

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI BENCH 'B',
NEW DELHI

BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER, AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

SA No. 877/DEL/2018
[A/o ITA No. 7471/DEL/2018 [A.Y 2015-16]]

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ITA No. 2805/DEL/2016 [A.Y 2010-11]
ITA No. 4940/DEL/2016 [A.Y 2011-12]
ITA No. 1554/DEL/2017 [A.Y 2012-13]
ITA No. 1555/DEL/2017 [A.Y 2013-14]
ITA No. 7076/DEL/2017 [A.Y 2014-15]
ITA No. 7471/DEL/2018 [A.Y 2015-16]

ZTE Corporation
6th Floor, Tower 'B'
Building No. 10,
Cyber City, Phase 2
Gurgaon [Haryana]

Vs.

The D.D.I.T
International Taxation
Circle - 3(2)
New Delhi

PAN: AAACZ 4115 A

ITA No. 3628/DEL/2016 [A.Y 2010-11]
ITA No. 5197/DEL/2016 [A.Y 2011-12]

The J.C.I.T [OSD]
International Taxation
Circle 3(2)
New Delhi

Vs.

ZTE Corporation
6th Floor, Tower 'B'
Building No. 10
Cyber City, Phase 2
Gurgaon [Haryana]

(Applicant)

PAN: AAACZ 4115 A
(Respondent)

Assessee By : Shri Harpreet Singh Ajmani, Adv
Shri Rohan Khare, Adv

Department By : Shri G.K. Bhall, CIT-DR

Date of Hearing : 11.02.2019
Date of Pronouncement : 15.02.2019

ORDER

PER BENCH:-

The captioned appeals filed by the assessee and revenue are preferred against the separate orders of the ld. CIT(A) pertaining to assessment years 2010-11 to 15-16. In assessment years 2010-11 and 201-12, the revenue is also in cross appeal. Since all the appeals pertain to same assessee involving common grievances and were heard together, we are disposing them off by this common order for the sake of convenience and brevity. The assessee has also filed stay application for assessment year 2015-16.

2. The first common grievance in assessee's appeal relates to the denial of having any Permanent Establishment [PE] in India. At the very outset, the ld. counsel for the assessee stated that to avoid protracted litigation, he is not pressing this common grievance.

3. However, the ld. DR submitted the following written submissions in this regard, explaining the stand of the revenue:

"PRELIMINARY

1. The assessment order and the DRP directions /order of the CIT(A) are emphatically relied upon.
2. This submission is restricted only to specific aspects. On balance aspects, above orders and oral submissions are relied upon.

Claim during Assessment Proceedings-

Function/Claims	As per Assessee	As per Survey documents
Collection of market Info	ZTE India (AO-4)	Huang Dabin Q-4 (AO-9)
Time to time clarifications and communicating with the assessee	ZTE India (AO-4)	Huang Dabin Q-2 (AO-9)
Identifying business opportunities	ZTE India (AO-4)	
Act as interface with Indian customers	ZTE India (AO-4)	
Contracts with Indian customers were negotiated through electronic means or through short visits of assessee's personnel at the customers locations in India	ZTE China (AO-4)	ZTE China sometimes seek clarifications from customers through ZTE India (Huang Dabin Q- 47 AO-10)
Contracts were accepted and concluded outside India	ZTE China (AO-4)	
No fixed Place & employees visiting India didn't have	ZTE China (AO-4)	S P. 21 of Annex-7 (not available) of survey documents shows

<i>access to ZTE India premises without its approval</i>		<i>office address as 804-808 Tower B Global Business Park Gurgaon and contact person is Raiesh Singh (Huang Dabin Q-25 AO-10) . The above premises are at the disposal of ZTE India. The employees of ZTE China are also working here for ZTE China.(Rock Q 10 AO-12) On the day of survey expatriates were found working in Gurgaon office of ZTE India. These employees come to meet the customer impart technical training and for rendering technical support. (Huang Dabin Q14-15 p.93 Annex-1)</i>
<i>At the time of joint bids the bidding teams come together merely for coordination purposes.</i>	<i>ZTE China (AO-5)</i>	<i>Huang Dabin Q-10 (AO-9) Q-47 (AO- 10) ZTE India suggests price to be quoted. (Rocky Q-7 AO-11)</i>
<i>Technical Support through employees under service contract</i>	<i>ZTE China (AO-5)</i>	<i>Huang Dabin Q-5 (AO-9) No specific employees for specific services. Employees come to India to render all kinds of technical support services, be it Tendering support, product support, post sales support etc (Huang Dabin Q-49AO-11: Q14- 15 p.9 Annex-1)(Rocky Q-8-9 AO- 12)</i>
<i>Technical Training of employees</i>		<i>Huang Dabin Q-4 (AO-9)</i>
<i>Business transactions</i>		<i>Huang Dabin Q-4 (AO-9)</i>
<i>Sharing of experiences</i>		<i>Huang Dabin Q-4 (AO-9)</i>
<i>Local purchases</i>		<i>Huang Dabin Q-27 (AO-10)</i>

B. Role of Employees of assessee in India-

- To provide technical support services for the equipments sold by assessee to its customers. (Dalip Ghosh, Q-7, AO-12)
- Employees generally come to India to meet customers, to impart technical training and to render some technical support.(Huang Dabin Q14-15 p.93 Annex-1)

-Employees meet customers to introduce the products of the assessee, to explain technical solutions and to get requirements from the customers.

(Huang Dabin Q16 p.93 Annex-1)

- *ZTE China as a vendor of ZTE India helps us to prepare the technical documents in respect of supply of equipments. (Huang Dabin Q10 p.94 Annex-1)*
- *We need technical support from ZTE China for installation and commissioning of equipments supplied by ZTE China. The employees of ZTE China come on short visits to render such technical support. (Huang Dabin Q.5 p.95 Annex-1)*
- *Office of ZTE China (India Office) shown as 804-808, Tower-B, Global Business Park, Gurgaon India and Rajesh Singh shown as contact person (p.21 Annex-7 as per Q. 25 to Huang Dabin p.91 Annex-1)*

C. ITAT Order dt.30.05.2016

S.No	Findings & Observations of Hon'ble ITAT	Ref. Para No	Challenged
1	<i>Business Connection (not a GOA before ITAT)</i>		
2	<i>Existence of PE under Art-5(1), 5(2)(c), 5(2)(u) &5(4) not pressed</i>	13	No
3	<i>Level of PE's participation /Functions carried out by PE</i>	46, 50	No
4	<i>Attribution of Profits to PE</i>	50	Yes (194,195,196,227, 228)
5	<i>Whether activities are preparatory & auxiliary in character (not a GOA before ITAT)</i>	28 r.w. 46	No. In p.187, 194,196,228, it profitability of activities are highlighted.

Para-18 *"We have noted earlier that the assessee had agreed for attribution of profits to PE without prejudice to his claim that there is no PE in India (in its) endeavor to end protracted litigation with revenue and to save judicial time and efforts"*

Para-20 *"For the purpose of attribution of profits to PE, the most important aspect to be kept in mind is the level of PE's participation in the economic life of source country. It is primarily nexus between*

source country and the PE's activities which produce the taxable income to assessee."

Para-24 *"The issue of attribution of profits depends on the facts in particular case and is dependent on the level of operations of the activities carried out in India. It becomes necessary to examine the level of operations carried out by PE in India."*

Para-25 *"We have pointed out earlier that AO had held that there was fixed PE in India, dependent agency PE in India and Installation PE in India. These findings were recorded on the basis of operations carried out in India which came to light after the survey was carried out."*

Para-46 *"In the present case, we have earlier reproduced paras 6.2.2 and 7.2.3 from Id. CIT(A)'s order and also findings from AO's order for A.Y.2009-10 which give a clear picture of the level (of) operations carried out by **ZTE India, the assessee's PE.**" id. CIT (A) has pointed out that ZTE India is doing preparatory work, negotiating the contract and price and answering specified queries of the customers on behalf of the assessee. These are all vital functions which are revenue generating. The AO in AY 2009-10, as noted earlier, has elaborated in detail the functions carried out by PE in connection with sale in India. At the cost of repetition, we reproduce the same-"*

Para-50 *"... we find that the level of operations carried out by assessee through its PE in India are considerable enough to conclude that almost entire sales functions including marketing, banking and after sales were carried out by PE in India..."*

D. Undisputed Facts-

- *Survey Operation u/s 133A was conducted on 6.10.2009 in the premises of ZTE India and not in the premises of the PO or LO of the assessee;*
- *Documents recovered from ZTE India relating to assessee;*
- *It was never claimed that the statements given during the course of survey are not correct or don't reflect the business processes and practices followed by the assessee;*
- *Assessee vide its submission dt. 15.3.13 submitted that there was no change in the facts and circumstances from earlier years in respect of business model, revenue streams and their taxability in India. (AO-09-10)*
- *No evidence produced to controvert the finding of facts recorded by Hon'ble ITAT in para-46 of its order relating to the functions and operations carried out by the assessee in India through its PE.*
- *The findings of the Hon'ble ITAT on the role and functions of the PE and the activities & operations carried out by such PE has not been challenged before the Hon'ble High Court. The questions of law raised before the Hon'ble ITAT relate only to the attribution of income to such PE. It was claimed that marketing, negotiation and conclusion of contracts are not revenue generating activities (as distinct from preparatory and auxiliary activities) and consequently no income should be attributed to the PE (Ref. p.196 & 228 of Common Paper Book)*

- *Once the existence of Fixed Place PE is established by the Revenue during earlier years, the onus is on the assessee to establish and prove that such a PE has ceased to exist during relevant year. The assessee has failed to prove this.*

- *In the TP study for ZTE India for A.Y.2012-13 it was confirmed that "During the year the company (ZTE Telecom India Pvt. Ltd.) has taken services from certain expatriate employees in relation to various projects carried out by the company, however, an amount of Rs. 215 million towards salary of such employees have been paid directly by the Holding Company (ZTE Corporation, China). The company has discharged the statutory liabilities with respect to PF, amounting to Rs. 2 million and taxes of Rs. 48 million for these employees to the respective authorities. The amount of PF and taxes are included in personnel expenses. The Holding Company has provided services by such employees on a 'Free of Cost' basis. These employees are not engaged in the administrative services and logistics charges."(p. 408 of Vol-II of PB for A.Y. 2012-13)*

- * *No evidence produced to establish that the functions carried out during the relevant years are in the nature of 'preparatory and auxiliary activities only'. Once it is established that there is a fixed place PE under Art-5(1) the same can cease to exist only with the disposal of the fixed place of business or with the cessation of any activity through it. To quote Klaus Vogel-*

" 11. Beginning and end of a PE: A permanent establishment begins to exist as soon as the enterprise commences to carry on its business through a fixed place of business. This is the case once

the enterprise prepares, at the place of business, the activity for which the place of business is to serve permanently. The period of time during which the fixed place of business itself is being set up by the enterprise should not be counted, provided that this activity differs substantially from the activity for which the place of business is to serve permanently. The permanent establishment ceases to exist with the disposal of the fixed place of business or with the cessation of any activity through it, that is when all acts and measures connected with the former activities of the permanent establishment are terminated (winding up current business transactions, maintenance & repair facilities)." (pp.301-302)

"c. Beginning & End of a PE

78 The PE ceases to exist as soon as the first of the indispensable elements of Art. 5(1) OECD and UN MC for of Art. 5(5) OECD and UN MC. respectively) has dropped out. Insignificant interruption of the business activity are not taken into account. Apart from such short-term interruptions, the leasing out of an enterprise or a PE by the taxpayer will usually bring the PE of the lessor taxpayer to an end.

Likewise, a PE ceases to exist as soon as one of the negative elements contained in Art-5(4) or (6) OECD and UN MC occurs.

It is important to note, however, that the determination of the beginning and end of a PE is relevant for capital taxation only. By contrast, it need not be considered for income tax purposes. This is particularly true with regard to Art 7(1) & (2)... as the rules on

attribution of profits to a PE allow an attribution of earnings and expenses to the PE even if they have accrued at a time when the PE had not subsisted yet - or vice versa, after the PE ceased to exist." (pp.348-349)

E. Analysis of Documents relating to assessee found during Survey-

Description	Reference
Non-Disclosure Agreement dt. 6/3/07 between assessee and Dishnet. - Address of the assessee given at 8 th Floor, Tower B, Global Business Park, Gurgaon - Agreement signed by Mr. Yi Chen, GM, Marketing (signing for ZTE Corp)	p. 244-248, Survey Doc, Vol.III
Communication between ZTE India & Aircel dt. 15/10/07 & 17/9/07 signed by James Yi Chen, GM, Marketing (compare the signatures)(signing for ZTE India)	p. 250 & 253, Survey Doc,
Undertaking dt. 25/1/08 by ZTE India w.r.t. RFP dt. 11/4/07 to Aircel&Dishnet signed by Yi Chen, GM, Marketing (signing for ZTE India)	p. 254, Survey Doc, Vol.III
Offer letter issued by assessee to Dishnet dt. 23/8/07 - Printed on the letterhead of ZTE India - Signed by Yi Chen, GM, Marketing - 'For and on behalf of ZTE Corporation' accepting the T&C of the purchase order (compare the signatures)	p. 255-256, Survey Doc, Vol.III
Amendment letter dt. 11/8/08 to ZTE Corp contract with Dishnet signed by Yi Chen, GM, Marketing (signing for ZTE India) (compare the signatures)	p. 302, Survey Doc, Vol.III
Aircel letter dt. 14/11/06 to Mr. James Yi Chen, Mobile Project Manager, ZTE Corporation, Gurgaon, Haryana	p.333-334, Survey Doc, Vol.III
Trial Contract for testing of WCDMA Pilot System between ZTE Corp and Aircel dt. 11/12/06	p.337-341, Survey Doc, Vol.III
Trial Contract Testing Report signed by Yi Chen, (signing for ZTE Corpn) (compare the signatures)	p.390-409, Survey Doc, Vol.IV
Services and other materials quotation signed by Yi Chen, (signing for ZTE Corpn) (compare the signatures)	p.494-496, Survey Doc,

<i>Letters addressed by Aircel to the 'Project Manager, Aircel Bihar GSM Project, ZTE Corporation' enclosing Acceptance Check Test Certificates.</i>	<i>p. 273-278, Survey Doc, Vol.III</i>
<i>Trial Contract between Aircel & ZTE China with office of ZTE Telecom India given as communication address and signed by Zhang Lili, an employee of ZTE Telecom India (refer to p. 1215 of Survey Doc, Vol-X)</i>	<i>p.337-341, Survey Doc, Vol.III</i>
<i>Letter from Aircel to ZTE China through James Yi Chen, Mobile Project Manager, ZTE China, Gurgaon</i>	<i>p.333-334, Survey Doc,</i>
<i>Certificates from Aircel certifying that ZTE Corpn has successfully 'supplied' and 'installed' the trial system</i>	<i>p.330, Survey Doc. Vol.III</i>
<i>Confidential & Non-disclosure Agreement between ZTE Corp & Teracom signed by Mr. D.Bhattachraya for ZTE Corp who is an employee of ZTE India (refer to p. 1215 of Survey Doc, Vol-X)</i>	<i>p.649-652, Survey Doc, Vol.VII</i>
<i>MOU for Business Alliance Partnership between ZTE Corp & Teracom CLIP phones (signed by Mr. D.Bhattachraya for ZTE Corp who is an employee of ZTE India (refer to p. 1215 of Survey Doc, Vol-X)</i>	<i>p.676-683, Survey Doc,</i>
<i>Details of Legal advice sought & fees paid. It may be noted that the law firm Fox Mandal & Co discussed various issues including the following which proves that ZTE Corp had its own employees working in India as well as seconded employees to ZTE India who were working for it - Termination of employment of Rajan Kalsi Finalization of secondment agreements with ZTE India Discussion and advice to Deepak Thakur of ZTE India (refer to p. 1215 of Survey Doc, Vol-X) on various issues (after receiving mail from ZTE Corp) i.e.</i> <ul style="list-style-type: none"> • FRRO • Customs • Contract Employee • IP Issues • Corporate Guarantee matter regarding ASTER-Kenya 	<i>p.663-671, Survey Doc, Vol.VII</i>
<i>Letter from Calyon Bank addressed to ZTE Corpn, Gurgaon</i>	<i>p.684, Survey</i>
<i>Network Handover Certificate signed by Mr. Zhao Wangxin for ZTE Corp who is an employee of ZTE India (refer to p. 1215 of Survey Doc, Vol-X to know</i>	<i>p.708, Survey Doc, Vol.VII</i>
<i>Extension List & Name of employees of ZTE Telecom India Pvt. Ltd. including Project Teams</i>	<i>p.710-712, ' Survey Doc,</i>
<i>Statement before Customs describing the nature of software supplied (Refer to p.892, Survey Doc, Vol.VIII)</i>	<i>p.1140-1143 Survey Doc,</i>
<i>Letter from BSNL addressed to ZTE Corpn, Gurgaon</i>	<i>p.1159,1164,</i>

	Survey Doc, Vol.V
Minutes of meeting with ITI CMD by Debashish Bhattacharya	n 1195-1196, Survey Doc,
Blank Letter Head of ZTE Corpn	n 1197. Survey Doc, Vol.X
Minutes of meeting dt. 22/09/07 relating to status of work with BSNL	n 1211-1213, Survey Doc,
List of Employees of ZTE Telecom India Pvt. Ltd.	1215-1217 Survey Doc,
Letter dt. 5/9/06 from ZTE Corpn to BSNL signed by Mr. Gan Yona for ZTE Corpn who is an employee of ZTE India (refer to p. 1215 of Survey Doc, Vol-X to know about the signatory) forwarding Bid Documents	n.955. Survey Doc, Vol.IX
Section VII of Bid Form for BSNL signed by Mr. Gan Yona for ZTE Corpn who is an employee of ZTE India (refer to p. 1215 of Survey Doc, Vol-X)	n 956. Survey Doc, Vol.IX
Authorisation of Mr Gan Yong to sign the Bid documents on behalf of ZTE Corpn	n 957. Survey Doc, Vol.IX
Letter to BSNL communicating the presence of Sandeep Kumar & Gan Yong during bid opening	n 958. Survey Doc, Vol.IX
Letter from Huang Zuwei, MD, ZTE India on ZTE Corpn letter head to ITI assuring supply of equipments. It may be noted that the address of ZTE India given as 8 th Floor, Tower B, Global Business Park, Gurgaon which happens to be the Indian office of ZTE Corpn. (Similar letters may be found in pages-167-	n 714-715 Survey Doc, Vol.VIII
Letter from Huang Zuwei, CMD Assistant ZTE Corpn. (India) on ZTE Corpn letterhead with Gurgaon address(also at p.759-760,756)	n.716-720. Survey Doc, Vol.VIII
Minutes of meeting between ITI & ZTE Corpn represented by Huang Zuwei, MD & P.P.Sindhal, VP on terms of BSNL Contract	n 722-723; 794- 796 Survey Doc,
Letter addressed to Mr. Huang Zuwei, MD, ZTE Corpn, as 8 th Floor, Tower B, Global Business Park, Gurgaon	n 724 834 Survey Doc, Vol.VIII
Letter to ITI from ZTE Corpn signed by Huang Zuwei, Assistant to CMD ZTE India(also at p.751,754,755,806-815)	n 725-726 Survey Doc, Vol.VIII
Letter to BSNL /ITI from ZTE Corpn showing offices at Bangalore & New Delhi too signed by Huang Zuwei, MD	n 727-730,802 & 820- 821 824 828, Survey Doc,
High Court Notice to ZTE Corpn send to Gurgaon address	n 731. Survey Doc, Vol.VIII
Letter to Chairman Telecom Commission dt. 4/8/2006 from ZTE India Ltd. in ZTE India letterhead signed by President South Asia stating that 'we are doing business in India for last 5 years' i.e. from 2001 although ZTE Telecom India Pvt. Ltd. was incorporated only on 9/12/2003. This shows the merger of functional identities between ZTE Corpn & ZTE Telecom India although the	n 743-744 Survey Doc, Vol.VIII
Letter from ZTE Corpn in ZTE Corpn letterhead to ITI signed by Liu Ren, MD, ZTE Telecom India on behalf of ZTE Corpn.	n.752-753. Survey Doc, Vol.VIII
Letter from Huang Zuwei, MD, ZTE India on behalf of /for ZTE Corpn	n 757. Survey Doc, Vol.VIII
Agreement with ITI signed by Liu Ren, MD ZTE Corpn who is an employee of ZTE India (refer to p. 3 of Survey Doc, Vol-X)	n 758 767 Survey Doc,
Letter from Himanshu Gupta, Manager, Marketing for ZTE Corpn. Address given at Gurgaon and seal of ZTE Corpn India LO. However, Himanshu is an employee of ZTE Telecom India too (refer to p. 1215 of Survey Doc, Vol-X)	n.761. Survey Doc, Vol.VIII
Memorandum of Settlement between ZTE Corpn & Atlas Interactive on Stored equipments of ZTE Corpn. Very Important in the context of passing of title for	n 772. Survey Doc, Vol.VIII

<i>MOU between ZTE Corp & ITI signed by Liu Ren in the capacity of Director Marketing who is an employee of ZTE India (refer to p. 3 of Survey Doc, Vol-X)</i>	<i>n 773-779-782 Survey Doc, Vol.VIII</i>
<i>Minutes of meeting between ITI, ZTE Corp & ZTE India signed by CMD, ZTE India on behalf of ZTE Corp</i>	<i>n 812-822-823 Survey Doc, Vol.VIII</i>
<i>Huang Zuwei MD ZTE India signing on behalf of ZTE China on letterhead of ZTE Kanaxin Telecom Company India Pvt. Ltd. operating from the same</i>	<i>n 814 Survey Doc, Vol.VIII</i>
<i>Huang Zuwei, MD ZTE India signing on behalf of ZTE China for delivery schedule</i>	<i>n 818 Survey Doc, Vol.VIII</i>
<i>Huang Zuwei, MD ZTE India signing on behalf of ZTE China</i>	<i>p.831-833 8.36- 8.38, Survey Doc,</i>
<i>Licensing agreement between ZTE China & ITI dt. 5/8/03 signed by MD India of ZTE (although ZTE Telecom India was not incorporated as on this date)</i>	<i>n 840-853 Survey Doc, Vol.VIII</i>
<i>Authorisation Letter in favor of Liu Ren dt. 19/12/08 to enter contracts</i>	<i>n 871 Survey Doc, Vol.VIII</i>
<i>Letter for reclassification of software as 'packaged software' and not as 'customised software'. Refer to Statement before customs in p.1140-1143</i>	<i>n 892 Survey Doc, Vol.VIII</i>
<i>Liu Ren signing MOU dt. 25/5/06 with Samsung as MD, ZTE Telecom India</i>	<i>n 922 Survey Doc, Vol.VIII</i>
<i>Letter from United Telecoms to ZTE China showing India office address at Gurgaon</i>	<i>n 931 Survey Doc, Vol.VIII</i>
<i>Pre-bid agreement dt. 7.5.05 between ITI & ZTE China signed by Liu Ren</i>	<i>n 938 Survey Doc, Vol.VIII</i>
<i>Letter between ITI & ZTE Corporation (India) with Liu Ren as MD having office at Gurgaon</i>	<i>n 941 Survey Doc, Vol.VIII</i>
<i>Letter to ITI on ZTE China Letterhead signed by Liu Ren as MD of ZTE Telecom India on 28/2/05</i>	<i>n 942-943 Survey Doc, Vol.VIII</i>
<i>Communication between Renjun Zhang, President, ZTE South Asia having office at Gurgaon and ITI</i>	<i>n 944-945 Survey Doc, Vol.VIII</i>
<i>Supply agreement dt. 7.12.05 between ITI & ZTE China signed by Liu Ren</i>	<i>n 946-954 Survey Doc, Vol.VIII</i>
<i>Sales Contract between ITI & ZTE dt. 27/12/04 & Letter from ITI addressed to Bangalore Office</i>	<i>n 1434 Vol-XII of PB</i>
<i>Contract between Atlas India & ZTE China dt. 2/12/04 signed by Zuwei Huang, MD, ZTE Corp, Gurgaon</i>	<i>n 1449 Vol-XII of PB</i>
<i>Contract between ShvamTelelink & ZTE China dt. 5/9/08 signed by Zhao Wangxin, SekharTatia both employees of ZTE India.</i>	<i>n 1520 & 1522 Vol-XII of PB</i>

4. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below qua the issue. We find that in assessment years 2004-05 to 2009-10, when this issue was agitated before the Tribunal, the Tribunal in ITA No. 5870/DEL/2012 at para 13 of its order observed as under:

"At the time of hearing, the Id. counsel for the assessee submitted that he has instructions from his clients that the dispute between the assessee and the department may be settled and, therefore, on the most contentious issue regarding existence of PE in India, he has instructions not to press the same."

5. This ground was accordingly not considered by the Tribunal in earlier assessment years. Since during the captioned assessment years before us the Id. counsel for the assessee has made a similar concession and on such concession, we decline to dwell into this issue.

6. Second grievance relates to attribution of profit.

7. A perusal of the orders of the authorities below show that the lower authorities have followed the findings given in earlier assessment years 2004-05 to 2009-10 and this issue has been settled by the Tribunal in ITA No. 5870/DEL/2012 and others. The relevant findings given by the Tribunal read as under:

"24. The issue of attribution of profits depends on the facts in particular case and is fully dependent on the level of operations of the activities carried ITA 5870/Del/12 & ors. - ZTE Corporation out in India. This is evident from [Article 7](#) of DTAA and [Explanation 1](#) to clause (i) of [section 9\(1\)](#). Facts in two cases cannot

be identical. The AO had attributed only 20% (from A.Ys. 2004-05 to 2008-09) of the operating profit as per the global financial statement submitted by the assessee. This implies that 20% of the profits were generated on account of involvement of PE in the revenue generating structure and the 80% profit accrued in the resident state. However, for AY 2009-10, the AO has attributed 45% of the operating profit. Considering the different modes adopted by AO and Id. CIT(A), it becomes necessary to examine the level of operation carried out by PE in India so as to arrive at reasonable percentage of profit to be attributed to PE in India.

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46. From the aforementioned discussion it is evident that each case has to be considered on its own merits, depending upon the level of operations carried out by PE in India. In the present case we have earlier reproduced paras 6.2.2 and 7.2.3 from Id. CIT(A)'s order and also findings from AO's order for AY 2009-10 which give a clear picture of the level operations carried out by ZTE India, the assessee's PE. Ld. CIT(A) has pointed out that ZTE India is doing preparatory work, negotiating the contract and price and answering specified queries of the ITA 5870/Del/12 & ors. - ZTE Corporation customers on behalf of the assessee. These are all vital functions which are revenue generating. The AO in AY 2009-10, as noted earlier, has elaborated in detail the functions carried out by PE in connection with sale in India. At the cost of repetition, we reproduce the same:-

"Activities performed by PE, summarized by AO as under,

- *Supervision and control of projects in India by MD of ZTE India*
- *Meetings at Tendering/ Pre Bid stage in India*
- *Preparation of Bidding Documents in India*
- *Signing and submissions of bids in India*
- *Price and contract negotiations in India*
- *Preparation of draft agreements and MOUs in India*
- *Signing of agreement in India*
- *Entering contracts in India*
- *Obtaining Purchase Orders/ other supply orders on behalf of ZTE China*
- *LC opening and supply of equipments/ handsets*
- *Shipment of equipments/ handsets*
- *Customs clearances*
- *Transportation and delivery*
- *Installation and commissioning*
- *Supervision of installation and commissioning*
- *Technical support services*
- *Quality assurances*
- *After sales services and replacement*
- *Concluding agreements and MOUs on behalf of ZTE China*
- *Performance Guarantee of the . company- ZTE*
- *Coordination with Government Departments*
- *negotiation at Government level*
- *Decisions regarding partnership with other concerns/ marketing.*
- *Foreign Investments in India ITA 5870/Del/12 & ors. - ZTE Corporation*

- Taxation matters of ZTE China
- Marketing Functions
- Banking Functions
- Visiting customers and vendors

47. In the case of Motorola)supra), Tribunal has referred to the decision in the case of Ahmadbhai Umarbhai (supra), wherein it has been held that income attributable to the manufacturing activity should be more than the income attributable to the activity of sale. Therefore, out of the total global income of assessee relating to the supplies made to India more income is to be attributed to the assessee as accruing in China and from sale activity, it is not to that extent. We find that Id. CIT(A) has adopted the reasoning in the case of Alcatel Lucent. In this decision Id. CIT(A) himself noted that assessee had accepted and not contested in appeal attribution @ 2.5% of total sales revenue. Therefore, this decision, considered by Id. CIT(A), cannot be the basis for arriving at the conclusion that 2.5% of entire sales revenue should be attributable to Indian PE, which is primarily as per Rule 10(1) methodology provided. We are not inclined to accept this plea of Id. CIT(DR). Therefore, in our opinion, attribution is to be done as per Rule 10(2) of the IT Rules.

48. Ld. counsel has endeavoured to distinguish the decision in the case of Rolls Royce PLC by referring to absence of identical [Article 7\(3\)](#) of India UK DTAA being present in India China DTAA. In our opinion, this is not of much ITA 5870/Del/12 & ors. - ZTE Corporation significance because it only considers the involvement of assessee's representatives in negotiations. We have to consider

the overall operations carried out by PE in India. Mere involvement of expatriates in the activities of PE for assisting the Indian team cannot substantially affect the revenue generating capacity of PE.

49. The decision in the case of M/s Nortel Networks India International Inc. (ITA nos. 119 to 121/Del/2010 and 1153 to 1155/Del/2010 order dated 13.6.2014), the Tribunal in para 14.4 has noted that in assessee's case hardware supply contract was a part of the trunk contract which involved supply, installation, testing and commissioning etc. as is in the present case. Activities of M/s Nortel India and that of LO of Nortel Canada and services of expatriate workers had also been taken as part of the execution of the work by the PE. Thus, the level of operation carried out in India were extensive and under such circumstances Tribunal had attributed 50% of the net profit arising out of Indian transactions as assessee's income.

50. Having discussed the entire case law and after considering the factual aspects, we find that the level of operations carried out by assessee through its PE in India are considerable enough to conclude that almost entire sales functions including marketing, banking and after sales were carried out by PE in India and, therefore, keeping in view the decision of Hon'ble Supreme Court in the case of ITA 5870/Del/12 & ors. - ZTE Corporation Ahmedbhai Umarbhai & Co. (supra), the decision of Rolls Royce (supra) and Nortel Networks India International Inc. (supra), we are of the opinion that it would meet the ends of justice if 35% of net global profits as per published accounts out of transactions of assessee with India are attributed to PE in India in respect of both

hardware and software supplied by assessee to Indian customers. At this juncture we may point out that while deciding the department's appeal in subsequent part of this order, we have upheld the findings of Id. CIT(A) to tax the income from sale of software as business income and not royalty. We may point out that in AY 2009-10 the AO estimated the operating profits at 7.5% as against the weighted average of net operating profit at 2.53% as per the global accounts.

We are not inclined to accept this mode of computation resorted by AO, particularly in view of Rule 10 of the IT Rules, which mandates the AO to go by the published accounts of assessee. In the result assessee's ground no. 6 in AY 2009-10 stands allowed. We may further clarify that our decision does not amount to enhancement of income because overall tax effect will be less as compared to tax computed by AO/CIT(A)."

8. Respectfully following the findings of the co-ordinate bench, we hold accordingly.
9. Third grievance relates to taxability of software as royalty [In revenue's appeal].
10. This dispute has also been considered and decided by the Tribunal in earlier assessment years 2004-05 in ITA No. 5870/DEL/2012

and others [supra]. The relevant findings given by the Tribunal read as under:

"71. Ld. counsel for the assessee submitted that this issue stands settled by the Hon'ble Delhi High Court in the cases of DIT Vs. Ericsson AB 343 ITR 470 (Del.); DIT Vs. Nokia Networks OY 58 ITR 259 and 358 ITR 259. He submitted that receipts on account of supply of software were integrally connected to the ITA 5870/Del/12 & ors. - ZTE Corporation supply of hardware and, therefore, AO was not right in taxing such receipts as royalty. He submitted that Id. CIT(A) has rightly held that receipts from supply of software could not be taxed as royalty, relying on various decisions. He further pointed out that Id. CIT(A) also held that in view of the decision of Hon'ble Delhi High Court in the case of DIT Vs. Nokia India (supra), software supplies could not be taxed even under the amended law. Further, as per the provisions of [Article 12\(5\)](#) of the DTAA the supply of software being integral to the supply of hardware and the finding of existence of a PE of assessee in India, [Article 12\(5\)](#) of the DTAA would cease to apply and the provision of [Article 7](#) would be applicable and, therefore, the income from software is to be taxed as business income.

72. Ld. counsel relied upon following decisions:

- DIT Vs. Ericsson AB (2012) 343 ITR 470 (Del.);*
- DIT Vs. Infrasoftware Ltd. (2013) 39 Taxmann.com 88 (Del.)*
- Aspect Software Inc. Vs. ADIT (2015) 61 Taxmann.com 36 (Del.)*

73. We have considered the submissions of both the parties and have perused the record of the case. We find that in the case of Alcatel Lucent, France Tribunal in para 12,13 & 14 it has been held as under:

"12. We have carefully considered the arguments of both the sides and perused relevant material placed before us. We find that learned (A) allowed the relief to the assessee following the decision of ITAT in assessee's own case for AY 1997-98 in ITA No.407/Del/2001. The ITAT had delivered the above ITA 5870/Del/12 & ors. - ZTE Corporation decision following the decision of Special Bench of ITAT in the case of Motorola Inc. (supra). We find that Hon'ble jurisdictional High Court upheld the decision of ITAT of Special Bench in the case of Motorola Inc. (supra) in the case of DIT Vs. Ericsson A.B. (supra). In the appeal by the Revenue, question No.3 pre posed before the Hon'ble Jurisdictional High Court and admitted by their Lordships reads as under:-

"Whether in law, the learned De/hi Tribunal was justified in holding that the consideration for supply of software was not a payment by way of royalty, and, hence, was not assessable both under section 9(1)(vi) of the Double Taxation Avoidance Agreement between the Government of India and Sweden?"

13. That the Hon'ble Jurisdictional High Court, after detailed discussions which are at pages 474 to 506 of the ITR 343,

answered the question in favour of the assessee and against the Revenue.

14. The Revenue had also filed the appeal against the decision of ITAT in assessee's own case which is decided by their Lordships alongwith various other cases including the case of MIs Nokia Networks, In this case also, the question NO.3 proposed by the Revenue and admitted by their Lordships reads as under:-

"Whether any part of the consideration for supply of software stated by the respondent to be integral to the equipment is taxable as 'royalty' either under section (1)(110 or the relevant provisions of the Double Taxation A voidance Agreement?"

After detailed discussion, their Lordships answered the question in favour of the assessee and against the Revenue. Since the issue is squarely covered by the decision of Hon'ble ITA 5870/Del/12 & ors. - ZTE Corporation Jurisdictional High Court in the case of the assessee as well as in the case of Ericsson A.B. (supra). respectfully following the same, we uphold the order of learned CIT(A) in this regard and reject ground No.2 of the Revenue's appeal."

74. Respectfully following the decision of Hon'ble Jurisdictional High Court, as noted by Tribunal, ground nos. 2 & 3 are rejected."

11. This quarrel travelled upto the Hon'ble High Court and the Hon'ble High Court in ITA No. 904 to 909 of 2016 has held as under:

"22. In the present case, the facts are closely similar to Ericson. The supplies made (of the software) enabled the use of the hardware sold. It was not disputed that without the software, hardware use was not possible. The mere fact that separate invoicing was done for purchase and other transactions did not imply that it was royalty payment. In such cases, the nomenclature (of license or some other fee) is indeterminate of the true nature. Nor is the circumstance that updates of the software are routinely given to the assessee's customers. These facts do not detract from the nature of the transaction, which was supply of software, in the nature of articles or goods. This court is also not persuaded with the submission that the payments, if not royalty, amounted to payments for the use of machinery or equipment. Such a submission was never advanced before any of the lower tax authorities; moreover, even in Ericson (supra), a similar provision existed in the DTAA between India and Sweden.

23. As far as the question of interest payments and [Section 234B](#) is concerned, the court is of the opinion that the issue is covered by *GE Packaging* (supra). This question of law too is answered against the revenue, and in favour of the assessee."

12. Last grievance relates to levy of interest u/s 234B of the I.T. Act.

13. As can be seen from the aforementioned judgment of the Hon'ble High Court, the Hon'ble High Court has also considered the levy of interest u/s 234B at para 23 of its judgment wherein the Hon'ble High Court has considered the judgment of its own in the case of *GE Packaging Power Inc.* 373 ITR 65.

14. However, it may be pointed out that the Finance Act, 2012 w.e.f 1.4.2012 added proviso below section 209ID of the Act. The said proviso is applicable from assessment year 2013-14 and, therefore, prospective in operation. We, accordingly, direct the Assessing Officer to charge interest u/s 234B of the Act from assessment year 2013-14 onwards as per amended provision r.w the proviso.

15. In the result, the appeals of the assessee are partly allowed whereas appeals of the Revenue are dismissed. Stay application is dismissed as having become otiose.

The order is pronounced in the open court on 15.02.2019.

Sd/-

**[BEENA PILLAI]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 15th February, 2019

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	