IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'A', BENGALURU

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND
SHRI. S. JAYARAMAN, ACCOUNTANT MEMBER

1-2. I.T (TP).A Nos.209 & 210/Bang/2011
(Assessment Years : 2000-01 & 2001-2002)

3-5. Cross Objection Nos.31 to 33/Bang/2011
(In I.T (TP).A Nos.617 to 619/Bang/2011
(Assessment Years : 2002-03, 2003-04 & 2004-05)

M/s. Arrow Electronics India Ltd,
India Liaison Office, No.26, Akshaya Commercial Complex,
4th floor, Victoria Layout,
Bengaluru 560 047 .. Appellant
PAN : AAGCA0297G

v.

Additional Director of Income Tax,
(International Transaction) -1, Bengaluru .. Respondent

6-8. I.T (TP).A Nos.617 to 619/Bang/2011
(Assessment Years : 2002-03, 2003-04 & 2004-05)

Additional Director of Income Tax,
(International Transaction) -1, Bengaluru .. Appellant

v.

M/s. Arrow Electronics India Ltd,
India Liaison Office, No.26, Akshaya Commercial Complex,
4th floor, Victoria Layout,
Bengaluru 560 047 .. Respondent

Assessee by : Shri. Gurunathan, Advocate
Revenue by : Smt. Preethi Garg, CIT-DR

Heard on : 05.01.2017
Pronounced on : 31.03.2017

O R D E R

PER BENCH :

Two appeals are filed by the assessee for the a ys. 2000-01, 2001-02 , three appeals are filed by the Revenue for the a y s. 2002-03 to 2004-

05 and three cross objections are filed by the assessee against those three appeals filed by the Revenue for the a ys. 2002-03 to 2004-05, respectively, against the respective orders of the CIT(A) –IV, Bangalore which are under consideration in this proceedings .

02. M/s. Arrow Asia Pac Ltd, Hong Kong is a group company of the US based Arrow group which is looking after the Asian operations. M/s. Arrow Asia Pac Limited has set up one of its branch offices in Singapore in the name and style of M/s. Arrow Electronics India Limited which in turn had immediately opened a liaison office (LO) in Bangalore in 1994, obtaining approval of the RBI. Later on, this company opened branches of the LO at Hyderabad, Mumbai, New Delhi & Pune. However, the main operations and control remained with Bangalore office where 59 employees were working as against 16 employees in all other branches put together. The Singapore based company was exclusively set up to service the customers in India only and they constitute the entire customer base of the company.

03. Arrow Group started a fully owned subsidiary of M/s. Arrow Asia Pac limited in the name of M/s. Arrow Electronics India Private Limited in December 2002. However, till July 2003, no effective operation was carried out by the subsidiary. The LO itself was taking care of the operations till July 2003. Subsequently, it became in-operative. The sales of the Indian subsidiary are shown from July 2003, it continues till date and is reported to be filing its return from July 2003. A survey was conducted on

28.08.2006 on the liaison office premises in Bangalore where the office of the Indian subsidiary is also located. There, the sales and expenses details and other accounts pertaining to the LO was found and impounded. Statements of former employees of LO, who were later on working for the subsidiary, were recorded. After the survey, notices u/s 148 were issued for a ys 2000-01 to 2004-05. Complying with them, the assessee filed the returns declaring income on the basis of cost + 6% . The A O has recorded the findings of the survey. According to the A O, the LO was not supposed to do business in India as per the approval from the RBI but, in fact, the LO was carrying on some income earning activities in India which fact has been recorded by obtaining statements of former employees of the Indian subsidiary and the employees of the erstwhile LO. The AO noticed that out of the total profits earned, a portion of the profit was attributable to the Indian operations since they had liaison offices in lndia. After concluding so, he took into consideration the total sales and deducted the cost of sales to arrive at the gross profit. The Singapore expense was taken as claimed by the assessee and after deducting expenses of Singapore and of Indian liaison offices, net profit was determined and 40% of it was taken as profit attributable to the Indian LO. Before deciding the 40:60 ratio, the AO determined the functional analysis after fixing the relative weightage of 50:25:25 to Functions, Assets and Risks and finally determined the weighted average after taking into intra sectional

ratio between the LO and the HO and finally arrived at the profit attributable to Indian operations at 40%. Thus, the AO determined the profit attributable to the Indian LO at Rs. l,35,85,005/-, Rs.74,90,544/-, Rs. l,83,37,555/-, Rs. l,42,54,775/-& Rs.92,04,320/-, for a ys 2000-01,2001-'02,2002-'03,2003-'04& 2004-05,respectively. Simultaneously, the AO referred the matter to the TPO for ays 2002-03 to 2004-05. The TPO determined adjustments u/s 92CA at Rs.5,65,55,609/-, Rs.4,96,10,165/- & Rs.1,70,10,258/-, respectively, for ays 2002-03 to 2004-05 and the AO substituted these figures as against his working of income for these ays as stated above and concluded the assessments , inter alia, charging of interest u/s. 234B , initiated penalty proceedings u/s 271(1)(c) and u/s 271B and accordingly issued demand notices. Aggrieved by the finding that the Singapore branch had business connection in India and against the finding that the Singapore Company had a PE in India and determination of 40% of the total profits as attributable to the Indian operations etc, the assessee filed appeals before the CIT (A). The CIT (A) dismissed them for ays 2000-01& 2001-02. However, in the appeals related to ays 2002-03 to 2004-05, the CIT(A) gave part relief on the adjustments made by the TPO. Aggrieved, the assessee filed two appeals in I.T (TP). A Nos. 209 & 210/Bang/2011 for ays 2000-01& 2001-02 with similar grounds of appeal. One of the appeal grounds is extracted as under:

1. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (A) ought to have accepted the explanation of the appellant and refrained from upholding the way in which the income was apportioned between the appellant and its Indian Liaison Office (for short LO).

2. On the facts the income declared by the LO was fair and reasonable and the learned Commissioner (A) ought to have refrained from enhancing the income by approving the arbitrary apportionment as made by the assessing authority.

3. The learned Commissioner (A) erred in giving the weightage to the various submissions made by the employees of the appellant without appreciating that the LO has not been carried on any substantial business for and on behalf of the company to justify the apportionment of income of the company in the manner as done by the assessing authority and accordingly the income as determined by the assessing authority ought to have been deleted and the income as declared by the appellant ought to have been accepted and allowed.

4. The learned Commissioner (A) ought to have appreciated that the company being a non-resident, the provisions of DTAA applies and accordingly no income other than what was declared by the LO accrued in India for taxation.

5. The learned Commissioner (A) erred in holding that the LO was the permanent establishment of the appellant company.

6. Assuming that the LO was deemed to be a permanent establishment, there being no income other than the income declared accrued to the appellant company through LO, the impugned enhancement of income was opposed to law and the impugned addition is accordingly liable to be deleted.

7. Without prejudice the additions are excessive, arbitrary and unreasonable and ought to be deleted in full.

04. The assessee also filed similar additional grounds of appeals for ays 2000-01& 2001-02, one of the appeal grounds is extracted as under:

The appellant respectfully submits that the additional ground of appeal enclosed to this memo was omitted to be raised when the appeal for the relevant assessment year was filed before the Hon'ble ITAT, Bangalore.

This ground does not involve any investigation on the facts otherwise than found on the records of the department and is a pure question of law and goes into the very root of the matter. Hence, it is prayed that additional ground may be admitted for advancement of substantial case of justice having regard to the ratio laid down in National Thermal Power Co., Ltd., vs. CIT (1998) 229 ITR 383(SC) and Gundathur Thimmappa and Sons vs. CIT, Mysore (1968) 70 ITR 70 (Kar).

In the circumstances, it is prayed that the additional ground of appeal duly signed and now enclosed may kindly be taken on record, linked to the appeal filed and the appeal may kindly be disposed of in the interest of justice and equity.

Additional grounds of appeal no 2:

The CIT (A) ought to have appreciated that on the facts and in the circumstances of the case, no interest was chargeable u/s.234B of the Act and consequently he ought to have directed the AO to delete the interest charged u/s.234B of the Act.

Additional grounds no 3 :

1. The learned CIT (A) erred in confirming the assessment order u/s.143(3) r.w.s.147 of the Act dt.28.12.2007, which was based entirely on statements recorded u/s.133A of the Act, which is bad in law.

Additional grounds of appeal no 4 :

1. On the facts and in the circumstances of the case, and in law the learned Commissioner of Income-tax(A) erred in upholding the inference of the AO that the Liaison Office (LO) of the appellant in India formed permanent establishment of the appellant in India by wrongly alleging that the LO was securing orders/ entering into contracts with Indian customers on behalf of the appellant.

2. On the facts and in the circumstances of the case, and in law the learned Commissioner of Income-tax (A) erred in upholding the inference of the AO that the LO of the appellant was engaged in the core functions of the appellant and not merely preparatory and auxiliary activity.

3. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in upholding the inference of the AO that the LO was an elaborate façade maintained by the appellant to carry out its core activities in India in violation of the permission granted by the RBI to the appellant to establish a LO in India.

4. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in upholding the AO's misinterpretation of the Power of Attorney granted to the person in charge of the LO to hold that the person in charge of the LO was granted wide powers to negotiate and conclude contracts with customers on behalf of the appellant.

5. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in upholding the AO's observation that the employees of the LO possessed specialized knowledge of various technical activities which were not necessary for the liaisoning and auxiliary functions and that these employees were not essential for functioning of an LO.

6. The learned CIT(A) erred in upholding the AO's inference that the appellant's relationship with its "LO" in India constituted "business connection" and therefore income accrued to the appellant as envisaged under the provisions of Sec.9(1) of the Act.

05. The AR submitted the same plea which was taken before the CIT (A) and on the lines of the above additional grounds. Let us examine, how the CIT (A) dealt those issues by extracting the relevant portion of the order as under :

"4…….The following were the findings of A O:

i. The LO could not make any supplies on its own but the Indian subsidiary could do so. This is evident from the statement of Mr. Singh, Sales Manager wherein he has stated that the customers had to import their requirements from their overseas office located at Singapore.

ii. Salaries were earlier paid by the LO and later by the Indian company.

iii. Earlier to incorporation of the subsidiary they were permitted to canvass imported sales from Singapore, but after the incorporation of the company they were permitted to do Rupee sales.

iv. Revenue recognition was always there before incorporation in the hands of the LO and after the company came into existence.

V. Profits arose to the Indian company after the incorporation and it was attributable to the LO before incorporation.

vi. The nature of the business remain the same before and after the incorporation since the LO was dealing with the same functions like marketing, sales, service, accounts, administration etc. The LO was also assigned the task of identifying potential customers for which technically competent personnel were appointed.

vii. The Indian LO was involved in procurement of orders and step by step execution including collection of payments.

viii. Price negotiation was also one of the functions assigned to LO.

X.The LO was taking the final decision on the pricing without even referring the issue to Singapore or Hong Kong.

xi.LO was responsible for concluding the contracts. xii. Targets were given to the Indian LO.

5. After observing the above, the AO concluded that though the LO was not doing any trading business in the conventional sense still it was involved in income earning operations by employing technically qualified persons for marketing, sales, administration, accounts etc., It was also involved in finding potential customers, price negotiations, concluding contracts, following up of payments etc., The AO finally concluded that the LO was virtually doing the business but was carefully avoiding the outcome of the act by ensuring the goods delivery by HO and receipt of payments was in Singapore. LO was surviving on remittances received from Singapore office and it was taking care of its expenses out of these remittances. This was essentially done in order to adhere to the stipulation of the RBI. The LO was not permitted to do any activity pertaining to industrial, commercial or trading in nature. Apart from that, any income arising from a business connection in India was liable to be charged to tax in India as per provisions of section 9(1)(1). The appellant wanted to avoid that also as also the provisions of 7 and Article 5 of India Singapore DTAA. The AO finally concluded that the appellant should have apportioned a portion of the profit to Singapore operation and the balance to Indian Operations since the LO could have been regarded as Indian permanent establishment. The AO did exactly that, which was not done by the appellant. AO held that there is no mathematical formula for working out the profits of Indian operations and that of Singapore operations and finally concluded that Functions, Assets and Risks analysis is the best way to arrive at the profits. AO assigned relative weightage to these functions and fixed the same at 50:25:25 for F:A:R, Considering the role of the LO and the role of the HO (head office) in 8 different functions being identifying new customers, pursuit and follow up of the customers, co-ordination with the suppliers, price

negotiations and finalization, securing orders, processing Of orders, dispatching of materials, payment for materials, the AO held that LO could be assigned 565 points and the HO 235 points on a scale of 800 and concluded that 70.30 ratio is fair and reasonable. As regards assets analysis. The AO held that LO has virtually no assets and in view of the same tuck the ratio of 10:90 for LO : HO. As regards risk analysis, it was held that mostly it is borne by the HO and the LO was in charge of only the manpower and not for the stock he assigned the ratio of 90:10 for HO : LO. Finally he worked out the basis of 40:60 between LO and HO as under:

Table - I

Parameters	Functions	Assets	Risks	Total
Sectoral weightage	50%	25%	25%	100%
Intra Sectoral ratio (LO : HO)	70 : 30	10 : 90	10 : 90	100
Weighted average (LO : HO)	35 : 15	2.5 : 22.5	2.5 : 22.5	40 : 60

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…….

8. Quantification of 40% of the profits to- the LO:

The AO after detailed analysis has held that 40% of the profits as attributable to Indian operations and the balance 60% to its Singapore HO. The appellant has argued that the functions performed pertaining to determination, negotiation and / or fixing of prices of goods, identifying new customers, determining sale prices for third party customers, developing marketing strategy, coordinating marketing strategy implementation, planning advertisement and promotional material as well as use of media and processing of sales order, the LO had very limited role and in all other spheres it has no role to play. They have listed out various functions wherein the LO had no role at all which according to the appl1ant include purchasing of finished goods, inventory control, handling import, quality control,

distribution network maintenance, warehousing, shipping, selling to end users, sub-distributors, middlemen, determining its marketing and remuneration of sales personnel, undertaking warranties and other functions. In support of their arguments they have quoted judgment of the Hon'ble Supreme Court in the case of DIT vs. Morgan Stanley and Company Inc. It is held that this judgment was applicable only to the facts of the relevant case and it has no application to the facts of the appellant's case and hence is not relevant. Incidentally this judgment was based on clarification issued by the CBDT in circular no.23 of 1969. Since the circular itself is now withdrawn, the facts of the case are no longer relevant to the appellant's case. The appellant has also argued that preparatory to the auxiliary activities, the Indian LO carried on certain activities and their case is covered under Article 5(7) of the tax treaty between India and Singapore. It is held that that the Indian LO was carrying on activities right from the year 1996 and it was not a preparatory activity and accordingly the appellant's argument does not survive. The restriction of the activities by the RBI is cited as one of the reasons to claim that they have-not conducted any business operations nor they had a PE. Incidentally the conduct of the appellant as found out after conducting survey u/s 133A and the appellant's own admission of existence of partial income attributable to the Indian operations do not support the appellant's arguments that their case is not covered under Section 9(1) (i) as also their argument about existence of PE in India. It is also further held that the AO has taken enormous pains in quantifying the percentage of profit attributable to Indian operations at 40% as depicted in page 16 and 17 of the assessment order. it is held that the AO was reasonable in considering sectoral weightage at 50:25:25 for functions performed, assets employed and risks involved. Further it is held that AU was correct in taking only 10% towards assets and risks in the intra sectoral ratio pertaining to LO and the balance 90% to the HO.

Even in the functions performed, the 8 broad parameters as discussed in page 16 of the assessment order practically cover every aspect of functions performed and relative weightage allocation is also held to be proper and the final quantification of 565 to LO and 235 to HO on a scale of 800 is held to be perfectly justified and accordingly quantification of 70 : 30 between LO and HO is upheld. The final quantification of profits attributable to LO and HO as per the table 1 above as per para 5 at 40 : 60 is also upheld."

5.1 With regard to the issues as to whether the assessee had any business connection in India as per provisions of Section 9(i) and whether the appellant had a PE in India, the assessee has relied on the following cases before the CIT(A):

- CIT vs RD Aggarwal & Co (SC) [56 ITR 201
- CIT vs. Hindustan Shipyard Ltd (AP) [109 ITR 158]
- CIT vs Atlas Steel Company Ltd (Cal) [164 .ITR 4011
- CIT vs Gulf Oil (Great Britain) Ltd (Bom) [108 ITR 874]
- Imperial Chemical Industries Limited vs inspecting Assistant Commissioner [19 ITD 275]
- VDO Tachometer Warke, West Germany vs CIT (Kar) [117 ITR 804]

and the circular no 23 of the CBDT. After considering them, the CIT (A) held as under:

" 7.1 ……..-

i. The CBDT has withdrawn circular no 3 dated 23.07.1969 along with circular no. 163 dated 29.05.1975 and circular no. 786 dated 07.02.2000 vide Circular No.712009 [F.No. 500/ 135/2007-FTD-I], dated 22.10.2009. Accordingly relying on the above circular has no significance as it is no longer operative. It is

worthwhile to mention that the appellant themselves have filed returns in response to the notices u/s 148 by declaring income on the cost +6% basis. By filing the returns in response to the notices u/s 148 the appellant has categorically admitted that a portion of income was earned in India and was taxable in India. The only issue which remained to be decided was whether the quantification of profits of LO to HO was 40:60 or otherwise. Considering the appellant's submissions the AO was asked to submit the remand report and in turn the AO has submitted the remand report where-in he has reiterated whatever is stated in the assessment order. However, the AO has reiterated the fact that the appellant's themselves admitted to the activities of the LO are taxable in India by showing income at cost + 6% basis. In view of the appellant's own admission by showing income attributable to the Indian operations, the appellant has indirectly accepted the Fact that they had business connection in India and also the Indian LO as the PE of Arrow Singapore. The appellant's arguments deserve no consideration in view of the detailed reasons given by the AO in the assessment order as also in view of the appellant's own admission of income having arisen in India and the indirect existence of the PE. Accordingly, the case laws cited by the appellant are held to be not relevant to the facts of the case and it is held that the appellant's arguments deserve no consideration."

06. We have considered the rival submissions and gone through relevant material. It is clear from the above that a survey was conducted on 28.08.2006 on the liaison office premises in Bangalore where the office of the Indian subsidiary is also located. There, the sales and expenses details and other accounts pertaining to the LO was found and impounded. Statements of former employees of LO, who were later on working for the subsidiary, were recorded. On due appraisal of those facts and materials , notices u/s 148 were issued

for a ys 2000-01 to 2004-05. Complying with them, the assessee filed the returns declaring income on the basis of cost + 6%. It is seen that the AO gave due opportunity to the assessee in his letter dated 24.12.2007 drawing assessee's attention towards using the statements recorded at the time of survey, its due analysis etc and thereafter passed the impugned assessment orders. The CIT (A) has also given an opportunity by way of a remand proceedings. The AO has reiterated the fact that the appellant's themselves admitted to the activities of the LO are taxable in India by showing income at cost + 6% basis. In view of the assessee's own admission by showing income attributable to the Indian operations, it has indirectly accepted the fact that they had business connection in India and also the Indian LO as the PE of Arrow Singapore. Thus, as held by the CIT(A) that the assessee's arguments deserve no consideration in view of the detailed reasons given by the AO in the assessment order as also in view of the appellant's own admission of income having arisen in India and the indirect existence of the PE. Accordingly, the case laws cited by the assessee and the circular are held to be not relevant to the facts of the case and it is held that the appellant's arguments deserve no consideration. The CIT (A), inter alia, held that incidentally the conduct of the appellant as found out after the survey u/s 133A and the appellant's own admission of existence of partial income attributable to the Indian operations do

not support the appellant's arguments that their case is not covered under Section 9(1) (i) as also their argument about existence of PE in India. It is also further held that the AO has taken enormous pains in quantifying the percentage of profit attributable to Indian operations at 40% as depicted in page 16 and 17 of the assessment order. It is held that the AO was reasonable in considering sectoral weightage at 50:25:25 for functions performed, assets employed and risks involved. Further, it is held that AO was correct in taking only 10% towards assets and risks in the intra sectoral ratio pertaining to LO and the balance 90% to the HO. Even in the functions performed, the 8 broad parameters as discussed in page 16 of the assessment order practically cover every aspect of functions performed and relative weightage allocation is also held to be proper and the final quantification of 565 to LO and 235 to HO on a scale of 800 is held to be perfectly justified and accordingly quantification of 70 : 30 between the LO and the HO is upheld. The final quantification of profits attributable to the LO and the HO as per the table 1 , above , as per para 5 at 40 : 60 is also upheld. Before us, the assessee could not lay any material to dislodge the above findings and hence we uphold the orders of the CIT(A) for ays 2000-01 & 2001-02. The assessee by way of additional ground pleaded that the CIT (A) erred in confirming the assessment orders u/s.143(3) r.w.s.147 dt.28.12.2007, which was based entirely on statements recorded u/s.133A , which is bad in law. We have

considered this plea. It is clear from the survey findings extracted , supra, in sub-para 4 under para 5 etc, that the AO has relied on various relevant materials and hence this plea of the assessee is held as untenable. The CIT (A), applying the ratio laid by the Supreme Court in the case of CIT v Anjum M H Ghaswala 252 ITR 1, has held that the levy of interest u/s.234B is mandatory with which we are in agreement. In the result , all the above grounds of the assessee are dismissed for ays 2000-01 & 2001-02.

ITA Nos.617 to 619/Bang/2011 – By the Revenue
CO Nos.31 to 33/Bang/2011 – By the Assessee :

07. Now, let us examine the Revenue's three appeals I.T (TP).A Nos.617 to 619/Bang/2011for assessment years 2002-03, 2003-04 & 2004-05 & Assessee's cross -objections Nos.31 to 33/Bang/2011 on I.T (TP). A Nos.617 to 619/Bang/2011 on Revenue's above three appeals as under:

08. For a ys 2002-03, 2003-04 & 2004-05, the AO determined the profit attributable to the Indian L O at Rs. l,83,37,555/-, Rs. l,42,54,775/-& Rs.92,04,320/-, respectively. The AO noticed that the assessee's international transactions with its A E being more than 15 crores in each year referred the matter to the TPO. The TPO after making a detailed analysis, determined arm's length margin at 4.78%, 5.18% and 5.58% as mean PLI for the three years, and determined arm's length profit at Rs.5,65,66,609/-, Rs.4.96,10,165/- and Rs.1,70,10,258/-, respectively, for the three

assessment years. The TPO took the TNMM as the most appropriate method. The A O substituted these figures as against his working of income for these ays as stated above and concluded the assessments , inter alia, charging of interest u/s. 234B , initiated penalty proceedings u/s 271(1)(c) and u/s 271B and accordingly issued demand notices. Aggrieved by the finding that the Singapore branch had business connection in India and against the finding that the Singapore Company had a PE in India and determination of 40% of the total profits as attributable to the Indian operations and against the determination of adjustment u/s 92CA for these years etc, the assessee filed appeals before the CIT(A). The CIT (A) gave a part relief on the adjustments made by the TPO . Aggrieved, the Revenue filed three appeals I.T (TP).A Nos.617 to 619/Bang/2011for assessment years 2002-03, 2003-04 & 2004-05 with similar grounds of appeal. One of the appeal grounds is extracted as under:

1. The learned CIT (Appeals) has erred in partly allowing the appeal of the assessee which is opposed to law, equity, facts and circumstances of the case.

2. The Ld. CIT(A) erred in considering that only 40% of the sales in India were attributable to the assessee while the TPO held that entire sales were the result of the assessee's functions as a trader and that the amount of entire sales for a year represented the international transaction made during that year.

3. The Ld.CIT(A) despite having accepted the computations of the PLIs by the TPO for the three years 2002-03, 2003-04 and 2004-05 based on the treatment of the assessee as a camouflaged trader of electronic goods, erred in taking a contradictory view that the assessee was a mere service provider and thus bifurcated the sales on a hypothetical basis when there was no formal division of profits between the assessee and the AE.

09. The assessee filed three cross -objections Nos.31 to33/Bang/2011 on I.T (TP). A Nos.617 to 619/Bang/2011 for assessment years 2002-03, 2003-04 & 2004-05 with similar grounds of appeal. One of the cross -objection's grounds is extracted as under:

1. The learned Commissioner of Income-tax (Appeals) grossly erred in upholding the way in which the income was apportioned between the appellant and its Indian Liaison Office (in short LO).

2. The learned Commissioner (A) ought to have appreciated that income declared by the LO was fair and reasonable and ought to have refrained from upholding the apportionment of income as made by Assessing Officer.

3. The learned Commissioner (A) ought to have appreciated that LO has not caused on any substantial business for and on behalf of the company to justify the apportionment of income of the company in the manner as done by AO and hence ought to have deleted the income as determined by the A.O.

4. The learned Commissioner(A) ought to have appreciated that the company being anon-resident, the provisions of DTAA applies and accordingly no income other than what was declared by the LO accrued in India for taxation.

5. Without prejudice, to the above even assuming that the LO was deemed to be a permanent establishment there being no income other than the income declared accrued to the appellant company through LO and hence the impugned addition is accordingly liable to be deleted.

6. The learned Commissioner (A) was right in holding that the percentage of Arm length profit (in short ALP) are to be applied on the turnover of the LO which is determined to be 40% of the total turnover and not on total turnover since TPO has not considered applying the determined percentage attributed to LO which was held by the department itself at 40% of global sales.

10. The assessee also filed similar additional grounds of appeals for ays 2002-03 to 2004-05, one of the additional grounds is extracted as under:

> The appellant respectfully submits that the additional ground of appeal enclosed to this memo was omitted to be raised when the appeal for the relevant assessment year was filed before the Hon'ble ITAT, Bangalore.
>
> This ground does not involve any investigation on the facts otherwise than found on the records of the department and is a pure question of law and goes into the very root of the matter. Hence, it is prayed that additional ground may be admitted for advancement of substantial case of justice having regard to the ratio laid down in National Thermal Power Co., Ltd., vs. CIT (1998) 229 ITR 383(SC) and Gundathur Thimmappa and Sons vs. CIT, Mysore (1968) 70 ITR 70 (Kar).
>
> In the circumstances, it is prayed that the additional ground of appeal duly signed and now enclosed may kindly be taken on record, linked to the appeal filed and the appeal may kindly be disposed of in the interest of justice and equity.

Additional grounds of appeal no 2:

> The CIT (A) ought to have appreciated that on the facts and in the circumstances of the case, no interest was chargeable u/s.234B of the Act and consequently he ought to have directed the AO to delete the interest charged u/s.234B of the Act.

Additional ground no 3 :

> 1. The learned CIT (A) erred in confirming the assessment order u/s.143(3) r.w.s.147 of the Act dt.28.12.2007, which was based entirely on statements recorded u/s.133A of the Act, which is bad in law.

Additional grounds of appeal :

1. On the facts and in the circumstances of the case, and in law the learned Commissioner of Income-tax(A) erred in upholding the inference of the AO that the Liaison Office (LO) of the appellant in India formed permanent establishment of the appellant in India by wrongly alleging that the LO was securing orders/ entering into contracts with Indian customers on behalf of the appellant.

2. On the facts and in the circumstances of the case, and in law the learned Commissioner of Income-tax (A) erred in upholding the inference of the AO that the LO of the appellant was engaged in the core functions of the appellant and not merely preparatory and auxiliary activity.

3. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in upholding the inference of the AO that the LO was an elaborate façade maintained by the appellant to carry out its core activities in India in violation of the permission granted by the RBI to the appellant to establish a LO in India.

4. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in upholding the AO's misinterpretation of the Power of Attorney granted to the person in charge of the LO to hold that the person in charge of the LO was granted wide powers to negotiate and conclude contracts with customers on behalf of the appellant.

5. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in upholding the AO's observation that the employees of the

LO possessed specialized knowledge of various technical activities which were not necessary for the liaisoning and auxiliary functions and that these employees were not essential for functioning of an LO.

6. The learned CIT(A) erred in upholding the AO's inference that the appellant's relationship with its "LO" in India constituted "business connection" and therefore income accrued to the appellant as envisaged under the provisions of Sec.9(1) of the Act.

7. The learned Commissioner of Income-tax (A) erred in upholding the inference of the AO that the LO was a Permanent Establishment of the appellant merely based on the statements recorded from the former employees of the appellant and without any corroborative evidence.

8. For these and other grounds that may be urged at the time of hearing of the appeal the appellant prays that the appeal may be allowed.

10. The DR submitted his plea on the lines of the Revenue's grounds of appeal. The AR submitted on the lines of cross objections and the additional grounds of appeal. Let us examine, how the CIT (A) dealt them by extracting the relevant portion of the order as under :

"8.....
.....
.....The final quantification of profits attributable to LO and HO as per para 42 of the assessment orders and table I above as per Para 5 at 40:60 is also upheld. However, for AY 04-05 there is an arithmetical mistake committed by the AO in not allowing Singapore expenses and accordingly for AY 04-05 the

figures as determined under the head TP adjustments, (worked out below) of Rs.52,82,613/- is confirmed.

9. Transfer Pricing adjustment as per Section 92CA:

9.1 The AO noticing that the appellant's international taxation with its AE being more than 15 crores in each year referred the matter to the TPO after making a detailed analysis determined arm's length margin at 4.78%, 5.18% and 5.58% as mean PLI for the three years, and determined arm's length profit at Rs.5,65,66,609/-, Rs.4.96,10,165/- and Rs.1,70,10,258/- for the three assessment years. The TPO took the TNMM as the most appropriate method.

9.2 The appellant has raised objections on the determination of the ALP on its entire sales rather than applying the above percentage on the profit attributable to LO. Besides that, it is also stated that the working capital adjustment has not been given by the TPO. It was also pointed out that the AO has determined certain profit for the same year on protective basis but the TPO has determined income at much higher ratio which was 3.09 times, 3.48 times and 1.85 times higher as compared to the AO. This is because of the fact, that the TPO has not considered applying the determined percentages attributable to the LO which was held by the department itself at 40%. of the global sales. Besides that, it was stated that by not giving working capital adjustment of 2.75%, 2.81% and 1.92%, the TPO has arrived at a much higher figure as compared to what the AO under identical circumstances has computed. The appellant has also relied on the following judgments in support of the working capital adjustment:

(a) Philips Software Centre Pvt. Ltd Vs. ACT (119 TTJ 721)

(b) Sony India Pvt. Ltd Vs. CIT (315 ITR 150)

(C)Egain Communications Pvt. Ltd (Delhi Tribunal in ITA No.1885/PM/2007).

(d) Mentor Graphics P. Ltd., [109 ITD 101] [2007] [Delhi]

After considering the appellant's arguments on these issues only two issues have to be determined.

(i) Whether the determined margin of ALP for three years are to be applied on the total turnover or on the turnover of the LO which is determined to be 40% of the total turnover.

(ii) Whether the appellant can be given working capital adjustment as claimed by them.

To be in consistent with the departmental stand for AY 00-01 & 01-02 which is also confirmed by the CIT (A) as also in view of the AO's protective assessment wherein he has taken 40 : 60 to LO HO it is to be held that the percentage of ALP as determined by the TPO should have been applied only on 40% of the total sales and the ALP should have been determined accordingly. Coming to the working capital adjustment the appellant has given a detailed working but ultimately arrived at the figure of working capital by taking the PLR as determined by the Centre for Monitoring Indian Economy (CMIE). The appellant had adopted percentage of 10.31, 10.21 & 9.81 for the three FY's respectively. Incidentally there is no uniform agreement on the adoption of PLR as adopted by the CMIE. Though approximately the RBI and the CMIE determined PLR are almost the same still SBI PLR and LIBOR rates vary. Accordingly, there is no uniformity in adoption of the PLR rate as determined by the CMIE. Accordingly, it is not possible to allow working capital adjustment as requested by the appellant though the appellant is right in asking for certain percentage of working capital adjustment. Considering the fact that the AO has independently determined the profit attributable to the LO, corresponding to this determination the working capital adjustment could be given. Accordingly working capital adjustment of 0.906% and 1.459% could be given in AY's 02-03 & 03-04 respectively. Accordingly, the ALP margin to be re-determined for AY 02-03 & 03-04 works out as under:

		AY 02-03	AY 03-04
ALP Margin determined by TPO	=	4.780	5.180
Working capital adjustment	=	0.906	1.459
Revised ALP margin to be taken	=	3.874	3.721
Applied on 40% of total sales	=	1,83,37,996	1,42,54,781
(40% of 118,34,01,862 = 47,33,60,745			
40% of 95,77,25,148 = 38,30,90,059)			

AO is directed to adopt ALP adjustments of Rs.1,83137,996/- and Rs.1$_1$42,54,781/- for AY 02-03 & 03-04 respectively which are almost the same as Rs.1,83,37,555/- and Rs.1,42,54,775/- determined by the AO on protective basis.

However, for AY 04-05 AO has determined on protective basis income attributable to. LO at Rs.92,04,320/- but it is seen from his table in para 42 that he has not allowed Singapore expenses while arriving at this figure. For AY 04-05, the AO is directed to allow an adhoc figure of 1.25% towards Working capital adjustment. Hence the ALP margin shall be taken at 4.34% (5.59% - 1.25%) and on 40% of the global sales, being Indian LO sales, ALP is to be determined. This percentage is to be adopted on Rs.12,17,19,202/- (being 40% of Rs.30,42,98,005/-) and the ALP is to be taken at Rs.52,82,613/- for AY 04-05. Though this figure is slightly lower than the income determined by the AO, in view of the AO's non allowance of Singapore expenses the profit was determined at Rs. 92,04,320/- though in the other two years AO has allowed the same."

11. We heard the rival submissions and gone through relevant material, From the above, it is clear that the CIT (A, consistent with the departmental stand for a ys 2000-01 & 01-02 which is also confirmed by the CIT (A) as also in view of the AO's protective assessment wherein he has taken 40 : 60 to the LO :HO, held that the percentage of ALP as

determined by the TPO should have been applied only on 40% of the total sales and the ALP should have been determined accordingly. When there is no uniformity in adoption of the PLR rate as determined by the CMIE, it is not possible to allow working capital adjustment as requested by the appellant though the appellant is right in asking for certain percentage of working capital adjustment. Considering the fact that the AO has independently determined the profit attributable to the LO, corresponding to this determination the working capital adjustment could be given. Accordingly, the working capital adjustment of 0.906% and 1.459% could be given in ay's 02-03 & 03-04, respectively. Thus, the CIT (A) re-determined the ALP margin for a ys 02-03 & 03-04. For a y 04-05, the CIT (A) found that the AO has determined on protective basis income attributable to the LO at Rs.92,04,320/- but it is seen from the AO's table in para 42 that he has not allowed Singapore expenses while arriving at this figure. For ay 04-05, the CIT (A) directed the AO to allow an adhoc figure of 1.25% towards working capital adjustment. Hence, the ALP margin shall be taken at 4.34% (5.59% - 1.25%) and on 40% of the global sales, being Indian LO sales, and re-determine the ALP . Before us, the Revenue could not assail such findings with any material. The CIT (A) orders are consistent with the findings in ays 2000-01 & 01-02 and on the facts and circumstances appears reasonable . Hence, the orders of the CIT (A) do not require any interference and hence we dismiss the Revenue's appeal for a ys 02-03, 03-04 & 04-05, respectively.

12. With regard to issues in the assessee's cross-objections and the additional grounds of appeals for a ys 02-03, 03-04 & 04-05, respectively, for the elaborate reasons mentioned in para 6, supra, they fail and hence the corresponding grounds are dismissed.

13. In the result, the assesssee's appeals are dismissed, the appeals of the Revenue and the Cross-Objections of the assessee are also dismissed.

Order pronounced in the open court on 31st day of March, 2017.

Sd/-	Sd/-
(SUNIL KUMAR YADAV) JUDICIAL MEMBER	(S. JAYARAMAN) ACCOUNTANT MEMBER

MCN*

Copy to:
1. The assessee
2. The Assessing Officer
3. The Commissioner of Income Tax
4. The Commissioner of Income Tax (A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar.