporation India v. CIT* 2012 Taxmann 7 (Kar) held that commercial activities including procuring orders, identifying buyers, negotiating with buyers, agreeing to the price, and requesting them to place an order with the foreign headquarters were not auxiliary or preparatory in nature. The observations and findings of the High Court are eerily similar to the facts of this case:

"Relying on these provisions, it is contended by the assessee that the liaison office was opened to act as a communication channel between the head office at Korea and the parties in India. They have not undertaken any other activity of a trading or commercial or industrial nature nor have they entered into any business contract in their names. They have not charged any commission or any remuneration and they have not earned any such amount in India for liaison activities. The entire existence of the office in India is made exclusively out of the funds of the head office and they have not borrowed any money. They have not acquired any properties. They have no direct commitment with the customers and therefore, it was contended

that the liaison office in Bangalore cannot be considered as a PE so as to attract the provisions of the Act. It is in this background, we have to see what was unearthed in the course of investigation by an investigating agency.

9. The liaison office of the assessee was opened in 1998. The operations of the assessee at Bangalore were carried out pursuant to the approval by the RBI. The liaison office has five employees in all. The South Korean based company is a trader in semi-conductor components manufactured by various companies across the world. In the course of the said survey and investigation, the authorities have recorded the statement of one Sri V. Natarajan, the country manager. He has stated on oath that out of the five employees who are working in the liaison office, three of them are directly related to sales (including him) and two administrative assistants. They also identify new customers by way of their past experiences in the field of sales and sometimes, the customers themselves will enquire with them regarding the products based on the market information. Once this is done, they will fix an appointment with the right person in the organization and try to identify the exact requirement and also to explain the availability of products. After this, the customer will give his requirement based on the products available with them. The customer expects their sales personnel to quote within a reasonable time. After this, the same enquiry is converted into a request for a quotation format to the head office staff responsible for purchase activities from their suppliers in Korea and China. As soon as they get the request for a quotation format fully filled up with price, delivery and specification in Bangalore through e-mail, the sales person who is responsible for generating the enquiry will reply to the customer with a quotation adding the sales margin. They have a thumb rule to calculate the sales margin depending upon the end-use of the product and the competition in the market and the volumes. They get only the buying price from the head office and the margins are decided by the sales team based in Bangalore on a case to case basis depending upon the merits of the case. After this, there will be a negotiation for each enquiry between the customers and the

sales personnel of the office and in some cases, they are able to close the order to the satisfaction of the customer and the head office. In other cases, if the customer is not happy with the price and if he asks for more discount, the personnel at Korea will discuss the same with the suppliers to request for more discount in the price. If the supplier agrees for giving more discount, then accordingly, they quote a new discounted price to the customers and close the deal. After this, if the deal is through they have to process the order. They fill the details in the order processing chart and send the same to the head office through e-mail as an attachment. The purchase team at the head office will process and place the order to the supplier and then wait for the goods to be ready. Once the goods are ready, they will be inspected by the quality control team at the head quarters to ensure that the specifications are properly met. After that the goods are packed and shipped to the freight forwarder appointed by the customer. The same will be shipped directly to the customer by the first available flight or ship. The head office will send a copy of the commercial invoice, packing list and airway bill/bill of lading to the liaison office at Bangalore by e-mail/fax. They in turn send these three documents to the customer. Then the responsibility of getting the goods cleared lies with the customers. The payments will be made by the customer through telegraphic transfer through bank to the head office account at Korea. Their work also involves following up of payments from the customers and offer sales support, if necessary. He has also deposed that they have cent per cent freedom in deciding the margin or selling price provided they are not incurring any loss. It was stated that the marketing man is given the liberty to sell the goods on profit within a band margin of profit and in case any discount is asked then he has to revert back to the head office. Hence, only in those cases where the price quoted by the liaison office is not competitive then they have to revert back to the head office. Sri H.B. Raghumaran who was working as a Senior Engineer (Marketing) has stated that he enjoys full freedom in deciding the price of the material while negotiating with the customer. Once the selling price is arrived at with the customer, he does

not need to discuss with the head office or the organization. He immediately requests the customer to release the purchase order. The annual sales target has also been fixed by the organization.

10. It is on the basis of the aforesaid material, the Tribunal held that the activities carried on by the liaison office are not confined only to the liaison work. They are actually carrying on the commercial activities of procuring purchase orders, identifying the buyers, negotiating with the buyers, agreeing to the price, thereafter, requesting them to place a purchase order and then the said purchase order is forwarded to the head office and then the material is dispatched to the customers and they follow up regarding the payments from the customers and also offer after-sales support. Therefore, it is clear that merely because the buyers place orders directly with the head office and make payment directly to the head office and it is the head office which directly sends goods to the buyers, would not be sufficient to hold that the work done by the liaison office is only liaison and it does not constitute a PE as defined in art. 5 of DTAA. In fact, the AO has clearly set out what was discovered during the investigation and the same has been properly appreciated by the Tribunal and it came to the conclusion that though the liaison office was set up in Bangalore with the permission of the RBI and in spite of the conditions being stipulated in the said permission preventing the liaison office from carrying on commercial activities, they have been carrying on commercial activities.

11. It was further contended that the RBI has not taken any action and therefore, such interference is not justified. Once the material on record clearly establishes that the liaison office is undertaking an activity of trading and therefore entering into business contracts, fixing price for sale of goods and merely because the officials of the liaison office are not signing any written contract would not absolve them from liability. Now that the investigation has revealed the facts, we are sure that the same will be forwarded to the RBI for appropriate action in the matter in accordance with law. But 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."

51. GE contends that the business activities in India must include the authority to conclude contracts for such activities to not be auxiliary or preparatory in nature. This is not necessary. The assessee's reading is based on a misapplication of the principles of Article 5(4)(a) – dealing with agency PE – in the context of Article 5(3) which deals with only fixed place PE. It is indeed correct that neither a dependent agent PE nor a fixed place PE can be constituted if the business activities undertaken are preparatory or auxiliary. However, Article 5(3) makes no mention of the authority to conclude contracts – language that is explicitly used in Article 5(4)(a). Accordingly, reading the conditions as equivalent would erode a key distinction between fixed place PE and agency PE – and it is accordingly recommended that GE's contention should be rejected. This interpretation also accords with the decision of the Karnataka High Court in *Jebon (supra)*.

52. In *Browne & Sharpe Inc. v. Commissioner of Income Tax and Another* 2014 (369) ITR (All), the Allahabad High Court held as follows, in the context of a liaison office operating on behalf of a foreign company:

"14. The disclosures which were made by the assessee before the Assessing Officer clearly indicate that during the year previous to the assessment year in question, the activities of the liaison office were not confined only to being a channel of communication between the Head Office in the US and prospective buyers in India. The activities of the liaison office included: (i) explaining the products to buyers in India; (ii) furnishing intimation in accordance with the requirements of the buyers; and, (iii) a discussion of commercial issues

pertaining to the contract through the technical representative, after which an order was placed by the buyer directly. Apart from this, it is significant that the performance of the personnel in India was, as disclosed by the Chief Representative Officer, judged by the number of direct orders that the assessee received and by the extent of awareness of the assessee that was generated in India. The assessee had an incentive plan, and it is not in dispute, as was disclosed by the Chief Representative Officer, that in the sales incentive plan an employee was allowed to receive upto 25% of its annual remuneration as SIP. Whether or not any incentive was, in fact, paid to an employee during the year in question, is not material. What is relevant is that the nature of the incentive plan would clearly indicate that the purpose of the liaison office in India was not merely to advertise the products of the assessee or to act as a link of communication between the assessee and a prospective buyer but involved activities which traversed the actual marketing of the products of the assessee in India because it was on the basis of the orders generated that an incentive was envisaged for the employees. The assessee sought to explain away the incentive plan by stating before the Assessing Officer that the incentive which was provided for in the letters of the appointment was only "standard language of the appointment letter of the company", which had inadvertently not been deleted from the contract of appointment by the liaison office. Such an explanation was, to say the least, far-fetched because the assessee which has a transnational business with a range of advisors cannot readily be assumed to have committed an inadvertent mistake on an issue as significant as this. The Assessing Officer has quite justifiably declined to accept the explanation."

53. Applying the above standards to the factual matrix at hand, the ITAT concluded that GE's activities in India were not of an auxiliary or preparatory nature. Substantial reliance was placed on e-mail exchanges between employees in India and overseas, the job description of employees in India and their appraisal reports. In the brief before this

Court, GE strongly disagreed with ITAT's characterization of the above sources and provided a point by point rebuttal to ITAT's inferences drawn from various e-mails.

54. The above factual records are too extensive to comprehensively discuss in this section. Nonetheless, as an overall matter, GE is correct that in some instances, ITAT's characterization of certain conversations appears to overstate the importance of the activities in India (for e.g. e-mail chain on Reliance-GT Exhaust Height; e-mail chain on confirmation of RIL PO No. DG8/3389741). Nevertheless, in many other instances, ITAT's decision is sound, and gives rise to the inference that business activities that were not auxiliary or preparatory were taking place in India. (for e.g. e-mail chain on Reliance CS-1 GE Oil & Gas).

55. It would be useful to recapitulate briefly that the tasks performed by some of the employees. Ricardo's Assignment letter showed him to be GE Energy's "Oil & Gas, India Country Leader" the revenue has concurrently stated that he was not merely *"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."* Similarly with respect to Kumar Pratyush, the findings are pertinent and decisive; he was designated 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."

56. The decision of the lower authorities reveal that the process adopted for business development involved four steps: 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. The first step is identification of a market opportunity, involving collection of information, analysis etc. The next two steps are described elaborately as follows:

> "*…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 ld. 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."

57. This court is of the opinion that the process of sales and marketing of GE's product through its various group companies, in several segments of the economy (gas and energy, railways, power, etc.) was not simple. As noticed by the tribunal, entering into contract with stakeholders (mainly service providers in these segments) involved a complex matrix of technical specifications, commercial terms, financial terms and other policies of GE. To address these, GE had stationed several employees and officials: high ranking, and in middle level. At one end of the spectrum of their activities was information gathering and analysis- which helped develop business and commercial opportunities. At the other end was intensive negotiations with respect to change of technical parameters of

specific goods and products, which had to be made to suit the customers. Standard "off the shelf" goods – or even standard terms of contract, were inapplicable. In this setting, a potential seller of equipment – like GE, had to create intricate and nuanced platforms to address the needs of customers identified by it, in the first instance. After the first step, of gathering information, GE had to commence the process of marketing its product, understanding the needs of Indian clients, giving them options about available technology, address queries and concerns with respect to technical viability and cost efficacy of the products concerned and- wherever necessary indicate how and to what extent it could adapt its known products, or design parameters, to suit Indian conditions as well as Indian local regulations. This process was time consuming and involved a series of consultations between the client, its technical and financial experts and also its headquarters. Oftentimes the headquarters too had to be consulted on technical matters. After this consultative process ended and the terms of supply were agreed to, the final affirmative to the offer, to be made by the Indian customer, would be indicated by GE's headquarters.

58. This court is of the opinion that the facts of the present case clearly point to the fact that the assessee's employees were not merely *liaisoning* with clients and the headquarters office. E-mail communications and chain mails indicate that with respect to clients and possible contracts of GE with Reliance CS-1, GE Oil & Gas, Bongaigaon Refinery, Draft LOA for WHRU (E-mail from Andrea Alfani (GE Overseas) to Vivek Venkatachalam (GEIIPL) and Riccardo Procacci (GEII) on proposed e-

mail to send Reliance, including comments to RIL on the proposed letter of acceptance and relevant attachments. Also, asked them whether they wanted to send the e-mail themselves to RIL or for it to be sent directly. These appear to show important role for Vivek and Riccardo in the negotiating process.

59. The e-mail chain on *"CONFIDENTAL: Ad Syst"* contains e-mail from Gioseppe La Moita (GE Overseas). These suggest that Gioseppe La Moita, Renato Mascii (GE Overseas) and Riccardo Procacci (GEII) were in India negotiating the BHEL contract. Rest of the correspondence is not particularly relevant. These suggest that substantive negotiation work on the BHEL contract was done in India by a mix of GE Overseas and GE India team.

60. It is clear that in the kind of activity that GE carries out, i.e manufacture and supply of highly specialized and technically customized equipment, the "core activity" of developing the customer (identifying a client), approaching that customer, communicating the available options, discussing technical and financial terms of the agreement, even price negotiations, needed a collaborative process in which the potential client along with GE's India employees and its experts, had to intensely negotiate the intricacies of the technical and commercial parameters of the articles. This also involved discussing the contractual terms and the associated consideration payable, the warranty and other commercial terms. No doubt, at later stages of contract negotiations, the India office could not take a final decision, but had to await the final word from headquarters. But that did not mean that the India office was just for mute

data collection and information dissemination. The discharge of vital responsibilities relating to finalization of commercial terms, or at least a prominent involvement in the contract finalization process, discussed by the revenue authorities, in the present case, clearly revealed that the GE carried on business in India through its fixed place of business (i.e the premises), through the premises.

61. In view of the above analysis and conclusions, it is held that Question No. 1 is answered in favour of the revenue and against the assessee. They are so found.

Question No. 2

62. With respect to this question of law, the ITAT relied on a two-part framing to see if Agency PE is met, that is para 4 of the DTAA, especially 4(a) lays down framework for when something is an agency PE and the exception to the application of 4(a) laid out in Para 5, which says that the use of 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 shall not be considered Agency PE.

63. Applying the standard to the facts at hand, ITAT recorded in its findings that the expats of GEII and employees of GEIIPL were rendering services to multiple entities. But also, that these expats were dealing on behalf of the major business lines of the GE Group. Accordingly, GE India comprising of expats and other employees of GEIIPL etc., were not working for a particular enterprise, but, for multiple enterprises dealing in one of the three major businesses of GE group. Activities of an agent must be *"devoted wholly, or almost wholly on behalf of that enterprise."* On a

conjoint reading of part 2 of para 5 of Article 5 and Article 3(g), it is apparent that the second part of para 5 refers to an agent looking after the activities of a single enterprise and not multiple enterprises. GE relies on *Varian India (supra)* which held in para 5 it is necessary that the activities of agent must be devoted wholly or almost wholly to one enterprise. Non-disclosure of transactions are not sufficient to establish someone as agent of independent status – there was needed to fulfill both conditions. Furthermore, there also was the need to show that they were not at arm's length practice. Nonetheless, ITAT held that GE India counts as agency PE. An agent of a foreign company is an agent of dependent status even if there is more than one company in the related group. If there are multiple independent customers – you qualify as an agent of independent status. 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.

64. The ITAT opinion focuses on Article 5(4)(a) i.e. the authority to conclude contracts. GE relies on Para 33 of OECD commentary to suggest the understanding of such authority - *"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 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." The revenue responded by clarifying that India had clarified its position that it does not agree with the above portions of Para 33 commentary. The position of India is 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."*

65. The ITAT noted that India's position has a binding effect on all conventions entered after the date – but does not retrospectively apply to conventions entered before the date. And, therefore, the Indian commentary (which serves as a reservation) cannot modify bilateral treaties prior to 2008 such as the US-India DTAA. At the same time, it cannot be said that every line of the OECD commentary is read into the statute by incorporation. ITAT notes that *"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"*.

66. Regarding the OECD commentary this court notices that the position in Para 32.1 runs contrary to Para 33 that GE relies on. Therefore, the assessee cannot selectively quote on certain parts of the commentary – rather, must read the spirit of the entire commentary. The ITAT concluded that as long as the activities of the agent in concluding contracts is not

auxiliary, and at the same time, does not require concluding every single element of the contract. As Italian court noted in *Ministry of Finance (Tax Office) v. Philip Morris (GmBH), Corte Suprema di Cassazione No.7682/02 of May 25 2002*:

> *"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."*

Therefore, GE India's activities clearly constitute activities that would establish agency PE in India

67. As regards the question that whether the position of *Varian India v. ADIT* 2013 (142) ITD 692 (Mumbai) is to be followed in this case, ITAT chose to distinguish that decision since facts of that case are distinguishable. In that case, there were AEs and separate agreements and different payments– this did not occur here (was not able to find proof on whether this is the case – this is ITAT's finding of fact). As regards the level of activity which is required for an agent to have habitually exercised an authority to conclude on behalf of the enterprise, it is necessary to make a reference to the parties' arguments.

68. Counsel on behalf of the Appellant, drawing on OECD commentary, argued that person who is authorized to negotiate all elements and details of a contract which is in a way binding on the enterprise can be said to have exercised this authority. Accordingly, the mere fact, however, that a person has attended or even participated in

negotiations, will not be sufficient. The revenue, on the other hand, suggested that in 2008, India had clarified its position with respect to paragraph 33 of the OECD commentary – suggesting it did not agree with the above sentences. Rather, India's position was that if a person has attended or participated in negotiations in a State between an enterprise and a client, can, in certain circumstances, be sufficient, *ipso facto*, 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.

69. On this question of law, ITAT recorded in its finding that India's comments do not have retroactive application. Further, OECD commentary is not binding, but can only be used as a guidance, they do not form part of the treaty under doctrine of incorporation. This view finds support in the judgment of this court in *Chryscapital Investment Advisors India (P) Ltd v DCIT* 376 ITR 183. Further, the ITAT also relied on para 32 of the OECD commentary which says that lack of active involvement by an enterprise in transactions may be indicative of a grant of authority to an agent.

70. "Lack of" does not mean 'none'. The court notices that since the OECD commentary appears to be contradictory across paragraphs 32 and 33, it cannot be relied upon wholly. The term *"authority to conclude"* does not mean all elements and details, since that would make other portion of the clause redundant – therefore only means that the activity

needs to be core in nature. This is the opinion in *Philip Morris (supra)*, 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.

71. It would be useful to notice the facts and analysis of the law in *Rolls Royce Plc* (supra). The assessee had a local office (LO) in India; the AO determined that it constituted dependent agent PE. Though the dependent agent had no authority to negotiate and enter into contracts for and on behalf of the assessee, it habitually secured orders for RRIL and was its PE. At the same time, this court held that Rolls Royce Plc's presence in India was also a fixed place of the assessee constituting PE. Activity at this fixed place was no auxiliary but was a core activity of marketing, selling, negotiating. RRIL was a sales office for assessee – employees worked wholly and exclusively for assessee and its group. Employees of assessee in India were also present in various locations in India and reported to director of RRIL India. The following extracts of the judgment are indicative of the approach to be adopted wherever the court has to see if the entity has a PE and a dependent agent PE:

> *"…16. After holding that the assessee had business connection in India, the Tribunal adverted to the question as to whether there was any PE in India within the meaning of Article 5 of the Indo-UK DTAA. The Tribunal extracted the provisions of Article 5 and stated the legal position that emerged therefrom. Thereafter, it referred to various documents in para 22 and narrated its effect in detail. Our purpose would be*

served by extracting para 23 of the impugned order which reads as under:-

"23. It is also seen that the appellant has a dependent agent in India in the form of RRIL. The fact that RRIL is totally dependent upon the appellant is not denied.

However, the contention of the appellant is that even though RRIL is a dependent agent and such agency is to be deemed as PE, so long such dependent agent has no authority to negotiate and enter into contracts, under Article 5 (4)*, there is no PE in India. It is to be noted that Article 5* (4) *has three clauses, namely, a, b & c. Thus, even if one has to hold that the dependent agent has no authority to negotiate and enter into contracts for and on behalf of appellant, still as per clause (c) of sub Article (4) , it is found that RRIL habitually secures orders in India for the appellant. It is a set practice that no customers in India are directly to send orders to the appellant in UK. Such orders are required to be routed only through RRIL. This fact is evident from the letter of Mr. L.M. Morgan to Mr. Prateek Dabral and Ms. Usha. In the said letter, it is made clear that even request for quotation/extension could not be communicated directly to the appellant but are to be routed through the office of RRIL. This is applicable even to the orders. The fact is not denied that the orders are firstly received by RRIL from the customers in India and only then communicated to the appellant. Thus, as per Para 4(c) of Article 5 , the dependent agent habitually secures orders wholly for the enterprise itself and hence, is deemed to be a permanent establishment of the appellant. The contention of appellant that the role of RRIL is merely of a post office is, therefore, unacceptable in view of the facts of the case as evidenced by various documents and correspondence found during the course of survey. It can, therefore be summarized that in the light of the facts as well as documents mentioned above, RRIL's presence n India is a permanent establishment of appellant because:*

(a) It is a fixed place of business at the disposal of the Rolls Royce Plc and its group companies in India through which their business are carried on.

(b) The activity of this fixed place is not a preparatory or auxiliary, but is a core activity of marketing, negotiating, selling of the product. This is a virtual extension/projection of its customer facing business unit, who has the responsibility to sell the products belonging to the group.

(c) RRIL acts almost like a sales office of RR Plc and its group companies.

(d) RRIL and its employees work wholly and exclusively for the Rolls Royce Plc and the Group.

(e) RRIL and its employees are soliciting and receiving orders wholly and exclusively on behalf of the Rolls Royce Group.

(f) Employees of Rolls Royce Group are also present in various locations in India and they report to the Director of RRIL in India.

(g) The personnel functioning from the premises of RRIL are in fact employees of Rolls Royce Plc. This has been admitted by the MD Mr. Tim Jones, GM, and can be discerned from statement of Mr. Ajit Thosar and documents like terms of employment of GMS.

Thus, the appellant can be said to have a PE in India within the meaning of Article 5 (1) 5 (2) and 5 (4) *of the Indo UK DTAA. Since we have found that the appellant 496/2008, 497/2008, 498/2008,498/2008 584/2008, 647/2008, 648/2008, 649/2008, 650/2008,663/2008 has a business connection in India as well as PE in India, the income arising from its operation in India are chargeable to tax in India."*

17. We are thus convinced that there is a detailed discussion after taking into consideration all the relevant aspects while holding that RRIL constituted PE of the assessee in India. While undertaking critical analysis of the material on record, the Tribunal kept in mind the objections filed by the assessee as well as the documents on which it wanted to rely upon. Those objections were duly met and answered.

18. We thus, do not find any need to remand the case back to the Tribunal for this purpose which was the plea raised by the learned Counsel for the appellant/assessee. Agreeing with the view taken by the ITAT in the impugned order as well as in the Misc. Application, we answer questions no.2 & 4 against the assessee. As a result, we find no merits in the appeals of the assessee which are accordingly dismissed."

72. In *Varian (supra)*, on the other hand, the assessee's orders were not binding on the VGCs, Varian India has no authority to negotiate or conclude contracts on behalf of VGCs; Varian India did not maintain any cost of analytical instruments supplied by VGCs to customers in India, or title of goods supplied by VGCs was ever transferred to Varian India. It did not keep inventory or regularly deliver goods on behalf of foreign enterprise. For the spare parts, it owns those goods and delivers on its own accounts. Varian India did not secure orders on behalf of VGC – merely introduced and liaised those orders to VGC. These sales orders were not binding on VGCs until accepted by them. Therefore, it was held that it did not habitually accept orders on behalf of the enterprise. Lastly it was not shown to have any authority to conclude contracts on behalf of the enterprise. Interestingly Varian India was not devoted to only a single enterprise – it is devoted to multiple foreign enterprises (each VGC counting as their foreign enterprise).

73. The present case indicates an interesting intersects between the applicability of both Article 5 (1) and (3) on the one hand, and the applicability of the dependent agent – as defined in the treaty (DTAA) principles. Enterprises, we note, do not necessarily organize the business principles on which they function into neat pigeon holes that the DTAAs envision. The ingenuity and innovation of the enterprise – indeed its intangible wealth is to aggregate and maximizing profits in the most efficient manner possible, even while minimizing costs. The DTAAs and indeed tax *regimes* are based on known patterns of such organizational behavior. As Cardozo remarks that at *"Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn".* So the law, or even treaties, which are the result of compact between nations, deal with generalities based on the way institutions behaved in the past, and the way they would presumably behave. At the same time, these general provisions do not cater to all situations, and often courts have to grapple with the kind of intersects which this case demonstrates.

74. The assessee, GE has organized its affairs in such a manner – and one cannot quarrel with its intent, so as to minimize tax incidence in India. Yet, the court's task is not as easy to neatly compartmentalize the analysis of whether the patterns of past decisions result in its establishments constituting fixed place PE or a dependent agent PE. The intricate nature of activities it has carefully designed, where technical officials having

varying degree of authority involve themselves – along with local managerial and technical employees, in contract negotiation, often into core or "key" areas, modification of technical specifications and the negotiations for it, to fulfill local needs and even local regulatory requirements, the complexities of price negotiation, etc. clearly show that the assessee carries out through the PE business in India. These activities also intersect and overlap with the content of the principle of dependent agent, inasmuch it is evident that these agencies work solely for the overseas companies, in their core activities.

75. In view of the above observations it is held that the second question is, therefore, answered in favour of the revenue, and against the assessee.

Question No. 3

76. On this question, the ITAT reasoned and held as follows:

> *"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 ld. 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 ld. 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."

77. The Revenue authorities carried out a two-part analysis on this aspect, i.e. attribution of income based upon the profits derived by the assessee. By this analysis, 10% of the sales income made in India is attributed as the basis of total profits of GE overseas entities in India. Upon that figure, the attribution of profit to the marketing activity, which the Assessing Officer applied, was 35%. In this regard, the contentions of the assessee were that the attribution was arbitrary and high and that the application of principles in *Galileo International Inc. (supra)* were not automatic. Learned counsel had stressed that each case would involve an intensive factual analysis to arrive at a figure that would fit in the concept of total profits accruing to the overseas entities from Indian activities and that the further refinement of that into a broad percentage cannot be a matter of precedent.

78. This Court notices that the analysis carried out by the Revenue – not merely by the ITAT but also by the AO in the assessment order, was after considering the relevant decisions – including *Rolls Royce PLC* – where 35% profits were attributable to marketing activities in India. The AO's findings in this regard are instructive:

"In the case of Rolls Royce, the equipments supplied were highly technical, proprietary and sophisticated, as the same were sold to Defence Department. In this case also, the items are proprietary in nature and R&D has a major role to play in the manufacture of these equipments, therefore, the products in case of GE Overseas entities can be considered similar to that of Rolls Royce and the ratio decision in the case of Rolls Royce will apply to this case also. As was held by Hon'ble ITAT, it is held that 35% of the profits pertain to marketing activities. As the profits earned by the assessee are not available, therefore, guidance is drawn from the provisions of Sections 44BBB and 44B8, wherein the deemed profit is estimated @ 10% of the revenue/ price/ consideration. In all the cases of overseas entities, it is that the assessee has earned global profit of 10% on the sales prices to the customers in India. As held earlier, in these cases, the ratio of decision of Hon'ble ITAT in the case of Rolls Royce is applicable; therefore, it is held that 35% of this profit of 10% is attributable to the PEs of the assessee in India. Due to this, the income chargeable to tax, as attributable to the PEs is computed @3.5% of the sale price.

16.4 The AR vide letter dated 23.12.2008 has claimed that "GE overseas has adequately remunerated GE India Industrial Pvt. Ltd. for local marketing support provided by it. Reference in this regard can be made to remuneration paid by GE overseas to third party independent agents, who provided local marketing support with regard to offshore sales into India. Should you require, we can provide copies of these agreements for your reference? Therefore, even assuming, without admitting that GE overseas has a PE in India, placing reliance on the decision of Supreme Court in the case of DIT vs. Morgan Stanley (292 ITR 416) as affirmed by the Mumbai High Court judgment in the case of SET Satellite (Singapore) Pte. Ltd. vs. DCIT (307 ITR 205), no further profits can be either attributed or taxed in hands of the alleged PE".

This contention of the assessee is not acceptable for the following reasons:

(i) The service agreement between GE Power/ GEIIPL provides for performance of very specific services and which centre around to act as a communication channel between customers and GEIOC or its affiliates. The payment to GEIIPL is on account of those specific services only. As found during survey and discussed in this order, the scope of services of employees' of GEIIPL far exceeds the scope provided in the agreement. More than 40 employees of GEIIPL are providing the services. The assessee was asked to submit the designation and the qualifications of these persons, which could have suggested that these persons are not only support persons, but provide various other type of services with regard to sales by overseas entities.

(ii) The persons of GEIIPL are working under the control and direction of the expatriates and also report to them. Therefore, GEIIPL cannot be considered as an independent person. The agreement does not refer to any such type of reporting structure.

(iii) The agreement has continued to be the same since April, 2001 and the compensation to the GEIIPL is based on a markup of 5% on cost. How could the assessee claim that the payments to GEIIPL are at arm's length always? As discussed in this order, some of the independent entities have operating margin of 14%. Even all the costs in providing the services may not have been captured. Therefore, it is also not acceptable that the transaction with GEIIPL was at arm's length.

(iv) The GEIIPL has not been compensated by the overseas entities to whom it provided the services, but by GEIOC.

(v) The value of international transaction between GEIDC and GEIIPL during F.Y. 2004-05 was Rs.88,415,604/- relating to provision of marketing support services. The information for other years was requested but not submitted. This is the payment, which GEIOC has made to GEIIPL as per the service agreement dated 16.01.2001.

As discussed in this order, the GEIIPL has been remunerated for the activities referred in the services agreement. Such activities agreed in the agreement are very limited in scope and are relating to acting as a communication channel only. But in this order, it has been proved that GEIIPL was performing various activities beyond the scope referred in the service agreement. For such activities, GEIIPL have-not been remunerated and such activities have led to the creation of the PE of the assessee in India and such PE is required to be attributed a profit. This attribution of profits in this order is not only on account of dependent agent PE, but also other types PEs, discussed in this order. In this regard; reference is made to the order of the Hon'ble Apex Court in the case of Morgan Stanley (Supra).

"As regards attribution of further profits to the P.E. of MSCo where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a P.E.) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the P.E. ***The situation would be different if the transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise, in such a case, there would be need to attribute profits to the P.E. for those functions/risks that have not been considered.*** *The entire exercise ultimately is to' ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represent the value of the profit attributable to his service.*

(Emphasis supplied)

Reference is also made to the DECO Commentary on Article 7, which reads as below:

"Where, under paragraph 5 of Article 5, a permanent establishment of an enterprise of a Contracting State is deemed to exist in the other Contracting State by reason of the activities

of a so-called dependent agent (see paragraph 32 of the Commentary on Article 5), the same principles used to attribute profits to other types of permanent establishment will apply to attribute profits to that deemed permanent establishment. As a first step, the activities that the dependent agent undertakes for the enterprise will be identified through a functional and factual analysis that will determine the functions undertaken by the dependent agent both on its own account and on behalf of the enterprise. The dependent agent and the enterprise on behalf of which it is acting constitute two separate potential taxpayers. On the one hand, the dependent agent will derive its own income or profits from the activities that it performs on its own account for the enterprise; if the agent is itself a resident of either Contracting State, the provisions of the Convention(including Article 9 if that agent is an enterprise associated to the enterprise on behalf of which it is acting) will be relevant to the taxation of such income or profits. On the other hand, the deemed permanent establishment of the enterprise' will be attributed the assets and risks of the enterprise relating to the functions performed by the dependent agent on behalf of that enterprise(i.e. the activities that the dependent agent undertakes for that enterprise),together with sufficient capital to support those assets and risks. Profits will then be attributed to the deemed permanent establishment on the basis of those assets, risks and capital; these profits will be separate from, and will not include, the income or profits that are properly attributable to the dependent agent itself (see section 0-5 of Part I of the Report Attribution of Profits to Permanent Establishments)."

In view of the above, the profit is required to be attributed to the deemed PE of the assessee, as held in this order, on the basis of assets, risks and capital of the enterprise relating to the functions performed by the GEIIPL (dependent agent). In view of these facts and position of law, the contention of the assessee regarding applicability of the decision of Hon'ble Bombay High Court in the case of SET Satellite (Supra), is rejected, as the same is distinguishable on facts. Regarding the decision of Hon'ble Apex Court in the case of

Morgan Stanley (supra), this decision supports the position taken by this office. Without prejudice to this finding, it is also stated that the overseas entities have fixed place PE (because of presence of expatriates) and also construction PE in India and profits for all the PEs have been attributed by taking them together.

16.5 It is stated that the assessee cannot take a plea that the payments to GEIIPL, requires to be allowed as deduction from the profits worked out in this order, because the global expenses including expenses incurred in India have already been considered while working out the profits. Once the profits are worked out, the expenses cannot be allowed further, because it will lead to double allowance of the expenses. It is not the revenue, which is attributed in this case, but the profits, which takes care of global expenses, including Indian expenses.

16.6 On the basis of discussions in the order, I am satisfied that it is a fit case for initiation of penalty proceedings u/s 271(1)(c) the Act.

17. The total sales of the assessee in India during the year are ofRs.199,806,676/-. The profit @3.5% of the same works out to Rs.6,993,234/-. This is taxable as business income."

Assessed u/s 143(3) of the Act at income Rs.6,993,234/- at the applicable tax rate, surcharge and ed. cess. Charge interest u/s 234A, 234B and 234C of the Act.

Issue penalty notice u/s 271(1)(c) of the Act. Issue necessary forms."

79. We notice that in *Galileo International Inc. (supra)* as well as in *Hukum Chand v. UOI* 1976 (103) ITR 548, it was stressed that what are the proportions of profit of sales attributable to the profits carried on in a national jurisdiction is essentially where all facts are dependent upon circumstances of the case. It was further noticed in these decisions that

absence of statutory or other formal framework render the task dependent on some extent on guess work and that the endeavor will only be to approximate the correct figure. The Court stated in *Hukum Chand (supra)* that "*there cannot in the very nature of things great precision and exactness in the matters. As long as the attribution fixed by the Tribunal is based upon the relevant material, it should not be disturbed."*

80. Having regard to the conspectus of facts in this case and the findings of the lower Revenue authorities – including the AO and the CIT(A), both of whom have upheld the attributability of income to the extent of 10% and apportionment of 3.5% of the total values of supplies made to the customers in India as income, the Court finds no infirmity with the findings or the approach of the Tribunal in this regard. This question too is answered against the assessee and in favor of the Revenue.

81. On account of the foregoing reasoning and since all questions of law have been answered against the assessees, these appeals have to fail and are consequently dismissed but without orders as to costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

DECEMBER 21, 2018