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IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Shri Aby. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No. 390/Kol/2015

Assessment Year : 2011-12

HITT Holland Institute of Traffic Technology B.V (now known as "Saab Technologies B.V.). [PAN: AABCH 5694 R]	-vs-	DCIT, International Taxation, Circle-1(1), Kolkata
(Appellant)		(Respondent)

For the Appellant : Shri Avisekh Kejriwal, AR

For the Respondent : Shri G. Mallikarjuna, CIT DR

Date of Hearing : 21.03.2018

Date of Pronouncement : 04.04.2018

ORDER

Per M.Balaganesh, AM

1. This appeal is directed against the order of the Learned DCIT, International Taxation, Circle 1(1), Kolkata [hereinafter referred to as the ld AO] for the Asst Year 2011-12 under section 143(3) of the Income Tax Act, 1961, [hereinafter referred to as the 'Act'] dated 9.2.2015, pursuant to the directions of the Learned Dispute Resolution Panel [hereinafter referred to as ld DRP] issued u/s 144C(5) r.w.s 144C(8) of the Act dated 30.12.2014.

2. The brief facts of this appeal is that the assessee is a subsidiary of HITT N.V.. It is a company incorporated as per the laws of Netherlands operating in the international market for safety, security and efficiency of nautical and air traffic. It operates in the specialized market for traffic control, navigation and port management systems. The assessee has entered into contracts with Oil and Natural Gas Corporation of India (ONGC) . Director General of Lighthouse and Lightships (DGLL) and Airports

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Authority of India (AAI) for supply of equipment and services. During the year under consideration, the assessee received payments in respect of performance of services and supply of equipment under the following contracts in India :-

a) Supply, Installation, testing and commissioning of Advances Surfaces Movement Guidance Control System (ASMGCS) at Chennai, Mumbai and Kolkata Airports by AAI [AAI (Mumbai, Chennai and Kolkata) Project].

b) Establishment of Vessel Traffic Service (VTS) system in the Gulf of Kuchchh (GOK Project)

c) Contract to provide Annual Maintenance of the Vessel and Air Traffic Management System (VATMS) system for ONGC (ONGC VATMS – AMC Project).

The transactions of the assessee are covered under the Double Taxation Avoidance Agreement (DTAA) between India and Netherlands.

2.1. The first issue to be decided in this appeal is as to whether the ld AO was justified in treating the amount of Rs 28,06,200/- as consideration for 'Training' in the facts and circumstances of the case.

AAI Mumbai Project

2.2. The brief facts of this issue is that the assessee was awarded a contract for supply, installation, testing and commissioning of Advanced Surface Movement Guidance Control System (ASMGCS) at Chennai, Mumbai and Kolkata Airports by the AAI in the year 2008. The nature of activities undertaken by the assessee and receipts from the said activities during the year under consideration for each project was as follows :-

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HITT Holland Institute of Traffic Technology BV		
AY 2011-12		
Details of Income Revenue from Various Projects		
Activity	Revenue (EUR)	Revenue (INR)
AAI (Mumbai, Kolkata and Chennai) Project		
Offshore Suply of Hardware	235,455	14,682,974
Training	45,000	2,806,200
Total	**280,455**	**17,489,174**
GOK Project		
Onshore Supply of Equipment	27,842	1,285,465
Offshore Suply of Equipment	471,967	20,875,100
Onshore Provision of Services	765,484	35,342,381
Offshore Provision of Services	400,000	17,692,000
Training	61,807	2,733,724
Total	**1,727,100**	**77,928,670**
ONGC (AMC) Project		
Onshore Supply of Services	200,738	12,518,018
Total	**200,738**	**12,518,018**
GRAND TOTAL	**2,208,293**	**107,935,862**

2.3. With respect to the services to be provided, as per the contract , the assessee would provide services which are in the nature of installation, commissioning and testing services for Chennai, Kolkata and Mumbai Airport. During the year under consideration, the assessee received the following payments :-

a) Payment for off shore supply of equipment and

b) On shore provision of services of Euro 45,000 equivalent to Rs 28,06,200/-.

2.4. With respect to the payment towards On shore provision of services of Euro 45,000 , the ld AR referred to the letter of AAI dated 28.10.2010 (page 202 of Paper Book) , according to which the payment of Euro 45,000 was approved by AAI for installation, commissioning and testing services for Mumbai Airport. As per the said letter, this additional payment was with respect to deployment of additional resources to meet AAI's urgent operational requirement being installation efforts beyond the contractual obligations. Accordingly, the corresponding invoice (enclosed in page 180 of paper

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book) which was raised mentioned the payment to be for "Additional expenses – Mumbai" . The total amount eligible as per the contract to the assessee for Mumbai Airport was Euro 585162 towards Installation, Testing & Commissioning Charges. This sum of Euro 45,000 was paid to the assessee as an additional sum for Mumbai Airport for deploying additional resources to meet urgent operational requirements. The assessee reflected this additional income of Euro 45,000 under installation, commissioning and testing services . The ld AO alleged that the consideration of Euro 45,000 (Rs 28,0,6200/-) received by the assessee during the subject year for providing servies pertaining to installation, testing, commissioning etc is for provding ' training' to the customer and hence, taxable as 'Fees for Technical Services' (FTS) under the provisions of the Act as well as the DTAA between India and Netherlands. The ld AO observed that the consideration received for On-shore provision of services refers to 'training' by referring to Annexure I of the PO (page 194 of paper book) which states the scope of supply of services including installation / commissioning and training etc as separate items. This action of the ld AO was upheld by the ld DRP. Aggrieved, the assessee is in appeal before us on the following grounds :-

> *2.1 On the facts and in the circumstances of the case and in law, the ld. AO has erred in treating the amount of INR 28,06,200, being the consideration amount for on-shore provision of services pertaining to installation, testing, commissioning etc., as "Fees for Technical Services"(FTS) in terms of Article 12(5) of the India-Netherlands DTAA and consequently charging tax on the same @ 10% on gross basis.*
>
> *2.2 On the facts and in the circumstances of the case and in law, the ld. AO has erred in wrongly assuming the aforesaid amount as consideration for "Training", which is contrary to the facts of the case.*
>
> *2.3 On the facts and in the circumstances of the case and in law, the ld. AO has failed to appreciate that the services pertaining to installation, testing, commissioning etc. do not "make available" technical knowledge, know how, skills etc, as required under Article 12(5) of the India-Netherlands DTAA to bring it within the scope of FTS.*

