IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Vikas Awasthy (Judicial Member)]

ITA Nos. 386/Mum/2016, 1836 and 7174/Mum/2017, 53,7739 and 7740/Mum/19
Assessment year: 2011-12 to 2016-17

Gemological Institute of America Inc. …….……Appellant
10th floor, Trade Centre, Bandra Kurla Complex
Bandra (E), Mumbai 400 051 [PAN: AADCG7962K]

Vs.

Additional Commissioner of Income Tax
International Tax Circle 2(3), Mumbai ……Respondent

Appearances by

J D Mistry, Senior Advocate,
along-with **Neeraj Sheth and K K Ved** *for the appellant*

Sanjay Singh, Commissioner (DR) *for the respondent*

Date of concluding the hearing: : February 3, 2021
Date of pronouncement of the order : April 30, 2021

O R D E R

Per Pramod Kumar, VP:

1. These six appeals pertain to the same assessee, involve some common issues, and were heard together. Therefore, all six appeals are being disposed of by a consolidated order as a matter of convenience.

2. While almost all the issues in these appeals are stated to be fully covered by a decision of the coordinate bench, in the assessee's own case for the assessment year 2010-11 [reported as **Gemological Institute of America Inc Vs. ACIT [(2019) 178 ITD 620 (Mum)],** there is one issue that is required to be decided by us on the first principles, and that is concerning the impact of Advance Pricing Agreement being signed by the assessee's Indian associated enterprises, namely GIA India Laboratory Pvt Ltd, with the Central Board of Direct Taxes, in terms of which a part of the royalty received by the assessee company from its Indian AE had to refund to the Indian AE. As learned representatives fairly agree, the short question requiring our adjudication, on this point, is whether the amount so refunded by the assessee company to its Indian AE, in terms of the APA terms, can still be taxed in the hands of the assessee company as its income. As learned representatives fairly agree, that is

the core issue requiring our adjudication, even though learned CIT(DR) puts it rather differently as whether, given the framework of law on transfer pricing, any such adjustment in royalty income can be allowed to the assessee as a result of an APA to which the assessee is not even a party. Whichever way one looks at it, the core issue really is whether or not the quantification of royalty income in the hands of the assessee will stand reduced by the refund granted by the assessee tin terms of the APA that the assessee's AE has entered into with the CBDT. Revenue is fiercely resisting this claim, for the reduction in the taxable income of the assessee, on technicalities as also on merits. We will take up this issue first. While related ground of appeal for all the assessment years before us are materially similar even if not rather satisfactorily worded, except for the changes in figures, we are reproducing below the related ground of appeal for the assessment year 2011-12 for ready reference:

8:0 <u>Re: Taxation of royalty income at Rs. 49.08,99,451</u>

8:1 The Appellant submits that the amount taxable in terms of Article 12(2) of the India-USA Double Taxation Avoidance Agreement [DTAA] should be restricted to Rs.49,08,99,45l/ which is in accordance with the Advanced Pricing Agreement ["APA"] dated 07 May 2018 entered into by GIA India Laboratory Private Limited.

8:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty taxable in its hands in its hands for the year under consideration should be restricted to Rs. 49,08,99,451/- in accordance with the APA.

8:3 The Appellant submits that the Assessing Officer be directed to consider the royalty income worked out in terms or the APA and to re-compute its total income and tax thereon accordingly.

3. The issue in appeal lies in a narrow compass of material facts. The assessee before us is a US based company, and it has an associated enterprise (AE) in India, by the name of GIA India Laboratory Pvt Ltd (**GIA-India**, in short). During the financial period relating to the assessment years 2011-12 to 2016-17, the assessee received the following amounts as royalties from the said AE, i.e., GIA-India:

Assessment year		**Amount (In INR)**
2011-12	(Financial year ended 31st March 2012)	68,53,46,239
2012-13	(Financial year ended 31st March 2012)	79,48,51,211
2013-14	(Financial year ended 31st March 2012)	141,39,35,180
2014-15	(Financial year ended 31st March 2012)	157,13,38,680
2015-16	(Financial year ended 31st March 2012)	288,71,40,778
2016-17	(Financial year ended 31st March 2012)	261,86,26,595

4. The royalties so received by the assessee company were duly offered to tax, under article 12 of the India US Double Taxation Avoidance Agreement [(1991) 187 ITR (Stat)

102; **Indo US tax treaty**, in short], @ 15% on a gross basis. While the authorities below had no issues about the quantum of income so offered to tax, there were certain issues with regard to the manner in which the said income is to be taxed as the stand of the authorities below has been that the assessee had a permanent establishment of the assessee in India, and the royalties so offered to tax, being attributable to such a permanent establishment, are liable to be taxed on a net basis under article 7 of the Indo US tax treaty. While we are not really concerned with the merits of that aspect of the matter as of now, suffice to note that, as a result of these disputes, the assessment of income is yet to reach finality.

5. In the meantime, GIA India reached out to the Central Board of Direct Taxes for an Advance Pricing Agreement (APA), under section 92CC, in respect of, *inter alia*, the above transactions. 0n 7th May 2018, the APA was finally entered into between the GIA India and the CBDT. This APA was for five consecutive previous years, namely financial period ended 31st March 2014, 2105, 2016,and 2017, it also covered, as a rollback period, four consecutive preceding previous years as well i.e., financial periods ended 31st March 2010, 2011,2012 and 2013. This agreement, under clause 12(a) thereof, was to "**cease to be binding on parties, subsequent to it having been entered into, if** *(inter alia)* ……(iii) **there is failure to meet any of the critical assumptions of this agreement**". One of these critical assumptions, as set out in Appendix II to the APA dated 7th May 2018, was as follows:

> **5. Invoicing and Credit terms**
>
> **5.1 For previous years 2009-10 to 2016-17, where the payments made for the international transactions of:**
>
> **……**
> **……**
>
> **(iii) payment of royalty to the AE exceeds the ALP determined in accordance with Para 6 read with sub-item (iii) of item (b) of Appendix I,**
>
> **the applicant shall raise appropriate invoice on the AE to recover the aforesaid excess payment made and show the respective excess amounts as additional income in the modified return of the respective years.**
>
> **5.2 For the additional income referred to in Para 5.1 the Applicant shall raise an invoice for the equivalent amount in the month following the month in which this Agreement is signed. The invoice shall be realised within 60 days of the date of the issue of the invoice.**

6. So far as the determination of arm's length price of royalty paid to the assessee is concerned, which is sought to be adjusted by the mechanism above, the relevant provision in 1(b)(iii) of Appendix 1 provided as follows:

> **The covered international transaction referred to in item (ii) of Para 3 of this agreement shall be considered to be at arm's length in a previous year in the**

Rollback Years and the APA Years (other than previous year 2009-10, when it was not payable), if the payment made by the applicant in respect of the said transaction does not exceed an amount which represents 53.5% of the operating profit of India Graded Segment of the relevant previous year. In respect of previous year 2017-18 the ALP so determined shall be subject to the condition that after payment of royalty the applicant shall, in the India Graded Segment of this year, have an operating profit of at least 33.37% of the operating revenue of said segment. Further, it is clarified that the operating profits for the purpose of this sub-item shall be the operating profit of India Graded Segment determined after reduction of payment for all operating expenses but before any deduction on account of royalty. In order to provide necessary clarity the manner of computation of payable royalty for different years and the additional income to be included in the modified return in this respect has been included in Appendix IV to this agreement based on the information furnished by the applicant.

7. It was in this background that the 'year-wise working of the royalty payable and the adjustment amount based on the working given by the applicant' was set out in Appendix IV of the said APA, and the relevant portion of the working was as follows:

The assessment year 2011-12

Sr. No.	Particulars	FYE March 2011			
F	**46.5:53.5 Split (including Management Fees and excluding Royalty)**				
	i) For India (C * %)	**426,669,616**			**426,669,616**
	ii) For US (C * %)	**490,899,451**			**490,899,451**
G	**Royalty (%)**				
H	**1) As per the 46.5 : 53.5 Split [= F (ii)/A]**	**25.51%**			
	ii) Actual paid (= D / A)	**35.62%**			
	Primary Adjustment				
	i) Actual Royalty (= D)	**685,346,239**			**685,346,239**
	ii) Royalty as per Split [= F (ii)]	**490,899,451**			**490,899,451**
	Primary adjustment (H) = [(i) –(ii)]	**194,446,788**			**194,446,788**

The assessment year 2012-13

Sr. No.	Particulars	FYE March 2012			
F	**46.5:53.5 Split (including Management Fees and excluding Royalty)**				
	i) For India (C * %)	**490,904,396**			**490,904,396**
	ii) For US (C * %)	**564,803,982**			**564,803,982**
G	**Royalty (%)**				
H	**1) As per the 46.5 : 53.5 Split [= F (ii)/A]**	**25.61%**			
	ii) Actual paid (= D / A)	**36.03%**			
	Primary Adjustment				
	i) Actual Royalty (= D)	**794,851,211**			**794,851,211**
	ii) Royalty as per Split [= F (ii)]	**564,803,982**			**564,803,982**
	Primary adjustment (H) = [(i) –(ii)]	**230,047,229**			**230,047,229**

The assessment year 2013-14

Sr. No.	Particulars	FYE March 2013			
F	**46.5:53.5 Split (including Management Fees and excluding Royalty)**				
	i) For India (C * %)	**819,285,731**			**819,285,731**
	ii) For US (C * %)	**942,619,067**			**942,619,067**

G	**Royalty (%)**				
H	**1) As per the 46.5 : 53.5 Split [= F (ii)/A]**	**29.43%**			
	ii) Actual paid (= D / A)	**44.14%**			
	Primary Adjustment				
	i) Actual Royalty (= D)	**1,413,935,180**			**1,413,935,180**
	ii) Royalty as per Split [= F (ii)]	**942,619,067**			**942,619,067**
	Primary adjustment (H) = [(i) –(ii)]	**471,316,113**			**471,316,113**

The assessment year 2014-15

Sr. No.	**Particulars**	**FYE March 2014**			
F	**46.5:53.5 Split (including Management Fees and excluding Royalty)**				
	i) For India (C * %)	**929,422,416**			**929,422,416**
	ii) For US (C * %)	**1,069,355,468**			**1,069,355,468**
G	**Royalty (%)**				
H	**1) As per the 46.5 : 53.5 Split [= F (ii)/A]**	**31.58%**			
	ii) Actual paid (= D / A)	**46.41%**			
	Primary Adjustment				
	i) Actual Royalty (= D)	**1,571,338,680**			**1,571,338,680**
	ii) Royalty as per Split [= F (ii)]	**1,069,355,468**			**1,069,355,468**
	Primary adjustment (H) = [(i) –(ii)]	**502,003,212**			**502,003,212**

The assessment year 2015-16

Sr. No.	Particulars	FYE March 2015			
F	**46.5:53.5 Split (including Management Fees and excluding Royalty)**				
	i) For India (C * %)	**1,601,310,544**			**1,601,310,544**
	ii) For US (C * %)	**1,842,368,046**			**1,842,368,046**
G	**Royalty (%)**				
H	**1) As per the 46.5 : 53.5 Split [= F (ii)/A]**	**35.28%**			
	ii) Actual paid (= D / A)	**55.29%**			
	Primary Adjustment				
	i) Actual Royalty (= D)	**2,887,140,778**			**2,887,140,778**
	ii) Royalty as per Split [= F (ii)]	**1,842,368,046**			**1,842,368,046**
	Primary adjustment (H) = [(i) –(ii)]	**1,044,772,732**			**1,044,772,732**

The assessment year 2016-17

Sr. No.	Particulars	FYE March 2016			
F	**46.5:53.5 Split (including Management Fees and excluding Royalty)**				
	i) For India (C * %)	**146,74,52,579**			**53,71,52,579**
	ii) For US (C * %)	**1,68,83,59,419**			**1,68,83,59,419**

G	**Royalty (%)**				
H	**1) As per the 46.5 : 53.5 Split [= F (ii)/A]**	**31.02%**			
	ii) Actual paid (= D / A)	**48.11%**			
	Primary Adjustment				
	i) Actual Royalty (= D)	**2,61,86,26,595**			**2,61,86,26,595**
	ii) Royalty as per Split [= F (ii)]	**1,68,83,59,419**			**1,68,83,59,419**
	Primary adjustment (H) = [(i) –(ii)]	**93,02,67,176**			**93,02,67,176**

The assessment year 2017-18

Sr. No.	**Particulars**	**FYE March 2017**			
F	**46.5:53.5 Split (including Management Fees and excluding Royalty)**				
	i) For India (C * %)	**3,02,77,98.811**			**3,02,77,98.811**
	ii) For US (C * %)	**3,48,35,96,482**			**3,48,35,96,482**
G	**Royalty (%)**				
H	**1) As per the 46.5 : 53.5 Split [= F (ii)/A]**	**38.69%**			
	ii) Actual paid (= D / A)	**66.39%**			
	Primary Adjustment				
	i) Actual Royalty (= D)	**5,97,75,36,448**			**5,97,75,36,448**
	ii) Royalty as per Split [= F (ii)]	**3,48,35,96,482**			**3,48,35,96,482**
	Primary adjustment (H) = [(i) –(ii)]	**2,49,39,39,966**			**2,49,39,39,966**

8. The net result of the above APA is that the royalties which were received by the assessee company from its Indian AE, namely GIA Laboratory India Pvt Ltd, were required to be partially refunded to the Indian AE. Whatever was held to be in excess of the arm's length price arrived at under the aforesaid APA was required to be refunded. The details of royalties actually paid, held to at arm' length price under the APA, and required to be refunded to the Indian AE can be summed up as follows:

Assessment year	Royalty actually paid by the Indian AE (In INR)	ALP of the royalty as concluded in Indian AE's APA with the CBDT	Amount to be recovered by the Indian AE, from the assessee, under the APA
2011-12	68,53,46,239	49,08,99,451	19,44,46,788
2012-13	79,48,51,211	56,48,03,982	23,00,47,229
2013-14	141,39,35,180	94,26,19,067	47,13,16,113
2014-15	157,13,38,680	106,93,35,468	50,20,03,212
2015-16	288,71,40,778	184,23,68,046	104,47,72,732
2016-17	261,86,26,595	168,83,59,419	93,02,67,176
2017-18	597,75,36,448	348,35,96,482	249,39,39,966
		Total refund by the assessee to Indian AE, under the APA	**586,67,93,216**

9. The assessee now claims that the amounts so refunded by the assessee, to its AE in India- namely GIA-India, be reduced from the computation of its income from the royalties. So far as the assessment year 2017-18 is concerned, the claim for reduction in income has been accepted at the assessment level itself, and, in any event, we are not dealing with that assessment year in this bunch of appeals. In the first three assessment years before us, i.e., assessment years 2011-12, 2012-13, and 2013-14, this grievance is raised before us by way of additional grounds of appeal, and in the remaining assessment years, i.e., assessment years 2014-15, 2015,16 and 2016-17, this grievance was raised before the Dispute Resolution Panel. The Dispute Resolution Panel, however, rather summarily rejected the claim so made, and the brief observations made by the Dispute Resolution Panel in this regard, barring the necessary changes in the amount involved, are as follows:

Discussions and Directions of the DRP:

We have examined the claim of the assessee that the royalty received should be computed at Rs.106.93 Crs. as per APA dated 07.05.2018 in the case of GIA India Lab instead of at Rs.157.13 Cr. as per the return of income. It is noted that as per section 92(3) of the Act, if any adjustment has the effect of reducing

> **the income chargeable to tax or increasing the loss with respect to any international transaction or specified domestic transactions, the provisions of section 92 shall not apply. It is further noted that the APA in the case of GIA India Lab does not have a binding force on computation of Royalty in the hands of the assessee since the APA proceedings in the case if GIA India Lab are entirely independent and cannot be imported into the computation of taxable Royalty in the hands of the assessee. In view of this discussion it is held that the amount of royalty received cannot be decreased in the hands of the assessee on the basis of APA in the case of GIA India Lab. and the additional ground of objection raised by the assessee is rejected**

10. It is in this backdrop that the assessee is now before us seeking modification in quantum of royalty, received from the Indian AE, being taxed in the hands of the assessee. The claim of the assessee, in substance, is that the amount which has been refunded by the assessee to its AE cannot be treated as income in the hands of the assessee, and must, therefore, be reduced from its taxable income as 'royalties'.

11. Learned senior counsel submits this issue, along-with another ground of appeal dealing with a connected facet of taxability of the royalty income, which has been rendered infructuous in the present context in the light of the coordinate bench decision holding that the assessee company did not have a permanent establishment (PE) in India, has been taken up by way of an additional ground in the first three assessment years, i.e. 2011-12, 2012-13 and 2013-14. This appeal as also the other six appeals of the assessee, which have been taken up for hearing today, are the appeals in which hearing was concluded earlier and these appeals have now been refixed for hearing *de novo*. It was further pointed out that these additional grounds of appeal was admitted earlier and argued at length, and there is no reason not to admit the same for these proceedings now. Learned Departmental Representative does not dispute this submission, but vehemently opposes the admission of this additional ground nevertheless. Learned senior counsel for the assessee once again prays, on merits, for admission of this ground of appeal. He submits that this additional grounds of appeal has arisen because of subsequent developments and could not have been, therefore, raised earlier, that it involves a substantial legal issue which goes to the foundational aspect of quantification of income, and that it deserves to be admitted by us, in the light of the well settled legal position- particularly as laid down by Hon'ble Supreme Court in the case of **NTPC Vs CIT (229 ITR 383).** It is submitted that the additional ground in question is raised bonafide. Learned CIT(DR) seriously oppose the admission of additional ground, and submits that quantification of the royalty income is as per the voluntary information furnished by the assessee in the return of income, and it cannot be revisited at this stage. It is also submitted that the relevant facts are not on record. He also submits that the case of the assessee *prima facie* lacks any merits. Learned CIT(DR), however, does submit that in the event of admitting additional grounds of appeal, he should ideally remit the matter to the file of the Assessing Officer for necessary verification of facts. As regards second additional ground of appeal, learned CIT(DR) fairly accepts that given the findings of the coordinate bench about non-existence of assessee's PE in India, this ground is wholly academic and it may not even need any adjudication on merits. He does not oppose the admission of the second additional ground, Learned senior counsel submits that

no useful purpose will be served by remitting the matter to the file of the Assessing Officer as all the related facts are on record, and as, in the assessment years 2013-14, 2014-15, 2015-16 and 2016-17, this issue has been considered on merits by the authorities below and decided on merits. All those assessment years are also before us today. We are urged to take a call on merits. On a careful consideration of rival contentions, as also material on record, we are inclined to admit both the additional grounds of appeal and proceed to deal with the same. The second additional ground of appeal will be taken up later along-with other issues raised in appeal. Coming to the first additional ground of appeal in the assessment years 2011-12, 2012-13 and 2013-14, which is core issue in all these appeals, the learned senior counsel then begins, on merits, by submitting that the income on account of royalty which can be taxed in the hands of the assessee is the net amount, as finally received by the assessee after the adjustments made pursuant to the APA settlement of the Indian AE, and not the amount as initially billed and received by the assessee. The subsequent event of refunding the amount of royalty, as a result of the Indian AE entering into APA with the Indian tax authorities, is not a standalone event, and it has to be essentially considered in conjunction with the original payment of royalties by the Indian AE to the assessee company. He submits that for example, in the assessment year 2011-12, the initial amount billed and received by the assessee, on account of royalty by the Indian AE i.e., GIA-India, was Rs 68,53,46,239, but then, after giving a refund of Rs 19,44,46,788, in terms of the requirements of the Indian AE's APA, the net royalty income of the assessee was only Rs 49,08,99,451. The fact that the refund was made in a subsequent year does not really matter as it is admittedly on account of the royalty income booked in the assessment year 2011-12, and, therefore, it has to relate back to that assessment year. The royalty income for the assessment year 2011-12, which can be taxed in the hands of the assessee, is only Rs 49,08,99,451. It was contended that by virtue of the APA, the fundamentals of the transactions between GIA India Lab and the assessee had undergone a change with the approval of the CBDT and the royalty which is payable by GIA India Lab and the only amounts which are receivable by the assessee are Rs. 49,08,99,451. It was contended that income can be said to accrue to the assessee only when the assessee has an indefeasible right to receive the same, and that in view the APA between GIA India Lab and CBDT, the appellant has a right to receive only Rs. 49,08,99,451 and not Rs. 68,53,46,239. It is contended that what can be brought to tax is the real income of an assessee and not hypothetical and notional income. Reliance was placed on the decision of the Hon'ble Supreme Court in **CIT vs. Bokaro Steel Ltd. (236 ITR 315)** which refer to the decision in the case of **Godhra Electricity Co. Ltd. vs. CIT (225 ITR 746**). Reliance was also placed on the decision of the Bombay High Court in the case of **H.M. Kashiparekh & Co. Ltd. Vs CIT (39 ITR 706)** which has held that "**the principle of real income is not to be so subordinated as to amount virtually to negation of it when a surrender or concession or rebate in respect of managing agency commission is made agreed to or given on grounds of commercial expediency simply because it takes place sometime after the close of an accounting year. In examining any transaction and situation of this nature the Court would have more regard to the reality and speciality of the situation rather than the purely theoretical or doctrinaire aspect of it**." It was thus contended that the amount actually refunded by the assessee to the Indian AE cannot be treated as income in the hands of the assessee. Learned counsel then submits that second proviso to section 92C(4) of the Act does prohibit an AE from getting a corresponding benefit of an

arm's length adjustment being made in the case of an enterprise but this prohibition applies only where the total income of an enterprise is computed under sub-section (4) of section 92C on determination of the arm's length price paid to another associated enterprise. It is pointed out that sub-section (4) applies where an ALP is determined by AO under sub-section (3) of section 92C. It is then pointed out that, in contrast, no corresponding prohibition provided in section 92CC to 92CE, which are the provisions governing the APA scheme, nor is there any such prohibition in rule 10F to 10T, rules 44GA, rule 10MA and 10RA, which are the relevant rules for the APA scheme. It is therefore submitted that where a *suo motu* adjustment to the transfer price is made by an enterprise pursuant to an APA, a corresponding effect thereof must be allowed to the AE. It stands to reason that a prohibition should exist in section 92C and not in section 92CC. Section 92C deals with a situation where an assessee declares a price to be ALP which is found not to be correct on scrutiny by Transfer Pricing Officer. Therefore, when an adjustment is made to ALP under section 92C, it is provided that the corresponding benefit is not to be given to the AE. However, in contrast, the APA under section 92CC is a voluntary agreement between an assessee and the Department and is not a determination by the AO/TPO where the ALP declared by an assessee is found to be incorrect. Besides, the APA, as in the present case, has the effect of varying and altering the transaction and not varying the ALP of the transaction. Therefore, it is submitted that the corresponding benefit of an agreed amount ought to be given to the AE in case of APA. Our attention is invited to the decision of the Bangalore Bench of ITAT in the case of **ACIT vs. EYGBS India Pvt. Ltd. [ITA No 2984/Bang/2018]**, a copy of which was placed before us, in which an APA was entered into whereby an upward ALP adjustment of Rs. 8,66,80,000 was made to the income received by the assessee, and it was held that the prohibition contained in the first proviso to section 92C(4) would have no application to a case of APA. Similarly, it is submitted that the prohibition contained in the second proviso would also not have any application in the case of APA. On the strength of these submissions, learned counsel submits that only the net amount, i.e. originally billed royalty amount- as reduced by the refunds in terms of the APA arrangement, should be brought to tax in the hands of the assessee. In other words, the amounts refunded by the assessee, as mandated by the terms of the APA with assessee's AE, should be excluded from the income taxable in the hands of the assessee.

12. Learned CIT (DR) vehemently opposed the claim made by the assessee. The elaborate submissions made by the leaned Commissioner (DR) have been adequately summed up in his written note as follows:

> *4. It is humbly submitted that:*
>
> *(i) The assessee GIA Inc is not a party to the APA and, therefore, cannot seek any relief based on the APA which applies only to the parties/ applicants covered by the APA.*
>
> *(ii) The assessee GIA Inc had voluntarily offered income under the head royalty and paid taxes as per return of income filed. The claim made before the Hon'ble*

ITAT is beyond the purview of section 253 as no such claims were made in the assessment and appellate proceedings of the assessee and the assessee was not a party to the APA.

(iii) As per the provisions of sec. 92CE of the Act and relevant rules, the terms of Advance Pricing Agreement are applicable only in the case of a person who is a party to the agreement. Since the assessee is not a party to the Advance Pricing Agreement, the terms of the same is not binding on the assessee and hence the same cannot be claimed by the assessee.

(iv) The decision relied upon by the assessee are not in the context of the Transfer Pricing Provisions of sections 92C , 92CD, and 92CE. Further in the case of Bokaro Steel Ltd., the entries were reversed in the second year. Here there is no record that entries are reversed and it is not the case that Royalty agreement is cancelled. What has merely happened is that ALP has been determined at different price than that recorded in the books of the Indian Company. Similarly in the case of Godhra Electricity Co. Ltd., the subject matter of enhancement of tariffs was litigated upto the Apex Court. The decision was applicable to the assessee. In the case of the assessee here, apart from the fact that there is no evidence or any reversal on records in the present proceedings, the question is whether it is voluntary in the case of the assessee and if so will it go to reverse the entries ab-initio, or it will apply to the year in which reversal is made.

5. The claim of the assessee is in the nature of secondary adjustment since it pertains to the associated enterprise as a result of the primary adjustment. The proviso to sec. 92C(4) reads as

"provided further that where the total income of an associated enterprise is computed under this sub-section on determination of the arm's length price paid to another associated enterprise from which tax has been deducted or was deductible under the provisions of Chapter XVIIB, the income of the other associated enterprise shall not be recomputed by reason of such determination of arm's length price in the case of first mentioned enterprise".

