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

% ***Judgment delivered on: 19.09.2024***

\+ ITA 491/2019 & CM APPL. 23000/2019 (Stay)

GE NUOVO PIGNONE S.P.A (NOW KNOWN AS NUOVO PIGNONE INTERNATIONAL SRL) .....Appellant

Through: Mr. Sachit Jolly, Ms. Disha Jham, Ms. Soumya Singh, Mr. Devansh Jain, Mr. Raghav Dutt & Mr. Abhyudaya Shankar Bajpai, Advs.

versus

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

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, JSC, Mr. Abhishek Anand & Mr. Pranjal Singh, Advs.

61

\+ W.P.(C) 6494/2019

GE NUOVO PIGNONE S.P.A (NOW KNOWN AS NUOVO PIGNONE INTERNATIONAL SRL) .....Petitioner

Through: Mr. Sachit Jolly, Ms. Disha Jham, Ms. Soumya Singh, Mr. Devansh Jain, Mr. Raghav Dutt & Mr. Abhyudaya Shankar Bajpai, Advs.

versus

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

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar & Mr. Rishabh Nangia, JSCs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. The instant appeal was admitted on 29 January 2024 on the following questions of law:

> "A. Whether on the facts and in the circumstances of the case and in law, the Income Tax Appellate Tribunal ["ITAT"] was justified in upholding the action of the Assessing Officer ["AO"] in exercising jurisdiction under Section 147/148 of the Income Tax Act, 1961 ["Act"] and assessing the income of the appellant for Assessment Year ["AY"] 2009-10 even in the absence of any material whatsoever in the possession of the AO relating to the relevant AY?
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> B. Whether on facts and in the circumstances of the case and in law, the ITAT was justified in upholding the finding of the AO that the appellant herein had a fixed place permanent establishment ["PE"] in India under Article 5(1) of the Double Taxation Avoidance Agreement ["DTAA"]?
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> C. Whether on facts and in the circumstances of the case and in law, the ITAT erred in was in upholding the finding of the Dispute Resolution Panel ["DRP"] and AO that the appellant herein had a dependant agent permanent establishment ["DAPE"] in India under Article 5(4) of the DTAA?
>
> D. Whether on the facts and circumstances of the case and in law, the ITAT while dealing with the issue of attribution of profits erred in relying upon a Judgment which had been reversed by the Hon'ble Supreme Court?"

2. The appellant is principally aggrieved by the order of the **Income Tax Appellate Tribunal**[1] dated 01 January 2019 pertaining to **Assessment Year**[2] 2009-10 and which has principally upheld the final assessment order which came to be framed pursuant to a reassessment action which was initiated in terms of Section 147 of the **Income Tax Act, 1961**[3].

[1] ITAT
[2] AY
[3] Act

3. Since the litigation between the parties has had a chequered history, we deem it apposite to notice the following facts. **General Electric International Operations Company**[4] is stated to have set up a Liaison Office in New Delhi on 01 July 1987. GEIOC in turn entered into a Global Services Agreement dated 16 January 2001 with **GE India Industrial Pvt. Ltd.**[5] for providing market support services to the latter as well as its other affiliates.

4. A survey is stated to have been conducted on 02 March 2007 at the Liaison Office of GEIOC. Based on the material gathered in the course thereof, notices under Section 148 of the Act came to be issued to various entities of the GE Group including the appellant assessee. Pursuant to those notices, assessments came to be completed for AYs' 2001-02 to 2008-09.

5. In the course of that assessment, the **Assessing Officer**[6] came to hold that the Liaison Office of GEIOC constituted a **Fixed Place Permanent Establishment**[7] of the appellant in India. It further held that in view of the activities of the expatriates as well as the presence of employees of GEIIPL, the same also constituted a **Dependent Agent PE** of the appellant. The AO, consequently, computed the profits of the GE Group entities at 10% of sales and attributed a 35% profit margin to the sales activities carried out in India. It is also pertinent to note that 3.5% of those sales was held to be the income attributable to the PE in India.

6. The aforesaid assessments were subjected to an appeal before

[4] GEIOC
[5] GEIIPL
[6] AO
[7] PE

the **Commission of Income Tax (Appeals)**[8], and the appeals preferred by the appellant formed part of a larger batch of 139 appeals which were instituted by the GE Group entities.

7. Before the Tribunal to which the matter travelled consequent to those appeals coming to be dismissed by the CIT(A), in the case of GE Energy Parts, and while ruling on ITA 671/DEL/2011, by an order dated 27 January 2017 it firstly held that the invocation of Sections 147 and 148 of the Act was unjustified being based on material which pertained to other AYs'. It, however, held that since the assessee itself had withheld information from the AO, adverse inference was liable to be drawn and, consequently, the reassessment proceedings were not liable to be interdicted on that score.

8. While rendering judgment on that appeal, the Tribunal upheld the findings of the lower authorities of a Fixed Place PE having come into existence in India, a DAPE also being present and consequentially holding that 75% of the profits from the sales activities could be attributed to those entities. Following the aforesaid order, the Tribunal disposed of the appeals for AYs' 2001-02 to 2008-09.

9. The aforesaid order of the Tribunal was thereafter challenged before this Court in terms of an appeal under Section 260A of the Act. That appeal in terms of an order dated 13.09.2017 was remitted back to the Tribunal for adjudication on various issues including PE, ad hoc attribution between sales and services and taxability of income as Fee for Technical Services.

10. Pursuant to the remit, the Tribunal answered those issues in terms of its judgment dated 31 January 2018 against the assessees'.

[8] CIT(A)

This saw the institution of another set of appeals before this Court pertaining to AYs 2001-02 to 2008-09.

11. Those appeals came to be admitted on the following questions of law:

> "2.8.1 Did ITAT fall into error in its findings with respect to existence of a fixed place PE of the assessee/ Appellant in India?
>
> 2.8.2 Did ITAT fall into error in concluding that the assessee separately had an independent agent PE, located in India? and:
>
> 2.8.3 Whether on the facts and the circumstances of the case and the law, the ITAT was justified in attributing as high as 35% of the profits to the alleged marketing activities and thereafter, attributing 75% of such 35% profits to the alleged PE of the Appellant in India?"

12. The said appeals came to be dismissed in terms of a detailed judgment dated 21 December 2018 and in terms of which the order of the Tribunal was affirmed in toto. It becomes pertinent to take note of the following conclusions which this Court came to render on the question of Fixed Place PE, DAPE, Fee for Technical Services and attribution of profit:

> **<u>In regards to Fixed Place PE:</u>**
>
> "56. The decision of the lower authorities reveal that the process adopted for business development involved four steps: Stage 1-Pre-qualification; Stage 2-Bid/no bid and Proposal development; Stage 3-Bid approval and negotiations; and Stage 4-Final contract development and approval. The first step is identification of a market opportunity, involving collection of information, analysis etc. The next two steps are described elaborately as follows:
>
> "...survey documents, as discussed above, abundantly show GE India playing an important and proactive role in the finalization of the deal and the terms and conditions with customers in India. In reality, the major activities about sourcing of customers and finalizing the deals with them were done by GE India in consultation, wherever required, with GE Overseas. The assessee frankly admitted in the same para that: 'In some instances, the proposal development is jointly run by the GE Overseas and GE India teams. This is also borne out from page 104 of the Survey documents PB-II, as discussed above, which is an e-mail from

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

28.9.1. The Id. AR submitted for the third stage of 'Bid approval and negotiations', that the assessee stated before the AO that once the proposal/bid/tender have been put together as described in Stage 2 above, it is approved by the senior management during the Stage 3 and, thereafter, submitted to the end customer. Subsequently, GE Overseas may carry out negotiations with the customer, which may entail addressing queries, if any, raised by the end-customer, seeking/providing clarifications regarding work scope, pricing, etc required by the end customer. For the fourth stage of 'Final contract development and approval', the assessee stated that GE Overseas discusses the outcome of the negotiation process internally amongst its various overseas functional heads/approving authorities (operations, finance, legal, etc.) so as to decide whether or not to go-ahead with the contract on the agreed terms and conditions with the customer. If the negotiated contract terms are approved and accepted both by GE Overseas and the end-customer, the contract documents are prepared and executed/signed by GE Overseas. Local inputs are obtained from GE India at this stage on a need basis.

28.9.2. Here again we find that the assessee's submissions are only partly true. Pages 101-103 of the Survey documents PB-II, as discussed above, evidence GE India finalizing MOU with the Indian customer, Pump Design Department of IOC, and advising accordingly to the GE Overseas. Then, there is a mail showing that the change was permitted in the terms of MOU by the Indian team, which was conveyed by GE India to the customer, with a copy to another member of GE India. GE India was negotiating terms with the Indian customers is also borne out from page 195 of Survey Documents PB-I as discussed above, whereby Indian customer was requesting GE India to revise the offer. Similarly, page 82 of Survey Documents PB-I, as discussed above, shows that GE India changed the terms and conditions. In the like manner, pages 2 and 3 of Survey Documents PB-II show that the draft agreement by Reliance Industries Ltd. to GE Overseas was sent back to GE India to get it reviewed from aftermarket colleagues in India. Pages 32 and 33 of Survey documents PB-II show that when GE Overseas tried to contact directly with RIL, GE India objected to the same and wanted the entire consultations only through the Indian team, which was positively responded by GE Overseas. Page 39 of the

Survey documents PB-II again shows that it is GE India which was negotiating with Indian customers and not allowing GE Overseas even to change the terms and conditions.

28.10. At this juncture, it is significant to note that the assessee is not dealing in off the shelf goods. Sales are made on the basis of a prior contract. In such cases, customer's requirements are first properly understood and thoroughly examined; then commercial and technical discussion meetings take place; then proposals are prepared after negotiations on technical and commercial aspects taking Indian laws and regulations in consideration. These are all significant and essential parts of sales activity, which have to be necessarily done in India by GE India. Ordinarily, it is not the Indian customer, who would visit GE entities overseas, but it is GE India, who has to have physical presence in India and such presence is through the GE India team.

57. This court is of the opinion that the process of sales and marketing of GE's product through its various group companies, in several segments of the economy (gas and energy, railways, power, etc.) was not simple. As noticed by the tribunal, entering into contract with stakeholders (mainly service providers in these segments) involved a complex matrix of technical specifications, commercial terms, financial terms and other policies of GE. To address these, GE had stationed several employees and officials: high ranking, and in middle level. At one end of the spectrum of their activities was information gathering and analysis- which helped develop business and commercial opportunities. At the other end was intensive negotiations with respect to change of technical parameters of specific goods and products, which had to be made to suit the customers. Standard "off the shelf goods or even standard terms of contract, were inapplicable. In this setting, a potential seller of equipment - like GE, had to create intricate and nuanced platforms to address the needs of customers identified by it, in the first instance. After the first step, of gathering information, GE had to commence the process of marketing its product, understanding the needs of Indian clients, giving them options about available technology, address queries and concerns with respect to technical viability and cost efficacy of the products concerned and- wherever necessary indicate how and to what extent it could adapt its known products, or design parameters, to suit Indian conditions as well as Indian local regulations. This process was time consuming and involved a series of consultations between the client, its technical and financial experts and also its headquarters. Oftentimes the headquarters too had to be consulted on technical matters. After this consultative process ended and the terms of supply were agreed to, the final affirmative to the offer, to be made by the Indian customer, would be indicated by GE's headquarters.

58. This court is of the opinion that the facts of the present case clearly point to the fact that the assessee's employees were not merely liaisoning with clients and the headquarters office. E-mail communications and chain mails indicate that with respect to clients and possible contracts of GE with Reliance CS-1, GE Oil & Gas, Bongaigaon Refinery, Draft LOA for WHRU (E-mail from Andrea Alfani (GE Overseas) to Vivek Venkatachalam (GEIIPL) and Riccardo Procacci (GEII) on proposed e-mail to send Reliance, including comments to RIL on the proposed letter of acceptance and relevant attachments. Also, asked them whether they wanted to send the e-mail themselves to RIL or for it to be sent directly. These appear to show important role for Vivek and Riccardo in the negotiating process.

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

60. It is clear that in the kind of activity that GE carries out, i.e manufacture and supply of highly specjalized and technically customized equipment, the "core activity" of developing the customer (identifying a client), approaching that customer, communicating the available options, discussing technical and financial terms of the agreement, even price negotiations, needed a collaborative process in which the potential client along with GE's India employees and its experts, had to intensely negotiate the intricacies of the technical and commercial parameters of the articles. This also involved discussing the contractual terms and the associated consideration payable, the warranty and other commercial terms. No doubt, at later stages of contract negotiations, the India office could not take a final decision, but had to await the final word from headquarters. But that did not mean that the India office was just for mute data collection and information dissemination. The discharge of vital responsibilities relating to finalization of commercial terms, or at least a prominent involvement in the contract finalization process, discussed by the revenue authorities, in the present case, clearly revealed that the GE carried on business in India through its fixed place of business (i.e the premises), through the premises."

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"62. With respect to this question of law ,the ITAT relied on a two-part framing to see if Agency PE is met, that is para 4 of the DTAA, especially 4(a) lays down framework for when something is an agency PE and the exception to the application of 4(a) laid out

in Para 5, which says that the use of a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary, course of their business shall not be considered Agency PE.

63. Applying the standard to the facts at hand, ITAT recorded in its findings that the expats of GEII and employees of GEIIPL were rendering services to multiple entities. But also, that these expats were dealing on behalf of the major business lines of the GE Group. Accordingly, GE India comprising of expats and other employees of GEIIPL etc., were not working for a particular enterprise, but, for multiple enterprises dealing in one of the three major businesses of GE group. Activities of an agent must be "devoted wholly, or almost wholly on behalf of that enterprise." On a conjoint reading of part 2 of para 5 of Article 5 and Article 3(g), it is apparent that the second part of para 5 refers to an agent looking after the activities of a single enterprise and not multiple enterprises. GE relies on Varian India (supra) which held in para 5 it is necessary that the activities, of agent must be devoted wholly or almost wholly to one enterprise. Nondisclosure of transactions are not sufficient to establish someone as agent of independent status - there was needed to fulfill both conditions.

Furthermore, there also was the need to show that they were not at arm's length practice.

Nonetheless, ITAT held that GE India counts as agency PE. An agent of a foreign company is an' agent of dependent status even if there is more than one company in the related group. If there are multiple independent customers – you qualify as an agent of independent status.

The fact that transactions between such an agent of dependent status and multiple related enterprises are or are not as ALP, is not relevant at the stage of establishment of a dependant PE in India, which is created solely due to the nature of activities of such an agent for the overseas entity.

64. The ITAT opinion focuses on Article 5(4) (a) i.e. the authority to conclude contracts. GE relies on Para 33 of OECD commentary to suggest the understanding of such authority - "a person who is authorized to negotiate all elements and details of a contract in a way binding on the enterprise can be said to have exercised this authority" and "the mere fact, however, that a person has attended or even participated in negotiations …will not be sufficient, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise." The revenue responded by clarifying that India had clarified its position that it does not agree with the above portions of Para 33 commentary. The position of India is that :

> *"a person has attended or participated in negotiations in a State between an enterprise and a client, can, in certain circumstances, be sufficient, by itself to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise; and that a person who is authorized to negotiate the. essential elements of contract, and not necessarily all the elements, can be said to exercise the authority to conclude contracts."*

65. The ITAT noted that India's position has a binding effect on all conventions entered after the date – but does not retrospectively apply to conventions entered before the date. And, therefore, the Indian commentary (which serves as: a reservation) cannot modify bilateral treaties prior to 2008 such as the US-India DTAA. At the same time, it cannot be said that every line of the OECD commentary is read into statute by incorporation. ITAT notes that *"it is only an interpretation of the OECD Model Convention. One should take cognizance of the view given in the Commentary, on a holistic basis and not as emanating from individual and selective lines, which, at times, may turn out to be overlapping in nature".*

66. Regarding the OECD commentary court notices that the position in Para 32.1 runs contrary to Para 33 that GE relies on. Therefore, the assessee cannot selectively quote on certain parts of the commentary - rather, must read the spirit of the entire commentary. The ITAT concluded that as long as the activities of the agent in concluding contracts is not auxiliary, and at the san1e time, does not require concluding every single element of the contract. As Italian court noted in *Ministry of Finance (Tax Qffice) v. Philip Morris (Gll1BH), Corte Suprema di Cassazione No. 7682/02 of May 25 2002*:

> " the participation of representatives or employees of a resident company in a phase of the conclusion of a contract between a foreign company and another resident entity may fall within the concept of authority to conclude contracts in the name of the foreign company, even in the absence of a formal power of representation."

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

With regards to DAPE:

"71. It would be useful to notice the facts and analysis of the law in Rolls Royce Pic (supra). The assessee had a local office (LO) in India; the AO determined that it constituted dependent agent PE. Though the dependent agent had no authority to negotiate and enter

into contracts for and on behalf of the asssessee, it habitually secured orders for RRIL and was its PE. At the same time, this court held that Rolls Royce Plc's presence in India was also a fixed place of the assessee constituting PE. Activity at this fixed place was no auxiliary' but was core activity of marketing, selling, negotiating. RRIL was sales office for assessee – employees worked wholly and exclusively for the assessee and its group. Employees of assessee in India were also present in various locations in India and reported to director of RRIL India. The following extracts of the judgement are indicative of the approach to be adopted wherever the court has to see if the entity has a PE and a dependant agent PE:

> "16. After holding that the assessee had business connection in India, the Tribunal adverted to the question as to whether there was any PE in India within the meaning of Article 5 of the Indo-UK DTAA. The Tribunal extracted the provisions of Article 5 and stated the legal position that emerged therefrom. Thereafter, it referred to various documents in para 22 and narrated its effect in detail. Our purpose would be served by extracting para 23 of the impugned order which reads as under:-
>
> > "23. It is also seen that the appellant has a dependent agent in India in the form of RRIL. The fact that RRIL is totally dependent upon the appellant is not denied. However, the contention of the appellant is that even though RRIL is a dependent agent and such agency is to be deemed as PE, so long such dependent agent has no authority to negotiate and enter into contracts, under Article 5 (4), there is no PE in India. It is to be noted that Article 5 (4) has three clauses, namely, a, b & c. Thus, even if one has to hold that the dependent agent has no authority to negotiate and enter into contracts for and on behalf of appellant, still as per clause (c) of sub Article (4), it is found that RRIL habitually secures orders in India for the appellant. It is a set practice that no customers in India are directly to send orders to the appellant in UK. Such orders are required to be routed only through RRIL. This fact is evident from the letter of Mr. L.M Morgan to Mr. Prateek Dabral and Ms. Usha. In the said letter, it is made clear that even request for quotation/extension could not be communicated directly to the appellant but are to be routed through the office of RRIL. This is applicable even to the orders. The fact is not denied that the orders are firstly received by RRIL from the customers in India and only then communicated to the appellant. Thus, as per Para 4(c) of Article 5, the dependent agent habitually secures orders wholly for the enterprise itself and hence, is deemed to be a permanent establishment of the appellant. The contention of

appellant that the role of RRIL is merely of a post office is, therefore, unacceptable in view of the facts of the case as evidenced by various documents and correspondence found during the course of survey. It can, therefore be summarized that in the light of the facts as well as documents mentioned above, RRIL's presence in India is a permanent establishment of appellant because:

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

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

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

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

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

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

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

Thus, the appellant can be said to have a PE in India within the meaning of Article 5 (1) 5 (2) and 5 (4) of the Indo UK DTAA. Since we have found that the appellant 49612008~ 49712008, 49812008,498/2008 58412008, 64712008, 64812008, 64912008, 65012008,663/2008 has a business connection in India as well as PE in India, the income arising from its operation in India are chargeable to tax in India."

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

Those objections were duly met and answered.

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

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

74. The assessee, GE has organized its affairs in such a manner – and one cannot quarrel with its intent, so as to minimize tax incidence in India. Yet, the court's task is not as easy to neatly compartmentalize whether the patterns of past decisions result in its establishments constituting fixed place PE or a dependent agent PE. The intricate nature of activities it has carefully designed, where technical officials having varying degree of authority involve themselves - along with local managerial and technical employees, in contract negotiation, often into core or "key" areas" modification of technical specifications and the negotiations for it, to fulfill local needs and even local regulatory requirements, the complexities of price negotiation, etc. clearly show that the assessee carries out through the PE business in India. These activities also intersect and overlap with the content of the principle of dependent agent, inasmuch it is evident that these agencies work solely for the overseas companies, in their core activities."

With regard to Attribution of Profit:

"77. The Revenue authorities carried out a two-part analysis on this aspect, i.e. attribution of income based upon the profits derived by the assessee. By this analysis, 10% of the' sales income made in India is attributed as the basis of total profit of GE overseas entities in India.

Upon that figure, the attribution of profit to the marketing activity, which the Assessing Officer applied, was 35%. In this regard, the contentions of the assessee were that the arbitrary and high and that the application of principles in Galileo International Inc. (supra) were not automatic. Learned counsel had stressed that each case would involve an intensive factual analysis to arrive at a figure that would fit in the concept of total profits accruing to the overseas entities from Indian activities and that the further refinement of that into a broad percentage cannot be a matter of precedent.

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

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

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"Para 16.4

As discussed in this order, the GEIIPL has been remunerated for

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

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

(Emphasis supplied)

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

"Where, under paragraph 5 of Article 5, a permanent establishment of an enterprise of a Contracting State is deemed to exist in the other Contracting State by reason of the activities of a so-called dependent agent (see paragraph 32 of the Commentary on Article 5), the same principles used to attribute profits to other types of permanent establishment will apply to attribute profits to that deemed permanent establishment. As a first step, the activities that the dependent agent undertakes for the enterprise will be identified through a functional and factual analysis that will determine the functions undertaken by the dependent agent both on its own account and on behalf of the enterprise. The dependent agent and the enterprise on behalf of which it is acting constitute two separate potential taxpayers. On the one hand, the dependent agent will derive its own income or profits from the activities that it performs on its own account for the enterprise; if the agent is itself a resident of either Contracting State, the provisions of the

Convention(including Article 9 if that agent is an enterprise associated to the enterprise on behalf of which it is acting) will be relevant to the taxation of such income or profits. On the other hand, the deemed permanent establishment of the enterprise' will be attributed the assets and risks of the enterprise relating to the functions performed by the dependent agent on behalf of that enterprise(i.e. the activities that the dependent agent undertakes for that enterprise), together with sufficient capital to support those assets and risks. Profits will then be attributed to the deemed permanent establishment on the basis of those assets, risks and capital; these profits will be separate from, and will not include, the income or profits that are properly attributable to the dependent agent itself (see section 0-5 of Part I of the Report Attribution of Profits to Permanent Establishments)."

In view of the above, the profit is required to be attributed to the deemed PE of the assessee, as held in this order, on the basis of assets, risks and capital of the enterprise relating to the functions performed by the GEIIPL (dependent agent). In view of these facts and position of law, the contention of the assessee regarding applicability of the decision of Hon'ble Bombay High Court in the case of SET Satellite (Supra), is rejected, as the same is distinguishable on facts. Regarding the decision of Hon'ble Apex Court in the case of Morgan Stanley (supra), this decision supports the position taken by this office. Without prejudice to this finding, it is also stated that the overseas entities have fixed place PE (because of presence of expatriates) and also construction PE in India and profits for all the PEs have been attributed by taking them together.

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

xxxx xxxx xxxx

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

> the endeavor will only be to approximate the correct figure. The Court stated in *Hukum Chand* (supra) that "there cannot in the very nature of things great precision and exactness in the matters. As long as the attribution fixed by the Tribunal is based upon the relevant material, it should not be disturbed.
>
> 80. Having regard to the conspectus of facts in this case and the findings of the lower Revenue authorities - including the AO and the CIT(A)both of whom have upheld the attributability of income to the extent of 10% and apportionment of 3.5% the total values of supplies made to the customers in India as income, the Court finds no infirmity with the findings or the approach of the Tribunal in this regard. This question too is answered against the assessee and in favor of the Revenue."

13. Although the aforesaid judgment was assailed before the Supreme Court, the Special Leave Petition ultimately came to be withdrawn since the appellants are stated to have applied under the Direct Tax Vivad Se Vishvas Act, 2020 for settlement of all pending disputes.

14. It was during the pendency of the aforenoted proceedings, and more particularly on 13 March 2015, that notices under Section 147 and 148 of the Act came to be issued for AY 2009-10. The instant appeal is concerned with the aforesaid reassessment action and the findings which came to be rendered in the course of the assessment which was so undertaken.

15. As noted hereinabove, the Tribunal in terms of the order impugned before us, disposed of the appeal for AY 2009-10 principally taking into account its own decision that had been rendered in the case of the GE Group for AY 2001-02. Post the Tribunal having rendered judgment, the appellants moved a Miscellaneous Application for the recall of the aforesaid order asserting that the Tribunal had failed to dispose of certain grounds of the appeal which had been preferred. That application came to be rejected by an order dated 13

May 2019 and which forms the subject matter of the connected writ petition.

16. The reasons which formed the basis of commencement of reassessment as noted by the AO are reproduced hereinbelow:

> "Reasons for issue of notice u/s 148 of the I.T. Act, 1961, in case of M/s GE Nuovo Pegnone SPA for A.Y. 2009-10
>
> 1. A survey operation was carried out at the office premise of General Electric International Operation Company INC., India Liaison office (GEIOC) located at AIFACS, 1 Rafi Marg, New Delhi – 110001 on 02.03.2007. During the course of survey, copies of various documents were obtained and statements of various GE Overseas entities (including the assessee), employees working from the liaison office of General Electric Information Operation Company Inc., Liaison office ("GEIOC"), roles and responsibilities of various employees etc.
>
> 2. On the basis of various documents found during the course of survey in the form of agreements/ purchases order/ copies of contracts the assessments were completed in this case for AY 2001-02 to AY 2008-09, wherein it was held that the assessee was having business connection as well as Permanent establishment ('PE') in India and the PE was engaged in activities which cannot be termed as auxiliary and preparatory. Further, it was held that 35% of the total business profits pertain to marketing activities carried out in India (the business profits were calculated @ 10% on the sales prices to the customers in India). Accordingly, 3.5% of the total sales in India was taxed as business profits in India. Further the income declared as FTS was taxed u/s 44DA as the same was held as effectively connected to the PE. The reasons for completing these assessments were as under:
>
> i. It is seen that GE Group is engaged in various sales activities in India for which the business heads are generally expats, who are appointed to head Indian operations, with the support staff provided by GE India Industrial Pvt. Ltd. And also by various third parties. These expats are on the payroll of GE International Inc. (hereinafter GEII), but working for various business of GE Group.
>
> ii. As per the application made to RBI and permission obtained the liaison office was to act as a communication channel between the head office and the customers in India. However, as a result of survey, it was found that the company instead of undertaking the permitted activities, was employing various persons and providing the services of such persons to the GE

Group entities (including the assessee) worldwide. The activities indicated that the GEIOC was carrying out business in India through a PE and the income attributable to such PE was taxable in India. But the company had not filed return of income for any year.

iii. The expatriate employees of GE Group were responsible for looking ad looked after the business of GE Group as a whole irrespective of any GE group company making sales in India. The bifurcation of sales by various entities was decided by the GE management, as was evident from the documents seized during the course of survey. These expats and their teams had at their disposal a fixed place of business in the form of office premises at AIFACS, 1, Rafi Marg, New Delhi. It revealed that the activities of the non-resident GE group entities being conducted from the fixed place of business referred above were not of the preparatory or auxiliary character but constituted the PE as provided in paragraph 2 of Article 5 of respective tax treaties.

iv. The various documents found during the course of survey in the form of agreements/ purchases order/ copies of contracts also proved the active involvement of the employees of Indian company and expats in the conclusion of contracts on behalf of such non-resident GE Group entities. Therefore, GE India Industrial Pvt. also constituted the agent, other than an agent of independent status of the non-resident GE Group entities. This resulted into the creation of the dependent agent PE as per the provision of the tax treaties and business connection as per the provisions of Explanation 2 to Section 9(1)(i) of the Income Tax Act, 1961.

3. During the assessment proceedings for AY 2011-12, income of the assessee was again assessed on the same lines as the assessee was continuing with the same type of business. The finding that there was no activities change in business activities gets support with the submission of the assessee, during the course of the DRP Proceedings, that it had sought assistance from M/s GE India Industrial Pvt.Ltd. ('GEIPL') i.e., an associated entity of the Asessee (established as PE as referred above), for providing local marketing support for which it had adequately remunerated GEIPL.

4. It is further gathered that during the course of assessment proceedings for AY 201-13, the Assessee has submitted that there has been no change in their business activities since the earlier years.

In view of the above, it is evident that the assessee had a business connection as well as PE in India for AY 2009-10 also. The assessee filed the return of income without disclosing full particulars of income attributable to the PE of the assessee in India.

> Accordingly, I have reasons to believe that during the AY 2009-10, the assessee had earned income from the business activities which was, attributable to the established PE of the assessee in India and the same has escaped assessment within the meaning of section 147 of the I.T. Act and, therefore, a notice u/s 148 is being issued after taking approval of Addl. CIT(IT), Range-1(3), New Delhi."

17. The Tribunal, however, has essentially held that most of the issues which were sought to be canvassed, were in fact a reiteration of contentions which had been addressed in the earlier round of litigation and which had ultimately culminated in the passing of a final order by this Court. This becomes evident from a reading of paras 9, 9.1, 9.2, 9.3, 9.4 and 9.5 of the impugned order and which are reproduced hereinbelow:

> "**9.** The legal position on this issue is that Assessing Officer should have a *prima facie* ground for forming belief that there is some escapement of income which is a condition preceded and for initiating reassessment. Also that, decisions relied upon by Ld.Counsel, it is evident that, there must be some material to indicate that income chargeable to tax has escaped assessment for a particular year, which are trite law, and cannot be interfered with.
>
> **9.1.** In our considered opinion, these decisions are not applicable to facts and circumstances of assessee before us. Admittedly, assessee itself has submitted before Ld.AO that returns originally filed did not include sale proceeds received on supply of spare parts/equipments to various customers in India. Further from consolidated order passed by this Tribunal in case of a group entity of GE *Overseas being* GE *Energy Parts Inc. (supra),* it is observed that the documents/evidences/materials gathered by survey team during survey proceedings and postsurvey enquiries also included documents pertaining to assessee and various sales proposals that had been exchanged between assessee and the Indian office being GEIIPL since year 2001 onwards. Further, there is no denial on behalf of assessee that expats stationed in India having office at premises of GEIOC were not working for assessee in India. It is observed from reply filed by assessee, vide letter dated 10/03/16 that, details of Directors of assessee has been provided wherein, personnel called Claudio Santiago was communicating for assessee which is evident from *Annexure* F at page 30 of consolidated order passed by this *Tribunal, in case of GE Energy Parts Inc. (Supra).* Thus, it can be safely concluded that, there were expats working on making sales for assessee, even prior to years under consideration

through GEIIPL, which has already held to be Fixed place PE for all GE Overseas entities, and having business connection through GEIIPL in terms of Article 5(4) & (5) of India-Italy DTAA, there is no Income that could be deemed to have accrued or arisen in India under Sec.9 of the Act.

9.2. Admittedly assessee was engaged in various sales activities in India through expats with support staff provided by GEIIPL during preceding years as well as year under consideration. From draft assessment order passed by Ld.AO, it is observed that assessee was called upon to file figures of offshore supply for year under consideration and it was submitted by assessee that, due to change in accounting software figures of offshore supply for year was not available. These documents/materials found during survey which has been related to assessee by Ld. CIT DR sufficiently establishes existence of sales team, _ formed by employees of GEIIPL and expat of assessee, which secured orders in India for non-resident assessee, thereby constituting a dependent agent PE.

9.3. Admittedly, onshore supply services received have been offered to tax by assessee in India, by assessee. However, offshore supplies made to Indian customers by assessee through GEIIPL, *in* India has not been declared in return of income and has amounted to escapement of income for year under consideration.

9.4. In our considered opinion at the stage of issuance of notice to initiate reassessment proceedings, sufficiency of correctness of material is not a thing to be considered. We draw our support from the decision of Hon'ble Supreme Court in case of ACIT vs Rajesh Jhaveri Stockbroker (P) Ltd. Reported in (2007) 161 Taxman 316, wherein Hon'ble Court has held that:

*"**16.** Section* 147 *authorises and permits the Assessing Officer* to *assess* or *reassess income chargeable to tax if he has reason* to *believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe' would mean cause* or *justification. If the* Assessing *Officer has cause or justification* to *know or suppose that income had escaped assessment) it can be* said *to have reason to believe that an income had escaped* assessment. *The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence* or *conclusion. The function of the Assessing Officer* is to *administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers..... .... At that stage) the final outcome of the proceeding is not relevant. In other wo.rds) at the initiation stage) what* is *required* is "*reason to believe") but not the established fact of escapement of income. At the stage of issue of notice the only question* is *whether there was relevant material on which a reasonable person could have formed a requisite belief Whether*

> *the materials would conclusively prove the escapement* is *not the concern at that stage. This* is so *because the formation of belief by the Assessing Officer* is *within the realm of subjective satisfaction ITO v. Selected Dalurband Coal Co. (P.) Ltd./1996] 217 ITR* 597 *(SC); Raymond Woollen Mills Ltd. v. ITO [1999J* 236 *ITR 34 (SC).”*
>
> **9.5** Thus, on basis of above discussions and factual observations, we are of considered opinion that assessee had failed to disclose revenue received from sales made to Indian customers through GEIIPL on basis of materials gathered during survey for Ld. AO to form prima facie reason to believe by Ld.AO, of income having escaped assessment, for year under consideration, as per Explanation 2(b) to Section 147 of the Act.”

18. Before us, the appellants sought to assail the view as taken by the Tribunal by principally contending that the entire reassessment action was based upon the survey report and material which had been gathered and collated for AYs’ other than 2009-10 and thus could not have justifiably formed the basis for invocation of Section 148.

19. We, however, note that in the course of the reassessment proceedings, the appellant at no point in time appears to have asserted or taken a position that the facts as they obtained in 2009-10, were distinct or distinguishable from those which had fallen for detailed examination of the respondents in the litigation which had ensued and had ultimately culminated in the passing of a judgment by this Court on 21 December 2018.

20. Mr. Bhatia, learned counsel, rightly highlights this aspect and draws our attention to the contents of some of the replies which were submitted by the petitioner in this respect in the course of the reassessment proceedings and which clearly appear to be a mere repetition of the stand which had been taken in the earlier round of litigation. This becomes apparent from the following extracts of the replies which were submitted:

"2.4.1 As alleged Liaison Office (CLC) cannot be treated as a PE in India General Electric International Operations Co Inc ('GEIOC') had a LO in India at AlFACS Building, 1 Rafi Marg, New Delhi. Under the provisions of Article 5 of the tax treaty, the term PE has been defined to mean a fixed place through which the business of an enterprise is carried on.

In the-instant case, the LO merely acts as a communication interface/ channel and activities undertaken by the LO are in the nature of preparatory and auxiliary character, therefore no PE exists on this account. During the period under review (i.e. Financial Year 2008-09), following activities were performed by the Liaison Office:

- Collecting information about potential customers in India and passing on the information to its non-resident businesses;
- Creating awareness of the business' products.

The activities, clearly show that the activities were in the nature of preparatory and auxiliary character. The LO had no decision-making powers and had not concluded any contracts on behalf of the Company. The activities nowhere lend credence to allegation made by the tax department that the LO carried out commercial negotiations.[9]"

xxxx xxxx xxxx

"**B.2 Functions performed by GE India**

12. GE India undertakes following activities for providing marketing support services to GE Overseas:

• Identify and seek business opportunities and provide information relating to products and services of GE Overseas to potential customers in India;

• Arrange appointments, and meetings between existing as well as prospective customers and GE Overseas and provide necessary support in client meetings and discussions;

• Act as a channel of communication between customers and GE Overseas;

• Investigate and provide information on current trends in business, status of competing products, technology developments, pricing of competitors, Government policies and other developments, etc. that would be of interest to GE Overseas; and

• Provide an effective link between GE Overseas and various regulatory authorities from time to time on all business matters.

[9] Annexure A, PDF page no. 1013.

13.It is apparent that GE India merely provides captive support services to GE Overseas and does not bear any market risks and product liability risks which arise due to market competition and pricing pressures, change in demand pattern and inability to develop/ penetrate the market, non-performance of a product to generally accepted standards, etc. Further, GE India neither maintains inventory nor takes inventory related decisions and consequently is not exposed to inventory risk. GE India employs minimal work-force and is thus exposed to minimal manpower risk. GE India is not exposed to credit risk as it does not book the sales. GE India is not involved in research and development efforts and accordingly, does not bear research and development related risks.[10]"

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41. "In view of the above, the crucial question for determining whether there is a PE or not, is whether the premises could be occupied as a matter of right by the Assessee or its employees. It is respectfully submitted that premises at AIFACS or premises of GEIIPL ' are not at the disposal of GE Overseas entity or its employees and the same stands fully supported by the following facts:

(i) As mentioned earlier in this submission, GEIIPL provides certain marketing support services through its employees to GEIOC and its affiliate entities. In consideration for the performance of these support services, GEIOC is required to pay fees to GEIIPL equivalent to cost of services plus a mark-up of five percent (5%) of such costs. GEIIPL, renders certain marketing support services, however, the employees of GEIIPL are neither working under the control and supervision of GE Overseas entity nor reporting to any such entity.

(ii) Further, activities of the expatriates deputed by GEII to India have a preparatory or character. It is also submitted that expatriates are reporting to GEII i.e. their employer entity and not to any GE Overseas

(iii) Overseas entity have no control over the actions of employees of GEIIPL and the expatriates

42. In view of the above, the very test of disposal i.e. presence of a facility such as a premise for carrying on the business of the enterprise to be at the constant disposal of the enterprise is not met and therefore, it cannot be held that the Assessee has a fixed place

[10] Annexure A, PDF page no. 1119.

PE in India. There is no basis to contend that employees of GE Overseas entity have at their disposal a fixed place of business in India in the form of office premises at AIFACS, I Rafi Marg, New Delhi through which they operate/' It 'has already been clearly demonstrated in our above submissions that expatriate employees and GEIIPL employees have neither worked under the control or supervision of GE Overseas Entity nor reported to GE Overseas entity and cannot therefore be equated with the Assessee's employees."[11]

xxxx xxxx xxxx

69. "As regard the criterion for assessing an agent's economic independence from the enterprise, one needs to analyse how its business relations with the enterprise are shaped, particularly in economic aspects. As per the commentary by Arthur Pleijsier, for in agent to be economically independent from its principal it would mean that even if the principal no longer requires the services of the agency, the agent could still be in business. Paragraph 38 of the OECD commentary in connection with economic independence refers the important criteria to ascertain whether the entrepreneurial risks are to be borne by the person or by the enterprise the person represents in the instant case, though GEIIPL may not be undertaking any entrepreneurial risk viz a viz services performed for the Assessee, it can still be treated as economically independent since it is not wholly or almost wholly dependent on GE Overseas for its business survival. On similar consideration, GEII expatriates will also qualify as being economically independent of the Assessee**."**[12]

21. We consequently find no justification to interfere with the view taken by the Tribunal insofar as invocation of Section 148 is concerned. Regard must be had to the indubitable fact that a challenge to commencement of reassessment is liable to be tested on the threshold of a jurisdictional error and the assumption of authority itself being liable to be faulted on a failure to meet the preconditions which stand statutorily erected. Tested on those basic precepts, we find no merit in the challenge which stands raised on that score.

22. Insofar as the issues pertaining to Fixed Place PE and DAPE are

[11] Annexure A, PDF page no. 1132.
[12] Annexure A, PDF page no. 1138.

concerned, the Court had, in the previous round of litigation, by way of a detailed determination ultimately come to hold against the appellant. That decision has undoubtedly attained finality. While it is true that the principles of res judicata may not, and strictly speaking, be applicable to tax litigation, we cannot completely ignore the precepts of consistency which are of equal significance be it from the point of the Revenue or for that matter the assessee.

23. This assumes added importance where the assessee abjectly fails to advert to any set of facts or allude to any circumstance which may distinguish the position that may obtain in a particular assessment year warranting separate or independent evaluation.

24. Although the appeal and the writ petition were heard over a course of time, the appellants had woefully failed to draw our attention to any fact or feature which would have warranted the respondents undertaking an independent enquiry in relation to Fixed Place PE or DAPE. In any case, the decision of this Court in the earlier round, coupled with a failure on the part of the appellant to establish that the factual scenario had come to be fundamentally altered, the respondents were clearly entitled to proceed on the basis of the unchanged facts and commence reassessment.

25. While principally speaking and on a foundational plane, the power to reassess can be invoked only on the basis of material that may be pertinent to a particular AY, that principle would pale into insignificance where the assessee fails to assert a change or a fundamental alteration of the facts which are asserted to have remained unaltered. Viewed in that light, we find no merit in the challenge which stands raised to the initiation of reassessment action.

26. What has additionally weighed upon the Court is the attempt on the part of the appellant to seek a review and reconsideration of aspects which had come to be conclusively answered by this Court in the previous round of litigation which had ensued. The appellant has woefully failed to draw our attention to any material or circumstance which would justify such a course being tread or contemplated.

27. That only leaves us to deal with the issue of attribution and which formed the subject matter of Question 2.8.3. The Tribunal made the following observations regarding attribution of profit:

> **"2.5.** From materials collected during survey proceedings and post survey enquiries, Ld.AO observed that GE Group, including assessee was engaged in various activities in India for which, business was headed by expats, who were appointed to head Indian operations, with support staff provided by GE India Industrial Pvt. Ltd. (hereinafter referred to as GEIIPL).
>
> **2.6.** Based upon survey materials and post survey enquiries gathered by Department, to ascertain facts for year under consideration, Ld.AO called upon various details and issued notice dated 15/02/16 under section 142(1), along with questionnaire to assessee.
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> **2.7.** In response to questionnaire, assessee vide letter dated 10/03/16 and 22/03/16 submitted that; Assessee is a Company incorporated in Italy and is a tax resident of Italy. It was further submitted that assessee is entitled to avail beneficial provisions of DTAA between India & Italy. Further assessee submitted that it has earned income from various Indian customers being:
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> - receipts in respect of on-shore services;
> - receipts from off-shore supply of equipment parts.
>
> Assessee submitted that out of above, receipts from on-shore services had been duly offered to tax as Fee for technical services @ 20% in original return. Assessee placed reliance on Sec.9(1)(i) of the Act and submitted that, any income earned directly or indirectly through or from any Business connection would only deem to be accrue or arise in India and would be taxable in India. Assessee thus submitted that as it did not have business connection in India, off shore supplies were not taxable.
>
> **2.8.** Assessee, further submitted that, even if it is presumed that assessee has PE in India, no further profits can be attributed in

hands of GEIIPL, for local marketing support provided by it as the same has been held to be remunerated at arm's length price to GEIIPL. Assessee in support of its argument placed reliance upon service agreement dated 16/01/01 Transfer Pricing Order and decision of Hon'ble Supreme Court in the case of Morgan Stanley reported in 292 ITR 416. It was thus submitted that no further attribution of income was necessary in this case.

2.9. Assessee further contended without prejudice to the above that, in any case, attribution was being made to alleged PE in India, deduction of fees paid by assessee to GEIIPL for marketing services availed by assessee should be allowed in computing taxable income.

2.10. Ld.AO after considering detailed submissions filed by assessee, was of opinion that, assessee is one of the entities of GE Overseas, and was having business connection in India, with Fixed Place PE, and Agency PE. He further recorded that, similar findings were determined by this Tribunal vide order dated 27.01.2017 passed for assessment years 2001-0 to 2008-09 in case of GE Energy Parts Inc. vs. DDIT. It was also observed by Ld.AO that expats along with their teams were at their disposal at fixed Place business in India in the form of office premises held by GEIOC, through which they operated and carried out business of all GE Overseas entities, including assessee with support of GEIIPL.

2.11 Ld. AO during reassessment proceedings for year under consideration, observed that, certain agreements in respect of receipts by assessee revealed that, there was no change in business activity of assessee in preceding assessment years vis-a- vis year under consideration, and that, nothing was furnished to rebut this contention. Ld.AO thus concluded that, GEIOC was the fixed place PE for assessee in India, which was not just engaged in activities of auxiliary and preparatory nature but functioned more than what a Liaison Office was supposed to do. Ld.AO also was of opinion that through GEIIPL assessee had business connection with Indian counterparts and thus GEIIPL was held to be Agency PE for assessee, through which assessee carried out offshore supply of spare parts, against which revenue was not declared in return of income originally filed by assessee and it deserves to be attributed to GEIIPL.