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2.5. We have heard the rival submissions and perused the materials available on record. The facts stated hereinabove are not reproduced herein for the sake of brevity. It would be relevant to address the general principles of taxation of non-residents in this regard. Under section 4 of the Act, the charge to tax is on the total income of every person. Section 5 of the Act explains the scope of total income of every person. Section 5(2) lays down the scope of total income of every person who is a non-resident. Any income received or deemed to be received in India and any income which accrues or arises in India or is deemed to have, accrued and arisen in India shall be included in his total income. Section 9 of the Act lays down as to when income shall be deemed to have accrued or arisen in India. Section 90 of the Act provides that Central Government may enter into an agreement with the Government of any country outside India for avoidance of Double Taxation of income under the Act and under the corresponding law in force in that country. Section 90(2) provides that where such agreement exists with any country outside India, then in relation to an assessee to whom such agreement applies, the provisions of the Act, shall apply only to the extent they are more beneficial to that assessee. India and Netherlands have entered into an Agreement for A voidance of Double Taxation (DTAA) with effect from 21-1-1989 and therefore the taxability of any income that accrues or arises in India to the assessee who is non-resident in India and a tax resident of Netherlands will have to be determined in accordance with the said DTAA. As to when a non-resident would be considered as having a PE in the other country is generally decided on the basis of the facts in each case, the criteria being the extent to which the non-Resident has set a firm foot in the soil of the other country. If a non-resident is considered as having a Permanent Establishment (PE) in the other country then income attributable to the PE will be taxed in the other country. As to whether the income attributable to the PE alone has to be taxed in the other country or any other income which accrues to the Non-Resident in the other country having no connection with the PE, can also be brought to tax in the other country, is also laid

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down in the various clauses of the DTAA between countries. Available Model Conventions differ in this regard. Some provide for taxing profits/income only to the extent that they are attributable to the PE, which is referred to as "No force of Attraction" principle. Some provide for taxing income/profits from direct transactions effected by the non-resident, provided the transactions are of the same or similar kind as that effected through the PE, which is referred to as "Limited Force of Attraction" principle. Some provide for taxing profits/income from all transactions whether they are attributable to PE or not or whether they are of the same kind of transactions carried on by the PE or not, which
is referred to as "Full Force of Attraction" principle. As to which principle is applicable in a given case depends on the clauses of the convention between two countries. Article 7(1) of the DTAA between India and Netherlands provides for taxing profits of the enterprise in the other state only to the extent they are attributable to the PE in the other state, adopting "No Force of Attraction" principle. With the above broad principles in mind we will now consider the facts of the present case and the rival contentions on behalf of the assessee and the revenue on the various grounds of appeal raised by the Assessee before us.

2.5.1. The short point that arises for our consideration is as to whether the additional amount sanctioned by AAI during the year over and above the contract amount for Mumbai Airport in the sum of Rs 28,06,200/- is to be treated as installation, commissioning & testing services or as amounts received towards training. The total amount eligible as per the contract to the assessee for Mumbai Airport was Euro 585162 towards Installation, Testing & Commissioning Charges. A sum of Euro 45,000 was paid to the assessee as an additional sum for Mumbai Airport for deploying additional resources to meet urgent operational requirements. AAI had sanctioned this additional amount of Euro 45,000 by way of a separate sanction since it is over and above the original contract amount of Euro 5,85,162 towards installation, commissioning and

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testing. For the sake of convenience, the sanction letter of AAI dated 28.10.2010 is reproduced below:-

Ref. No. AAI/ASMGCS/BB/2010 *Dated: October 28,2018*

To,

M/s HITT Holland Institute of Traffic Technology B.V.,
Oude Apeldoomsewag 41-45,
7333, NR Apeldoom
The Netherlands

Subject: ***Supply, Installation, Testing and Commissioning (SITC) of ASMGCS for Chennai,Kolkata and Mumbai Airports***

Reference: ***1. Purchase Order No. AAI/PO-02/2008-09/ASMGCS/MM-CC-BB/CNS(P)/2007 dated 15.04.2008***
2. Purchase Order Amendment No. 1 dated 16.04.2008
3. Purchase Order Amendment No. 2 dated 17.04.2008
4. Purchase Order Amendment No. 3 dated 16.09.2008

Sir,

Reference may kindly be made to your letter ref. no. 20100804_JVG dated 4th August, 2010 regarding partial delivery for one SMR only at Mumbai Airport to achieve the partial coverage of the ASMGCS at Mumbai Airport as soon as possible wherein additional financial burden due to deployment of additional resources to meet the AAI's urgent operational requirement by installation efforts beyond the contractual obligations have been indicated.

AAI has approved additional cost of Euro 45,000 (Euro Forty Five Thousand only) towards the additional expenditure that HITT will encounter due to the partial delivery at Mumbai Airport and multiple commissioning efforts for commissioning with both SMR only. This cost is in addition to the cost mentioned in above referred Purchase Order towards Installation, Testing and Commissioning charges of Euro 585,162 for Mumbai Airport.

Rest all the terms and conditions shall remained unchanged.

Kindly acknowledge the receipt in acceptance of this amendment by signing at each page and return to AAI.