The Ld AR has relied on the decision of the Hon'ble ITAT in the case of EYGBS to contend that section 92C(4) does not fetter the claim pursuant to the APA. It is submitted that facts in that case were different. It was a case of the same tax payer and not the other AE. Further, it was held that section 10AA does not restrict the claim and is worded widely to not be constrained by section 92C(4). It is humbly submitted that the reliance on this decision is misplaced in the facts of the assessee.

6. Your kind attention is drawn to section 92CE brought on the statute by the Finance Act 2017 w.e.f. 2018. This section which specifically deals with and permits the secondary adjustment, in Sec. 92CE(1)(iii) refers to the primary adjustment determined by the Advance Pricing Agreement entered into by the assessee u/s 92CC on or after 01.04.2017. In the present case, the APA was entered in May 2018 and this section is therefore applicable. The first proviso to section 92CE(1) stipulates

that if the primary adjustment is made in respect of an assessment year commencing on or before 01.04.2016 then the secondary adjustment provision under section 92CE will not be applicable. Thus secondary adjustment permitted u/s 92CE is not applicable upto A.Y. 2016-17. The claim accepted by the AO for A.Y. 2017-18, as referred to by the AR, has to be seen in this context. Further, the second proviso to section 92CE(1), stipulates that no refund of taxes paid could be claimed or allowed. The terms primary adjustment and secondary adjustment are defined and explained in sec. 92CE(iii)(3).

7. The assessee has also contended that the directions contained in the APA is not in the nature of Transfer Pricing adjustment. It is humbly submitted that the covered transactions are enumerated and mentioned in para 3 of the APA and includes payment of royalty. These transactions have been covered and the exercise was to determine the arm's length price with respect of these transactions which include payment of royalty. A perusal of the APA shows that the same was determined based on the various international transactions relating to the payments made between the Indian enterprise GIA India to the foreign affiliates, including the assesee GIA Inc, in respect of the grading services, management services and royalty. The ALPs were determined for all these three transactions. This no suo motu adjustment as claimed by the assessee before your honours. This is resolution of dispute between the TPO and the GIA India in respect of transfer pricing issues. Further, the Ld AR has claimed that where a suo motu adjustment to the transfer price is made by the enterprise pursuant to an APA , a corresponding effect thereof must be allowed to the AE. This clearly shows that this is admitted to be a transfer pricing adjustment, and a secondary adjustment is sought. Under Appendix II there is reference to payment of royalty in item 5.1(iii). This refers to the Appendix -I (1)(b)(iii). A perusal of the same shows that the determination was made keeping in view the operating profits resulting from the transactions. Thus, it is humbly submitted that the Advance Pricing Agreement is in the context of Transfer Pricing methodology and the directions which are the subject matter of APA falls under section u/s 92CC. Thus the determination under APA are nothing but transfer pricing adjustments based on ALP.

8. It was open to the assessee to join as a party to APA which it chose not do so. The APA has no binding force on assessee GIA Inc. It is up to the assessee whether to remit any funds to the Indian Party to the APA, which is a voluntary act on its part, but this has no bearing on the claim for reduction of income in the return of income filed since the APA is not binding on the assessee. In fact, the APA in Appendix-II para 5.3, does recognized and envisage a situation where the applicant GIA India can chose not to raise any invoice on the assessee GIA Inc, in previous years, for receiving back of payment made by it. In this case, certain additional income has been offered for which the formula has been specified. This again shows that invoice is raised by GIA India on GIA Inc , if any, the acceptance by the assessee GIA Inc is a voluntary act.

9. Further, in para 5.4 of the Appendix-I it is stipulated that no downward adjustment is required if the payment actually made by GIA India is less than that

required as per the APA as ALP. Thus, there can be a situation where the payment made by the Indian entity is less than the ALP. The assessee GIA Inc would not offer any additional income as royalty and can claim that it is not a party to the APA.

10. Without prejudice, it is further submitted that it is not known the option chosen by GIA India, and whether invoices were raised on GIA Inc, whether payments were made by GIA Inc, RBI or other approvals, revision of accounts etc. These facts ware not on record. Further assuming any such payments were made by GIA Inc, it would be subsequent to APA dated 7. 5.2018, and thus fall in a different assessment year. A subsequent event cannot lead to revision of income of an earlier year, which has accrued as per the accounting system and audited accounts for the earlier assessment years. Thus even in that case a claim can only be made in the year in which payments are made, if and as permitted under law.

13. In a brief rejoinder, learned senior counsel has reiterated his submissions. It was contended that not excluding the royalties refunded by the assessee, and not give a corresponding effect in the computation of income of the AE, would result in double taxation and an unjust collection of tax twice over by the Department, which can never be the intention of the legislature and any interpretation which leads to such absurd result must be avoided. Reliance was placed on Hon'ble Supreme Court's judgments in the cases of **CIT Vs J H Gotla (156 ITR 323)** and **K P Varghese Vs ITO (131 ITR 597).** As regards reliance placed by the learned Departmental Representative ("DR") on the provisions of section 92CE of the Act, it is contended that such a reliance is completely erroneous and misconceived for the following reasons:

The said provision, has been inserted by the Finance Act, 2017 with effect from 01 April 2018 i.e., Assessment Year 2018-19 onwards. The first proviso to section 92CE of the Act in terms provides that the provisions of this section shall not apply if the primary adjustment is made in respect of an assessment year commencing on or before 01 April 2016 – the years under consideration are Assessment Year 2011-12 to 2016-17 and therefore the provisions of section 92CE cannot have any application.

Without prejudice to the above, even on merits this provision would have no application. Section 92CE (1) provides inter-alia that where a primary adjustment to the transfer price is determined by an APA entered into by the assessee u/s. 92CC on or after 01 April 2017, the assessee shall make a secondary adjustment. Thus, the primary as well as the secondary adjustments are to be made in the case of the same assessee. In other words, if section 92CE were to be applied post 1st April 2018, the question of making any secondary adjustment could only arise in the hands of GIA India Lab and not in the hands of the assessee.

A reading of sub-section (2) of section 92CE shows that the secondary adjustment, which is envisaged in section 92CE(3)(v) is where, as a result of the primary adjustment, there is an increase in total income of the assessee (GIA India Lab) and the excess money is not repatriated to India by its AE (i.e. GIA US) within the prescribed time, such excess is to be deemed to be an advance made by GIA India to GIA US and the interest on such advance is required to be

computed in the prescribed manner. In the instant case, the excess money has been repatriated by GIA US to the GIA India Lab and therefore there can be no question of any secondary adjustment.

14. We were thus urged to uphold the plea of the assessee and reject the hyper technical, as also wholly incorrect, objections raised by the authorities below as also by the learned Departmental Representative. Learned senior counsel concludes by submitting that there is no way in which an income, which is neither actually received nor actually arisen to the assessee- as a result of an APA arrangement, can be taxed in the hands of the assessee, and that once an assessee reduces the royalty payable by its associated enterprise, and gives effect to this reduction, the original billing of the royalty, which stands altered now- in law and in fact, ceases to be relevant for determination of royalty income taxable in the hands of the assessee.

15. We have given our careful consideration to the rival contentions and the facts of the case in the light of the applicable legal position.

16. We find that one of the "critical assumptions" in the APA between GIA India, an AE of the assessee, and the CBDT was that if payment of royalty by the GIA India to the assessee was to exceed its arm's length price, as determined in the APA, **"the applicant** *(i.e., the GIA India***) shall raise the appropriate invoice on the AE to recover the aforesaid excess payment made and show the respective excess amounts as additional income in the modified return of the respective years."** Under rule 10F(f) critical assumption means **"the factors and assumptions that are so critical and significant that neither party entering into an agreement will continue to be bound by the agreement, if any of the factors or assumptions are changed."** It is, thus, clear that one of the fundamental assumptions of the said APA was partial recovery of royalty from the assessee, i.e., to the extent of the excess of actual payment of royalty by the GIA India to the assessee vis-à-vis arm's length price of the royalty as determined under the APA. Under these circumstances, the *bonafides* of the adjustments, in quantum of royalty payable by the GIA India to the assessee, cannot be questioned. The next question is, what is its impact on the income of the assessee. Obviously, these royalty refunds by, or royalty recoveries from, the assessee are not standalone events, which can be seen in isolation with the receipts of related royalties in the corresponding previous year. These refunds and recoveries of royalties are thus required to be seen in conjunction with the associated receipts of royalties from GIA India. In the period relating to the assessment year 2011-12, for example, the assessee had received Rs 68,53,46,239 as royalties from GIA India, but since the assessee was *bonafide* called upon to refund Rs 19,44,46,788, the actual income of the assessee, on account of royalty received from GIA India, was only Rs 49,08,99,451. Any part of royalty receipt, which had to be *bonafide* refunded to the payer of the royalty, cannot be taxed in the hands of the assessee as this money did not eventually belong to the assessee. It is also important to note that corresponding refund to the GIA-India has been shown as an income of the GIA-India, and offered to tax as such, by way of a modified return in consequence of the APA, as were the terms of critical assumption 5.1 reproduced earlier which required that the GIA India "shall raise an appropriate invoice on the AE to **recover the aforesaid excess payment made and show the respective excess amounts as additional income in the modified return of the respective years".** There was also a time limit granted to carry out this exercise inasmuch as

under critical assumption 5.2, it was provided that **"(*f*)or the additional income referred to in Para 5.1 the applicant** *(i.e. GIA-India)* **shall raise an invoice for the equivalent amount in the month following the month in which this Agreement is signed. The invoice shall be realised within 60 days of the date of the issue of the invoice".** The excess of actual royalty payments vis-à-vis ALP royalty under the APA, which is sought to be taxed in the hands of the assessee, has thus already been declined deduction in the hands of the India AE, namely GIA India, and corresponding higher income has been brought to tax in the hands of the Indian AE. This treatment is clearly incongruous inasmuch as what is being treated as an income in the hands of the recipient of royalty is not being treated as expenditure in the hands of the person paying the royalty in question. What is thus admitted not treated as paid by the payer of royalty is being sought to be treated as what is received by the recipient of royalty. That is wholly incongruous. There can be no way in which an assessee can be taxed in respect of that part of receipt of an income which the assessee has *bonafide* refunded to the person from whom such an income was received. As is the well-settled legal position, in order that an income is taxed in the hands of an assessee, it must be a real income, which the assessee has actually earned in reality, and not a mere hypothetical income which assessee could have earned but, in fact, did not earn.

17. Learned CIT (DR) suggests that it is beyond the scope of Section 253 to get into a question which already stands concluded by accepting the quantum of income that the assessee had offered to tax. There is little substance in this argument. Section 253 only refers to the orders against which appeals can be filed before the Tribunal. As for the powers of the Tribunal, Section 254 describes these powers in the widest terms by stating that the Tribunal may, after giving both the parties to an appeal an opportunity of being heard, "pass such orders thereon as it thinks fit." As to whether such a new issue can be raised for the first time before us, we may refer to the observations made by Hon'ble Delhi High Court, in the case of **Orissa Cement Ltd Vs. CIT [(2001) 250 ITR 856 (Del)]**, as follows:

> **"In Jute Corpn. of India Ltd.'s case (supra), while dealing with the powers of the AAC, it was held by the Apex Court that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the powers of the AAC in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the ITO. The Court went on to further observe that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The AAC must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reason. The AAC should exercise his discretion in permitting or not permitting the assessee to raise additional ground in accordance with law and reason. The issue was again considered by the Apex Court in National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 3832 . It was observed that the observations made in Jute Corpn. of India Ltd.'s case (supra) would apply to appeals before the Tribunal also. In addition to what has been stated earlier in Jute Corpn. of India Ltd.'s case (supra), the Apex Court**

observed that undoubtedly the Tribunal will have the discretion to allow or not to allow a new ground to be raised but where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings, there is no reason as to why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

18. We thus reject the contention of the learned Commissioner (DR) that this issue cannot be raised before us at this stage. Coming to the merits of objections raised by the authorities below as also the learned CIT (DR), we find that the basis on which the impugned reduction in taxable royalty is declined by the Dispute Resolution Panel is that, in view of the provisions of Section 92(3), where the computation of income on the basis of arm's length price results in a reduction of taxable income increase of loss, the provisions of Section 92 will not apply, but that is a wholly irrelevant observation. It is not the question of computation of income on the basis of ALP adjustments in the hands of the assessee, but the issue is whether the royalty actually received post refund is to be taken into account as income of the assessee or whether the original figure of royalty income, despite the refund, could be taxed in the hands of the assessee. The approach of the DRP was thus wholly superficial. As regards the observations by the DRP that the assessee cannot benefit from the APA that GIA India has entered into with the CBDT, and the terms of the APA cannot be imported into the assessment of taxable royalty in the hands of the assessee, once again this observation is also very superficial. It is not the content of the APA, but the impact of the APA, that is relevant for the assessee. In terms of the APA, a recovery of royalty is made from the assessee by the GIA-India. This shows that the recovery is *bonafide***.** What is, however, even more material, from our perspective, is that as a result of this bonafide recovery of the part of royalty received by the assessee and offered to tax as such, income of the assessee stands reduced. The reduction in the quantum of royalty income is on account of this factor of actual reduction in income, and that is a reality- *dehors* the APA. Whether it happened on account of APA, or it was to happen otherwise, the fact remains that there is a reduction of royalty income in the hands of the assessee. And, if there is a reduction in royalty income, what should be brought to tax is only the actual, i.e., reduced, royalty income. Learned CIT(DR) has contended that since the claim of the assessee is in the nature of secondary adjustment since it pertains to the associated enterprise as a result of the primary adjustment, but proviso to sec. 92C(4) lays down the principle that "that where the total income of an associated enterprise is computed under this sub-section on the determination of the arm's length price paid to another associated enterprise from which tax has been deducted or was deductible under the provisions of Chapter XVIIB, the income of the other associated enterprise shall not be recomputed by reason of such determination of arm's length price in the case of first mentioned enterprise." In other words, according to the learned CIT(DR), merely because arm's length price of royalty paid to an AE is different than the amount actually paid to the AE, on which tax under section 195 is deducted, the income of the said AE, i.e. the assessee, cannot be recomputed. Once again, there is a clear fallacy in this reasoning. It is not because of determination of ALP of the royalty received by the assessee at a certain figure, other than the figure on which taxes are withheld at source, that the royalty income is being sought to be revised. The modification in quantum of royalty being taxed in the hands of the assessee is sought because of the actual, even if partial, refund of the royalty

received by the assessee. As for the reasons of this refund, the relevance of the APA is only in establishing *bonafides* of the reduction in the quantum of royalty, and nothing more. It is not that the assessee is seeking to invoke any benefit from this APA, but the relevance of the assessee's referring to the APA is in explaining the circumstances in which a part of the royalty received by the assessee had to be refunded. Whether the assessee had a legal obligation to do so or not is not material, but what is material is whether it was commercially expedient for the assessee to do so. The answer, to our mind, is in the affirmative**.** It is also important to note that in the assessment year 2018-19, the Assessing Officer himself has reduced the amount refunded, as above, from the royalty income of the assessee. When it was pointed out to the learned Commissioner (DR), he explained that the legal position post 1st April 2018 is materially different. Learned Commissioner (DR) seeks to justify this difference in treatment on the ground that while Section 92CE was in force with effect f the question of making any secondary adjustment could only arise in the hands of GIA India and not in the hands of the assessee from 1st April 2018, which permits secondary amendment, the law did not permit secondary adjustments for a period prior to 1st April 2018 as pertaining to the assessment years before us. It may be recalled that, as noted earlier, stand of the assessee is concerned, so far as secondary adjustments under section 92CE are concerned, these adjustments can only be made in the hands of the assessee and not its AE, and, therefore, "the question of making any secondary adjustment could only arise in the hands of GIA India and not in the hands of the assessee". It is, therefore, necessary to briefly deal with the scope and impact of Section 92CE so far as the fact situation before us is concerned.

19. Section 92 CE, as introduced by the Finance Act 2017 w.e.f. 1st April 2018, provides that where a primary adjustment to transfer price has been made *suo motu* by the assessee in his return of income, made by the Assessing Officer has been accepted by the assessee, is determined by an advance pricing agreement entered into by the assessee under section 92CC, on or after the 1st day of April, 2017, is made as per the safe harbour rules framed under section 92CB; or is arising as a result of the resolution of an assessment by way of the mutual agreement procedure under an agreement entered into under section 90 or section 90A for the avoidance of double taxation, the assessee "shall" make a secondary adjustment. This provision, however, does not apply where primary adjustment does not exceed Rs 1,00,00,000 or where primary adjustment is made in respect of an assessment year prior to the assessment year 2016-17. The way in which secondary adjustment works is like this. Where as a result of a primary adjustment to the transfer price, there is an increase in income or reduction in loss, the excess payment (i.e., amount actually paid *minus* the arm's length price) will have to be repatriated by the foreign AE, or any other AE, within the time prescribed, and, if no such repatriation takes place, (a) the excess amount not so repatriated will be treated as an advance to the AE bearing such interest as may be prescribed; or (b) the assessee, at his option, pay additional income-tax @ 18% on such excess payment or part thereof. Once the assessee so pays the additional income tax @18%, the assessee is not required to make any secondary adjustment under section 92CE(1), and, in that sense, 18% additional income tax is in lieu of inward remittance on account of secondary adjustment. This option of paying 18% as additional income tax was introduced by subsequent amendment in Section 92CE by the Finance Act 2019. While dealing with the introduction of Section 92CE, the Central Board of Direct Taxes, vide circular no. 2/2018, had observed, *inter alia*, as follows:

45.3 In order to align the transfer pricing provisions in line with OECD transfer pricing guidelines and international best practices, a new section 92CE has been inserted in the Income-tax Act so as to provide ***that the assessee shall be required to carry out secondary adjustment where the primary adjustment to transfer price****, has been made suo motu by the assessee in his return of income; or made by the Assessing Officer has been accepted by the assessee; or is determined by an advance pricing agreement entered into by the assessee under section 92CC of the Income-tax Act; or is made as per the safe harbour rules framed under section 92CB of the Income-tax Act; or is arising as a result of resolution of an assessment by way of the mutual agreement procedure under an agreement entered into under section 90 or 90A of the Income-tax Act.*

45.4 It is also provided that where as a result of primary adjustment to the transfer price, there is an increase in the total income or reduction in the loss, as the case may be, of the assessee, ***the excess money which is available with its associated enterprise, if not repatriated to India within the time as may be prescribed, shall be deemed to be an advance made by the assessee to such associated enterprise and the interest on such advance, shall be computed as the income of the assessee , in the manner as may be prescribed****.*

45.5 It is also further provided that such secondary adjustment shall not be carried out if, the amount of primary adjustment made in the case of an assessee in any previous year does not exceed one crore rupees or the primary adjustment is made in respect of an assessment year commencing on or before 1st April, 2016.

45.6 Applicability: This amendment takes effect from 1st April, 2018 and will, accordingly, apply from assessment year 2018-19 and subsequent years.

[Emphasis, by underlining, supplied by us]

20. Quite clearly, Section 92CE is in the nature of an additional obligation on the assessee to either repatriate back to India the excess payment made (i.e. actual payment *minus* the arm's length price) or to pay additional income tax @ 18% thereon. The secondary adjustment under section 92CE is thus not in a vacuum but in the light of the corresponding obligation to either repatriate back that amount to India or pay additional income tax thereon. While proviso to Section 92CE(1) does clarify that the above provisions do not apply where primary adjustments are less than Rs 1 crore or where primary adjustments are made in respect of an assessment year prior to 2016-17, that exception refers to the scheme of this section as a whole because a secondary adjustment under section 92CE(1) is an obligation on the assessee with certain mandatory consequences under section 92CE(2) as also 92CE(2A to 2D) , rather than a secondary adjustment *simplicitor*. Learned CIT(DR) proceeds on the basis that Section 92CE gives certain concession or relief when he treats Section 92CE as "permitting" the secondary adjustments, whereas as a matter of fact, Section 92CE "requires" that the assessee "shall" make the secondary adjustment which being coupled with certain further requirements under section 92CE(2) and 92CE(2A to D), operate in favour of the revenue. Given the scheme of Section 92CE, secondary adjustments are not concessions to an

assessee but obligations on the assessee. The proviso to Section 92CE(1) cannot, therefore, be interpreted as a bar on any secondary adjustment by the assessee, even *dehors* the requirements under section 92CE(1). In any case, Section 92CE has nothing to do with the taxability of correct income in the hands of the foreign AE to which payment for the international transaction has been made, inasmuch as, this provision cannot be seen as a bar on repatriating back the excess payment made (i.e. actual payment *minus* the arm's length price) even if there was no statutory obligation to do so. In our humble understanding, there was no bar, even in respect of the period prior to insertion of Section 92CE, on any secondary adjustments being made by parties to a transaction. It is also important to note that so far as the APAs are concerned, under rule 10 M (1)(vi) of the Income Tax Rules 1962, an APA **may, amongst other things, include** "**the conditions, if any, other than provided in the Act or these rules**" and, therefore, as long as an APA refers to secondary adjustments, whether specifically permissible under the law or not, these secondary adjustments are to be carried out. It is also important to bear in mind the fact that no secondary adjustment can anyway be unilateral in nature. When an assessee is to raise an invoice on its AE abroad, that invoice is to be accounted for by the entity issuing the invoice as also by the entity receiving the invoice. These two facets of the transactions are two sides of the same coin Section 92CE(3)(v) aptly defines, consistent with the first principles as well, 'secondary adjustment' means "**an adjustment in the books of account of the assessee and its associated enterprise to reflect that the actual allocation of profits between the assessee and its associated enterprise are consistent with the transfer price determined as a result of the primary adjustment, thereby removing the imbalance between a cash account and actual profit of the assessee**." It is, therefore, not correct to say that when an APA requires an assessee to raise debit notes or invoices on its AE abroad, it is open to the AE abroad to ignore those invoices or debit notes and continue with computation of its income *dehors* these invoices or debit notes, because the said AE is not a party to the APA. The AE may not be party to the APA, yet the impact of the terms of the APA has to be taken note of when these terms affect the AE. That's a reality and cannot be wished away. We, therefore, reject this objection raised by the learned CIT(DR) as well. As for learned CIT(DR)'s observation that "**the second proviso to section 92CE(1) stipulates that no refund of taxes paid could be claimed or allowed**", which suggests that no refund of taxes paid could be claimed or allowed as a result of the secondary adjustment, this observation is wholly misconceived inasmuch as while the second proviso states that "**Provided further that no refund of taxes paid, if any, by virtue of provisions of this sub-section as they stood immediately before their amendment by the Finance (No. 2) Act, 2019 shall be claimed and allowed**", this proviso was quite clearly in specific context of insertion of words "on or after the 1st day of April, 2017" in Section 92CE(1)(iii) by the same Finance Act 2019 which had resulted in the exclusion of rigours of Section 92CE in respect of the cases in which the additional obligations were incurred by the assessee in respect of the APAs concluded even prior to 1st April 2017. All that this proviso meant was that even though the assessee may have paid the additional tax, on account of consequences envisaged in Section 92CE(2), with respect to APAs concluded before 1st April 2017, these taxes will not be refunded. In still other words, in our considered view, the practical connotations of the second proviso to Section 92CE(1) was that relief granted by insertion of words "on or after the 1st day of April 2017" in Section 92CE(1)(iii) was with prospective effect. Learned CIT(DR) has been a bit too naïve in ignoring the import of words **"if any, by virtue of provisions of this sub-section as they stood immediately before their amendment by the Finance (No. 2) Act, 2019 shall be**

claimed and allowed" in the proviso, and, therefore, ended up reading a bit too much into this rather innocuous and unidimensional provision. It is thus not correct to say that, in principle, in terms of the provisions of section 92CE, no refund of taxes could be claimed or allowed on account of secondary adjustments- even if, for example, as in this case, such secondary adjustments end up reducing the income of the foreign AE assesses as a result of partial repatriation of income. A lot of emphasis is then placed by the learned CIT(DR) on the claim that the action of the assessee, in partially refunding the royalty amount to the GIA India, i.e., Indian AE, was voluntary inasmuch as the assessee was not a party to the APA. Nothing, however, turns on this plea. Whether the refund was voluntary or under a legal obligation, it does not really make any difference as long as the refund is *bonafide* and particularly when its commercial expediency is not, and rightly so, even called into question. None of the objections taken by the DRP or raised by the learned CIT(DR), for the detailed reasons, set out above, really impresses us.

21. In view of the above discussions, as also bearing in mind the entirety of the case, we are of the considered view that, in principle, the claim of the assessee deserves to be accepted. However, as learned CIT(DR) rightly points out, factual aspects with respect of these claims, i.e., with respect to verifications and quantum of actual refunds of royalties by the assessee, have not been examined at any stage. We, therefore, deem it fit and proper to accept the claim of the assessee, in principle, but remit it back to the Assessing Officer for verification of factual elements embedded in the claim of the assessee. Ordered, accordingly.

22. Let us now pick up all the six appeals one by one and take up the grounds of appeal raised therein.

23. We, therefore, begin by taking up the ITA No. 386/Mum/2016, i.e. the appeal filed by the assessee for the assessment year 2011-12. By way of this appeal, the assessee appellant has challenged correctness of the order dated 16th December 2015, passed by the Assessing Officer under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2011-12.

24. Ground no. 1 is general in nature and does not call for any adjudication.

25. In ground nos. 2 and 3, the assessee has raised the following grievances:

> **2:0 Re: Holding that the Appellant has a 'Permanent Establishment' ("PE") in India:**
>
> **2:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the Appellant has a Permanent Establishment' ("PE) in India.**

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no PE in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

2:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the Appellant had a PE in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

2:4 The Appellant submits that the Assessing Officer's stand that the Appellant has a PE in India be struck down and he be directed to accept the total income as returned.

3:0 Re.: Holding that the Appellant has a "business connection in India:

3:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that the Appellant has "business connection in India.

3:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no business connection in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

3:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the appellant had business connection in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

3:4 The Appellant submits that the Assessing Officer's stand that the Appellant has business connection in India be struck down and he be directed to accept the total income as returned

26. Learned representatives fairly agree that these issues in appeal are squarely covered by a decision of the coordinate bench, in assessee's own case for the immediately preceding assessment year i.e. 2010-11, wherein the coordinate bench has observed as follows:

9. We have carefully considered the rival submissions, perused the relevant material, including the orders of the lower authorities as well as the case laws referred at the time of hearing. Notably, the controversy before us primarily revolves around as to whether or not the subsidiary of the assessee company i.e., GIA India Lab can be construed as its PE in India. The income-tax authorities have invoked section 9 of the Act and/or Article 5 of the India-US Treaty in order to say that the assessee company has a PE in India. On the contrary, as per the assessee, the impugned receipts are in the nature of business profits, and in the absence of any PE in India, the same are

not taxable in India. Factually speaking, it is evident that the on perusal of the agreements, the transaction of grading services between assessee company and GIA India Lab cannot be considered to be in the nature of a joint venture, since GIA India Lab has its own independent expertise but only due to its technology/capacity constraints, it forwards the stones to the assessee company for grading purposes; it is not an arrangement between two parties where each party contributes its share in order to undertake an economic activity which is subjected to joint control; in fact, the arrangement is akin to assignment or sub-contracting of grading services to the assessee company, wherever GIA India Lab does not have the requisite expertise or technology or capacity for carrying out the grading services; further, the aforesaid arrangement has also been accepted as a mere rendering of grading services by the Transfer Pricing Officer both in the case of GIA India Lab and the assessee company. In this background, we may now proceed to decide as to whether the Indian Subsidiary GIA India Lab can be construed as a PE under any of the aspects contained in Article 5 of India-USA DTAA.

10. Firstly, we may examine whether GIA India Ltd. can be constituted as a fixed place PE of the assessee in terms of Article 5(1) of the India- USA DTAA. As per Article 5(1) of the Indo-USA DTAA, a fixed place PE arises when the foreign entity has a fixed place in India through which its business is wholly or partly carried on. In this context, the learned Counsel pointed out that a similar situation has been considered by the Hon'ble High Court of Delhi in the case of E- Funds IT Solutions (supra), which has been upheld by the Hon'ble Supreme Court. In that case, it has been held that a subsidiary cannot be regarded as a 'fixed place PE' of the parent company on the ground of a close association between the Indian subsidiary and the foreign taxpayer. In that case, it was noted that because various services were being provided by E-Fund India (Indian subsidiary) to the taxpayer or that the foreign tax payer was dependent upon Indian subsidiary (e- Fund India) for its earnings or assignment or sub-contract of contracts to e-Fund India or e-Fund India being reimbursed on a certain cost-plus basis or saving / reduction in cost by transferring business or back office operations to the Indian subsidiary or the manner and mode the payment of royalty transactions or e-Fund India providing support for carrying on core activities being performed by the taxpayer or associated transactions, cannot be the basis to construe the Indian subsidiary as PE of the foreign tax payer. Further, before the Hon'ble Delhi High Court, the Department had contended that the foreign company had a joint venture or partnership with Indian subsidiary as the businesses of the assessee company and the Indian subsidiary were inter-linked and closely connected (which is also contended in the case of the assessee before us) and therefore the Indian subsidiary was regarded as PE of foreign company in India. The aforesaid argument of the Revenue was repelled since the conditions under Article 5 of the DTAA were not met and it has been held that PE cannot be established merely because of transactions between associated

enterprises or the principal sub-contracting or assigning the contract to the subsidiary.

11. Factually, in the case of the assessee company, there is no joint venture arrangement between the assessee company and GIA India Lab vis-à-vis gem grading services rendered by the assessee company to GIA India Lab since it is GIA India Lab who enters into agreement with the client and bears all the risks including credit risks, client facing risks, etc. Also, in terms of the agreement, GIA India Lab bears the risk of loss or damage to articles while in transit to and from the assessee company and also during the time when the articles are at or in the assessee company's facilities. Therefore, the economic risks of the gem grading services rendered by the assessee company vis-à-vis stones/diamonds of customers of GIA India Lab shipped to it are borne by GIA India Lab and hence, there is no joint venture arrangement whatsoever between the assessee company and GIA India Lab. In terms of Article 5(6) of the India USA DTAA, it is provided that the mere fact that a company has controlling interest in the other company does not by itself construe the other company to be its PE. Accordingly, the assessee company is not having a 'fixed place' PE in India.

12. In terms of Article 5 (1) of the India - USA DTAA, a service PE arises on the furnishing of services in India by the assessee company through employees or other personnel, but only if: activities of that nature continue in India for a period or periods aggregating to more than 90 days within any twelve-month period; or the services are performed within India for a related enterprise. Hence, a service PE is triggered if the services (other than included services as defined in Article 12 'Royalties and Fees for Included Services') are rendered by the assessee company through employees or other personnel and activities of that nature continue in India for a period or periods aggregating to more than 90 days within any twelve-month period; or the services are performed within India for a related enterprise. The assessee company renders 'grading services' and 'management services to GIA India Lab'. In fact, 2 graders who were earlier employed with the assessee company are now employed with GIA India Lab and are on the payrolls of GIA India Lab and are working under control and supervisions of GIA India Lab and therefore, no service PE is created in India in terms of India- US DTAA. The Supreme Court has affirmed the decision of the Delhi High Court in E- Funds (supra) wherein it has been held that two employees deputed to e-Fund India fund India did not create a service PE as the entire salary cost was borne by e-fund India and they were working under control and supervision of e-fund India. In the facts of the instant case, since the said services are rendered outside India and none of the employees/ personnel of the assessee company has visited India and therefore, service PE is not triggered in the case of the assessee company.

13. In terms of Article 5(4) of the India – US/DTAA, an agency PE is created where a person-other than an agent of an independent status to whom

paragraph 5 applies - is acting in India on behalf of an enterprise of the USA, that enterprise shall be deemed to have a permanent establishment in India, if:

> **(a) he has and habitually exercises in India an authority to conclude on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph;**
>
> **(b) he has no such authority but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, and some additional activities conducted in the State on behalf of the enterprise have contributed to the sale of the goods or merchandise ; or**
>
> **(c) he habitually secures orders in India wholly or almost wholly for the enterprise.**

14. The definition excludes from the ambit of a PE any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status acts in the ordinary course of its business. The OECD Commentary deals with the concept of 'Independent Agent' in paragraphs 36 to 39. In terms of paragraph 37 of the OECD Commentary, a person will be regarded as an independent agent (i.e. it will not constitute a PE of the enterprise on whose behalf it acts) only if:

- **He is independent of the enterprise both legally and economically, and**
- **He acts in the ordinary course of his business when acting on behalf of the enterprise.**

In other words, Article 5(5) of the India- USA DTAA stipulates the following conditions which are required to be satisfied in order that an agent may be said to be an independent agent, i.e.,

- **That he should be an agent of independent status; that, he should be acting in the ordinary course of his business; and, that his activities should not be devoted wholly or almost wholly on behalf of the foreign enterprise for whom he is acting as agent.**

15. GIA India Lab is an independent/separate legal entity in India which is engaged in rendering of grading services. Further, considering the functions and the risks assumed by GIA India Lab vis- à-vis its business activities in India (as has been recorded in the transfer pricing study report - which functional and risk analysis has been accepted by the Transfer

Pricing Officer both in the case of GIA India Lab and in the case of the assessee company), GIA India Lab is an independent entity which is rendering grading services to its clients in India. GIA India Lab also bears service risk and all client facing risks vis-à-vis the stones sent to the assessee company for grading purposes (as has been recorded in the Transfer Pricing Study Report). Hence, GIA India Lab is not acting in India on behalf of the assessee company. Further, GIA India Lab is not having any authority to conclude contracts and has neither concluded any contracts on behalf of the assessee company nor has it secured any orders for the assessee company in India. Thus, GIA India Lab cannot be regarded as 'agency PE' of the assessee company in India.

16. Before parting, we may also note the reference made by the Ld. Representative to the assessment concluded by the Assessing Officer for assessment year 2009-10. It was explained that during the assessment proceedings for assessment year 2009-10, a similar query i.e. why GIA India Lab should not be construed as PE of the assessee company in India was raised, but after considering the detailed response furnished by assessee vide reply letter dated 02 November 2012, no addition whatsoever was made, which is evident from the Assessment Order (AY 2009-10) dated 26 March 2013. Thus, in this background it was all the more incumbent upon the Revenue in this year to discharge its onus as to why a different stand is being adopted, especially in the face of the fact that the nature and source of income in question remains the same. Therefore, on this aspect also, we are not inclined to uphold the stand of the assessing authority.

17. Before parting, we may also refer to the reliance placed by the Ld. DR on the judgment in the case of Formula One World Championship Ltd. (supra). In that case, the assessee was a U.K tax resident who obtained licence over all commercial rights in FIA Formula One World Championship. For this purpose, the assessee (foreign tax payer) entered into a contract with J.P. Sports (an Indian concern) by way of which it granted to J.P. Sports the right to host, stage and promote Formula One Grand Prix of India event at Motor racing Circuit owned by J.P. Sports. After examining all the relevant agreements, the case of the Revenue was that the Circuit located in India constituted a PE of assessee (i.e. the foreign tax payer) in India. The Hon'ble High Court concluded that since the assessee (foreign tax payer) had full access to the Circuit and could dictate as to who was authorised to access the Circuit and organising any other event on the Circuit was not permitted, the said Circuit constituted a PE of the foreign tax payer, i.e. Formula One World Championship Ltd., in India. The said decision of the Hon'ble High Court was approved by the Hon'ble Supreme Court. The aforesaid decision, in our view, stands on an entirely different fact-situation. In the present case, there is no material to show that the assessee dictates to the Indian subsidiary as to what activities it is authorised to engage in. We have also noted earlier that the Indian subsidiary is operating in an independent manner and there is nothing to show that factually speaking

the Indian subsidiary constitutes a PE of the assessee in India. Thus, on account of difference in fact-situation, the reliance placed by the Ld. DR in the case of Formula One World Championship Ltd. (supra) is misplaced.

18. In view of the aforesaid discussion, in our considered view, the Assessing Officer has erred in invoking section 9 of the Act and/or Article 5 of the India-USA DTAA in order to say that the assessee company has a PE in India. Thus, assessee succeeds on this issue

27. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Respectfully following the same, we uphold the plea of the assessee that the assessee did not have any permanent establishment in India under article 5 of the Indo US tax treaty, or business connection India under section 9 of the Income Tax Act, 1961. The assessee succeeds on this issue.

28. Ground nos. 2 and 3 are thus allowed.

29. In ground nos. 4 and 5, the assessee has raised the following grievance:

Without prejudice to the foregoing

4:0 Re.: Attribution

4:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that 50% of Receipts are attributable to the alleged PE of the Appellant in India.

4:2 The Appellant submits that considering the facts and circumstances of its case and the1aw prevailing on the subject no part whatsoever of its receipts are attributable to India and the stand taken by the Assessing Officer/ the Dispute Resolution Panel in this regard is incorrect, illegal, arbitrary, baseless, not in accordance with law and hence ought to be struck down.

4:3 The Appellant submits that the arbitrary action of the Assessing Officer/ the Dispute Resolution Panel be struck down and the Assessing Officer be directed to accept the total income as returned.

Without prejudice to the foregoing:

5:0 Re.: Estimation of gross profit:

5:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the 8.57% of the receipts attributable to the alleged Indian operations ought to be considered as profits of the PE taxable in India.

5:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, even if it is held that the Appellant

has a PE in India no further income can be taxed in India as the alleged PF has been remunerated at an Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.

5:3 The Appellant submits that the Assessing Officer be directed to accept the total income as returned.

30. Learned representatives fairly agree that in view of our conclusion that the assessee did not have any permanent establishment or business connection in India, the issues regarding attribution of profits or attribution of profits are infructuous, and do not call for any adjudication by us. We, therefore, decline to deal with these issues on merits, and reject the same as infructuous.

31. Ground nos. 4 and 5 are thus dismissed as infructuous.

32. In ground no. 6, the assessee has raised the following grievance:

6:0 RE: Taxing the "royalty" received during the year u/s. 44DA of the Income Act, 1961:

6:1 The Assessing Officer the Dispute Resolution Panel has erred in holding that the royalty income is "effectively connected" with the alleged PE of the Appellant in India and is therefore taxable u/s. 44DA of the Income Tax Act, 1961 @40%.

6:2 The Appellant submits that considering the facts and circumstances of its case and law prevailing on the subject and in particular the provisions of the India-USA DTAA, the Assessing Officer/ the Dispute Resolution Panel the "royalty" received by it during the year under consideration is not taxable u/s. 44DA of the Income-tax Act, 1961 and hence the stand taken by the Assessing Officer/ the Dispute Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.

6:3 The Appellant submits that the Assessing Officer be directed to tax the "royalty" income in accordance with the provisions of section 9 (1) (vi) of the Income-tax Act, 1961 read with Article 12 of the India-USA DTAA and be directed to accept the total income as returned.

33. Learned representatives agree that once we come to the conclusion that there is no PE on the facts of this case, there will be no occasion of royalty being effectively connected with the PE or taxability of royalty under section 44DA. This issue is also, therefore, academic and infructuous in the present context.

34. Ground no. 6 is also thus dismissed.

35. In ground no. 7, the assessee has raised the following grievance:

> **7:0 Re.: <u>Levy of interest u/s 234B of the Income-tax Act, 1961:</u>**
>
> **7:1 The Assessing Officer has erred in levying interest us. 234B of the Income-tax Act, 1961 on the Appellant.**
>
> **7:2 The Appellant submits that considering the facts and Circumstances of its case and the law prevailing on the subject no interest u/s. 254B is leviable and the stand taken by the Assessing Officer in this regard is misconceived, incorrect, erroneous and illegal.**
>
> **7:3 The Appellant submits that the Assessing Officer be directed to delete the interest u/s. 234B so levied on it and to re-compute its tax liability accordingly**

36. Learned representatives fairly agree that since the assessment year before us pertains to the period prior to insertion of Explanation to Section 209(1), with effect from 1st April 2012, the law stood at that point of time, irrespective of the actual deduction of tax at source, as long as the tax is deductible at source, the tax deductible will be reduced from the advance tax liability. That is what Hon'ble jurisdictional High Court has held in the case of **DIT Vs NGC Network Asia LLC [(2009) 313 ITR 187 (Bom)].** The levy of interest under section 234B, on the facts of this case when tax withholding obligations under section 195 were clearly applicable in respect of any payment, having an element of income taxable in India, to the assessee, is wholly unsustainable in law. We, therefore, uphold the plea of the assessee on this point.

37. Ground no. 7 is thus allowed.

38. In ground nos. 8 and 9, by way of additional grounds of appeal, the assessee has raised the following grievance:

> **8:0 <u>Re: Taxation of royalty income at Rs. 49.08,99,451</u>**
>
> **8:1 The Appellant submits that the amount taxable in terms of Article 12(2) of the India-USA Double Taxation Avoidance Agreement [DTAA] should be restricted to Rs.49,08,99,45l/ which is in accordance with the Advanced Pricing Agreement ["APA"] dated 07 May 2018 entered into by GIA India Laboratory Private Limited.**
>
> **8:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty taxable in its hands in its hands for the year under consideration should be restricted to Rs. 49,08,99,451/- in accordance with the APA.**

8:3 The Appellant submits that the Assessing Officer be directed to consider the royalty income worked out in terms or the APA and to re-compute its total income and tax thereon accordingly.

9:0 Re: Restricting the taxation of royalty income aft effectively connected to the PE only to Rs. 49,08,99,451/-

9:1 The Appellant submits that in case it is held that any part of royalty income is effectively connected to the alleged PE or the Appellant then such amount should be restricted to Rs. 49,08,99,451/- which is in accordance with the APA dated 07 May 2018 entered into by GIA India Laboratory Private Limited.

9:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty, if held to be connected to the alleged PE, should be restricted to RS. 49,08,99,451/ in accordance with the APA

9:3 The Appellant submits that the Assessing officer be directed to consider the royalty income, if any, connected to the alleged PE, only at Rs. 49,08,99,451/- and to re- compute its total income and tax thereon accordingly.

39. In view of the discussions earlier in the order, both the additional grounds of appeal are admitted for adjudication on merits, and in the lights of the discussions in paragraph 2-21 earlier in this order, this additional ground of appeal no. 8 decided in favour of the assessee, in principle, though the matter will go back to the Assessing Officer for verifications of factual aspects with respect of these claims, i.e., with respect to verifications and quantum of actual refunds of royalties by the assessee, which have not been examined at any stage. We, therefore, deem it fit and proper to accept the claim of the assessee, in principle, but remit it back to the Assessing Officer for verification of factual elements embedded in the claim of the assessee. Ordered, accordingly. As for second additional ground of appeal, i.e. ground no. 9, this is rendered infructuous in the light of the findings earlier in the order that no part of the royalty income is to be treated as attributable to the PE, and taxed under section 44AD as such, as it has been held that there is no PE on the facts of this case.

40. Ground no. 8 is thus allowed for statistical purposes in the terms indicated above, and ground no. 9 is dismissed as infructuous.

41. In the result, the appeal for the assessment year 2011-12 is partly allowed in the terms indicated above.

42. We now take up the ITA No. 1836/Mum/17, i.e. appeal filed by the assessee for the assessment year 2012-13. By way of this appeal, the assessee appellant has challenged correctness of the order dated 24th October 2017 in the matter of assessment under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2012-13.

43. Ground no. 1 is general in nature and does not call for any specific adjudication.

44. In ground nos. 2 and 3, the assessee has raised the following grievances:

2:0 Re: Holding that the Appellant has a 'Permanent Establishment' ("PE") in India:

2:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the Appellant has a Permanent Establishment' ("PE) in India.

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no PE in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

2:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the Appellant had a PE in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

2:4 The Appellant submits that the Assessing Officer's stand that the Appellant has a PE in India be struck down and he be directed to accept the total income as returned.

3:0 Re.: Holding that the Appellant has a "business connection in India:

3:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that the Appellant has "business connection in India.

3:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no business connection in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

3:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the appellant had business connection in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

3:4 The Appellant submits that the Assessing Officer's stand that the Appellant has business connection in India be struck down and he be directed to accept the total income as returned

45. While dealing with the assessment year 2011-12 earlier in this consolidated order, and respectfully following a coordinate bench decision in assessee's own case for the assessment

year 2010-11, we have decided this issue in favour of the assessee and held that the assessee did not have any permanent establishment in India under article 5 of the Indo US tax treaty, or business connection India under section 9 of the Income Tax Act, 1961. The assessee succeeds on this issue. We see no reasons to take any other view of the matter than the view so taken by us above. We, therefore, uphold the plea of the assessee on these points.

46. Ground nos. 2 and 3 are thus allowed.

47. In ground nos. 4 and 5, the assessee has raised the following grievance:

Without prejudice to the foregoing

4:0 Re.: Attribution

4:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that 50% of Receipts are attributable to the alleged PE of the Appellant in India.

4:2 The Appellant submits that considering the facts and circumstances of its case and the1aw prevailing on the subject no part whatsoever of its receipts are attributable to India and the stand taken by the Assessing Officer/ the Dispute Resolution Panel in this regard is incorrect, illegal, arbitrary, baseless, not in accordance with law and hence ought to be struck down.

4:3 The Appellant submits that the arbitrary action of the Assessing Officer/ the Dispute Resolution Panel be struck down and the Assessing Officer be directed to accept the total income as returned.

Without prejudice to the foregoing:

5:0 Re.: Estimation of gross profit:

5:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the 7.27% of the receipts attributable to the alleged Indian operations ought to be considered as profits of the PE taxable in India.

5:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, even if it is held that the Appellant has a PE in India no further income can be taxed in India as the alleged PF has been remunerated at an Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.

5:3 The Appellant submits that the Assessing Officer be directed to accept the total income as returned

5:4 Without prejudice to the foregoing and inspite of specific directions in this regard by the Dispute Resolution Panel, the Assessing Officer has erred in

holding that 20.31% of the receipts attributable to the alleged Indian operations ought to be considered as profits of the PE and taxable in India.

48. Learned representatives fairly agree that in view of our conclusion that the assessee did not have any permanent establishment or business connection in India, the issues regarding attribution of profits or attribution of profits are infructuous, and do not call for any adjudication by us. We, therefore, decline to deal with these issues on merits, and reject the same as infructuous.

49. Ground nos. 4 and 5 are thus dismissed as infructuous.

50. In ground no. 6, the assessee has raised the following grievance:

6:0 Re: Taxing the "royalty" received during the year u/s. 44DA of the Income Act, 1961:

6:1 The Assessing Officer the Dispute Resolution Panel has erred in holding that the royalty income is "effectively connected" with the alleged PE of the Appellant in India and is therefore taxable u/s. 44DA of the Income Tax Act, 1961.

6:2 The Appellant submits that considering the facts and circumstances of its case and law prevailing on the subject and in particular the provisions of the India-USA DTAA, the Assessing Officer/ the Dispute Resolution Panel the "royalty" received by it during the year under consideration is not taxable u/s. 44DA of the Income-tax Act, 1961 and hence the stand taken by the Assessing Officer/ the Dispute Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.

6:3 The Appellant submits that the Assessing Officer be directed to tax the "royalty" income in accordance with the provisions of section 9 (1) (vi) of the Income-tax Act, 1961 read to recompute its total income

51. Learned representatives agree that once we come to the conclusion that there is no PE or business connection on the facts of this case, as we have concluded dealing with preceding grounds of appeal, there will be no occasion of royalty being effectively connected with the PE or taxability of royalty under section 44DA. This issue is also, therefore, academic and infructuous in the present context.

52. Ground no. 6 is also thus dismissed.

53. In ground no. 7, the assessee has raised the following grievance:

7:0 Re: Credit for tax deducted at source amounting to Rs 21,442 not granted

6:1 The Assessing Officer has erred in not granting the appellant for tax deducted at source of Rs 21,442.

6:2 The Appellant submits that considering the facts and circumstances of its case and law prevailing on the subject it is entitled to full credit of Rs 21,442 being tax deducted at source from its income for the year.

6:3 The Appellant submits that the Assessing Officer be directed to grant the credit of tax deducted at source and re-compute its tax liability accordingly.

54. Learned representatives fairly agree that this issue may be remitted for adjudication de novo after giving yet another opportunity of hearing to the assessee, in accordance with the law and by way of a speaking order. Ordered, accordingly.

55. Ground no. 7 is thus allowed for statistical purposes.

56. In ground nos. 8 and 9, by way of additional grounds of appeal, the assessee has raised the following grievance:

8:0 Re: Taxation of royalty income at Rs. 56,48,03,982

8:1 The Appellant submits that the amount taxable in terms of Article 12(2) of the India-USA Double Taxation Avoidance Agreement [DTAA] should be restricted to Rs 56,48,03,982 which is in accordance with the Advanced Pricing Agreement ["APA"] dated 07 May 2018 entered into by GIA India Laboratory Private Limited.

8:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty taxable in its hands in its hands for the year under consideration should be restricted to Rs 56,48,03,982 in accordance with the APA.

8:3 The Appellant submits that the Assessing Officer be directed to consider the royalty income worked out in terms or the APA and to re-compute its total income and tax thereon accordingly.

9:0 Re: Restricting the taxation of royalty income aft effectively connected to the PE only to Rs 56,48,03,982

9:1 The Appellant submits that in case it is held that any part of royalty income is effectively connected to the alleged PE or the Appellant then such

amount should be restricted to Rs 56,48,03,982 which is in accordance with the APA dated 07 May 2018 entered into by GIA India Laboratory Private Limited.

9:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty, if held to be connected to the alleged PE, should be restricted to Rs 56,48,03,982 in accordance with the APA

9:3 The Appellant submits that the Assessing officer be directed to consider the royalty income, if any, connected to the alleged PE, only at Rs 56,48,03,982 and to re- compute its total income and tax thereon accordingly.

57. In view of the discussions earlier in the order, both the additional grounds of appeal are admitted for adjudication on merits, and in the lights of the discussions in paragraph 2-21 earlier in this order, this additional ground of appeal no. 8 decided in favour of the assessee, in principle, though the matter will go back to the Assessing Officer for verifications of factual aspects with respect of these claims, i.e., with respect to verifications and quantum of actual refunds of royalties by the assessee, which have not been examined at any stage. We, therefore, deem it fit and proper to accept the claim of the assessee, in principle, but remit it back to the Assessing Officer for verification of factual elements embedded in the claim of the assessee. Ordered, accordingly. As for second additional ground of appeal, i.e. ground no. 9, this is rendered infructuous in the light of the findings earlier in the order that no part of the royalty income is to be treated as attributable to the PE, and taxed under section 44AD as such, as it has been held that there is no PE on the facts of this case.

58. Ground no. 8 is thus allowed for statistical purposes in the terms indicated above, and ground no. 9 is dismissed as infructuous.

59. In the result, the appeal for the assessment year 2012-13 is partly allowed in the terms indicated above.

60. We now take up the ITA No. 7174/Mum/17, i.e. appeal filed by the assessee for the assessment year 2013-14. By way of this appeal, the assessee appellant has challenged correctness of the order dated 31st October 2017 in the matter of assessment under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2013-14.

61. Ground no. 1 is general in nature and does not call for any specific adjudication.

62. In ground nos. 2 and 3, the assessee has raised the following grievances:

2:0 Re: Holding that the Appellant has a 'Permanent Establishment' ("PE") in India:

2:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the Appellant has a Permanent Establishment' ("PE) in India.

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no PE in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

2:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the Appellant had a PE in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

2:4 The Appellant submits that the Assessing Officer's stand that the Appellant has a PE in India be struck down and he be directed to accept the total income as returned.

3:0 Re.: Holding that the Appellant has a "business connection in India:

3:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that the Appellant has "business connection in India.

3:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no business connection in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

3:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the appellant had business connection in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

3:4 The Appellant submits that the Assessing Officer's stand that the Appellant has business connection in India be struck down and he be directed to accept the total income as returned

63. While dealing with the assessment year 2011-12 and 2012-13 earlier in this consolidated order, and respectfully following a coordinate bench decision in assessee's own case for the assessment year 2010-11, we have decided this issue in favour of the assessee and held that the assessee did not have any permanent establishment in India under article 5 of the Indo US tax treaty, or business connection India under section 9 of the Income Tax Act, 1961. The assessee succeeds on this issue. We see no reasons to take any other view of the matter than the view so taken by us above. We, therefore, uphold the plea of the assessee on these points.

64. Ground nos. 2 and 3 are thus allowed.

65. In ground nos. 4 and 5, the assessee has raised the following grievance:

> ***Without prejudice to the foregoing***
>
> **4:0 Re.: Attribution**
>
> **4:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that 50% of Receipts are attributable to the alleged PE of the Appellant in India.**
>
> **4:2 The Appellant submits that considering the facts and circumstances of its case and the1aw prevailing on the subject no part whatsoever of its receipts are attributable to India and the stand taken by the Assessing Officer/ the Dispute Resolution Panel in this regard is incorrect, illegal, arbitrary, baseless, not in accordance with law and hence ought to be struck down.**
>
> **4:3 The Appellant submits that the arbitrary action of the Assessing Officer/ the Dispute Resolution Panel be struck down and the Assessing Officer be directed to accept the total income as returned.**
>
> ***Without prejudice to the foregoing:***
>
> **5:0 Re.: Estimation of gross profit:**
>
> **5:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the 20.31% of the receipts attributable to the alleged Indian operations ought to be considered as profits of the PE taxable in India.**
>
> **5:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, even if it is held that the Appellant has a PE in India no further income can be taxed in India as the alleged PF has been remunerated at an Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.**
>
> **5:3 The Appellant submits that the Assessing Officer be directed to accept the total income as returned**
>
> **5:4 Without prejudice to the foregoing and inspite of specific directions in this regard by the Dispute Resolution Panel, the Assessing Officer has erred in holding that 20.31% of the receipts attributable to the alleged Indian operations ought to be considered as profits of the PE and taxable in India.**

66. Learned representatives fairly agree that in view of our conclusion that the assessee did not have any permanent establishment or business connection in India, the issues regarding attribution of profits or attribution of profits are infructuous, and do not call for any adjudication by us. We, therefore, decline to deal with these issues on merits, and reject the same as infructuous.

67. Ground nos. 4 and 5 are thus dismissed as infructuous.

68. In ground no. 6, the assessee has raised the following grievance:

> **6:0 Re: Taxing the "royalty" received during the year u/s. 44DA of the Income Act, 1961:**
>
> **6:1 The Assessing Officer the Dispute Resolution Panel has erred in holding that the royalty income is "effectively connected" with the alleged PE of the Appellant in India and is therefore taxable u/s. 44DA of the Income Tax Act, 1961.**
>
> **6:2 The Appellant submits that considering the facts and circumstances of its case and law prevailing on the subject and in particular the provisions of the India-USA DTAA, the Assessing Officer/ the Dispute Resolution Panel the "royalty" received by it during the year under consideration is not taxable u/s. 44DA of the Income-tax Act, 1961 and hence the stand taken by the Assessing Officer/ the Dispute Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.**
>
> **6:3 The Appellant submits that the Assessing Officer be directed to tax the "royalty" income in accordance with the provisions of section 9 (1) (vi) of the Income-tax Act, 1961 read to recompute its total income.**

69. Learned representatives agree that once we come to the conclusion that there is no PE or business connection on the facts of this case, as we have concluded dealing with preceding grounds of appeal, there will be no occasion of royalty being effectively connected with the PE or taxability of royalty under section 44DA. This issue is also, therefore, academic and infructuous in the present context.

70. Ground no. 6 is also thus dismissed.

71. In ground nos. 7 and 8, by way of additional grounds of appeal, the assessee has raised the following grievance:

> **8:0 Re: Taxation of royalty income at Rs. 94,26,19,067**
>
> **8:1 The Appellant submits that the amount taxable in terms of Article 12(2) of the India-USA Double Taxation Avoidance Agreement [DTAA] should be restricted to Rs 94,26,19,067which is in accordance with the Advanced Pricing Agreement ["APA"] dated 07 May 2018 entered into by GIA India Laboratory Private Limited.**
>
> **8:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty taxable in its hands in its hands for the year under consideration should be restricted to Rs 94,26,19,067 in accordance with the APA.**

8:3 The Appellant submits that the Assessing Officer be directed to consider the royalty income worked out in terms or the APA and to re-compute its total income and tax thereon accordingly.

9:0 <u>Re: R estricting the taxation of royalty income aft effectively connected to the PE only to Rs 94,26,19,067</u>

9:1 The Appellant submits that in case it is held that any part of royalty income is effectively connected to the alleged PE or the Appellant then such amount should be restricted to Rs 94,26,19,067which is in accordance with the APA dated 07 May 2018 entered into by GIA India Laboratory Private Limited.

9:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty, if held to be connected to the alleged PE, should be restricted to Rs 94,26,19,067 in accordance with the APA

9:3 The Appellant submits that the Assessing officer be directed to consider the royalty income, if any, connected to the alleged PE, only at Rs 94,26,19,067 and to re- compute its total income and tax thereon accordingly.

72. In view of the discussions earlier in the order, both the additional grounds of appeal are admitted for adjudication on merits, and in the lights of the discussions in paragraph 2-21 earlier in this order, this additional ground of appeal no.7 decided in favour of the assessee, in principle, though the matter will go back to the Assessing Officer for verifications of factual aspects with respect of these claims, i.e., with respect to verifications and quantum of actual refunds of royalties by the assessee, which have not been examined at any stage. We, therefore, deem it fit and proper to accept the claim of the assessee, in principle, but remit it back to the Assessing Officer for verification of factual elements embedded in the claim of the assessee. Ordered, accordingly. As for second additional ground of appeal, i.e. ground no. 8, this is rendered infructuous in the light of the findings earlier in the order that no part of the royalty income is to be treated as attributable to the PE, and taxed under section 44AD as such, as it has been held that there is no PE on the facts of this case.

73. Ground no. 7 is thus allowed for statistical purposes in the terms indicated above, and ground no.8 is dismissed as infructuous.

74. In the result, the appeal for the assessment year 2012-13 for the assessment year 2013-14 is partly allowed in the terms indicated above.

75. We now take up the ITA No. 53/Mum/2019, i.e. appeal filed by the assessee for the assessment year 2014-15. By way of this appeal, the assessee appellant has challenged correctness of the order dated 29th October 2018, in the matter of assessment under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2014-15.

76. Ground no. 1 is general in nature and does not call for any specific adjudication.

77. In ground nos. 2 and 3, the assessee has raised the following grievances:

2:0 Re: Holding that the Appellant has a 'Permanent Establishment' ("PE") in India:

2:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the Appellant has a Permanent Establishment' ("PE) in India.

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no PE in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

2:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the Appellant had a PE in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

2:4 The Appellant submits that the Assessing Officer's stand that the Appellant has a PE in India be struck down and he be directed to accept the total income as returned.

3:0 Re.: Holding that the Appellant has a "business connection in India:

3:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that the Appellant has "business connection in India.

3:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no business connection in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

3:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the appellant had business connection in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

3:4 The Appellant submits that the Assessing Officer's stand that the Appellant has business connection in India be struck down and he be directed to accept the total income as returned

78. While dealing with the assessment year 2011-12 2012-13 and 2013-14 earlier in this consolidated order, and respectfully following a coordinate bench decision in assessee's own case for the assessment year 2010-11, we have decided this issue in favour of the assessee and held that the assessee did not have any permanent establishment in India under article 5 of the Indo US tax treaty, or business connection India under section 9 of the Income Tax Act, 1961. The assessee succeeds on this issue. We see no reasons to take any other view of

the matter than the view so taken by us above. We, therefore, uphold the plea of the assessee on these points.

79. Ground nos. 2 and 3 are thus allowed.

80. In ground nos. 4 and 5, the assessee has raised the following grievance:

> ***Without prejudice to the foregoing***
>
> **4:0 Re.: Attribution**
>
> **4:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that 50% of Receipts are attributable to the alleged PE of the Appellant in India.**
>
> **4:2 The Appellant submits that considering the facts and circumstances of its case and the1aw prevailing on the subject no part whatsoever of its receipts are attributable to India and the stand taken by the Assessing Officer/ the Dispute Resolution Panel in this regard is incorrect, illegal, arbitrary, baseless, not in accordance with law and hence ought to be struck down.**
>
> ***Without prejudice to the foregoing:***
>
> **5:0 Re.: Estimation of gross profit:**
>
> **5:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the 20.31% of the receipts attributable to the alleged Indian operations ought to be considered as profits of the PE taxable in India.**
>
> **5:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, even if it is held that the Appellant has a PE in India no further income can be taxed in India as the alleged PF has been remunerated at an Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.**

81. Learned representatives fairly agree that in view of our conclusion that the assessee did not have any permanent establishment or business connection in India, the issues regarding attribution of profits or attribution of profits are infructuous, and do not call for any adjudication by us. We, therefore, decline to deal with these issues on merits, and reject the same as infructuous.

82. Ground nos. 4 and 5 are thus dismissed as infructuous.

83. In ground no. 6, the assessee has raised the following grievance:

> **6:0 RE: Taxing the "royalty" received during the year u/s. 44DA of the Income Act, 1961:**
>
> **6:1 The Assessing Officer the Dispute Resolution Panel has erred in holding that the royalty income is "effectively connected" with the alleged PE of the**

Appellant in India and is therefore taxable u/s. 44DA of the Income Tax Act, 1961.

6:2 The Appellant submits that considering the facts and circumstances of its case and law prevailing on the subject and in particular the provisions of the India-USA DTAA, the Assessing Officer/ the Dispute Resolution Panel the "royalty" received by it during the year under consideration is not taxable u/s. 44DA of the Income-tax Act, 1961 and hence the stand taken by the Assessing Officer/ the Dispute Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.

84. Learned representatives agree that once we come to the conclusion that there is no PE or business connection on the facts of this case, as we have concluded dealing with preceding grounds of appeal, there will be no occasion of royalty being effectively connected with the PE or taxability of royalty under section 44DA. This issue is also, therefore, academic and infructuous in the present context.

85. Ground no. 6 is also thus dismissed.

86. In ground nos. 7 and 8, , the assessee has raised the following grievance:

7:0 **Re: Taxation of royalty income at Rs. 1,06,93.35,468/- in terms of the Advanced Pricing Agreement f"APA"1 dated 07 May 2018 entered into by GIA India Laboratory Private Limited:**

7:1 The Appellant submits that the amount taxable as royalty should be restricted to Rs. 1,06,93,35,468/- which is in accordance with the APA.

7:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty taxable in its hands for the year under consideration should be restricted to Rs 1,06,93,35,468/- in accordance with the APA.

7 :3 The Appellant submits that the Assessing Officer be directed to consider the royalty income worked out in terms of the APA and to re-compute its total income and tax thereon accordingly.

Without prejudice to the forgoing

8 :0 Re: Restricting the taxation of royalty income at effectively connected to the PE only to Rs. 1.06.93.35.468/-:

8 :1 The Appellant submits that in case it be held that the royalty income is effectively connected to the alleged PE in India of the Appellant then such amount should be restricted to Rs. ,06,93,35,468/- which is in accordance with the APA dated 07 May 2018 entered into by GIA India Laboratory Private Limited.

8 :2 The Appellant submits that the Assessing Officer be directed to consider the royalty income, if any, connected to the alleged PE, only at Rs. 1,06,93,35,468/- and to recompute its total income and tax thereon accordingly.

87. In view of the discussions earlier- particularly in paragraph 2-21 earlier in this order, ground of appeal no.7 decided in favour of the assessee, in principle, though the matter will go back to the Assessing Officer for verifications of factual aspects with respect of these claims, i.e., with respect to verifications and quantum of actual refunds of royalties by the assessee, which have not been examined at any stage. We, therefore, deem it fit and proper to accept the claim of the assessee, in principle, but remit it back to the Assessing Officer for verification of factual elements embedded in the claim of the assessee. Ordered, accordingly. As for ground no. 8, this is rendered infructuous in the light of the findings earlier in the order that no part of the royalty income is to be treated as attributable to the PE, and taxed under section 44AD as such, as it has been held that there is no PE on the facts of this case.

88. Ground no. 7 is thus allowed for statistical purposes in the terms indicated above, and ground no.8 is dismissed as infructuous.

89. In ground no. 8, the assessee has raised grievance against levy of interest under section 234A on the facts of the case, but no specific arguments have been addressed on this issue. Ground no. 8 is thus treated as not pressed.

90. Ground no. 8 is thus dismissed as not pressed.

91. In the result, the appeal for the assessment year 2014-15 is partly allowed in the terms indicated above.

92. We now take up the ITA No.7739/Mum/2019, i.e. appeal filed by the assessee for the assessment year 2015-16. By way of this appeal, the assessee appellant has challenged correctness of the order dated 18th October 2019, in the matter of assessment under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2015-16.

93. Ground no. 1 is general in nature and does not call for any specific adjudication.

94. In ground nos. 2 and 3, the assessee has raised the following grievances:

2:0 Re: Holding that the Appellant has a 'Permanent Establishment' ("PE") in India:

2:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the Appellant has a Permanent Establishment' ("PE) in India.

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no PE in India and the stand

taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

2:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the Appellant had a PE in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

2:4 The Appellant submits that the Assessing Officer's stand that the Appellant has a PE in India be struck down and he be directed to accept the total income as returned.

3:0 Re.: Holding that the Appellant has a "business connection in India:

3:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that the Appellant has "business connection" in India.

3:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no business connection in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

3:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the appellant had business connection in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

3:4 The Appellant submits that the Assessing Officer's stand that the Appellant has business connection in India be struck down and he be directed to accept the total income as returned

95. While dealing with the assessment years 2011-12 2012-13, 2013-14 and 2014-15 earlier in this consolidated order, and respectfully following a coordinate bench decision in assessee's own case for the assessment year 2010-11, we have decided this issue in favour of the assessee and held that the assessee did not have any permanent establishment in India under article 5 of the Indo US tax treaty, or business connection India under section 9 of the Income Tax Act, 1961. The assessee succeeds on this issue. We see no reasons to take any other view of the matter than the view so taken by us above. We, therefore, uphold the plea of the assessee on these points.

96. Ground nos. 2 and 3 are thus allowed.

97. In ground nos. 4 and 5, the assessee has raised the following grievance:

Without prejudice to the foregoing

4:0 Re.: Attribution

4:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that 50% of Receipts are attributable to the alleged PE of the Appellant in India.

4:2 The Appellant submits that considering the facts and circumstances of its case and the1aw prevailing on the subject no part whatsoever of its receipts are attributable to India and the stand taken by the Assessing Officer/ the Dispute Resolution Panel in this regard is incorrect, illegal, arbitrary, baseless, not in accordance with law and hence ought to be struck down.

Without prejudice to the foregoing:

5:0 Re.: Estimation of gross profit:

5:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the 20.31% of the receipts attributable to the alleged Indian operations ought to be considered as profits of the PE taxable in India.

5:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, even if it is held that the Appellant has a PE in India no further income can be taxed in India as the alleged PF has been remunerated at an Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.

98. Learned representatives fairly agree that in view of our conclusion that the assessee did not have any permanent establishment or business connection in India, the issues regarding attribution of profits or attribution of profits are infructuous, and do not call for any adjudication by us. We, therefore, decline to deal with these issues on merits, and reject the same as infructuous.

99. Ground nos. 4 and 5 are thus dismissed as infructuous.

100. In ground no. 6 and 7 , the assessee has raised the following grievances:

6:0 <u>Re: Non-consideration of correct amount of royalty for the year:</u>

6:1 The Assessing Officer / the Dispute Resolution Panel have erred in holding that the Appellant's income by way of royalty for the year is Rs. 2,88,71,40,780/-.

6:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty taxable in its hands for the year under consideration should be restricted to Rs. 1,84,23,68,0507- being the amount of royalty received for the year.

6:3 The Appellant submits that the Assessing Officer be directed to consider the royalty income on the basis of the actual income earned for the year and to re-compute its total income and tax thereon accordingly.

Without prejudice to the foregoing:

7:0 Re.: Taxing the "royalty" received during the year u/s. 44DA of the Income-tax Act. 1961:

7:1 The Assessing Officer/ the Dispute Resolution Panel have erred in holding that the royalty income is "effectively connected" with the alleged PE of the Appellant in India and is therefore taxable u/s. 44DA of the Income-tax Act, 1961.

7:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject and in particular the provisions of the India-USA.

DTAA, the Assessing Officer / the Dispute Resolution Panel the "royalty" received by it during the year under consideration is not taxable u/s. 44DA of the Income-tax Act, 1961 since it does not have any PE in India and hence the stand taken by the Assessing Officer/ the Dispute Resolution Panel in respect thereof js incorrect, erroneous, misconceived and illegal and hence ought to be struck down.

7:3 The Appellant further submits that even if it be held that the royalty income is effectively connected to the alleged PE in India of the Appellant then such amount should be restricted to Rs. 1,84,23,68,050/- which is in accordance with the APA dated 07 May 2018 entered into by GIA India Laboratory Private Limited.

101. In view of the discussions earlier- particularly in paragraph 2-21 earlier in this order, ground of appeal no.6 decided in favour of the assessee, in principle, though the matter will go back to the Assessing Officer for verifications of factual aspects with respect of these claims, i.e., with respect to verifications and quantum of actual refunds of royalties by the assessee, which have not been examined at any stage. We, therefore, deem it fit and proper to accept the claim of the assessee, in principle, but remit it back to the Assessing Officer for verification of factual elements embedded in the claim of the assessee. Ordered, accordingly. As for ground no. 7, this is rendered infructuous in the light of the findings earlier in the order that no part of the royalty income is to be treated as attributable to the PE, and taxed under section 44AD as such, as it has been held that there is no PE on the facts of this case.

102. Ground no.6 is thus allowed for statistical purposes in the terms indicated above, and ground no.7 is dismissed as infructuous.

103. In ground no. 8, the assessee has raised grievance against levy of interest under section 234A on the facts of the case, but no specific arguments have been addressed on this issue. Ground no. 8 is thus treated as not pressed.

104. Ground no. 8 is thus dismissed as not pressed.

105. In the result, the appeal for the assessment year 2015-16 is partly allowed in the terms indicated above

106. We now take up the ITA No.7740/Mum/2019, i.e. appeal filed by the assessee for the assessment year 2016-17. By way of this appeal, the assessee appellant has challenged correctness of the order dated 18th October 2019, in the matter of assessment under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2016-17.

107. Ground no. 1 is general in nature and does not call for any specific adjudication.

108. In ground nos. 2 and 3, the assessee has raised the following grievances:

> **2:0 Re: Holding that the Appellant has a 'Permanent Establishment' ("PE") in India:**
>
> **2:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the Appellant has a Permanent Establishment' ("PE) in India.**
>
> **2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no PE in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.**
>
> **2:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the Appellant had a PE in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.**
>
> **2:4 The Appellant submits that the Assessing Officer's stand that the Appellant has a PE in India be struck down and he be directed to accept the total income as returned.**
>
> **3:0 Re.: Holding that the Appellant has a "business connection in India:**
>
> **3:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that the Appellant has "business connection" in India.**
>
> **3:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no business connection in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.**
>
> **3:3 The Appellant submits that the Assessing Officer has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the appellant had business connection in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.**

3:4 The Appellant submits that the Assessing Officer's stand that the Appellant has business connection in India be struck down and he be directed to accept the total income as returned

109. While dealing with the assessment years 2011-12 2012-13, 2013-14, 2014-15 and 2015-16, earlier in this consolidated order, and respectfully following a coordinate bench decision in assessee's own case for the assessment year 2010-11, we have decided this issue in favour of the assessee and held that the assessee did not have any permanent establishment in India under article 5 of the Indo US tax treaty, or business connection India under section 9 of the Income Tax Act, 1961. The assessee succeeds on this issue. We see no reasons to take any other view of the matter than the view so taken by us above. We, therefore, uphold the plea of the assessee on these points.

110. Ground nos. 2 and 3 are thus allowed.

111. In ground nos. 4 and 5, the assessee has raised the following grievance:

Without prejudice to the foregoing

4:0 Re.: Attribution

4:1 The Assessing Officer/ the Dispute Resolution Panel has erred in holding that 50% of Receipts are attributable to the alleged PE of the Appellant in India.

4:2 The Appellant submits that considering the facts and circumstances of its case and the1aw prevailing on the subject no part whatsoever of its receipts are attributable to India and the stand taken by the Assessing Officer/ the Dispute Resolution Panel in this regard is incorrect, illegal, arbitrary, baseless, not in accordance with law and hence ought to be struck down.

Without prejudice to the foregoing:

5:0 Re.: Estimation of gross profit:

5:1 The Assessing Officer / the Dispute Resolution Panel has erred in holding that the 20.31% of the receipts attributable to the alleged Indian operations ought to be considered as profits of the PE taxable in India.

5:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, even if it is held that the Appellant has a PE in India no further income can be taxed in India as the alleged PF has been remunerated at an Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.

112. Learned representatives fairly agree that in view of our conclusion that the assessee did not have any permanent establishment or business connection in India, the issues regarding attribution of profits or attribution of profits are infructuous, and do not call for any

adjudication by us. We, therefore, decline to deal with these issues on merits, and reject the same as infructuous.

113. Ground nos. 4 and 5 are thus dismissed as infructuous.

114. In ground no. 6 and 7, the assessee has raised the following grievances:

> **6:0 <u>Re: Non-consideration of correct amount of royalty for the year:</u>**
>
> **6:1 The Assessing Officer / the Dispute Resolution Panel have erred in holding that the Appellant's income by way of royalty for the year is Rs. 261,86,26,600**
>
> **6:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty taxable in its hands for the year under consideration should be restricted to Rs. 168,83,59,420 being the amount of royalty received for the year.**
>
> **6:3 The Appellant submits that the Assessing Officer be directed to consider the royalty income on the basis of the actual income earned for the year and to re-compute its total income and tax thereon accordingly.**
>
> ***Without prejudice to the foregoing:***
>
> **7:0 Re.: Taxing the "royalty" received during the year u/s. 44DA of the Income-tax Act. 1961:**
>
> **7:1 The Assessing Officer/ the Dispute Resolution Panel have erred in holding that the royalty income is "effectively connected" with the alleged PE of the Appellant in India and is therefore taxable u/s. 44DA of the Income-tax Act, 1961.**
>
> **7:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject and in particular the provisions of the India-USA.**
>
> **DTAA, the Assessing Officer / the Dispute Resolution Panel the "royalty" received by it during the year under consideration is not taxable u/s. 44DA of the Income-tax Act, 1961 since it does not have any PE in India and hence the stand taken by the Assessing Officer/ the Dispute Resolution Panel in respect thereof js incorrect, erroneous, misconceived and illegal and hence ought to be struck down.**
>
> **7:3 The Appellant further submits that even if it be held that the royalty income is effectively connected to the alleged PE in India of the Appellant then such amount should be restricted to Rs. 168,83,59,420 which is in accordance with the APA dated 07 May 2018 entered into by GIA India Laboratory Private Limited.**

115. In view of the discussions earlier- particularly in paragraph 2-21 earlier in this order, the ground of appeal no.6 decided in favour of the assessee, in principle, though the matter

will go back to the Assessing Officer for verifications of factual aspects with respect of these claims, i.e., with respect to verifications and quantum of actual refunds of royalties by the assessee, which have not been examined at any stage. We, therefore, deem it fit and proper to accept the claim of the assessee, in principle, but remit it back to the Assessing Officer for verification of factual elements embedded in the claim of the assessee. Ordered, accordingly. As for ground no. 7, this is rendered infructuous in the light of the findings earlier in the order that no part of the royalty income is to be treated as attributable to the PE, and taxed under section 44AD as such, as it has been held that there is no PE on the facts of this case.

116. Ground no. 6 is thus allowed for statistical purposes in the terms indicated above, and ground no.7 is dismissed as infructuous.

117. In the result, the appeal for the assessment year 2016-17 is also partly allowed in the terms indicated above

118. No other issues were raised before us for adjudication.

119. In the result, all the six appeals are partly allowed in the terms indicated above. Pronounced in the open court today on the 30th day of April, 2021.

Sd/xx ***Sd/xx***
Vikas Awasthy **Pramod Kumar**
(Judicial Member) (Vice President)
Mumbai, dated the 30th day of April, 2021

Copies to: *(1)* *The appellant* *(2)* *The respondent*
(3) *CIT* *(4)* *CIT(A)*
(5) *DR* *(6)* *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai