IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'I-1', NEW DELHI

BEFORE SHRI N.K. SAINI, VICE PRESIDENT
AND
SHRI SMT. BEENA A PILLAI, JUDICIAL MEMBER

ITA Nos. 6018 & 6019/Del/2015
AYs: 2005-06 & 2006-07

Honda Motor Co. Ltd. SRBC & Associates, 4th & 5th Floor, Plot No. 2B, Tower 2, Sector-126, Noida. **PAN No. AACCH3050J**	**vs**.	DCIT Circle-Noida, Room No. 312, 3rd Floor, Aayakar Bhawan, A-2D, Sector-24, Noida.
(Appellant)		**(Respondent)**

Assessee by : S/Shri Tarun Gulati, Adv. &
Prashant Tahiliani, Adv.
Department by : Sh. Sanjay I. Bara, CIT DR

Date of Hearing : 12/12/2018

Date of Pronouncement: 13/12/2018

ORDER

PER BENCH

Present appeals have been filed by assessee against the final assessment order dated 31/08/15 passed by DCIT, International Taxation, Circle Noida, under section 147 read with 143(3)/144C(5) of the Act.

2. Brief facts of the case are as under:

Assessee is a company incorporated under laws of Japan and is engaged in business of manufacturing of cars, its spare parts and accessories. Assessee has wholly owned subsidiary company in

India known as Honda Siel Cars Pvt. Ltd., which has entered into several transactions relating to sale of raw materials, finished goods, capital goods and has received royalty income, fees for technical services etc. It has been observed by authorities below that transactions have been carried out between two companies ever since its inception.

2.1 On 24/06/10 a survey was carried out at premises of Indian subsidiary under section 133A of the Act. During survey statements of expatriates employees of Indian subsidiary were recorded, on basis of which Ld.AO formed a belief that income which was chargeable to tax, has escaped assessment. Ld.AO accordingly issued notice under section 148 of the Act on 30/03/11, by recording the reasons to believe that the income having escaped assessment. The main reason for reopening was that the materials collected/impounded during survey operation established business connection of assessee with its Indian subsidiary as per provisions of section 9(1)(i) of the Act, and existence of permanent establishment of assessee through its Indian subsidiary. Accordingly Ld.AO/ Ld. DRP was of opinion that income attributable to permanent establishment in India, has escaped assessment. Ld. AO, thus, passed final assessment order after DRP directions and attributed 25% of the global income amounting to Rs.12,01,49,055/- to the PE.

3. Aggrieved by order of Ld.AO assessee is in appeal before us now on following grounds of appeal:

1. *That on the facts & in the circumstances of the case and in law, the orders passed by the Assessing Officer (AO) /Dispute Resolution Panel (DRP) to the extent prejudicial to*

the interest of the appellant, are bad in law and void ab-initio.

2. *Thatthe AO/DRP erred in upholding the validity of the re-assessment proceedings under Section 147 of the Act when initiation of proceedings did not satisfy necessary requisites contained in Section 147 of the Act and there being no reason to believe that any income chargeable to tax had escaped assessment.*

Without prejudice

3. *That the AO/DRP erred in concluding that the Appellant had a Permanent Establishment (PE) under Article 5 of the Indo-Japan DTAA given the fact that necessary requisites of creating a PE under Article 5 of DTAA were lacking in the present case.*

3.1 *That the AO/DRP erred in coming to the conclusion that their existed a PE of the Appellant in India while relying on the statements of expatriate employees of Honda Cars India Ltd. (HCIL) which were inadmissible evidence in terms of the judgment of the Hon'ble Supreme Court in* ***S. Qadar Khan & Sons*** *(254 CTR 228)*

3.2 *That the AO/DRP erred in coming to the conclusion that expatriate employees working in Honda Cars India Ltd were working on behalf of the Appellant and as such controlled the day-to-day functioning of HCIL in terms of technology, economic and other control.*

3.3 *That the AO/DRP completely failed to appreciate that in terms of Article 5(9) of the Double Tax Avoidance Agreement between India and Japan (DTAA) control of holding company over subsidiary does not in itself create a Permanent Establishment of the non-resident.*

3.4 *That the AO/DRP erred in law in selectively relying on the statement of expatriate employees and failed to appreciate the true intention of the statements which evidenced that the expatriates were working only for HCIL in India.*

4. *That the AO/DRP erred in bringing to tax the off-shore supplies made by the Appellant to HCIL without appreciating that title and risk of these goods was transferred outside India to HCIL and hence no portion of the profit arising therefrom could be brought to tax in India.*

4.1 That the AO/DRP completely failed to appreciate that the international transactions relating to purchase of raw-materials of HCIL from the Appellant had been subjected to transfer pricing assessment wherein the value of said international transactions were found to be on arm's length basis.

4.2 That the AO/DRP completely failed to appreciate that in terms of Article 9 of DTAA once the international transactions between the Appellant and HCIL had been found to mean at arm's length basis, the Revenue was prohibited from allocating any further income of the Appellant to be taxed in India.

4.3 Without prejudice to the above grounds, that on the facts and circumstances of the case and in law, the DRP has erred in attributing 25% of the total income to the activities of the appellant in India alleging that selling of raw material, consumable spare parts, etc. has been carried in India when none of the selling operation is carried in India.

4.4 Without prejudice to the above grounds, the AO/ DRP has grossly erred in law and facts in rejecting the attribution study filed by the appellant.

5. That the AO/DRP erred in law and facts in taxing export commission ignoring the CBDT Circular No.23 dated July 23, 1969 and Circular No. 786 dated February 7, 2000 when it is a well settled principle that CBDT instruction/circular is binding on revenue authorities.

6. That the AO/DRP erred in law and facts in taxing reimbursement of expenses as 'income' under the Income Tax Act.

7. Without prejudice to the above grounds, that AO / DRP has grossly erred in law and facts in applying the adjusted global profit ratio of 10.59% after making disallowance of research and development (R&D), when as per global balance sheet operating profit ratio is 4.23%.

7.1 That on the facts and circumstances of the case and in law, the AO/ DRP has erred in increasing the global operating profit ratio by 5.34% (on the basis of consolidated global accounts) stating that R&D expense does not relate to appellant's PE in India.

7.2 That on the facts and circumstances of the case and in law, the AO/ DRP failed to appreciate that once the profits

are calculated on the basis of profit ratio, no further expense can be disallowed from the profit ratio.

8. *That the AO/DRP has grossly erred in law and facts in directing the levy of interest under sections 234B and 234C of the Act without appreciating that the Appellant is a non-resident and tax is deductible from the income of the Appellant.*
9. *That the AO/DRP has grossly erred in law and facts in levying interest under section 234A of the Act.*
10. *That the AO/DRP has grossly erred in law and facts in directing the levy of interest under section 234D of the Act without appreciating that no refund was granted to the Appellant.*
11. *That the AO/DRP has grossly erred in law and facts in initiating the penalty u/s 271(1)(c) of the Act and alleging that the Appellant has concealed the true and correct particulars of its taxable income and furnished inaccurate particulars of its income.*

That the above grounds are without prejudice to each other.
The Appellant also reserves its right to add, alter or amend any ground of appeal either before or at the time of hearing of this appeal."

4. At the outset, Ld. Counsel submitted that before this Tribunal, assessee is challenging primarily legal issue pertaining to initiation of re-assessment proceedings under section 148 of the Act.

4.1 He submitted that, asessee went before *Hon'ble Allahabad High Court* against reopening by way of *Writ Petition No. 1373 of 2012* and *Hon'ble Allahabad High Court* vide *order dated 05/08/14* dismissed writ petition against initiation of reassessment proceedings pursuant to impugned notice under section 148 of the Act.

4.2 Ld. Counsel submitted that assessee thereafter filed SLP before *Hon'ble Supreme Court* against order dated 05/08/14,

passed by *Hon'ble Allahabad High Court. Hon'ble Supreme Court* admitted *SLP Nos.26826/14 and 26803/14* in respect of assessment years under consideration before us now, wherein following substantial questions of law were formulated:

a) "*Whether the reasons recorded are contrary to the provisions of Article 5(9) of the DTAA which provides that the fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other?*

b) *Whether the Hon'ble High Court erred in sustaining the initiation of reassessment proceedings u/s 147 of the Act in the absence of any live link or nexus between the 'information' and the formation of the belief that income chargeable to tax had escaped assessment?*

c) *Whether statements recorded during a survey can constitute 'information' so as to initiate reassessment proceedings u/s 147 of the Act in the absence of any conclusion of any authority of such existence of the alleged PE?*

d) *Whether the High Court erred in not accepting the order of the TPO as conclusive on the grounds that such order was passed prior to the conduct of the survey when even after such survey the TPO had consistently found such transactions to have met the arm's length principle and as such rendering the order of the High Court perverse?*

e) Whether Article 9 of the DTAA prevents any further allocation of profits where the transactions between the related enterprises having met the arm's length test in the form of an order of the TPO and consequently there could not exist any reason to believe that income chargeable to tax had escaped assessment.

f) Whether the High Court fell in error in concluding that the order of the TPO was not binding on the AO at the stage of issue of a notice u/s 147/148 of the Act given the express provisions of section 92CA(4) of the Act."

4.3 Ld. Counsel thereafter referring to pages 41 & 42 of paper book, wherein, Civil Appeal being 2837-2838 of 2018 arising out of SLP (C)No.26826/2014 and 26803/2014 (supra) has been allowed by *Hon'ble Supreme Court* vide order dated 14/03/2018, by observing as under:

> *"In the judgment of this Court dated 24.10.2017 in Assistant Director of Income Tax-1, New Delhi vs. M/s E-Funds IT Inc., Civil Appeal No. 6082 of 2015 and connected matters, it has been held that once arm's length principle has been satisfied, there can be no further profit attributable to a person even if it has a permanent establishment in India.*
>
> *Since the impugned notice for the reassessment is based only on the allegation that the appellant(s) has permanent establishment in India, the notice cannot be sustained once arm's length price procedure has been followed."*

4.4 *Hon'ble Supreme Court,* thus, observed that notice issued under section 148 could not be sustained, once arm's length price procedure has been followed.

5. Ground No. 2 raised by assessee, pertains to validity of notice under section 148 of the Act was issued to assessee for assessment years under consideration, wherein, Ld.AO in draft assessment order held that assessee had fixed place of business PE in India in terms of Article 5(1) and 5(2) of DTAA between India and Japan, which was being used by its employees-expatriates, as premises (at their disposal) for business of assessee.

As *Hon'ble Supreme Court* in assessee's own case for years under consideration (supra) has quashed and set-aside notice of reassessment u/s 148 of the Act, *ground No.2* raised by assessee stands automatically allowed. As the notice has been quashed by Hon'ble Supreme Court, reassessment proceedings, pursuant to the said notice and the impugned orders passed by the AO stand automatically cancelled.

6. **In the result, appeals filed by assessee for years under consideration stand allowed on legal question raised.**

Order pronounced in the open court on13/12/2018

Sd/-	Sd/-
(N.K. SAINI)	**(BEENA A PILLAI)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dt. 13/12/2018
*Kavita Arora

Copy forwarded to: -

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

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

		Date
1.	Draft dictated on	12/12/2018 13/12
2.	Draft placed before author	12/12 13/12
3.	Draft proposed & placed before the second member	
4.	Draft discussed/approved by Second Member.	
5.	Approved Draft comes to the Sr.PS/PS	13/12
6.	Kept for pronouncement on	13/13
	Date of Uploading of Order	14/12
7.	File sent to the Bench Clerk	14/12
8.	Date on which file goes to the AR	
9.	Date on which file goes to the Head Clerk.	
10.	Date of dispatch of Order.	