Yours Sincerely
S.Sundara Raman
(Executive Director(CNS-P)

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2.5.2. The additional amount was agreed by the AAI because multiple commissioning efforts had to be undertaken by the assessee for certain urgent deliveries made at the Mumbai Airport , which is evident from the sanction letter of AAI reproduced supra, which was beyond the scope of the original contractual obligations between the parties. Accordingly, such expenses were in the nature of 'Additional Expenses –Mumbai' as reflected in the invoice. The assessee claimed that the additional consideration of Rs 28,06,200/- was received for provision of services pertaining to installation, testing and commissioning and hence the same cannot be treated as FTS under Article 12(5) of India-Netherlands DTAA (hereinafter referred to as Treaty). Article 12(5) of the Treaty defines the term "FTS" as –

> *For the purpose of this Article , "fees for technical services" , means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) if such services : (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received ; or (b) make available technical knowledge , experience, skill, know-how or processes , or consist of the development and transfer of a technical plan or technical design."*

2.5.3. The ld AR argued that based on the Most Favoured Nation (MFN) clause in the India-Netherlands DTAA, the meaning of the term 'make available' for interpreting the India-Netherlands DTAA may be taken from its meaning given in the India-Singapore DTAA. As per Article 12 of the India-Singapore DTAA, the term 'make available' has been explained as "(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein." The ld AR pleaded that the installation, commissioning activities do not involve transfer of technology and hence are not taxable as FTS. Reliance in this regard was placed on the co-ordinate bench decision of *Jabalpur*

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Tribunal in the case of Birla Corporation Limited vs ACIT reported in 153 ITD 679 wherein it was held that :-

> *"By no stretch of logic, installation or assembly activities even involve transfer of technology in the sense that recipient of these services can perform such services on his own without recourse to the service provider, nor has it been the case of the authorities below. For this short reason alone, the installation, commissioning or assembly activities cannot constitute fees for technical services, or fees for included services as these are termed in Indo US tax treaty."*

2.5.4. We find that the *Chennai Tribunal in the case of DDIT vs Ford India Ltd reported in (2017) 78 taxmann.com 5 dated 31.1.2017* followed the decision of Birla Corporation Ltd rendered by Jabalpur Tribunal supra and held as under:-

> ***37.*** *The above line of reasoning apart, in Birla Corp's case (supra) also, it was noted that so far as treaties with make available clause are concerned, the payments made for installation and commissioning charges, for that reason alone, cannot be taxed as fees for technical services. The income embedded in these payments are thus not taxable as FTS, and it is not even the case of the revenue that the installation period crossed the PE installation threshold limit. These amounts cannot be taxed as business profits either. There is no other treaty provision under which these amounts can be brought to tax in India under the respective tax treaty. The law is well settled, we may add at the cost of repetition, that under article 90(2) where the Government has entered into a tax treaty with any tax jurisdiction, in relation to the assessee to whom such treaty applies, "the provisions of this (i.e. Income Tax) Act shall apply to the extent they are more beneficial to that assessee". When the amounts are not taxable under the provisions of the respective tax treaties, there cannot be any occasion to deal with the provisions of the Income Tax Act. We, therefore, disapprove the conclusions arrived at by the CIT(A) and direct the Assessing Officer to delete the related disallowance. Ground no. 2 is thus allowed.*

2.5.5. We find that the installation, testing and commissioning services rendered by the assessee cannot be said to enrich the personnel of AAI with such knowledge that they can perform such services in the future of their own. Therefore, such activities in

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relation to installation, testing and commissioning etc cannot 'make available' any technical knowledge, skill etc to AAI and therefore, the consideration received by the assessee for such services is not in the nature of FTS as per Article 12 of the India-Netherlands DTAA. Further income in respect of such services cannot be taxed even as business income, in the absence of a Permanent Establishment (PE) of the assessee in India as per Article 7 of the India-Netherlands DTAA.

2.5.6. We find that the ld AO concluding, the subject mentioned receipt of Rs 28,06,200/- was towards training, is without any basis. We find that the ld AO had absolutely not adduced any reasoning for treating the subject mentioned receipt as received towards training. The ld DR argued that the total contract is towards installation and training and separate amounts were bifurcated towards the same in the contract. That bifurcation itself is to be questioned in as much as the total contract is towards 'installation and training'. He argued that moreover, since the assessee is engaged in rendering of services for air traffic movement , it cannot be said that once the installation, testing and commissioning is done, there is no requirement of training services to be rendered by the assessee. According to ld DR, training is a continuous process and an integral part of installation and commissioning. We find that the contract separately provided for training services and separate consideration was fixed for the same. Hence it would be inappropriate to question the contract in this year after the completion of the contract. The main contract value was examined in the earlier years and income has been received in the past. Infact the assessee had offered close to Euro 200000 as per the contract towards training in the earlier year(s), in addition to amounts received towards installation, commissioning and testing. Hence the bifurcation of the sums towards installation and training as per the contract has been accepted by the revenue in the past and cannot be questioned in the year under consideration. Moreover, we find that there is absolutely no evidence brought on record by the ld AO that the subject mentioned receipt of Rs 28,06,200/- from AAI is towards

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training. The ld DR later argued that in such a case, the year of completion of training need to be looked into and accordingly prayed for setting aside of this issue to the file of ld AO. We feel that this is not required in as much as the ld AO had not adduced any reasoning to construe the subject mentioned receipt of Rs 28,06,200/- from AAI as attributed towards training. Hence the basic premise that it is towards training fails. Accordingly knowing the year of completion of training does not have any relevance in this regard.

2.5.7. In view of the aforesaid findings, we hold that the additional amount received from AAI in the sum of Rs 28,06,200/- towards installation, commissioning and testing charges is not taxable as FTS within the meaning of Article 12(5) of the India – Netherlands DTAA. The same is not received towards training as assumed by the ld AO. Accordingly the addition made by the ld AO in this regard is to be deleted. **Accordingly, the Ground Nos. 2.1 to 2.3 raised by the assessee are allowed.**

3. **Gulf of Kuchch (GOK) Project**

The assessee had entered into a consortium agreement with Telecommunications Consultants India Limited (in short TCIL) and Dalmia & Company Limited , with TCIL acting as the consortium leader. This consortium was awarded a contract for establishment of Vesserl Traffic Service (VTS) system in the Gulf of Kuchch (GOK) by the Director General of Lighthouse and Lightships (DGLL) in 2005 (agreement between DGLL and consortium enclosed in pages 203 to 206 of paper book and consortium agreement enclosed at pages 207 to 231 of paper book) . The responsibilities of each of the members of the consortium are set out in the annexure to the consortium agreement. Supply, installation, testing and commissioning of integrated automatic identification system base stations equipments with associated software is the primary responsibility of the assessee. As per the consortium agreement , the assesse had set up a Project Office (PO) in India for the execution of this project in the year 2005. However, the PO

