IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I': NEW DELHI

BEFORE SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
and
SHRI VIMAL KUMAR, JUDICIAL MEMBER

ITA No.876/DEL/2021
(Assessment Year: 2016-17)

ITA No.2367/DEL/2022
(Assessment Year: 2017-18)

ITA No.2368/DEL/2022
(Assessment Year: 2018-19)

ITA No.888/DEL/2023
(Assessment Year: 2019-20)

Honda Trading Asia Company Ltd., 11/1, 8th Floor, AIA Sathorn Tower, South Road, Yannawa, Sathorn, Bangkok, Thailand - 10120.	vs.	DCIT (IT), Noida.

(PAN : AACCH3173K)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Percy Pardiwala, Sr. Advocate
Shri Swapnil Takwani, AR
REVENUE BY : Shri Dharm Veer Singh, CIT DR

Date of Hearing : 21.05.2026
Date of Pronouncement : 06.08.2026

<u>O R D E R</u>

<u>PER S.RIFAUR RAHMAN,AM:</u>

1. These appeals filed by the assessee are directed against the assessment order dated 30.03.2021, 29.07.2022, 29.07.2022and 31.01.2023 passed by

the DDIT (International Taxation), Noidaunder section 143(3) read with section 144(C)(13) of the Income-tax Act, 1961 (for short 'the Act") for Assessment Years 2016-17, 2017-18, 2018-19and 2019-20 pursuant to the directions of the Dispute Resolution Panel u/s 144C (5) of the Act.

2. Since the issues are common and the appeals are connected, hence the same are heard together and being disposed off by this common order. We take up assessee's appeal being ITA No.886/Del/2021 for Assessment Year 2016-17 as lead case wherein the assessee has raised the following grounds of appeal :-

> "Based on the facts and circumstances of the case, Honda Trading Asia Co. Ltd. [hereinafter referred to as the "Appellant"] respectfully craves leave to prefer an appeal against the order dated 30 March 2021 passed by Deputy Director / Assistant Director / Deputy Commissioner of Income Tax (International Taxation), Noida (hereinafter referred to as "the Learned AO") under Section 144C r.w.s. Section 143(3) of the Income Tax Act, 1961 ("Act") (hereinafter referred to as the "impugned order").
>
> The following grounds of appeal are mutually exclusive and without prejudice to each another.
>
> 1. That, on the facts and in law, the impugned assessment order is passed without following the prescribed process in section 143(3) of the Act as no tax payable was determined in the assessment order, hence liable to be set aside.
>
> 2. That on the facts and in law, the Learned AO erred in assessing the income of the Appellant for the relevant assessment year at INR 9,50,77,000 (including transfer pricing adjustment amounting to INR 8,30,68,090) as against the NIL returned income.
>
> Grounds specific to Corporate Tax Adjustments
>
> 3. That, on the facts and in law, the Hon'ble DRP / Learned AO erred in coming to the conclusion that there existed a Permanent Establishment (PE) of the Appellant in India on the basis of the statements of expatriate employees

of Honda Cars India Limited ("HCIL"), which were inadmissible in terms of the judgement of the Hon'ble Supreme Court in the case of CIT vs S. Khader Khan Son (254 CTR 228)(SC).

4. That, the Hon'ble DRP / Learned AO erred in law in selectively relying upon the statements of expatriate employees and ignored the statements which were recorded during the survey conducted in the relevant year where no adverse inferences were drawn and failed to appreciate the true intention of the statements which when read in entirety disclose that the expatriate employees working only for the business of HCIL.

5. That, the Hon'ble DRP / Learned AO erred in ignoring that the principles of res-judicata are not applicable to tax proceedings and extensively relied upon statements recorded at the time of survey conducted during Financial Year (FY) 2010-1 I of expatriate employees who were not even present in India during relevant year.

6. That, the Hon'ble DRP / Learned AO erred in facts and in law in concluding that the Appellant has a business connection and PE in India on the basis of the alleged facts and relationship of HCIL and Honda Motor Company Limited, Japan ("HMJ").

7. That, the Hon'ble DRP / Learned AO erred in law in ignoring the decision of the Authority of Advance Ruling (AAR) in Honda Motor Company Limited, In re 124 taxmann.com 225 wherein, the AAR has held that Honda Motor Company Limited does not have a PE in India by reason of its business transaction and related activities with HCIL. Thus, allegation of the Learned AO that the Appellant being affiliate of HMJ have PE in India through HCIL is without any basis and accordingly, bad in law and facts.

8. That, the Hon'ble DRP / Learned AO erred in coming to the conclusion that expatriate employees working in HCIL were working on behalf of the Appellant and as such were involved in critical decision making and functioning even when no employee was seconded by the Appellant to HCIL.

9. That there is not even a single expatriate of the Appellant who has been seconded to India during relevant year, thus, there arises no question of carrying out the business of the Appellant in India. Thus, there is no question of PE at all in India. The findings of the Assessing Officer/ DRP that the expatriates were carrying out the business of the Parent and all the AEs including the Appellant is without any basis and contrary to the records of the present case.

10. That, the Hon'ble DRP / Learned AO erred in facts and in law in concluding that the Appellant has a fixed place PE under Article 5 of India-Thailand DTAA, even where no expatriates have been deputed by the

Appellant to HCIL in India during relevant year. The Hon'ble DRP / Learned AO in this regard has completely ignored the decision of the Hon'ble Supreme Court in the case of ADIT vs E-Funds IT Solution Inc., 251 TaxmanZdf is squarely applicable to the present case.

11. That, the Hon'ble DRP / Learned AO erred in facts and in law and further in terms of the final order of Hon'ble Supreme Court in assessee's own case reported as Honda Motor Company Limited, Japan and Ors. vs. ADIT, 301 CTR 601, in the absence of seconded employee of the Appellant in HCIL, the findings of PE are erroneous and illegal. The Hon'ble DRP / Learned AO has substantially relied upon the judgement of the Hon'ble Allahabad High Court dated 05.08.2014, which has been set aside by the Hon'ble Supreme Court in the judgement reported as Honda Motor Company Limited (supra) in the Appellant's own case.

12. That, the Hon'ble DRP / Learned AO erred in taxing offshore supplies when the Appellant does not have any business connection or PE in India and the supplies made by the Appellant to HCIL are conducted outside India.

13. That, the Hon'ble DRP / Learned AO erred in facts and in law in constituting fixed place PE of the Appellant under Article 5 India-Thailand DTAA on account of supervisory activities / technical services, when income in relation to such services is exempt from tax under the beneficial provisions of India-Thailand DTAA.

<u>Grounds specific to Transfer Pricing Adjustments</u>

14. That, on the facts and in law, the Hon'ble DRP / Learned AO / Learned TPO have failed to comprehend that the Appellant is not required to comply with the transfer pricing provisions under the Act, as the transactions undertaken by the Appellant with its Associated Enterprises do not give rise to any taxable income in the hands of the Appellant in India.

14.1 That, on the facts and in law, the Hon'ble DRP / Learned AO / Learned TPO have failed to comprehend that the transfer pricing provisions do not get triggered in the case of the Appellant and that the Appellant is not required to file any report under Section 92E of the Act which is required to be filed only when the transactions undertaken by the Appellant with its Associated Enterprises have a bearing on the profits / income / losses of the Appellant in India.

15. That, on the facts and in law, the Hon'ble DRP / Learned AO / Learned TPO grossly erred in misunderstanding the relevance and purpose of preparing and filing of transfer pricing documentation and permanent establishment attribution report (on without prejudice basis).

16. That, the Hon'ble DRP / Learned AO / Learned TPO have grossly erred in rejecting the scientific analysis carried out by the Appellant in the transfer pricing documentation and permanent establishment attribution report (prepared and filed on without prejudice basis) which was consistent with the Indian transfer pricing regulations prescribed under the Act read with the Income Tax Rules, 1962 ("Rules") and modifying the same for the purpose of making the impugned adjustment.

17. That, the Hon'ble DRP / Learned AO / Learned TPO erred in law in re-determining the price of the impugned international transactions undertaken by the Appellant and making transfer pricing adjustment amounting to INR 8,30,68,090 as the circumstances necessitating the re-determination of price by the Learned TPO as mentioned in sub-section (3) of section 92C did not exist in case of the Appellant.

18. That, the Hon'ble DRP / Learned AO / Learned TPO erred on facts and in law, in placing incorrect reliance on the orders passed in preceding years and holding that the Appellant has a permanent establishment ("PE") in India, when the Appellant does not have any presence in the form of office, employees, etc.

19. That, the Hon'ble DRP / Learned AO / Learned TPO erred on facts and in law, in not comprehending that there should be no additional attribution in India since Honda Cars India Limited ('HCIL') (which is being alleged by the Indian Tax Authorities to be the PE of the Appellant in India) has already offered its income to tax in India for the relevant assessment year.

20. Without prejudice, the Hon'ble DRP / Learned AO / Learned TPO have erred on facts and in law and further in terms of the final order of Hon’ble Supreme Court in Assessee’s own case reported as Honda Motor Company Limited, Japan and Ors. vs. ADIT, 301 CTR 601 wherein the Hon’ble Supreme Court following its judgement in the case of E-Funds IT Solutions Inc., held that once arm’s length principle has been followed, there can be no further profit attributable to a person even if it has a PE in India.

21. Without prejudice, the Hon'ble DRP / Learned AO / Learned TPO have failed to appreciate that the transaction relating to offshore supplies has already been benchmarked under Indian Transfer Pricing regulations and if at all it was to be benchmarked again and result into an upward adjustment for the Appellant, it should also have a corresponding deduction in the hands of the AE (HCIL).

22. Without prejudice, the Learned AO / Learned TPO have grossly erred in undertaking an opaque analysis and acting in violation of natural justice by not sharing the search methodology, keywords used, criterions of selection / rejection of companies, number of companies rejected by way of applying

various filters applied for identification of comparable companies, for the purpose of making impugned adjustment and also by not allowing the sufficient opportunity to the Appellant to present its case.

23. Without prejudice, the following filter applied by / confirmed by the Learned TPO / Hon'ble DRP for the purpose of undertaking the fresh search is inappropriate:

- Companies that had more than 75% of the revenue from non-comparable services
- Companies with different financial year
- Companies having persistent operating losses

24. That, the Hon'ble DRP / Learned AO / Learned TPO took a myopic view and failed to give due cognizance to the services performed by the Appellant's alleged PE, thereby erred in not accepting the analysis performed by the Appellant and selecting the inappropriate companies in the final set of com parables for the purpose of making impugned adjustment amounting to INR 1,90,97,952 in relation to transaction involving provision of support services.

25. That, the Hon'ble DRP / Learned AO / Learned TPO have grossly failed to undertake appropriate functional, asset and risk analysis of comparable, thereby selecting the inappropriate companies in the final set of comparables for the purpose of re-determination of arm's length price of the export / offshore supply transaction, solely for the purpose of making impugned adjustment amounting to INR 6,39,70,138 in relation to offshore supply transaction.

26. That, the Hon'ble DRP / Learned AO / Learned TPO have grossly erred in concluding that Appellant's assumed NIL profit in relation to offshore supply transaction is not within the arm's length range.

27. That, without prejudice to the Appellant's contention that it does not have a PE in India and no further profits are attributable to the alleged PE, the profit attribution made by the Hon'ble DRP / Learned AO / Learned TPO is excessive and should be limited to the Appellant's proportion out of the total profit computed to be attributable for all the Honda Group entities which according to the Learned AO have an alleged PE (in the form of HCIL) in India.

28. That, the Learned AO has grossly erred in law and facts in levying 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.

> 29. That the penalty proceedings proposed to be initiated by the Learned TPO under section 271AA, 271BA and 271G and by the Learned AO under section 271(1)(c) of the Act are arbitrarily and unjustifiable. It is imperative to mention that the Appellant had duly submitted all the information to the extent available and had filed all the necessary information on record."

3. At the time of hearing, ld. AR of the assessee submitted that the assessee has raised several grounds. Grounds No.1 and 2 are general in nature, hence do not require adjudication. Grounds No.3 to 13 are corporate issues relating to existence of PE in India. He submitted that in case, the issue of Permanent Establishment (PE) is decided, the TP adjustment taken in Grounds No.14 to 27 made by the lower authorities are not applicable. Therefore, he first proceeded to make submissions on existence of PE in India. Grounds No.28 and 29 are consequential in nature.

4. With regard to above the relevant facts are, Honda Trading Asia Company Limited, Thailand (assessee) is a company incorporated under the laws of Thailand and is engaged in the business of trading of raw material and spare parts etc. It is an Associated Enterprises (AEs) of Honda Motor Co. Ltd., Japan (HMJ). The assessee also supplied raw material and capital goods to AEs/ sister concern in India namely, Honda Cars India Limited (HCIL) (also known as Honda Siel Cars India Private Limited). The abovesaid transactions of selling the raw material and

spare parts were carried out between the assessee and the Indian entity, HCIL since its inception.

5. Ld AR submitted that there were two surveys carried out by the Revenue in Indian entity, HCIL and it was noticed by the officers that expatriates are carrying out the business of the foreign company i.e. HCJ or its affiliates. Based on the survey findings and statements of the foreign expatriates recorded during the survey, it was stated that the expatriates were getting salary in India as well as were paid in Japan by HMJ. Based on the above submissions, it was observed by the Revenue that expatriates were carrying out business of the foreign entities including the assessee. When the issue was raised to the assessee to explain the above findings and why the assessee should not be treated as having PE in India. In this regard, assessee has objected to the information found during surveys were applied in the case of the assessee and also it was objected as held in the case of CIT vs. S. Khader Khan and Sons (2008) 300 ITR 157 (Mad.) wherein it was laid down the principle that statementsrecorded during survey statements have no evidentiary values. The above submissions were rejected by the Revenue. Further, he submitted that query raised by the AO with regard to PE in India and the assessee has submitted before that authorities below that the HCIL places

the order for goods and other materials and the assessee supplies the same against the purchase order raised by the Indian entity. No services of the expatriates deputed in HCIL by the HCJ in India were utilized. Assessee has supplied the raw material and finished goods as per the requirements of the assessee and in this regard, it was submitted that HCIL manufactures on its own, HCIL sells on its own and HCIL discharges warranty claims after sales on its own account. Assessee has not involved in any activities carried on by the Indian entity. Further, it was submitted that no employees have visited from assessee side during the subject year or ever. It was submitted that the expatriates deputed to Indian entity by the HCJ, are effectively employed by HCIL and such employees work only for Indian entity under the control and supervision of Indian entity. Further, it was submitted that as per section 5 of the Act, income of the non-resident will be subject to tax in India from whatever source derived which is received or deemed to be received in India or on behalf of such person or accrues or arise to him or deemed to arise in India. With regard to income accrued or deemed to accrue in India, it was submitted that assessee was involved only in offshore supply. It was further submitted that apart from supply of raw material and capital goods, assessee has also provided technical services and royalty for which assessee has declared the same in their return of income and paid their relevant tax in India. In this regard, reliance was placed on decision of Ishikawajma Harima Heavy Industries Limited vs. DIT 288 ITR 408.

6. With regard to PE under Article 5, it was submitted that none of the provisions contained in Article 5 are directly applicable to the assessee. It was submitted that assessee has carried on business in the other state in the ordinary course of their business and merely because the company which is a resident in India which is controlled by a company, a resident of Japan shall not by itself constitute a PE.It also submitted that all the business carried on by the assessee squarely falls under Article 7.

7. Further, it was brought to our notice that it doesnot have a PE in India under India-Thailand DTAA. In this regard, it was submittedbefore the lower authorities as under :-

> **The assessee objected that it does not have a permanent establishment in India under India - Thailand Double Taxation Avoidance Agreement:**
>
> In this regard, the assessee has stated as under :

- We reiterate that despite two surveys carried out by the tax office, there is not a single corroborative evidence available with the tax office to demonstrate that expatriates are carrying out business of the foreign parent company i.e. HMJ or its affiliates.
- It is submitted that foreign company's role is limited only to supply of material from outside India and HCIL is carrying on independent business on its own risks and for its own benefits. Further, it is submitted that no expatriate has been deputed by the assessee company. Hence, there is no question of PE of HTAS in India.
- We would like to further submit that Article 5(1) of the India-Thailand DTAA which deals with fixed place PE defines fixed place PE as a fixed place of

business through which the business of an enterprise is wholly or partly carried on. The essential characteristics of a fixed place PE for Article 5(1) as provided under the International commentaries and Indian judicial precedents are as follows:

- There must be a 'place of business' i.e. a facility such as premises or in certain cases, machinery or equipment ("place of business test').
- This place of business must be • 'fixed', i.e. it must be established at a distinct place with a certain degree of permanence ("permanence test"); and
- There must be certain right of use of the place of business i.e. place should be at disposal of foreign enterprise ("right of use/ disposal test');

Recently, the Hon'ble Supreme Court in case of E-funds IT Solution (supra) has held that there exists no fixed place PE in India that was at the disposal of the taxpayers to trigger fixed place PE. Furthermore, no part of the main business and revenue-earning activity of the Taxpayers was carried on through the Indian affiliate, which rendered only back office and support services. The relevant para (para 12) is reproduced herewith:-

Quote

Thus, it is clear that there must exist a fixed place of business in India, which is at the disposal of the US companies, through which they carry on their own business. There is, in fact, no specific finding in the assessment order or the appellate orders that applying the aforesaid tests, any fixed place of business has been put at the disposal of these companies

Unquote

None of the above conditions are fulfilled in the assessee's case as they do not have any place of business in India and the entire operations are conducted from outside India. In the present case, the disposal test has not been met as the conditions required for fulfilling disposal test have not been satisfied. Further, assessee wishes to submit that the deputed expatriate was working as employees of HCIL and for the business of HCIL only. Hence, no PE under Article 5(1) of the India-Thailand DTAA can be constituted. Further, there is no office or any fixed place established by the assessee in India, hence, no PE under Article 5(2) can be constituted.

- The allegation of a PE under Article 5(4) in earlier years is bad in law. In fact, none of the condition mentioned in Article 5(4) is fulfilled as:
- The transactions between Assessee and HCIL are on principal to principal basis and HCIL concludes contracts with dealers on its own account.
- The stocks are kept on its 'own' account.
- None of the activity has been done on behalf of the assessee.

Also, no facts were referred by the Ld AO in earlier order to justify the contention of agency PE.

- Further, the earlier order seems to refer Article 5(6) of India-Thailand DTAA. HCIL is neither subsidiary of HTAS nor HTAS has any control over HCIL. Thus, allegation is baseless. Without prejudice, merely because HCIL is a subsidiary of HMJ, it does not automatically constitute PE of HMJ and its affiliates including assessee. In this regard, reference may be made Article 5(6) of the India-Thailand 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 or a permanent establishment of the other ..... "

  Thus, the Article clearly provides that mere presence of a subsidiary of a foreign entity in India shall not by itself constitute such subsidiary as a PE of the foreign entity. The aforesaid clause is a beneficial clause and it's a mistake in law to conclude a PE under Article 5(6). This clause rather supports the case of the assessee only.

- Also, we wish to submit that there is no single evidence with the department to prove that employees of assessee visited India and are carrying out the business of assessee in India. Thus, the entire order is based on presumptions and manipulation of expatriate statements of HCIL. Further, the premises of HCIL are for use of HCIL business alone and are not at the disposal of the assessee.
- The contention made in the earlier years is that the expatriates employed with HCIL not only work for HMJ but work for other affiliates and subsidiaries of HMJ and thus HTAS has a fixed place of business in HCIL. However, above allegation is based on assumption without any evidence.
- Reliance in this regard is also placed on recent ruling by the Hon'ble Supreme Court in case of E-Funds IT Solution Inc. [86 taxmann.com 240 (SC). The Hon'ble Supreme Court in case of E-Funds IT Solutions (supra) after placing reliance on the ruling given by the Delhi High Court in the same case has held hat a subsidiary by itself cannot be considered to be a dependent agent PE. The Hon'ble Supreme Court has held as under:

  "Indian entity i.e. subsidiary company will not become location PE under Article 5(1) merely because there is interaction or cross transactions between the Indian subsidiary and the foreign Principal under Article 5(1)."

  In view of the above, it is respectfully submitted before you that HTAS and HCIL being Honda group companies, by itself does not constitute HCIL to be PE of HTAS. The determination of existence of PE must be done separately for each company of the corporate group on the basis of activities undertaken."

The contention of the assessee not accepted as the assessee has permanent establishment in India. Also, the facts in case of e-funds(supra) are not identical as in the case of the assessee, hence is not applicable. Following are the basic reasons for which the assessee is having permanent establishment in India:

B. Legal and economic dependence on Honda Motor Company Limited. Japan:

The assessee has mainly contradicted the facts relating to existence of Permanent Establishment in India through the expatriates seconded from Japan and other AEs tor performing the business of the parent as ~II as the assessee company.

It has been held through the statements of the various expatriates recorded during the survey proceedings and U/s 131 (1) of the IT Act after the survey, that the expatriates working in Indian company i.e. HCIL have been seconded from Honda Motors for carrying out the business of HMJ and its various AEs as well as the business of HCIL where they have been placed for a fixed tenure of about 2-4 years. The lien over these expatriates was still with the parent company. Moreover, the salaries received by them in India is more in the nature of allowances and their salary between from Honda Motor Company Limited, Japan, which is evident from the statement of expatriates employees as reproduced below:

"Statement of Director (Marketing) Shri Tatsuya Natsume:

Qn. Details of salary drawn in India and abroad?
Ans. **The salary in India is Rs.7 lacs per annum (approx) and salary in Japan Rs.40 lacs (approx). The salary in Japan is paid by Honda Motor Co. Ltd. Japan.**

Statement of K Harada, Director Purchase:

Q. At present how much salary getting in India and Japan?
Ans. **I am getting approximately 60000 in India and getting salary of Japanese Yen 5 to 6 lacs Japanese Yen approx. from Honda Motor Co. Japan.**

Statement of Hideyoshi Takarada, Director (Finance):

Q. How much salary you are getting in India as well as in abroad?
Ans. **I get salary of '66000/- PM in India and 835000 Japanese Yen.**

Thus, it is quite apparent that the employees are seconded to India by mainly reimbursing the expenses only and the salary portion paid by HCIL is very small. Actually, the employees seconded to India are getting salaries from their main company where they were the employees before coming to India. **The expatriates though have been seconded from the Global Pool maintained with the parent company i.e. Honda Motor Company Limited. Japan but were carrying out the business of the parent and all the AEs including assessee. It is through these ex pats the business of the assessee in India is being carried out.**

C. Permanent establishment -Basic rule

As regard the availability of fixed place of business it is relevant to mention the extract from TAXMANN'S OECD Commentaries.

The permanent establishment as described in TAXMANN'S OECD Commentaries on Article of Model Tax Convention states as under:

PE-Basic rule - The definition of PE in paragraph 1 of Article 5 provides a general definition. It is broad and highlights two fundamental elements: the existence of a fixed establishment, in a technical sense, and the operation of business by means of that establishment.

The basic test of a permanent establishment is contained in Para 1 of Article 5 which define the expression as :-

1. a fixed place of business through which the business of an
2. enterprise is
3. wholly or partly carried on;

Place of business -OECD Commentary -according to Paragraph 4 of the OECD commentary on Article 5, the term 'place of business'

- covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose; for example, a pitch in a market place or a certain permanently used area in a customs depot.
- May also exist where no premises are available or required for carrying on the business of the enterprise and it simple has a certain amount of space at its disposal; For example business facilities of another enterprise, certain business premises or part thereof owned by the other enterprise constantly at the disposal of the enterprise.

Place of business means al/ tangible assets used for carrying on of business

- "A place ", says Klaus Vogel at Page 205 of his "Double Taxation Conventions", though normally a particular portion of space must be read here in the light of its being used to define "establishment". "A place of business", therefore, means all the tangible asset used for carrying on the business, in marginal cases, one such tangible asset would be sufficient. The term covers both premises and other tangible assets used by the enterprise'. Both premises and other tangible assets, therefore, constitute permanent establishment.

Place of business covers premises, facilities and installations

Place of business, place of operations taking place through territorial situs machinery, equipment or personnel - The term "place of business" covers any premises, facility or installation used for carrying on the business of the enterprise whether or not it is used exclusively for the purpose.

The place of business is the place of operations of business activities from which profits arise, which may take place from the territorial situs or may be performed through machinery or equipment or an agent. Thus a fixed place would mean both physical resources as well as personnel who assists in the use or implementation of those resources. Any tangible property whether building, facilities, industrial, commercial or scientific equipment or machinery may constitute a place of business. The place of business is a -

- Premises, or
- Facilities or installations, or
- Certain amount of space, or
- In certain instances, machinery or equipment.

A. Sakaar in his book "Permanent Establishment", 1991 Edition, observed as follows in paragraph 1 0.1, page 126:

"The traditional point of view was that the place of business had to be fixed to the soil. Today, however, it is accepted that the place of business does not have to be actually fixed to the soil, for instance as a building or a permanent oil installation. It is sufficient that certain place is available for the performance of a business activity, for instance a market place. A German tax treaty commentator has suggested that the location of the place may even be in the open air, while others require that the place of the business remain on the soil or the seabed within the jurisdiction of the treaty.

The PE tradition early accepted in principle a place of business which is moving within a limited area, as in the case with road construction, laying of pipelines, and similar construction works. Nevertheless, it is clearly the conventional wisdom that a PE constituted only if the place of business remains at a 'distinct' place, or at a 'particular site'."

"Fixed" Place

Place is fixed in the sense of permanency of an activity and not casual or occasional- After a place of business having been found, other requirements of PE are to be seen whether satisfied, whether it is fixed and business is carried through it. The term "fixed place of business" refers to fixed place for the operation of business, including administrative offices, branch, factories, workshop, warehouse, mining fields, or construction sites, etc.

Permanence of the activity and not necessarily of the site- The expression "permanent" means some degree of permanence and absence of transience. The emphasis is on permanence of activity and not necessarily on the site. There is no need for the person to be the owner of the premises. It is sufficient if he has been given permission to use it in order to be in possession of PE . In some cases, there is no need to be attached to a physical location. For example, carrying on business through an agent or an automatic machines. He could be said to have a PE , even if he does not have a defined physical location from which it carries his operations.

Thus the bare reading of the above extract, it is quite apparent that there is no requirement for having an ear marked space in the office for having Permanent Establishment. The long-term and short-term expatriates visit India in connection with the business assignment without a pre planned schedule as all of them know in advance that they are having fixed place available for their working in the office of Hell for which no specific permission is required to be taken in advance. Merely change of the room or the use of visitors place or meeting rooms does not in any manner show that the expatriates are not having a fixed place available for their business activities in HCIL. Hence, the office premises of Hell is that fixed place which is available to expatriates coming from HMJ and other AEs including the assessee.

As far as the short-term expatriates are concerned, the assessee was repeatedly requested to furnish the details of short-term expatriates and the purposes of their frequent visits to India which has not been furnished in spite of repeated reminders. The frequent visits by the short-term expatriates cannot be without any business motive of the assessee. Since, these expatriates are employees of HMJ and its AE, hence the purpose of their visits obviously should be to carry out the business of their employer i.e. HMJ and its AE including the assessee. Non furnishing of the particulars by the assessee further establish that by furnishing such information, the assessee will be in disadvantageous position and this fact is prompting it to refrain from submitting the information.

D. The Indian company is a 100% subsidiary of HMJ. Surveys u/s 133A and subsequent enquires have shown that it does not function as an independent entity. It is technically, economically and in terms of human resources dependent on HMJ and its affiliate companies including assessee.

Further the parent company is exercising control over HCIL through the expatriate employees. All the senior heads are Japanese who are on deputation from HMJ and are also drawing salary in Japan. It is observed that expatriate employees are sent on deputation to HCIL. These expatriate employees are heads of various business segments in HCIL and accordingly provide services. On completion of services they return to Japan or are posted in other group companies at the discretion of HMJ. During the course of deputation to India, expatriates employees continue to have lien over their employment with HMJ. The fixed place in the office of subsidiary company is available to HMJ and its affiliates and was occupied by the expatriate employees. Hence it is inferred that this fixed place is at the disposal of the assessee. This fixed place of business is used by these expatriates for doing business of HMJ and its affiliates including the assessee, which constitutes a fixed place PE in India.

All the Key management personnel in subsidiary company are expatriates of the assessee. Some senior management positions are being occupied by Indians, but what is pertinent to note is that key management positions are occupied by the expatriates. The posts which govern the ultimate business strategies and decisions are mostly held by these expats. These expatriate are sent from HMJ Japan or from other affiliate companies.

All these factors and the discussion above clearly establishes the permanent establishment of the assessee company as per Article 5(1) and 5(2) of the India-Thailand Double Taxation Avoidance Agreement.

<u>Transfer Pricing Order and Morgan Stanley's Case:</u>

The assessee has submitted the transactions between Honda Motor Company Limited, Japan and its subsidiary were referred to the Transfer Pricing Authority (TPO) under Section 92CA and that the TPO by his order held that the prices at which the said transactions took place between Honda Motor Company Limited, Japan, other foreign AEs and its subsidiary in India were at arm's length prices and, therefore, no transfer pricing adjustment was required to be made under Chapter X of the Act. The assessee has submitted that the order of the TPO was binding on the Assessing Officer under Section 92CA(4). The assessee has submitted that the Assessing Officer had no jurisdiction or authority in law to raise any contention, which was contrary to or inconsistent with the order of TPO passed under Section 92CA.

The assessee has submitted that the transactions relating to sale of raw materials, finished good, capital goods, etc. between Honda Motor Company Limited, Japan, other foreign AEs and Indian Company stood already disclosed by the Indian Company and was accepted by the tax authorities and, consequently, the tax authorities having themselves accepted the same transactions in the Indian company's case were precluded from attributing any further income in the hands of the assessee. The assessee also cited the decision of Hon'ble Supreme Court in the case of Morgan Stanley's to support its view.

However, the contention of the assessee is not acceptable in view of the reason that a survey under Section 133A of the Act was conducted on the premises of the Indian Company in which the statements of various heads and expatriate employees were recorded and subsequent inquiries were carried out on the basis of which an opinion was formed that Honda Motor Company Limited, Japan and its AEs were having a business connection as per Section 9(1)(i) of the Act and has a fixed place of business as per Article 5(1) of the DTAA.

Once it is established that there exist a permanent establishment of MIs Honda Motor Company Limited, Japan and its AEs in India, then any income of a non-resident, namely, the assessee, has to be determined and profits need to be attributed and taxed in India as per the provision of Rule 10 of the Income Tax Rules.

Hence, the contention that as per the" provisions of Chapter X of the Act, the Indian Company, in terms of the provisions of Section 92E of the Act had disclosed all the transactions with HCIL relating to purchase of raw materials, finished good, capital goods, etc. in terms of Section 92CA of the Act, the TPO of the Indian Company had already examined the said transaction and found the same to be meeting the arm's length principle, consequently, the Assessing Officer was precluded from drawing any inference that any further income of Honda Motor Company Limited, Japan from the same transactions was chargeable to tax had escaped assessment is erroneous and cannot be accepted.

The assessee raised same argument before Hon'ble High Court of Allahabad in the Writ Petition filed by it. Hon'ble High Court of Allahabad discussed the matter at length and dismissed the assessee's contention the relevant part of the decision dated 05.08.2014 is quoted below:

> "The contention that as per the provisions of Chapter X of the Act, the Indian subsidiary, in terms of the provisions of Section 92E of the Act had disclosed all the transactions with the petitioner relating to purchase of raw materials, finished goods, commission and reimbursements and further, in terms of Section 92CA of the Act, the TPO of the Indian subsidiary had already examined the said transaction and by its order dated 20th December, 2006 found the same to be meeting the arm's length principle, consequently, the Assessing Officer was precluded from drawing any inference that any further income of the petitioner from the same transactions was chargeable to tax had escaped assessment is erroneous and cannot be accepted.
>
> In Morgan Stanley's case (supra), the Supreme Court held:

> "The object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India. Under Article 7(2) nor all profits of MSCo would be taxable in India but only those which have economic nexus with P.E. In India. A foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the P.E. in India. The quantum of taxable income is to be determined in accordance with the provisions of the Income-tax Act. All provisions of the Income-tax Act are applicable, including provisions relating to depreciation, investment losses, deductible expenses, carry forward and set off losses etc. …………………………."

Once the Assessing Officer is satisfied that a permanent establishment of the petitioner exists in India and business is being conducted from this permanent establishment, the attribution of profits is a necessary consequence. The order of TPO will not come in the way for the reason that the TPO's order is in relation to the transactions between a subsidiary company and the petitioner. The situation becomes different when the subsidiary company also works as a permanent establishment of the petitioner. Once a permanent establishment is established, the petitioner becomes liable to be taxed in India on so much of its business profits as is attributable to the permanent establishment in India. The order of the TPO is in relation with the subsidiary company and not in relation with the permanent establishment of the petitioner. The transfer pricing analysis is to be undertaken between the petitioner and its permanent establishment which has not taken place as yet. Once a transfer pricing analysis is done, the computation of income arising from international transaction has to be done keeping in mind the principle of arm's length price. Once this is done, there is no further need to attribute profits to a permanent establishment. However, where the transfer pricing analysis does not take into account all the risk taking functions of the enterprise and it does not adequately reflect the function performed and the risk assumed by the petitioner, the situation would be different and, in such a situation, there would be a need to attribute profits to the permanent establishment for those functions risk that have not been considered. This is precisely what was considered in Morgan Stanley's case (supra) wherein the Supreme Court held:

> "As regards attribution of further profits to the PE of MSCo where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a P.E.) is reimbursed on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the P.E. The situation would be different if the transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the P.E. for those functions/risks that have not been

> considered. The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provided (MSAS in this case) fully represent the value of the profit attributable to his service. "

It is further emphasized that once permanent establishment is established and function performed by the permanent establishment are identified, the income accruing to the assessee due to such function performed by permanent establishment needs to be attributed to the permanent establishment and taxed in the hand of the assessee. As TPO had not analysed functions performed by the permanent establishment as the same was not part of the TP analysis submitted by the subsidiary company, it cannot be said that nothing was attributable to the permanent establishment. It is also in line of the decision of Hon'ble Supreme Court in the case of Morgan Stanley.

The assessee was required to submit the audited books of account and India specific expenses. In response, the assessee has submitted that preparation of books of account is not applicable in the case as it does not have presence in India and has submitted the Global balance sheet for estimation of profits. Since the assessee has not maintained proper India specific accounts, income is attributed to the permanent establishment.

However, the assessee main reliance was based on his own case decided by The Hon'ble Supreme Court in the case of Honda Trading Asia Co. vs Asst. Commissioner of Income Tax E-Funds IT Solutions Inc.(2017) 86 Taxmann.com
240(SC):

'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"

The above judgment was in the knowledge of this office therefore, a reference was made to TPO after taking approval of the CIT-3 International Taxation Delhi through a letter dated 19.12.2018. The TPO has recently passed the order u/s 92CA (3) on 31.10.2019 advised this office after determining the arm's length price to enhance the income of the assessee by Rs. 9,67,91,6281 for the assessment year 2016-17.

As the assessee has itself mentioned that 'we wish to submit that TP proceedings in the case of HCIL for A. Y. 2016-17 are pending however, as the latest order passed by the Ld. TPO in the case of HCIL for the A. Y. 2015-16, no adjustment has been made on purchase of goods by HCIL from parent Company and its affiliates hence transactions entered in to between the assessee and HCIL in relation to purchase of goods is on arm's length price and in the view of the above order, no attribution should be made"

> **In the above reply the assessee has specially mentioned the TPO order for determining arm's length price and submitted that as there was no arm's length price in A.Y. 2015-16, there is no need to attribute income in this.** However, recently the TPO order for A.Y. 2016-17 was passed advising to enhance the income of the assessee amounting Rs.9,67,91,628/-. Therefore, it is necessary to enhance the income the assessee by the above amount for the AY. 2016-17."

8. Ld AR submitted that after considering the above detailed submissions, the AO rejected the above detailed submissions of the assessee and observed that assessee was required to furnish the details of function performed by the PE in India but the assessee has denied every function carried out by it as a PE in India. Afterconsidering the detailed submissions, the AOwere of the view that all the functions performed, assets employed and risk assumed by the assessee in India, it proposed that 75% of the profit is attributable out of India for various functions, such as, vendor development, procurements, quality inspection, etc. and other related functions and the remaining 25% is considered to be reasonable attributable to functions performed by the PE in India.

9. Ld AR submitted that aggrieved with the above order, assessee filed objections before the ld. DRP. Ld. AR brought to our notice that ld. DRP has rejected the detailed submissions of the assessee and held that the assessee has PE in India based on the sole findings from survey proceedings conducted in India.

10. Ld. AR further brought to our notice page 19 of the paper book which is the decision of coordinate Bench in the case of HCIL in AY 2009-10 order dated 29.06.2016. He submitted that in AY 2009-10, the coordinate Bench held in relation to the appeal against the survey conducted in Indian entity that assessee i.e. Honda Trading Asia Company Limited, Thailand is part of the above group wherein it is observed that assessee has supplied raw material and capital goods, provided technical services to the Indian entity. There was a specific discussion by the coordinate Bench that it was held by Ld CIT(A), 16 PEs other than assessee was not chargeable to tax in India. However, with regard to HMJ and assessee was held to have PE in India. However, he brought to our notice the conclusionof the coordinate bench at para 13 of the order,it wasconfirmed that 16 AEs do not have a PE in India and further held that ld. DRP in the case of Asia Honda Thailand for the year 2009-10 held that non-resident company had no PE in India. In substance, he submitted that it is the categorical finding that Honda Motor Japan only had PE in India.

11. Further he brought to our notice page 101 of the paper book which is the decision of Authority for Advance Rulings (AAR), New Delhi in the case of Honda Motor Company Limited, Japan wherein the grounds raised before them are as under :-

"1. On the facts and circumstances of the case and in law, whether the Applicant i.e. Honda Motor Co., Ltd. would be considered to have a permanent establishment ('PE') in India by reason of its business transaction and related activities with Honda Siel Cars India Limited ('HSCI'), under the provisions of India-Japan DTAA?

2. On the facts and circumstances of the case whether the amount received/receivable by the Applicant i.e. Honda Motor Co., Ltd. from HSCI as a consideration for offshore supply of raw material/components/capital goods and CR-V cars would be liable to tax in India under the provisions of the Act and India-Japan DTAA?

3. If answer to question 1 and 2 above is negative, whether HSCI would be liable to withhold taxes under section 195 of the Act on the payments to be made by HSCI towards the offshore supplies mode by the Applicant i.e. Honda Motor Co., Ltd?"

13. He brought to our notice submissions of the assessee at para 6 of that order which is as under :-

"6. HSCI has ex-patriate employees deputed from Honda to work as employees or HSCI under their control and supervision for a specified duration. It was explained that the applicant nominates its employees with requisite qualification and global experience for deputation with HSCI. Amongst ex-patriate employees some are holding senior management positions in HSCI, including the Managing Director (MD) of HSCI and also some Division Heads. The MD of HSCI is also an operating officer of Honda and visits Japan in this capacity to attend the meeting of Directors of Honda Group Companies. It was clarified that the role of the Managing Director as an operating officer of Honda does not have any relation to supply of goods by the applicant to HSCI and does not have any implication on taxability of the applicant in India. HSCI withholds tax on the entire salary payment made to ex-patriate employees. However, the applicant does not cross charge to HSCI the salary cost of such expatriate employees which has been paid overseas."

14. He also brought to our notice submissions of the ld. Revenue which reads as under :-

"9. The Revenue, represented by Mr. G C Srivastava, Special Counsel, submitted that while a subsidiary cannot be regarded as a P.E. of the parent under normal circumstances, in this case the survey conducted at the premises or the subsidiary HSCI has thrown ample proof that the subsidiary and the parent were working together as a part or of same business. Therefore, there was material to show that the non-resident applicant was carrying on its own business through a fixed place of business in India. It was pointed out that the revenue had objected to the admission of (he application on the ground that the same question as posed before the Hon'ble Authority was pending before tax authorities. The survey operations carried out on 24.06.2010 and 19.12.2012 had brought on record material to show that HSCI did not function as an independent corporate entity and that the business functions of the parent company in Japan were carried out in India through their employees. HSCI served as a fixed place of business through which the business of Honda, Japan was being carried out. The entity HSC[L was acting more like a branch of Honda than being a separate legal and operational entity.

10. It was submitted that the parent company. Honda Japan, follows a model where the overseas business operations are divided into Regional Headquarters and each regional headquarter controls and supervises the business functions in its region. The Indian operation falls tinder the control of Regional Headquarters in Bangkok, Thai land. In a structure of this kind, the business functions are carried out as a group where no entity enjoys a separate and independent status. The Indian Company was headed by an employee or the Parent company who also happened to be a Director or the parent company, Honda Japan and President of a subsidiary in Pakistan. All the major departments of the Indian company were headed by an employee of Honda, Japan. The Indian company was left to employ only subordinate, supervisory or technical staff or low-paid employees who worked under the supervision and control of the regular employees of Honda, Japan. The survey proceedings had revealed that the Indian subsidiary had no say either in the mode and manner of the selection or the placement of the expatriate employees of the parent company, for their assignments in India. The expatriate employees, though constituted 2% of the total employment, they carried out and controlled all the core business activities of the subsidiary company. They worked under the guidance, control and supervision of Honda, Japan and they came to serve in India on the instructions/directions of their supervisory heads in Japan or Thailand. They were paid bulk of their salary by Honda, Japan and the Indian company was called upon to bear only lodging, transport and other local expenses apart from a small amount per month which was just adequate to sustain these employees with their day to day expenses in India. The Indian subsidiary did not reimburse such payments and the major part of salary was not only paid but borne by the parent company. The argument that the parent company was not charging back major part of the salary in order to provide financial support to the Indian Company was highly fallacious. It was submitted that the Parent can support the subsidiary either through equity or debt. However, if no distinction is kept between the financial liabilities of the parent entity and that of the subsidiary, it impinges upon the corporate veil which separates the subsidiary from its parent. Further, all the

employees of Honda, Japan had lien over their employment with Honda, Japan and they were assigned the jobs in India for a specific period by either the Head Office or the Regional Offices of Honda. The Parent company or the Regional Headquarter Office decided as to how 'long au expatriate employee will work in India and then he/she is asked to move to other Honda Group companies, clearly indicating a continuous connection HCIL and other Honda companies.

11. The revenue contended that these employees in India represented the parent company and took all decisions on their behalf as instructed by the Regional/Head Office. The employees coming from Honda, Japan were reporting to Regional Headquarters or the Head Office in Japan. In this respect reliance was placed on tile statements of the various employees recorded during the survey. It was submitted that the employees of the Parent company were not in India as a mere deputationists working for the Indian Company, but they were representing the Parent Company ill India and doing functions on their behalf. According to revenue, while the Parent Company was fully justified to supervise or control the affairs of the subsidiary through the Board of Directors of the subsidiary, but if the Parent company directly controlled the functioning of the subsidiary by sending its own employees for heading all departments of the subsidiary, directly paying them salary without charging it from the subsidiary, getting reports from them and giving instructions through the regional offices then it would lead to an inevitable conclusion that the Parent company had decided not to recognise the independent corporate structure of the subsidiary and had thus, torn the corporate veil which separated the subsidiary from the parent. It was contended that the applicant had gone much beyond the shareholders function and the argument that there was nothing wrong or illegal in the functioning of the regional offices or getting reports etc. which were only advisory in nature; ignored the very vital aspect of cross border taxation that if the corporate veil of subsidiary was not recognised, the parent foreign company would be completely projecting itself as business entity in India and would have to be treated as such, both under the Domestic law and the Treaty law. Reliance was placed in this regard on the ruling of this Authority in the case of A.B. Mauritius (AAIR No.1128 of 2011). It was requested that in the light of the observations of the Hon'ble Supreme Court in the case of Vodafone (345 ITR 1), the Indian subsidiary be regarded as all extension of the Japanese Company."

15. After considering the same, he submitted that Ld AAR held as under :-

"27. We have carefully considered the submissions of the revenue and the materials and evidences brought on record. There is no evidence found in the course of survey that HSCI had conducted any market survey on behalf of the parent Honda. As both parent and the subsidiary were dealing in the same range of products, it is imperative that the market survey will be conducted by the subsidiary as it had exclusive right for the Indian market. When asked about launch of models by HSCI, Mr. Takashi Nagai, President & CEO of HSCI had categorically stated in the course of his statement that *"We have not launched any model which is not an existing model of Honda Motor Co. Limited. Japan. For existing models like JAZZ and Accord, we conduct surveys whether customers will buy these models or not and we share this information with Honda Motor Company Limited, Japan."* It is thus found that the market surveys were conducted by HSCI in order to launch the models in Indian market and that such market surveys were not conducted on behalf of the parent company. It is imperative that the result or the market survey will be shared with the parent company as the business of both parent and the subsidiary is inter-dependent. Mr. Nagai had further stated that the timing of launch of a particular model is decided only by HSCI and not the parent Honda.

28. As regards brand building exercise carried on by the HSCI, it is to be kept into consideration that HCIL itself is a manufacturing company and 95% of its sales are coming from own manufacturing. Therefore, maintenance, development and promotion of Honda brand is more in the interest of the subsidiary HSCI than the applicant. The promotion of Honda Brand in the Indian market will be for the purpose of supplementing the business opportunities of the subsidiary HSCI. In case HSCI has not at all shared its brand building expenses with the applicant that might be the case of transfer pricing adjustment. But it cannot be said that by promoting Honda brand in India, HSCI had carried on the business activity of the applicant.

29. With respect to negotiating and concluding the price at which the car and spare parts were to be exported to the Indian company, the revenue has alleged that the expatriate employees represented the importer as well as the exporter and the decision making was not independent. The applicant has submitted evidences that cost comparison amongst foreign supplier entities was done by HCIL and the parts were imported from the entity offering the least cost on competitive basis. In view of these evidences the allegation of the revenue has no substance. It was explained that the orders were placed by HCIL at a global portal through Global Logistic Operation Systems, an online system established by the applicant. If the expatriate employees had placed order on the global portal for purchasing goods from the applicant, they do not become an extension of the applicant. The placing of order was done on behalf of HCIL only. The revenue has not come with any evidence in support of the allegation that the price negotiations on behalf of the applicant was done by the expatriate employees. A survey operations u/s 133A of the Act was conducted by the revenue on the premises of HSCI twice, the primary purpose of which was to collect evidences. As the revenue has been unable to lay hands on any concrete material which impacts on the veracity of applicant's version of the facts and get hold of any incriminating evidence, we find no

basis to accept the contention of the revenue that the expatriate employees were functioning in dual roles.

30. The revenue has pointed that these expatriate employees carried out sale functions in respect of CR-V cars and the warranty claims were accepted by them on behalf of HM Japan. Further, these warrant claims were not always paid/reimbursed by HM Japan and that such business arrangement between the parent and subsidiary was possible only when the decision making authority of both the entities rests with the single person. The applicant has explained that the imported CR-V cars were sold to the customers by HSCI and not by the applicant. All the import of CR-V cars and spares was made by HSCI and, therefore, the warranty claims were in favour of HSCI only. As explained the warranty claims in respect of the defective parts were settled by HSCI and then got reimbursed from the applicant. In case certain warranty claim made by HSCI was not reimbursed by the applicant, it does not mean that HSCI was carrying on the business on behalf of the applicant. Similarly, regarding post sale functions of CR-V cars, as those cars were first imported by HSCI and then sold to the customers, it cannot be said that such functions were done all behalf of Honda Japan.

31. The revenue has also pointed out that the sample documents found during the survey have not been responded by the applicant. It is found that those documents were in respect of communication regarding increase in regular employees, reason for change of GA expense from the previous year, changes in the revised budget of the subsidiary and communication regarding periodical reports being sent to the principles in Japan. It is thus seen that these documents do not indicate that any business of the applicant was .carried out through the subsidiary HSCI.

32. In the absence of any proof regarding any management activity of the applicant being conducted in India we cannot agree with the contentions of the revenue that the applicant was conducting the business in India through its expatriate employees. The activities of the expatriate employees related to the specificity of the products, market surveys, promotion of brands, market strategies etc. which were within the ambit of the business of the Indian subsidiary. It cannot be said that all these activities were for the furtherance of the business of the applicant de hers the business of the subsidiary. By sharing the periodic reports, the expatriate employees were only discharging the duties of tile subsidiary company towards the holding company.

33. For the reasons as above, we are of the considered opinion that no business of the applicant was conducted through the expatriate employees working with the subsidiary HSCI in India. As the condition of carrying on of the business of the enterprise is not fulfilled, it cannot be held that the applicant had a PE under Article 5(1) of DTAA, even if it had a fixed place of business in the form of expatriate employees.

16. He submitted that with reference to above AAR decision that no PE in the case of Honda Motor Company Limited, Japan also, further, he submitted that in the case of assessee's own case filed before ITAT and coordinate Bench relevant to AYs 2010-11, 2013-14, 2014-15 and 2015-16, it was decided the issue in favour of the assessee as under :-

> "16. After considering the submissions and the material before us, it is established that in the case of HCIL for AY 2009-10, the issue under consideration was if HCIL, which is a subsidiary of M/s Honda Motors Company Ltd., was required to deduct tax at source for payments made for purchase of raw material, components, etc. from non-resident companies and those non-resident companies being associated enterprises numbering 17 were found to be not having a PE in India. In fact, the Tribunal in its order dated 29.06.2016 observes that the fact that these associated enterprises which included assessee also do not have PE in India stands accepted by DRP and the Department has not gone in appeal and, thus, the issue stands finalized. In this order dated 29th June, 2016, it was held that except for Honda Motors, Japan, payments made to all other 17 non-resident associated enterprises does not attract the provisions of section 195 and, consequently, section 40(a)(i) of the Act has no operation on the income of these companies arising from the supply of part, etc., and same was not liable for tax in India. This question was determined in favour of the assessee on the basis that the assessee was not having a PE in India. Thus, the issue findings being conclusive, do not require any further indulgence of this Bench and, accordingly, we are inclined to allow this ground No.2 in favour of the assessee.
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> 17. Ground 3: In relation to alleged erroneous taxation of offshore supplies Ld. Sr. Counsel relied Section 5 of the Act and submitted that this provision provides that total income of a non-resident (which is taxable under the Act) includes income which is received in India or accrues or arises in India. So, if income accrues or arises outside India and is also received outside India, then, the same shall be outside the scope of total income and may not be liable to tax in India. It was submitted that in the present case, the Appellant is making sales to HCIL outside India and HCIL is making sale subsequently in India in its own account without any control from its suppliers. Thus, supplies made by the Appellant are not taxable in India. In this context it was also submitted that it is now well settled law that receipts arising from offshore parts supplied are not taxable in India. In this regard, reliance is placed on the judgement in

Ishikawajma Harima Heavy Industries Ltd. v. Director of Income-tax, Mumbai (288 ITR 408) wherein the Hon'ble Supreme Court has held that only such part of the income as is attributable to operations carried out in India is taxable in India. It was submitted that Hon'ble Apex Court further held that where all parts of transaction i.e., the transfer of property in goods as well as payments thereof, are carried on outside the Indian soil, such transactions cannot be taxed in India. Ld. Sr. Counsel submitted that in the case of assessee appellant meets the tests laid down by the Hon'ble Apex Court and hence, the receipts attributable to supply of parts from outside India are not chargeable to tax in India in the hands of the Appellant.

17.1 In regard to this ground, as we appreciate the orders of the ld. tax authorities below, it comes up that the offshore-supplies are not taxable in India as the title and risk got transferred outside India. Further, the offer was accepted outside India and contracts got concluded outside India.

18. The Ld. Sr. Counsel submitted that without prejudice to the above contention of the assessee that HTAS is not having a PE in India, since the TPO has made, adjustment on the offshore supplies citing it to be arm's length, further addition by the Ld AO on similar offshore supplies lead to double taxation which is against the principle of taxation laws. Ld. Sr. Counsel further submitted that, even otherwise, offshore supplies are not taxable in India, for the purpose of attribution, reliance was placed on the judgment of Hon'ble Madras High Court in case of **Annamalais Timber Trust (41 ITR 781),** wherein it was held that profits exceeding 10% cannot be attributed in case of conclusion of trading operations.

19. We find that the DRP after considering various contentions raised by the assessee, observed that since it has been held by DRP that the assessee has PE in India, profits need to be attributed to various operations carried out in such PE in India. Further, since the assessee is not maintaining India specific accounts, the AO is right in applying Rule 10. However, the panel directed that instead of adhoc profit rate of 25%, global profit rate of the assessee should be applied and 25% of such profits should be attributed to PE in India. Thus, where we have concluded that the assessee has no PE in India, the directions to attribute profits to various operations carried out in PE in India are not left with any substratum and, accordingly, the ground No.3 deserves to be allowed in favour of the assessee.

20. **Ground 4:** In regard to the claim of assessee that FTS receipts are not liable to tax in the absence of FTS article in India-Thailand DTAA. It is submitted that the India- Thailand DTAA does not contain any provisions about the taxability of fees paid for technical services and that it is a well settled law that in absence of any specific clause of the DTAA, the payments made can be taxed only under the head of Business Profits. Reliance in this regard is placed on the following decisions:

- Tekniskil (Sendirian) Berhard v. CIT [1996] 222 ITR 551 (AAR)

- Bangkok Glass Industry Co. Ltd. v. ACIT [2013] (34 taxmann.com 77) (Madras HC)
- DCIT v. Michelin ROH Co. Ltd. [2022] 138 taxmann.com 497 (Delhi - Trib.)
- ACIT v Paradigm Geophysical Pty Ltd [2008] (25 SOT 94) (Delhi ITAT) 21.

21. The Ld. Sr. Counsel for assessee submitted that the assessee vide its Income Tax Return for the subject assessment year, offered to tax the receipts in the nature of fee for technical services (FTS) amounting to Rs.4,74,73,450 subject to tax @ 10%. Accordingly, the tax amounting Rs. 50,36,458 was paid by the Assessee on such receipts. In the given case, since there is no FTS clause in the India-Thailand DTAA, therefore, as HTAS does not have a PE in India, the subject FTS receipts should not be taxable in India.

22. DRP has considered the contentions raised by the assessee and found no force in contention of the assessee that FTS is not taxable when there is no FTS clause in DTAA. DRP observed, *"It is a matter of common understanding that fee for technical services is sub set of broader set of business income. When contracting states do not want to give separate treatment to FTS, these receipts become taxable as business receipts only."*

23. We find substance in the observations of the DRP, but is relevant is that Section 9 of the Act enumerates certain incomes to be deemed to accrue or arise in India and Section 9(1)(vii) of the Act provides under what conditions FTS income shall be considered to accrue or arise in India. Explanation 2 to Section 9(1)(vii) of the Act gives definition of FTS and which provides that any service falls within the definition of FTS are either be in the nature of managerial services, technical services or consultancy services. Thus FTS is a species of business income with specific definition and components and in DTAA, are made taxable specifically. If not, then they are brought to tax, as business income and in that case, again the existence of PE in India is necessary, but which is not established in case of assessee. Accordingly, this ground is decided against the Revenue.

24. Ground 11: Interest under section 234A. 234B and 234C of the Act. It is submitted that the return of income for subject AY was filed within due date prescribed under section 139(1) of the Act, accordingly, interest under section 234A is not applicable. As with regard to interest under section 234B of the Act it was submitted that same is not leviable in the instant case and reliance in this regard was placed on the decision of Hon'ble supreme Court in case of Director of Income-tax, New Delhi vs. Mitsubishi Corporation [2021] 130 taxmann.com 276 (SC). As for interest under section 234C it was submitted that interest is applicable on returned income, accordingly, AO has erred in levying interest under section 234C. Even otherwise, grounds challenging levy of interest are consequential and, accordingly, adjudicated in favour of the assessee.

> 25. Thus, when we have concluded and sustain the key contention that the impugned international transaction involving FTS receipts are not taxable in the absence of FTS clause in India-Thailand DTAA and as the appellant does not have a PE in India. The grounds arising out of the challenge of the order of the TPO vide Grounds No. 6 to 10 have to be sustained also for reason that international transactions including impugned international transaction involving FTS receipts have already been benchmarked in Honda Cars India Ltd. and Transfer Pricing Study stands accepted by TPO. Thus grounds No.6 to 10 also deserve to be allowed."

17. With reference to above, ld. AR submitted that the issue of assessee not having PE in India is settled in favour of the assessee and supply of raw material and other goods is not taxable in India.

18. Further, he brought to our notice decision of Hon'ble Delhi High Court in the case of Honda Cars India Limited vs. CIT in ITA 481/2017 order dated 20.05.2024 wherein it was upheld the decision in favour of the assessee. He concluded by saying that the assessee is conducting its affairs by supplying raw material, capital goods on the basis of offshore and there is no PE in India, therefore, as per the DTAA with India and Thailand, the Article 5 has no application in the case of the assessee. Therefore, he submitted that it clearlyestablishes that there is no PE in India, hence, the provisions of TP provisions relating to above activities is not applicable. Therefore, he submitted that grounds no.14 to 27 is rendered infructuous and not applicable.

19. On the other hand, ld. DR of the Revenuesubmitted that the decision of AAR is relating to Honda Car Japan. There is no impact on the present case under consideration. Further, he brought to our notice page 118 to 124 of the paper book which is the decision of AAR relating to Honda Car Japan. He also brought to our notice page 23 of the paper book which is the decision in the case of Honda Cars India Limited wherein there is a specific mention of purchase of materialby the Indian entity from Honda Trading, Thailand and for provision of technical services. Therefore, he submitted that the issue underconsideration is relating to the existence of PE in India. Since the assessee has direct transaction with the Indian entity as found in the survey proceedings that employees of the Japan entity are providing services to Indian entity, assessee being an AE of the Japan entity and both assessee and Japan entity have provided services to the assessee through their employees. Therefore, there is a direct nexus of involvement of the assessee. Therefore, he brought to our notice detailed findings of the lower authorities, accordingly, he relied on the same. Further, he also submitted that the decision relied upon by the ld. AR are relating to pre-survey period. He also brought to our notice findingsof the coordinate Bench in the AY 2009-10 which are not relevant for the proceedings under consideration.

Further, he submitted that about reliance on the decision of Hon'ble Delhi High Court decision, he submitted that which was delivered on different context. In this regard, he brought to our notice page 40 of the assessment order which is the detailedfindingsof the AO that legal and economic dependence of the Indian entity on Honda Motor Company Japan and the assessee. He brought to our notice detailed findings of AO in relation to relevance of survey proceedings, particularly relates to salary drawn by the expatriates from the Indian entity and parent entity. He brought to our notice detailed findings and survey proceedings which are reproduced in the assessment order. Accordingly, he heavily relied on the detailed findings of lower authorities.

20. In the rejoinder, ld. AR of the assessee brought to our notice pages 7 and 8 of the assessment order. He submitted that assessments were reopened mainly on the basis of findings in the survey proceedings. He submitted that the findings of the coordinate Bench in AY 2016-17 are relevant which is based directly on survey only. With regard to findings in AY 2017-18 to 2019-20, he submitted that TP adjustments were made on the import of raw material and other components and FTS. These are direct binding decisionsrelevant for the assessment year under consideration.

21. Considered the rival submissions and material placed on record. We observed that in the assessment order, the AO has heavily relied upon the findings in the survey proceedings that expatriates who were working in the Indian entity i.e. HCIL and expatriates were drawing their salary in India as well as partof salary from its parent entity i.e. HCJ. The abovesaid issue whether there exists PE in India basedon the findings of the survey only, we observed that the Ld. AAR has clearly held that there is no PE existence in relation to HCIL and Honda Cars Japan. Moreover, we observed that the assessee is supplying raw material and other capital goods and providing FTS to the HCIL, assessee being an independent entity which supplies the material and services offshore from Thailand merely because some expatriates deployed in India to provide services to HCIL and it is not brought anywhere in the recordsnor clearly established that any ofthe employees of HCJ deputed to HCIL in India have provided any services on behalf of the assessee in order to establish that assessee has PE in India. Further, none of the lower authorities have brought on record that assessee has fixed place of business or they have any employee deputed in India by any cogent material. In our view, mere presumption that the employees of parent company were deputed in the Indian entity would have provided services on behalf of the assessee, without bringing on any material, without their being any cogent material, it cannot be established the existence of PE in India. Apart from that assessee is a group concern/AE of Honda Cars Japan. It cannot be held that assessee has PE in India merely on the above basis.

22. After considering the detailed findings given by the coordinate Bench in assessee's own case from AYs 2010-11, 2013-14, 2014-15 and 2015-16, it was held as under:-

> 19. We find that the DRP after considering various contentions raised by the assessee, observed that since it has been held by DRP that the assessee has PE in India, profits need to be attributed to various operations carried out in such PE in India. Further, since the assessee is not maintaining India specific accounts, the AO is right in applying Rule 10. However, the panel directed that instead of adhoc profit rate of 25%, global profit rate of the assessee should be applied and 25% of such profits should be attributed to PE in India. Thus, where we have concluded that the assessee has no PE in India, the directions to attribute profits to various operations carried out in PE in India are not left with any substratum and, accordingly, the ground No.3 deserves to be allowed in favour of the assessee.

23. Respectfully following the above decision and the facts in the present case are exactly similar to the facts in the above assessments years, the findings of the coordinate Bench are accordingly followed and we conclude that assessee has no PE in India. Therefore, grounds no.3 to 13 raised by the assessee are accordingly allowed.

24. Since the above grounds are allowed in favour of the assessee which in sum and substance, the assessee has no PE in India, the other TP

adjustments proposed by the TPO against which assessee has raised the grounds no.14 to 27 has become infructuous and accordingly, the same are not adjudicated as infructuous.

25. With regard to grounds no.28 and 29 which are consequential in nature, the same are allowed for statistical purposes.

26. In the result, the appeal filed by the assessee being ITA No.876/Del/2021 for AY 2016-17 is partly allowed as indicated above.

27. Since the facts in AYs 2017-18 to 2019-20 are exactly similar to Assessment Year 2016-17, our above findings in AY 2016-17are applicable *mutatis mutandis* in Assessment Years 2017-18 to 2019-20. Accordingly, the appeals filed by the assessee for AYs 2017-18 to 2019-20are partly allowed.

28. To sum up, all the appeals filed by the assessee are partly allowed as indicated above.

Order pronounced in the open court on this 6TH day of August, 2026.

SD/-	**SD/-**
(VIMAL KUMAR) **JUDICIAL MEMBER**	**(S. RIFAUR RAHMAN)** **ACCOUNTANT MEMBER**

Dated: 06.08.2026
TS

Copy forwarded to:

1. Assessee
2. Respondent
3. CIT
4. CIT(Appeals).
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT, NEW DELHI