2.12. Thereafter, for purposes of attribution, Ld. A.O called for various details regarding sales of offshore supply for year under consideration. Assessee did not file relevant information, by submitting that, due to change in accounting software, figures of offshore supply for year under consideration were not available, and therefore, assessee proposed offshore supply amounting to be Rs.2,36,86,40,268/-, for year under consideration on the basis of

average sales for preceding 8 years, i.e. from 2001-02 to 2008-09. Ld.AO rejected working provided by assessee, and attributed income to GEIIPL being Agency PE, for offshore supplies for year under consideration as under:

Total expenses of all the project offices (Ahmedabad, Haldia & Delhi) of the assessee for A. Y. 2007-08 and 2008-09.	Rs. 1,82,17,590/-
Total offshore sale for A.Y. 2007-08 and 2008-09	Rs. 14,68,14,73,794/-
Total expense for A. Y. 2009-10 of all the project offices (Ahmd, Haldia & Del)	Rs. 77,47,448/ -
Hence the total offshore supply for A.Y. 2009-10 = Rs.14,68,14,73,794 * 77,47,448/1,82,17,590	Rs. 6,24,36,33,476/-

2.13. From above working, Ld.AO attributed 3.5% of average revenue from offshore supply computed at Rs.21,85,27,171/-, by passing draft assessment order dated 26/12/16.

xxxx xxxx xxxx

"26.3. We have heard rival submissions and perused relevant material on record. It is noticed that exercise of attribution of income by Ld.AO is in two parts, viz., calculation of total profit from sales made by assessee in India during preceding two assessment years, which, has been worked out at 10%and second, attribution of such profit to marketing activities, which Ld.AO has taken at 35% of 10%. As regards estimation of profit on sales made in India on basis of preceding two years, we find that Ld AO specifically required assessee to furnish details of sales party wise which was not given for deducing correct amount of profit. In such circumstances, Ld.AO was left with no alternative, but, to estimate income on a rational basis. It is observed that Ld.AO invoked provisions of Rule 10(iii) to estimated profit at 10% of sales made in India. Rate of 10% was applied by drawing strength from sections 44BB and 44BBB, which, in turn, are special provisions for computing profits and gains in connection with business of exploration, etc. of mineral oils/operation of aircraft in the case of non-residents. In our considered opinion, approach of Ld.AO in estimating income at 10% of sales made in India, in given circumstances, is perfectly in order, and does not require any interference.

> 26.4. As regards share of marketing activities in total profit, Ld.AO applied 35% by taking assistance from decision of ITAT Delhi Bench in case of *Rolls Royce vs.DDIT*, reported in [2009] 34 SOT 508. The said order of the Tribunal stands affirmed by the Hon'ble Delhi High Court in Rolls Royce PLC vs. DIT(IT) reported in (2011) 339 ITR 147 (Del). Further, ITAT Delhi Bench in ZTE Corporation vs. Addl. DIT reported in (2016) 159 ITD 696, has also attributed 35% of profits attributable to marketing activities in India. In our opinion and respectfully following view taken by this Tribunal in consolidated order passed in GE Energy Parts., (supra), there can be no hard and fast rule of attribution of profit to marketing activities carried out in India at a particular level and that attribution of profits to PE in India is fact based, depending upon role played by PE in overall generation of income. Such activities carried out by the PE in India resulting in generation of income, may vary from case to case, and attribution of income has to be in line with the extent of activities of PE in India.
>
> 26.5. Considering all relevant facts and adopting a holistic approach, we hold that GE India conducted core activities and the extent of activities by assessee in making sales in India is roughly one fourth of total marketing effort. We, thus estimate 26% of total profit in India as attributable to operations carried out by PE in India. Therefore, as against Ld.AO applying 3.5% to sales made by assessee in India, we direct Ld.AO to apply 2.6% on total sales for working out profits attributable to PE in India."

28. The conclusions as arrived at by the Tribunal are clearly unexceptionable bearing in mind the findings that this Court had rendered in its earlier judgment and which has attained finality. We consequently find no merit in the challenge that stands raised in this respect.

29. The connected writ petition seeks to question the order passed by the Tribunal on the Miscellaneous Application that was moved by the appellant. While disposing of that Miscellaneous Application, the Tribunal has held as under:

> "2. Apart from oral submissions, Ld. Counsel has filed written submission dated 05/03/19 elaborating issues raised in Miscellaneous Applications.
>
> 3. On perusal of written submission as well as Miscellaneous

Application, it is observed that assessee is seeking to rectify view taken by this Tribunal in attribution of profits to PE in India which has been raised in Ground No. 12-19.

4. On perusal of impugned order it is observed that in respect of attribution of estimated offshore supplies made by assessee to customers in India, this Tribunal has considered the same in paragraph nos .21 to 25"

30. The relevant paras thereof are reproduced hereinbelow:

"21. Ld. Counsel submitted that authorities below failed to appreciate that PE of assessee has been fairly compensated at arm's length price and there could be no further attribution of income from any offshore sales/ supplies made by assessee. He submitted that details regarding offshore supply were not available due to change in accounting software of assessee. It was thus stated before authorities below that, offshore supplies can be taken as a an average of previous 8 years which comes to Rs. 236,86,40,268/-. Ld. Counsel submitted that subsequent to conclusion of hearing before DRP on 16/08/17, assessee furnished application for additional evidence under Rule 4(3)(B) of DRP Rules, 2009, claiming that offshore supply during relevant year was Rs. 221,23, 25,028/-. It was also submitted that said sales proceeds was received from 35 customers in India and correspondence sales has been filed along with application.

22. Alternatively, Ld. Counsel submitted that assessing officer erred in estimating offshore supply based upon average of sales made in assessment year 2007-08 and 2008-09.

22.1. Ld. Counsel also submitted that for purposes of estimation, authorities below erred in relying upon ratio of Hon'ble Delhi High Court in case of Rolls-Royce PLC us. DDIT, reported in (2011) 339 ITR 147. He also submitted that Assessing Officer allocated entire marketing profits to alleged PE in India when core marketing activities were carried out by assessee outside India.

23. On the contrary, Ld. CIT DR submitted that, Ld.AO was right in calculating total profits from sales made by assessee in India at 100/0 and attribution of profits from marketing activities at 35% of 10%.

He submitted that regarding attribution of offshore supplies, assessee was called upon to produce all details regarding sales made to the parties in India. Admittedly the same was not done and therefore estimation of income based upon sales determined for immediately two preceding years were considered by Ld.AO, by invoking rule 10 (iii). He submitted that assessee filed relevant details at the end of DRP proceedings which were not considered

by DRP.

24. We have perused submissions advanced by both sides in light of records placed before us.

25. The primary argument advanced by Ld. Counsel was in respect of attribution made by Ld. AO of income from offshore supply as well as marketing activities in hands of PE in India asassessee has remunerated GEIIPL for international transactions undertaken with assessee at arm's length price. While doing so, he placed reliance upon decision of Hon'ble Supreme Court in case of a DDIT vs E Funds [2017J 86 taxmann.com 240].

25.1. He also argued that authorities below erred in applying "force of attraction rule" to bring to tax, profits of assessee, from its offshore supplies/sales, without appreciating that said rule was not applicable in present case, as it does not encompass offshore supplies."[13]

31. Bearing in mind the aforesaid, we find no merit in the challenge which stands mounted in the writ petition.

32. We thus answer the questions posed in the appeal in the negative and against the appellant. The appeal shall, for reasons aforenoted, stand dismissed. The writ petition deserves to be and is also dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

SEPTEMBER 19, 2024/rsk

[13] Annexure A, Pdf page nos. 119 to 121.