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never became operational and was not involved in any activity pertaining to this project. During the year under consideration, the assessee received payments for the following offshore supply of equipment / services / training and onshore supply of equipment / services:-

Sl. No.	Amount received for	Amount (USD)	Amount (INR)
	Off-shore work		
1	Off-shore supply of equipment	471,967	20,875,121
2	Off-shore provision of services	400,000	17,692,000
3	Training income received*	61,807	2,733,702
	On-shore work		
4	On-shore provision of services	765,484	35,342,381
5	On-shore supply of equipment	27,842	1,285,465
	TOTAL	**1,727,100**	**77,928, 669**

*Offered to tax in the return of income for assessment year 2011-12 as FTS on gross basis @10%

3.1. During the year under consideration, the assessee had undertaken offshore supply of equipment and offshore provision of services under this project in addition to rendering onshore provision of services and supply of equipment. The ld AO in the draft assessment order had observed that the PO of the assessee is a Fixed Place PE of the assessee in India and that the assessee also had an "Installation PE" in India as per Article 5(3) of the India-Netherlands DTAA. However, the Hon'ble DRP held that since no business activity has been carried out by the defunct PO, the same cannot be treated as Fixed place PE of the assessee. However, the panel upheld the stand of Installation PE of the ld AO. The ld AO accordingly following the directions of the ld

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DRP stated that the assessee constitutes an 'Installation PE' in India under Article 5(3) of the India-Netherlands DTAA and attributed Rs 77,92,867/- being 10% of total receipts of Rs 7,79,28,669/- as profits attributable to the Installation PE. Aggrieved, the assessee is in appeal before us on the following grounds:-

> *3.1. On the facts and in the circumstances of the case and in law, the ld. AO has erred in holding that the appellant has a Fixed Place Permanent Establishment (PE) in India in terms of Article 5(1) and Article 5(2) and without prejudice to this, the appellant has an 'Installation PE' in terms of Article 5(3) of the India-Netherlands DTAA, in respect of the GOK project.*
>
> *3.2 On the facts and in the circumstances of the case and in law, the ld. AO has failed to appreciate that Project Officer(PO) of the appellant is not operational, has no employees and has not carried out any business activity; hence, it cannot constitute a Fixed Place PE of the appellant in India. Further, the ld. AO has failed to appreciate that installation activity carried out in A.Y. 2011-12 does not exceed 6 months and therefore it cannot result in the constitution of and Installation PE of the appellant in India.*
>
> *3.3. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the ld. AO has erred in holding that the GOK project is a 'composite' contract and consequently has erred in estimating the profits in respect of all activities (offshore supply of equipment, services & training and onshore supply of equipment & services) as attributable to the alleged PE at INR 77,92,867, being 10% of the gross consideration amount, for determining the income chargeable to tax in India.*
>
> *3.4 Without prejudice to the above, on the facts and in the circumstances of the case and in law, even assuming that an Installation PE of the appellant is constituted, no part of income in respect of offshore supply of equipment, services and training can be attributed to the alleged PE in India for taxing as business profits under Article 7 of the India-Netherlands DTAA.*

3.2. We have heard the rival submissions. The ld AR before us fairly stated that the assessee be treated as an 'Installation PE' but pleaded for treating only the onshore provision of services and onshore supply of equipments at 10% on gross basis as profits

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attributable to the Installation PE in India as against the action of the ld AO in taking the total receipts (i.e both offshore and onshore activities). This is because of the lack of details with regard to the number of days of stay in India for executing the installation work by the assessee. The same is reckoned as a statement from the Bar by the ld AR. Therefore, we shall address the Ground No. 3.4. raised by the assessee before us and dismiss the Grounds 3.1. to 3.3. raised by the assessee as not pressed. Before going into this question, we feel that it would be relevant to address the contents of Article 5(3) of the India-Netherlands DTAA which is reproduced as under:-

'Permanent Establishment' to include –

> *"A Building site or construction, installation or assembly project constitutes a permanent establishment only where such site or project continues for a period of more than six months."*

3.2.1. We find that the ld AO in para 35 of his final assessment order had held as under:-

> *35. A perusal of the 'Purchase Orders' submitted by the assessee along with Annex-I to the copy of the Consortium Agreement dt 02.09.2003 reveals the fact that the contract for the establishment of Vessel Traffic Services in the Gulf of Kuchch involves the* ***installation****, testing and commissioning of* ***various complex equipments*** *such as the 'VTS Master Control Center Equipments' among others, wherein the assessee has been assigned the* ***'Primary Responsibility'****. Therefore, it is concluded that the contract for implementation of Vessel Traffic Services is in the nature of an* ***'installation project'****. The installation project, having been* ***in existence / operation for period of more than six months****, constitutes a Permanent Establishment (PE) as per the definition of* ***Article 5(3)*** *of the Indo-Netherlands DTAA. Accordingly, the provision of Article 7 of the DTAA on Business Profits will be applicable in the instant case.*

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3.2.2. We find that during the year under consideration, the equipment was supplied on high sea sale basis and the property in the equipment has passed outside India and for which payment was received outside India. Further, the off shore services consisted of labour services of sizing of equipment, tuning and testing of the equipment etc which were performed on the equipment in Netherlands. Therefore, the alleged Installation PE could not have been involved in such offshore supply and services since these were carried on by the assessee directly from Netherlands. Hence the profits from such offshore supply of equipment and services cannot be attributed to the Installation PE of the assessee in India. In this regard, we would like to place reliance on the decision of the *Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Limited vs DIT reported in 288 ITR 408 (SC)* wherein it was clearly stated that in case the PE of a foreign company is not involved in any transaction carried out in India or outside India, no part of income earned from such transactions can be attributed to the PE in India. The Hon'ble Supreme Court held there has to be some activity through PE for attracting the taxing statute and , if income arises without any activity of PE, even under DTAA, taxation liability in respect of overseas services would not arise in India. In the case before the Hon'ble Supreme Court, the foreign enterprise was to develop, design , engineer and procure equipment, materials and supplies to erect and construct storage tanks in India. The Hon'ble Supreme Court held that the off-shore supply and off-shore services under the contract were not taxable in India since all activities in connection with offshore activites were carried out outside India, and had nothing to do with PE.

