

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

**BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER
AND SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No. 1321/Del/2015
AY: 2011-12**

Kawasaki Heavy Industries Ltd.
507, 508 and 509, 5th floor
Meridian Tower, Windsor Place
New Delhi 110 001

vs. ACIT, Circle 2(1)(2)
International Taxation
Room no.310
3rd floor, E 2 Block
Prayaksh Kar Bhawan
Civic Centre, JLN Marg
New Delhi 110 002

(Appellant)

(Respondent)

Appellant by : Sh. Piyush Kaushik, Adv. and
Sh. Jasvinder Singh, C.A.

Respondent by : Sh. Anuj Arora, CIT, D.R.

ORDER

PER J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

This is an appeal filed by the Assessee directed against the final assessment order passed by the Assessing Officer (AO) u/s 144(13) r.w.s. 143 of the Income Tax Act 1961 (the Act) pertaining to the Assessment Year (A.Y.) 2011-12.

2. Facts in brief:- The assessee company is engaged in diversified business of ship building, consumer product such as motor cycles and all-terrain vehicles. It also manufactures personal water craft, ships, industrial plants, tractors, trains, small engines, and aero space equipment (including military air craft), sub contract work on jet air craft (including

jumbo jets) Boeing, Embracer, and Bombardier. The assessee has two subsidiaries in India by the name of Wipro Kawasaki Precision Machinery Pvt.Ltd. and India Kawasaki Motors Pvt.Ltd.

3. The grounds on which the appeal is filed before us are as follows.

“1. That on the facts and in the circumstances of the case and in law, the final assessment order passed by the Ld. Assessing Officer ("Ld. AO") in pursuance to the directions as issued by the Learned Dispute Resolution Panel ("Ld. DRP") is a vitiated order as the Ld. DRP has erred both on facts and in law in confirming the addition made by the Ld. AO to the appellant's income.

Appellant does not have a Fixed Place Permanent Establishment ("PE") in India :

2(a). On the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in holding that the Liaison Office ("LO") of the appellant in India results in creation of a Fixed Place PE of the appellant in India by wrongly alleging that the core business activities of the appellant are carried out through the LO and assessing the income at INR 76,03,04,690.

(b) On the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in holding that the Liaison office ("LO") of the appellant LO was engaged in the core functions of the appellant which were essential to be performed for the conclusion of the customer agreement and not merely preparatory and auxiliary activities.

(c) On the facts and in the circumstances of the case and in law, Ld. AOIDRP erred in holding that the appellant has filed false declaration before the Reserve Bank of India ("RBI") as the LO was intended to work as fully functional branch office and further holding that such information was also withheld from the Income Tax Department.

(d) On the facts and in the circumstances of the case and in law, Ld. AOIDRP very grossly erred in misinterpreting the Power of Attorney granted to the person in charge of the LO and held that the Chief Representative Officer of the LO has been granted wide powers to negotiate and conclude contracts with the customers which would be binding on the appellant and the Power of Attorney executed in favour of the Chief Representative Officer grants unfettered powers to do or act for and on behalf of the appellant.

(e) On the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in observing that the employees of the La possessed specialised knowledge of various technical activities which were not necessary for the liaisons and auxiliary functions and that these employees are not expedient for functioning of the LO.

(f) On the facts and in the circumstances of the case and in law, Ld. AO/DRP very grossly erred in holding that the visiting employees of the appellant used the place of business in India at the disposal of the appellant i.e. the LO, through which business of the appellant is being wholly or partly carried on.

(g) On the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in holding that for the income producing operations, no remuneration is being made to the La apart from the reimbursement of its expenses.

Treatment of supplies from outside India to Customers as business profits taxable in India in terms of Article 7 of the India-Japan DTAA

3. (a) On the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in holding that the sale of equipments concluded outside India were done through the Fixed Place PE (i.e. the LO) of the appellant in India ignoring the fact that there does not exist a Fixed Place PE of the appellant in India in the first place and attributing income of Rs.10,58,87,057 in this regard.

(b) On the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in holding that except manufacturing all other functions like market survey, market research, customer education, marketing, training, price negotiation, contract conclusion, procuring orders, delivery, installation of equipments etc. relating to the business enterprise of the appellant are carried out in India.

(c) On the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in holding that the judgment of Hon'ble Supreme Court in the case of the *Ishikawajima Harima Heavy Industries vs DCIT 288 ITR 408* is not applicable in the case of the appellant without stating reason for the same.

(d) That on the facts and circumstances of the case and in law, Ld. AO/DRP have failed to appreciate that income from off-shore supplies can under no circumstances be subject to tax in India.

Taxability of Fees for Technical Services under section 44DA of the Act considering it to be effectively connected to the alleged PE in India

4(a) On the facts and in the circumstances of the case and in law, Ld. AO erred in holding that the entire technical services income was taxable under section 44DA of the Act considering it to be effectively connected with the alleged Fixed Place PE and attributing income of Rs. 65,44,17,631 in this regard.

(b) On the facts and in the circumstances of the case and in law, Ld. AO erred in taxing the part of the fee for technical services arising from engineering services which were wholly carried outside of India and in Japan amounting to Rs.59,51,08,254 as being effectively connected to the alleged PE in India.

(c) On the facts and in the circumstances of the case and in law, Ld. AO erred in ignoring the fact that the amount of INR 70,92,129 appearing as income received from a customer was never received by the appellant without independently verifying the same.

(d) That without prejudice in any manner to the aforesaid grounds, the AO has very grossly erred in computing income from fees for technical services by allowing expenses at a meager rate of 0.02% of gross amount of receipt.

Attribution of profits to alleged PE should be in line with the transfer pricing principles and not on ad-hoc basis.

5.(a) On the facts and in the circumstances of the case and in law, Ld. AO/DRP has grossly erred in attributing ad-hoc profits to the alleged PE in India without having regard to Transfer Pricing ("TP") principles.

(b) On the facts and in the circumstances of the case and in law, Ld. AO/DRP has grossly erred in attributing profits to the alleged PE as only the revenue/profit attributable to the alleged PE ought to have been considered instead of considering the end customer revenue earned by the appellant from provision of services.

(c) On the facts and in the circumstances of the case and in law, Ld. AO/DRP has grossly erred in attributing 60% of the gross profits margin (based on the consolidated financials of the head office, which also includes profit for activities such as manufacturing, research, services etc.) in relation to goods supplied by HO in India to the Indian LO.

Levy of interest under the Act

6. The Ld. AO/DRP erred in law and on the facts and circumstance of the case by directing to levy the interest under section 234A, 234B and 234C of the Act.

Initiation of penalty proceeding

7. The Ld. AO erred in law and on the facts and circumstance of the case by initiating penalty proceedings under section 271(l)(c) of the Act for furnishing inaccurate particulars of income and concealment of income.

The Appellant craves leave to add, alter, amend, vary or rescind any of the above grounds either before or at the time of hearing in the interest of natural justice."

4. Mr.Piyush Kaushik, the Ld.Counsel for the assessee submitted that ground no.1 is general in nature. Ground no.2 pertains to the issue whether the liaison office (L.O.) of the assessee constitutes Permanent Establishment (P.E.) of the assessee in India. Ground no.3 is on the issue of attribution of business profits to the P.E. in India in terms of Article 7 of the India Japan Double Taxation Avoidance Agreement (DTAA), and ground no.4 is whether the fee for technical services earned by the assessee can be considered as effectively connected with the fixed place P.E. and attribution of income thereof. Ground no.5 is : contribution of profits should be in line with transfer pricing principles and not on adhoc basis. Ground no.6 is

against levy of interest u/s 234B of the Act and ground no.7 is against initiation of penalty proceedings.

5. The Ld.Counsel for the assessee laid emphasis on ground no.1 and argued that,

(a) The assessee opened a liaison office (hereinafter referred to as 'L.O.') in India with prior permission from Reserve Bank of India and the conditions laid down therein are complied with.

(b) The activities of the LO are only preparatory/auxiliary in nature and the L.O. is not authorised to discuss the terms of contract or to bind the head office or to initiate contracts.

(c) That the LO was opened only to act as a communication channel for its head office.

(d) that various evidences on sample basis were submitted before the A.O. to demonstrate that the L.O. was not involved in execution of any contracts etc. and that the purchase orders were directly raised by the Indian customers on the head office and that quotations and invoices were directly sent by the head office to the Indian customers and were signed/executed directly by head office without any involvement whatsoever of the LO in India.

(c) That the assessee does not have a Fixed Place Permanent Establishment (P.E.) in India and that the L.O. is not a P.E.

6. The basis for the A.O. as well as the D.R.P. to come to a conclusion that the assessee has a P.E. in India, was the interpretation placed by them on clauses in the power of attorney granted by the assessee, to the person in charge of the L.O. in Delhi. He took this Bench through the various Clauses of the power of attorney and submitted that these are restricted and limited power granted for the purpose of functioning of the L.O. and that no unfettered powers were granted to the person in-charge of the L.O. He argued that there were out right ostensible fallacies in the A.O's conclusions and the document was not considered as a whole. He pointed

out that the liaison office is engaged only in preparatory/auxiliary activities and this fact was supported by evidences filed by the assessee before the Revenue authorities and that the A.O. has not recorded any adverse finding of these evidences, nor could the A.O. refer to any documents or evidence to contradict the facts put forward by the assessee.

6.1. He argued that the findings that the L.O. of the assessee is carrying out the entire business activity is not based on any evidence or document, and the allegation that the assessee has violated the terms and conditions laid down by the Reserve Bank of India, while permitting opening of L.O., is perverse. He submitted that the finding as to whether the assessee had violated the conditions stipulated by the RBI and whether false declarations were given to the RBI, is matter to be decided by the RBI and not by the A.O. Reliance was placed on the following case laws.

- (i) DIT vs. Nokia Networks OY (2013) 358 ITR 259 (Del.)
- (ii) Mitsui & Co.Ltd. vs. ACIT (International Tax) 114 TTJ (Del) 903
- (iii) Motorola Inc. Vs. DCIT 95 ITD 269 (Del)(SB)
- (iv) Jebon Corporation India 127 TTJ (Bang) 98 (2009)

6.2. On the issue of tax on the off shore supplies made by the assessee, he submitted that, as the assessee has no P.E. in India, the question of attribution or bringing to tax the income from the off shore supplies made from Japan does not arise.

6.3. Without prejudice to the above, it was submitted that, even if it is assumed that there is a P.E., off shore supplies cannot be said to be effectively connected to the P.E. in India. He submitted that the copies of invoices along with shipping documents of supplies demonstrate that they were made on principal to principal basis. He submitted these copies to the A.O. and pointed out that all supplies were made on delivery terms outside India and payments for supplies were also received outside India. It was submitted that substantial amount of off shore supplies were made either on Free on Board (FOB) basis or ex-works basis.

6.4. He further argued that the A.O. was making totally a wrong allegation at para 6.3 of his order stating that, except manufacturing, all other functions like market survey, market research, customer education etc. are carried out in India and thereafter made a hypothetical determination of 60% of the profits from sales as attributable to the P.E. in India.

6.5. He relied on the decision of Hon'ble Supreme Court in the case of Ishikavajimaharima Heavy Industries Ltd. vs. DIT (2007) 288 ITR 408 (S.C.) as well as the judgement of the Apex Court in the case of CIT vs. Hyundai Heavy Industries Co.Ltd. (2007) 291 ITR 482 (S.C.) for the proposition that only such part of income as is attributable to the operations carried out in India is to be subjected to Indian tax and that off shore suppliers are to be excluded.

6.6. He also relied on judgements of the Jurisdictional High Court in DIT vs. Nokia Networks OY 358 ITR 259 (Delhi) and DIT vs. Ericsson AB (2012) 343 ITR 470 (Del.) wherein it is laid down that, in case of transaction of sale of goods, the determinative factor would be as to whether the property in goods would pass in India or not. Once the sale has taken place outside India, then even in case of a composite contract, the supply is to be excluded from taxation.

6.7. On taxability of fee for technical services (FTS), he submitted that the assessee committed an error by filing his return of income in as much as, the income from FTS was not disclosed in the return of income. He submitted that the entire FTS received Rs.65.44 crores is taxable in the hands of the assessee on gross basis @ 10% in accordance with Article 12 of the Indo Japan DTAA.

6.8. On a query from the Bench he submitted that the detailed note would be filed by him giving the amount that is taxable in the hands of the assessee in view of this admission.

6.9. The Ld.Counsel disputed the findings of the AO that any part of the FTS is effectively connected with the P.E. He submits that he is not pressing ground no.4(c) and that on the balance of Rs.59,51,08,254/- the entire activities were carried out in Japan and that no part of the activity is undertaken in India and hence no portion of the profits earned from FTS can be attributable to the P.E. He took this Bench through the purchase orders of Afcons Gunanusa Joint Venture (AGJV) and that of Larson & Toubro Ltd. (Engineering and Construction division) to demonstrate that the FTS in question is not attributable to the activity of the L.O. He vehemently contended that no amount can be brought to tax in terms of Article 7.

7. In ground no.5, the assessee did not make any submissions on the ground that the attribution of profits to the alleged P.E. should be in line with the transfer pricing principles and not on an adhoc basis. On the levy of interest the Ld.Counsel argued only against the levy of interest u/s 234B of the Act and has not argued on other levies. He relied on the decision of Jurisdictional High Court in the case of Director of Income Tax (International Taxation) vs. G.E. Packaged Power Inc. In ITA 352/2014 judgement dt. 12.1.2015. No other issue has been argued before us.

8. The Ld.D.R. Mr. Anuj Arora on the other hand controverted the arguments of the Ld.Counsel for the assessee and submitted that the so called L.O. in India is conducting core business activity. He submitted that salaries of 41.8 lakhs and 54 lakhs per annum are being paid to the employees in the L.O. and that though no adverse view can be taken keeping in view the quantum of salaries, he submitted that it is an indicator of the nature of functions rendered by the employees and that it is not merely for the purpose of news paper reading and report collection and that the employees are doing something more. He relied on the order of the AO as well as that of the DRP and submitted that a bare perusal of the power of attorney granted to the employees of the so called L.O. by the assessee

company permits core business activity and it is not restricted to L.O. specific activity. He argued that even otherwise, the stand of the Revenue that the employees of the assessee company in the L.O. are doing core business activity, is not contradicted by the argument that the power of attorney is L.O. specific. He relied on para 4.2 to para 4.9 of the AO's order and para 3.3 of DRP order.

9. On the arguments of the assessee that the findings of the AO that the conditions laid down in the RBI permission were violated and that the assessee has filed false compliance report with the RBI etc. are wrong and that it is not within the jurisdiction of the AO to give such a finding, he submitted that if an auditor certificate is taken as say all, then the requirement of investigation agencies such as Income Tax authorities etc. would not be there. He submitted that the AO can always verify whether the terms and conditions mentioned or stipulated by the RBI have been followed by the assessee. On the issue of taxability of sales he relied on the order of the AO. On FTS he pointed out that it is a composite contract and in the case of Afcons Gunanusa Joint Venure, the amount payable on FTS is a small portion as compared to the supplies. He submitted that these are composite contracts and cannot be segregated. He relied on the decision of the Hon'ble Supreme Court in the case of M/s Hindustan Ship Yard Ltd. vs. State of Andhra Pradesh judgement dt. 20.7.2000. On interest levied u/s 234B he relied on the order of the DRP. He pointed out that the assessee has not pressed ground no.4C and has not argued ground no.5 in the appeal and hence no specific reply is given. He submitted that some of the contracts were signed by highly qualified persons of the assessee company when they were in India for this purpose. He argued that qualified persons of the assessee company rendered Technical Services in India for more than 240 days and hence to say that FTS is not effectively connected with the P.E. is not the correct proposition of law.

9.1. The Ld.Counsel for the assessee on the other hand rebutted these arguments and submitted that in case of L&T, there is no element of supply

and the module design and the work was done outside India. On the issue of place of signing of the contract being India, it was submitted that the Hon'ble Supreme Court had held that this is of no consequence.

10. Rival contentions heard. On a careful consideration of the facts and circumstances of the case and on perusal of the papers on record, orders of the authorities below we hold as follows.

11. A perusal of the order of the AO as well as the DRP takes us to a conclusion that the sole basis on which they had come to a conclusion that the assessee had a P.E. in India is the clauses in power of attorney executed by the head office in favour of its employee in the L.O. in India. Reliance was also placed on the permission granted by the RBI to the assessee for setting up the L.O. For ready reference both these are extracted herein below.

11.1. The Power of Attorney is at page 276 of the paper book which is extracted hereunder.

“ KNOW ALL MEN BY THESE PRESENTS THAT the undersigned Kawasaki Heavy Industries Ltd., a company duly organized and existing under the laws of Japan and having its registered office at 1, Higashikawasakicho, 3- Chome, Chuo-ku, Kobe -65091 (hereinafter called KHI) duly represented by its Board of Directors, does hereby constitute and appoint Mr. Takao Suto holding Passport No. T.10453120, the true and lawful attorney/local representative of KHI for and in the name of and on behalf of KHI to do or execute all or any of the acts and things hereinafter mentioned.

1. To open and establish a Representative Office and/or Branch Office(s) of KHD in India (hereinafter called "the Liaison Office") and for the purpose sign and execute any rental agreements for office premises, residential premises, and for equipment's and services, undertaking or any other documents as may be necessary in the ordinary course of operation of the Liaison office, with any person including Municipal Bodies, State, and Central Government of India.

2. To open current account with a bank or banks in the name of the Liaison Office, and to make, draw, sign, endorse, accept, negotiate and realize (a) the case may be) cheques and perform such acts, deeds am things as may be necessary for operation of accounts with such banks.
3. To sign and execute contracts for the purchase of items required for the operation of the Liaison Office.
4. To sign bills of lading, orders for delivery of goods, forwarding notes, railway receipts, custom house wan ants, letter and correspondence in respect of the activities of the Liaison Office.
5. To negotiate, carry on correspondence with any association, Bank, corporation, firm, municipality, local or public body, department of the State and the Central Government including electricity, railway, excise, customs, industry, revenue, telephone telex, facsimile, postal authority, et; and execute, sign, verily and file all applications, agreements, deeds, documents, including guarantees, security papers that may be required or deemed proper for the operation of the Liaison Office.
6. To apply for, obtain and renew all licenses and permits that may be necessary for carrying on activities of the Liaison Office, and to undertake and fulfil all procedural formalities pertaining thereto, including making and filling of all applications, affidavits and giving necessary undertakings where required.
7. To file applications, documents and undertake follow-up thereof, with the Reserve Bank of India, Ministry of finance and any other authority for setting up the Liaison Office and to do all acts or things) essential l thereto.
8. To withdraw and receive papers, documents or such other instruments from any office, Bank, department of the government or any other person or public body and to give proper receipt and discharge therefore.
9. To employ and or disc large employees, to appoint or engage an agent or agents for in the name of the Liaison Office.
10. To appoint Attorney at law to represent KHI before governmental and judicial bodies and to take such legal action as may be necessary or appropriate to protect the interests of the Liaison Office; and
11. To generally represent and act in the name and behalf of KHI in all matters arising out of related to the establishment and functioning of the Liaison Office. KHI is hereby declares that every act, deed, which shall be

signed, executed made 01' done by the said attorney shall be as good, valid and effectual to all intents and purposes whatsoever as if the same had been signed, delivered, exercised , made or done by KHI itself.

KHI hereby ratifies, confirms and agrees at all times to ratify and confirm whatsoever the said attorney shall lawfully do or cause to be done by virtue of these presents.

The foregoing Power Attorney shall remain in full force and effect until revoked in writing.

IN WITNESS WHEREOF, the undersigned has caused this instrument to be duly executed on this 16th March, 2011.

*Sd/-
Mitsutoshi Takao
Senior Vice President
Representative Director
Kawasaki Heavy Industries, Ltd.”*

(Emphasis ours)

11.2. The RBI permission reads as follows.

*FE.CO.FID/ 10.96.545/2005-06
By Air Mail/Regd.A.D.*

*M/s Kawasaki Heavy Industries Ltd.,
1, Higashikawasakicho 3 – Chrome
Chuo-Ku, Kobe 650-91, JAPAN.*

Dear Sirs,

Permission to establish Liaison Office in India.

Please refer to your consultant's letter dated 16th October,2006 on the captioned subject.

2. Having noted from the documents furnished therewith that your company is engaged in the activity of manufacturing transportation equipment and industrial goods, Reserve Bank of India hereby grants you permission under Foreign Exchange Management Act (Establishment in India of a Branch or Office or other place of business), Regulation 5 of Notification No. FEMA/22/2000-RB dated May 3, 2000 for establishing Liaison Office in India at New Delhi, initially for a period of three years, for the purpose of undertaking solely liaison work related to the activity mentioned above, i.e. to

act as a communication channel between Head Office and parties in India. In the event that you propose to shift your Liaison Office to any other city you should seek prior approval from Foreign Exchange Department, Central Office, RBI, Mumbai.

3. Please note that this permission has been granted subject to the conditions mentioned in the Annexure.

4. Please note to furnish to us the postal address of your Liaison Office in due course for our record. Please also note to address the correspondence in future to:

The General Manager, Foreign Exchange Dept.
New Delhi Regional Office, RBI
6 Sansad Marg, P.B.No.696
New Delhi 110 001

5. Please acknowledge receipt.

Yours faithfully,
Sd/-
(Deepti B Raj)

Annexure:

M/s Kawasaki Heavy Industries Ltd.

i. Except the proposed liaison work, the office in India will not undertake any other activity of a trading, commercial or industrial nature, nor shall it enter into any business contracts in its own name without our prior permission.

ii. No commission/fees will be charged or any other remuneration received/income earned by the office in India for the liaison activities/services rendered by it or otherwise in India.

iii. The entire expenses of the office in India will be met exclusively out of the funds received from abroad through normal banking channels.

iv. The office in India shall not borrow or lend any money from/to any person in India without our prior permission.

v. The office in India shall not acquire, hold (otherwise than by way of lease for a period of not exceeding five years) transfer or dispose of any immovable property in India without obtaining prior permission of the RBI under the Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulations, 2000.

vi. The office in India will furnish to our Regional Office (on an yearly basis) a certificate from the auditor that the office has complied with the terms and conditions stipulated in the letter of approval issued by the RBI and that all the expenses are met by way of inward remittances. In the case of winding up of the office, you may approach Regional Office with the documents as required in terms of Regulations 8(1)(iii) of Notification no.FEMA 13/RB-2000 dated 3rd May, 2000.

- vii. *The office in India shall not render any consultancy or any other services directly/indirectly, with or without any consideration.*
- viii. *The office in India will not have any signing/commitment powers, except than those which are required for formal functioning of the office, on behalf of the head office.*
- ix. *In case you desire to open a head office account in the books of your liaison office in India, we hereby grant you our approval to maintain such an account subject to the conditions that the credits to the accounts should represent the funds received from head office through normal banking channels for meeting the expenses of the office. Debits to this account could be raised only for meeting the local expenses of the office.*
- x. *The activities/affairs of these offices may be verified/examined by RBI by carrying out a scrutiny as and when found necessary.*

11.3. A plain reading of the clauses in the power of attorney takes us to a conclusion that the powers given therein are L.O. specific. The AO's conclusion that the power of attorney granted unfettered powers to its L.O. employee, to do all or any acts for and on behalf of the assessee, is incorrect. In our view the finding of the AO that the power of attorney is an open ended document, which is clearly outside the scope of initial permission granted by the RBI is also perverse. No doubt the AO can investigate, call for evidences and come to a conclusion where any income earning activity has been carried out by the L.O. so as to construe it as fixed P.E. but, in our view it is beyond the jurisdiction of the AO to adjudicate and conclude that the assessee has filed false declarations before the RBI. At best, he can bring his findings to the notice of the RBI which may consider the same in accordance with law. The RBI has not found any violation of conditions laid down by it while permitting the assessee to have an L.O. In such circumstances, no adverse inference can be drawn.

11.4. Having come to conclusion that prima facie a reading of the power of attorney does not demonstrate that the employees of the assessee at the L.O. are authorised to do core business activity or to sign and execute contracts etc., we now examine whether the AO has brought out any documentary evidences in support of his contention that the assessee has a P.E. in India. The assessee has furnished before the AO as well as before

the DRP numerous documents, in support of his contention that all purchase orders would be raised directly by the Indian Customers on the Head Office of the assessee and that the Head Office had directly send quotations/invoices to its Indian customers and that these were signed and executed directly by the head office, without any involvement whatsoever by the LO in India. The AO has not given any adverse finding on the evidences filed before him nor did he point out from the evidences filed, as to why the claim of the assessee is not acceptable. There is no adverse comment by the D.R. on these voluminous evidences filed before us by the assessee to demonstrate that it does not have a P.E. in India. The AO has also not brought on record any material, other than his interpretation of the terms of the power of attorney, to demonstrate that the L.O. is carrying on core business activity warranting his conclusion that the assessee has a P.E. in India. Thus neither the documents produced by the assessee are rebutted by the Revenue, nor the Revenue has brought on record any evidence in support of its contention.

12. Thus we have to necessarily hold that the Revenue could not demonstrate that the assessee has a P.E. in India. Hence we allow ground no.1 of the assessee.

13. As we have held that the assessee has no P.E. in India, we need not adjudicate the grounds raised by the assessee on the issue of attribution of business profits to the P.E. in India. Thus ground no.3 is not adjudicated as it is consequential in nature to our finding in ground no.2.

14. This brings us to the issue of taxability of fee for technical services. The Ld.Counsel for the assessee has conceded before us that the entire FTS of Rs.65.44 crores is taxable in the hands of the assessee. This issue is set aside to the file of the A.O. for fresh adjudication, de novo in accordance with law.

14.1. The Ld.Counsel for the assessee did not press ground no.4(c) of the grounds and hence it is dismissed as such.

14.2. The Ld.Counsel for the assessee submitted that the entire FTS receipts earned by the assessee is subject to tax @ 10% as per the Double Taxation Avoidance Agreements (DTAA) rates. The A.O. shall consider this claim in the denovo assessment proceedings on this issue of taxation of FTS receipts.

14.3. The assessee was aggrieved by the finding of the A.O. that the entire FTS receipts are attributable to the P.E. As we have held that the assessee has no P.E. in India, we have to necessarily vacate the finding of the A.O. that the FTS in question is attributable to the P.E. The assessee raised other alternative contentions without prejudice to his main contention that the assessee has no P.E. in India. These alternative contentions have to be dismissed in view of our finding that the assessee has no P.E. in India.

15. Ground no.5 raised on attribution of profits is dismissed as not pressed as the assessee has not argued the same.

16. Ground no.6 is against the levy of interest. The assessee argued only against levy of interest u/s 234B. Thus the ground against levy of interest u/s 234A and 234C is hereby dismissed.

16.1. Coming to interest levied u/s 234B the issue is adjudicated in favour of the assessee by applying the decision of the Jurisdictional High Court in the case of DIT vs. Jacobs Civil Inc. 330 ITR 578 (Del.) and Director of Income Tax (International Taxation) vs. G.E. Packaged Power Inc. judgement dt. 12.1.2015 in ITA no.352/2014 and other batch of cases.

17. Ground no.7 is against the initiation of penalty u/s 271(1)(c) of the Act. This ground is dismissed as not pressed.

18. In the result the appeal of the assessee is allowed in part.

Order pronounced in the Open Court on 11th February, 2016.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(J. SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the 11th February, 2016

- *Manga*

Copy forwarded to: -

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

By Order,

ASSISTANT REGISTRAR