3.2.3. We also find that the *Hon'ble Authority of Advance Rulings , New Delhi had recently in the case of Michelin Tamil Nadu Tyres (P) Ltd., In re reported in (2018) 89 taxmann.com 217 (AAR-New Delhi) dated 19.12.2017* held that no income from the offshore supply of equipment would be taxable in India since the transfer of property in the goods as well as the payment, were carried on outside the Indian soil. In this case,

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the AAR placed reliance on the judgement of the Hon'ble Supreme Court in the case of Ishakiwajima Harima supra.

3.2.4. We find that the Co-ordinate Bench of *Mumbai Tribunal in the case of Atomstroy Export vs DDIT reported in (2017) 80 taxmann.com 178 (Mumbai ITAT)* held as under:-

> ***15.*** *Therefore, after analyzing the various case laws, statutory provisions, DTAA provisions and contractual terms and respectfully following judgment of Hon'ble Supreme Court in Ishikawajma-Harima Heavy Industries Ltd., (supra) we are inclined to hold that Offshore Supply contracts were 'carried and concluded' outside India and hence no income there-from deemed to accrue or arise in India as per Section 9(1) and DTAA provisions and accordingly, not chargeable to tax. The receipts thereof do not form part of receipts for the purpose of computational provisions of Section 44BBB. Explanation 4 could not overcome the limitation imposed by Explanation 1(a) to Section 9(1)(i) and hence, the impugned income do not form part of business receipts for computation of income u/s 44BBB of the Act. .*

3.2.5. Respectfully following the aforesaid judicial precedents and applying the same to the facts of the instant case, we hold that the consideration received in respect of offshore supply of equipments and services and profits attribution @ 10% on the same should not be added in the hands of the assessee construing it as 'Installation PE' in India.

3.2.6. However, we find that the assessee had received consideration in respect of onshore services to the tune of Rs 3,53,42,381/- pursuant to 4 invoices raised on 13.8.2010. The assessee had also received a sum of Rs 12,85,465/- (Euro 27842) towards onshore supply of equipment during the year under consideration. We hold that these two sums should be taken into account and profits attributable thereon at 10% should be added in the hands of the assessee treating the same as 'Installation PE'. In this regard, we also find that India-Netherlands DTAA contains PROTOCOL clause in

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its treaty vis a vis various Articles in the Treaty and the relevant Article 7 of the Protocol is reproduced hereunder :-

NETHERLANDS

PROTOCOL

At the moment of signing the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, this day concluded between the Kingdom of the Netherlands and the Republic of India, the undersigned have agreed that the following provisions shall form an integral part of the Convention.

I. Ad Article 7

1. In respect of paragraphs 1 and 2 of Article 7, where an enterprise of one of the States sells goods or merchandise or carries on business in the other State through a permanent establishment situated therein, the profits of that permanent establishment shall not be determined on the basis of the total amount received by the enterprise, but shall be determined only on the basis of the remuneration which is attributable to the actual activity of the permanent establishment for such sales or business. Especially, in the case of contracts for the survey, supply, installation or construction of industrial, commercial or scientific equipment or premises, or of public works, when the enterprise has a permanent establishment, the profits of such permanent establishment shall not be determined on the basis of the total amount of the contract, but shall be determined only on the basis of that part of the contract which is effectively carried out by the permanent establishment in the State where the permanent establishment is situated. The profits related to that part of the contract which is carried out by the head office of the enterprise shall be taxable only in the State of which the enterprise is a resident.

(underlining provided by us)

2. ....

3...........

We hold that even as per the Protocol clause in the Indo-Netherlands Treaty, only the profits attributable to the activities carried out in India shall be taxable and accordingly only the onshore services rendered by the assessee would have to be considered by the ld AO for taxing the onshore receipts at 10% . **Accordingly, the Grounds 3.1 to 3.3 raised by the assessee are dismissed as not pressed and Ground No. 3.4. is allowed.**

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4. **ONGC AMC Project**

The brief facts of this project are that the assessee was awarded a contract by ONGC for supply, installation, testing and commissioning of Vessel and Air Traffic Management System (VATMS) along with the provision of maintenance services. This contract envisaged a warranty period of 1 year after handing over of the project site and provision of Annual Maintenance Services (AMC services) for 6 years post such warranty period. The assessee started providing AMC services in relation to the VATMS system for a total period of 6 years, commencing from 1st October 2008, just after the completion of main contract for supply, installation , testing and commissioning of VATMS system. Page 316 of the paper book contains the AMC schedule. Accordingly, the assessee provided only AMC services for the VATMS system installed by it in the earlier years. The activity was sub-contracted to a local independent contractor viz Elcome Marine Services Private Limited (in short Elcome) and included regular maintenance activities such as visiting the sites for cleaning, checks, local fault repair etc. In general, there were all activities of a service nature. The assessee submitted that it did not perform any installation activity during the year under consideration and only maintenance services were undertaken through a sub-contractor in India. The copy of the invoices are enclosed in pages 281 to 284 of the paper book.

4.1. The ld AO brought to tax the AMC fee received as business profits attributable to an Installation PE in terms of Article 5(3) of the India-Netherlands DTAA. According to the revenue, the ONGC project was in existence for a period of more than six months and therefore constituted an 'Installation PE' of the assessee in India. The revenue further relied on the fact that a subcontractor had carried out AMC work in India on behalf of the assessee and therefore the assessee had a virtual presence in India for execution of the project. Aggrieved, the assessee is in appeal before us on the following grounds:-

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4.1. On the facts and in the circumstances of the case and in law, the ld. AO has erred in holding that the appellant has an 'Installation PE' in India as per Article 5(3) of the India-Netherlands DTAA in respect of the ONGC AMC Project. The ld. AO has further erred in stating that the independent third party sub-contractor providing the AMC services to ONGC 'could virtually be considered the assessee's presence in India'.

4.2 On the facts and in the circumstances of the case and in law, the ld. AO has failed to appreciate that the AMC contract is at a stage which is later to installation, commissioning etc. and that no installation activity was carried out in A.Y. 2011-12 and hence, it cannot lead to the constitution of an 'Installation PE' or any other form of PE in India.

4.3 Without prejudice to the above, on the facts and in the circumstances of the case and in law, the ld. AO has grossly erred in making ad-hoc attribution of profits to the alleged Installation PE at INR 6,259,009, being 50% of the gross consideration amount, which is wrong and very excessive.

4.4 Without prejudice to the above, on the facts and in the circumstances of the case and in law, the ld. AO has failed to appreciate that the AMC services are not covered by the scope of FTS, as defined under Article 12(5) of the India-Netherlands DTAA.

4.2. The ld DR argued that the assessee by employing a subcontractor to execute the AMC service contract, had made its presence indirectly in India . He argued that AMC is not a separate contract and it had only flowed from the earlier contract of doing installation and commissioning. As per Article 5 of the Treaty, PE includes 'place of business'. Place of business should have a location. All items included in the PE definition represent 'place of business'. Assessee has place in India through the sub-contractor viz Elcome Marine. Even the sub-contractor would have to visit the machinery location to do the maintenance job. As per the Clause 5(5) of the contract, it is the assessee's responsibility to deliver the contract. Hence subcontractor cannot perform the contract without the control of the assessee.

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4.3. The ld AR argued that this issue is decided in favour of the assessee by this tribunal in its own case for the Asst Year 2010-11 reported in *(2017) 78 taxmann.com 101 dated 8.2.2017* . He argued that the AMC services provided post completion of installation activities at the site of customer, cannot lead to carrying out installation activities for the purpose of constitution of an Installation PE in india. He argued that the assessee had subcontracted the whole AMC work on principal-to-principal basis and this does not create any virtual presence of the assessee in India. He argued that as per Article 5(3) of the India-Netherlands DTAA, the term 'Permanent Establishment' includes a building site or construction, installation or assembly project constitutes a permanent establishment only where such site or project continues for a period of more than six months. It was submitted that the ld AO has concluded that since the ONGC project *i.e.* the project for supply, installation, testing and commissioning of VATMS system (along with the provision of AMC services) has been continuing since the year 2006, the specified threshold of six months as mentioned in Article 5(3) of the India Netherlands DTAA has clearly been exceeded. It was his submission that the ld AO has not appreciated the facts of the case that the installation activity in the project in question was completed in October 2007 and no installation activity has been carried out by the assessee (or any contractor) in India during the subject year. The assessee has only provided maintenance services during the subject year on equipment which was handed over to ONGC in 2008. The ONGC in its letter dated 1 October 2008 has specifically confirmed that the system/ equipment was installed/ completed on 1st October 2007 and had therefore requested the assessee for commencing the maintenance services thereafter. It was pointed out that these maintenance services included visiting the sites for cleaning, checks, local fault repair etc., by the local contractor and limited remote assistance by the assessee from the Netherlands. Accordingly, such maintenance services cannot be considered as 'Installation activity' leading to creation of an 'Installation PE' of the assessee in India under Article 5(3) of the India-Netherlands DTAA. It was therefore submitted that in view of the above stated

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facts, since the essential condition of carrying out' Installation activity' is not fulfilled in the case of the assessee, it cannot be held that the assessee has an 'Installation PE' in India during the subject year. The ld AR placed reliance on the following decisions in support of his contentions, wherein it was held that in the absence of installation activity, the assessee could not be said to have an ‘Installation PE ‘ in India:-

a) Decision of Hon’ble Andhra Pradesh High Court in the case of CIT vs Vishakapatnam Port Trust reported in (1983) 144 ITR 146 (AP)

b) Decision of Mumbai Tribunal in the case of Uhde GmbH vs DCIT reported in (1997) 57 TTJ 447

c) Decision of Delhi Tribunal in the case of DCIT vs Alcatel reported in (1993) 47 ITD 275

4.4. It was further submitted that Maintenance Services performed post completion of installation cannot lead to 'Installation PE'. It was reiterated that formal acceptance of the VATMS system for the ONGC Project was done in October 2007 and the one year warranty period of the VATMS system has also expired. During the subject year, the assessee has only provided maintenance services after expiry of the warranty period of the VATMS system. Hence, such AMC services which are provided much after the delivery/ acceptance of the VATMS system by the customer cannot be considered as part of 'installation activity' leading to creation of an Installation PE of the assessee in India under Article 5(3) of the India-Netherlands DTAA. In this regard, he drew our attention to the OECD model commentary and available judicial guidance, an 'Installation PE' ceases to exist when the work at a site of a project/ site/ equipment is completed or the same is formally accepted and handed over to the customer. Therefore, once the project site/ equipment is accepted and handedover to the customer, any services (including maintenance services etc.) provided post such acceptance cannot be regarded as part of 'Installation activity' leading to creation of an Installation PE. The ld AR also placed reliance on the judgment of the Hon'ble AAR in the case of *Airports*

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Authority of India, *In re [2008] 299 ITR 102 (AAR - New Delhi)*, wherein the AAR observed that an earlier 'Installation PE' could not have any bearing on the contract for repairs and maintenance work to be carried out post completion of such installation. It was pointed out that the above position has also been confirmed by International tax commentator Klaus Vogel in his commentary "Klaus Vogel on Double Taxation Conventions" wherein he has opined that repairs and maintenance services performed after the formal acceptance of the installation work by the customer shall not be included in the minimum threshold for constitution of an 'Installation PE'. The relevant extract of the commentary is given below:

> "Repair and Maintenance work performed after such formal acceptance or taking delivery is not sufficiently connected with the original-building or installation works and is therefore not counted when determining the minimum period. Whether if constitutes a permanent establishment is a matter to be decided separately from the works accomplished prior to acceptance or taking delivery "

4.5. The ld AR therefore contended that maintenance activities cannot be considered a part of the "Installation activity" of the assessee in India. It was also submitted that there was no ‘Fixed Place PE’ of the assessee in India through which it carried on business and therefore the revenue cannot take recourse to Article 5(1) of the India-Netherlands DTAA. It was therefore contended that the assessee does not have any PE in India for the subject year.

4.6. On the question of the role of subcontractor in India and the allegation of the revenue that there was virtual presence of the assessee in India through the subcontractor, it was submitted by the ld AR that these allegations cannot be the basis to hold that the assessee had an 'Installation PE' in India since no installation activity was carried out by the assessee in India during the subject year. It was submitted that even assuming that the entire maintenance activity was performed by Elcome (an

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independent local contractor), it cannot be said that the business of assessee was carried out in India, so as to constitute its PE in India. In this regard, the argument of the ld AR was that the business of the foreign enterprise was not carried out in India and as per Article 5(1) of the India-Netherlands DTAA, the term 'Permanent Establishment' means:

> "a fixed place of business through which the business of the enterprise is wholly or partly carried on."

It was argued that on a plain reading of the opening paragraph of Article 5, the 'enterprise' referred to in Article 5(1) of the India- Netherlands DTAA has to be the foreign enterprise and the PE should be in relation to such foreign enterprise. Therefore, it would not be correct to hold that the fixed place of business of a contractor (an Indian enterprise) *i.e.* his own premises or even the project site, should be considered as the PE of the foreign enterprise in India. It was reiterated that all the onshore work performed as part of this contract was subcontracted to Elcome, a local independent contractor. The assessee provided only limited technical support to the contractor remotely from the Netherlands. Further, Elcome did not setup any office etc. at the project site. The ld AR placed reliance on the decision of the *Hon'ble Delhi High Court in the case of National Petroleum Construction Co.* v. *DIT (International Taxation) reported in (2016) 383 ITR 648 (Del)* wherein it has been held as follows:

> "*The activities at site carried on by any contractor through a subcontractor would not count towards the duration of the contractor's PE, as in that case, the construction site or project cannot be construed as a fixed place of business of the contractor and would fail one of the essential tests of paragraph 1 of Article 5 of the DTAA."*

4.7. It was argued that Articles 5(1) and 5(3) of the India-Netherlands DTAA are to be read harmoniously. It was submitted that the conditions specified under Installation PE [Article 5(3)] cannot be viewed as a water-tight compartment without taking colour from other clauses of PE, such as Fixed place PE [Article 5(1)]. The two clauses, providing for Installation PE and Fixed Place PE, should be read harmoniously, as part

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of the same concept. In relation to a building site and construction / installation project, the foreign enterprise should conduct or carry on business through such construction / installation site in India to constitute a PE in India. In support of the above submission, the following judicial pronouncements were brought to our notice wherein, it was held that there has to be a harmonious construction of Article 5(1) and Article 5(2)/ Article 5(3) of the DTAAs:

National Petroleum Construction Co. case (*supra*)

Pintsch Bamag, In re reported in (2009) 318 ITR 190 (AAR-New Delhi)

Cal Drive Marine Construction (Mauritius) Ltd. v. *DIT (International Taxation) reported in (2009) 315 ITR 334 (AAR-New Delhi)*

4.8. It was submitted that since the assessee was not involved in any activity at the project site in India, it does not satisfy the 'business test' as prescribed in Article 5(1) of the India Netherlands DTAA and therefore it cannot be said to have an Installation PE in India, even if it is assumed that the installation activity has been carried out in India beyond the threshold prescribed in the India-Netherlands DTAA. Time spent by subcontractor not to be included when "entire work" carried out by such subcontractor. Reference in this regard was made to the OECD commentary on 'Taxation of Income and Capital' of Article 5(3) at Para 19 states the following with regard to subcontracting in case of installation projects:

> *"If an enterprise (general contractor) which has undertaken the performance of a comprehensive project subcontracts parts of such a project to other enterprises (subcontractors), the period spent by a subcontractor working on the building site must be considered as being time spent by the general contractor on the building project. "*

It was argued that the commentary clearly states that only when a general contractor has undertaken a comprehensive project and he subcontracts parts of the project to other subcontractors, the period of the subcontractors must be considered for determining the

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PE of the general contractor. It was reiterated that in the present case, the assessee has subcontracted the entire onshore maintenance work for this project to Elcome and was not involved in any activity itself in India. Therefore, the time spent by the Indian contractor cannot be considered as time spent by the assessee in India to create its PE in India.

4.9. We have heard the rival submissions and perused the materials available on record. We find that similar arguments were advanced by both ld AR and ld DR in the earlier year in assessee's own case for the Asst Year 2010-11. This tribunal for the Asst Year 2010-11 with regard to the impugned issue had held as under:-

> *47. We have given a very careful consideration to the rival submissions. Our conclusions in para-36 with regard to existence of an installation PE in respect of GOK Project will equally apply to this project also. Admittedly, no installation activity was carried out during the previous year and therefore the question of an installation PE of the Assessee existing during the previous year does not arise for consideration at all. We are in complete agreement with the contentions put forth by the learned counsel for the Assessee on this aspect. Accordingly, we hold that since the VATMS equipment was already accepted and handedover to the customer in the year 2007 and no installation activity was carried out in India during the subject year, it cannot be held that the Assessee had an 'Installation PE' in India in the subject year. As far as the conclusion of the revenue that the independent contractor of the Assessee in India created a virtual presence of the Assessee in India so as to create an installation PE, given that the entire onshore maintenance contract has been performed by an independent local contractor in India, it cannot be said that the business of the Assessee has been carried out by the presence of the local contractor in India, so as to create its PE in India. The examination of whether a PE exists needs to be determined based on the activities of the foreign enterprise in India. Since no activities have been carried out by the Assessee in India with respect of such maintenance activity, it is unreasonable to conclude that the business of the Assessee was carried out in India through such subcontractor, to constitute its PE in India. We therefore hold that receipts in the form of AMC fees from ONGC on VATMS cannot be brought to tax in India as business income. In view of the above conclusion, the question of what quantum of income has to be attributed to the PE in India that is agitated in Gr.No.D-3 & 4 do not require any consideration.*

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4.10. In view of the aforesaid arguments and findings in the facts and circumstances of the case and respectfully following the aforesaid judicial precedent , we hold that AMC services provided post completion of installation activities at the site of customer, cannot lead to carrying out installation activities for the purpose of constitution of an 'Installation PE' in india. Further it is held that presence of an Indian contractor to which the assessee has sub-contracted the whole AMC work on principal-to-principal basis, does not create any virtual presence of the assessee in India. In view of the above decision, the Ground No. 4..3. and 4.4. raised by the assessee requires no adjudication. **Accordingly, the Grounds 4.1 to 4.4. raised by the assessee are allowed**.

5. The next issue to be decided in this appeal is with regard to charging of interest u/s 234B and 234D of the Act. The interconnected issue in this regard is picking up the right figure of refund determined for the assessee and consequential interest u/s 234D of the Act is to be worked out accordingly.

5.1. The brief facts of this issue is that the assessee pleaded that interest u/s 234B and 234D of the Act are not applicable to a foreign entity like an assessee where entire receipts were covered under the provisions of section 195 of the Act. The ld AR argued that as per section 234B of the Act, an assessee is liable to pay interest only in a case where advance tax is payable by the assessee in the first instance. U/s 208 of the Act, advance tax is payable only if the tax on the current income as computed u/s 209(1)(a) of the Act, as reduced by the amount of income tax which would be deductible at source, were to exceed Rs 10,000/-. During the year under consideration, the ld DRP relied upon the decision of the *Hon'ble Delhi High Court in the case of DIT vs Alcatel Lucent USA Inc. reported in (2014) 45 taxmann.com 422 dated 7.11.2013* wherein it was held that where non-resident assessee accepted its liability to be taxed in India at first appellate stage, all consequences under the Act including liability to pay interest

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under section 234 would follow; assessee could not be permitted to shift responsibility to Indian payers for not deducting tax at source from remittances, after leading them to believe that no tax was deductible. Accordingly, the ld AO pursuant to the directions of the ld DRP charged interest u/s 234B of the Act. The ld AO also charged interest u/s 234D of the Act by considering that the refund already granted to the assessee at Rs 37,44,400/-. Aggrieved, the assessee is in appeal before us on the following grounds:-

> *5.On the facts and in the circumstances of the case and in law, the ld. AO has erred in levying interest under Section 234B and Section 234D of the Act since the additions made in the impugned assessment order are bad in law and are liable to be deleted.*
>
> *6. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the ld. AO has erred in levying interest under Section 234B of the Act even though the entire income of the appellant was subject to tax deduction at source under section 195 of the Act.*
>
> *7. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the ld. AO has also erred in considering the amount of refund granted to the appellant to be INR 37,44,400, when in fact the actual refund granted to the appellant was INR 17,38,138, thereby levying an excess tax demand of INR 20,06,262.Consequent to the levy of such excess tax demand, the ld. AO has also erred in levying excess interest under section 234D of the Act.*

5.2. We have heard the rival submissions. We find that the income of the foreign enterprise is to be governed by the provisions of section 195 of the Act wherein any payment made to foreign enterprise would be subjected to full deduction of tax at source. The ld DRP had relied on the decision of Hon'ble Delhi High Court in the case of Alcatel Lucent USA supra. We find that this decision has been distinguished by the *Hon'ble Delhi High Court in the subsequent decision rendered in the case of DIT vs GE Packaged Power Inc. reported in (2015) 56 taxmann.com 190 (Del HC) dated 12.1.2015*. In this subsequent decision, it was held that interest u/s 234B of the Act

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cannot be levied for alleged failure to pay advance tax , where entire receipts are covered u/s 195 of the Act. We also find that the Hon'ble Delhi High Court in yet another recent decision in the case of CIT, International Taxation vs ZTE Corporation reported in (2017) 392 ITR 80 (Del HC) on the impugned issue had held as under:-

> ***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 Packaged Power Inc. (supra). This question of law too is answered against the revenue, and in favour of the assessee.*

5.3. We also find that the ld DRP for the year under appeal before us had held this issue in favour of the revenue. But the ld DRP for the Asst Year 2012-13, had held this issue in favour of the assessee by following the decision of the Hon'ble Delhi High Court in the case of GE Packaged Power Inc supra. Hence respectfully following the subsequent decisions of Hon'ble Delhi High Court which had distinguished its earlier decision in Alcatel Lucent USA supra, we hold that interest u/s 234B of the Act is not chargeable on the assessee in the instant case.

5.4. With regard to charging of interest u/s 234D of the Act, the ld AR stated that the ld AO erred in considering the refund figure of Rs 37,44,400/- (as refund granted earlier to the assessee) instead of considering the correct refund figure which was actually granted to the assessee at Rs 17,38,138/- and consequently erred in charging excess interest u/s 234D of the Act. We find that this factual aspect requires verification by the ld AO. We hold that the charging of interest u/s 234D of the Act is consequential in nature and we direct the ld AO to kindly verify the actual refund figure granted to the assessee earlier and take the same while charging interest u/s 234D of the Act in the proceedings giving effect to this order of the tribunal.

5.5. Accordingly, the Ground raised by the assessee in respect of interest u/s 234B of the Act is allowed . The Ground raised by the assessee with regard to charging of

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interest u/s 234D of the Act and adoption of correct figure of refund by the ld AO, the same is remanded back to the file of the ld AO for factual verification and recomputation as per the aforesaid directions in para 5.4. above.

6. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the Court on 04.04.2018

Sd/- [A.T. Varkey] Judicial Member	Sd/- [M.Balaganesh] Accountant Member

Dated : 04.04.2018

SB, Sr. PS

Copy of the order forwarded to:
1. HITT Holland Institute of Traffic Technology B.V. (now known as "Saab Technologies B.V.), Laan van Malkenschoten 40, 7333 NET PROFIT Apeldoorn, The Netherlands.
2. DCIT, International Taxation, Circle-1(1), Kolkata, Aayakar Bhawan Poorva, 110, Shantipally, 5th Floor, Kolkata-700107.
3. C.I.T(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches