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

BEFORE SH. VIKAS AWASTHY, JUDICIAL MEMBER
AND
SH. NAVEEN CHANDRA, ACCOUNTANT MEMBER

Sl. No	ITA/CO No(s)	Asst. Year(s)	Appeal(s) by Appellant vs. Respondent	
			Appellant	**Respondent**
1.	ITA No.1828/Del/2018	2013-14	Toyota Tsusho Corporation C/O. Deloitte Haskings & Sells LLP, CAs, 7th Floor, Building 10, Tower B, DLF Cyber Ceity Complex, DLF City Phase-II, Gurgaon Haryana – 122 002 PAN : AADCT 0928 L	DCIT(Int. Tax.) Circle – 3(1)(1) New Delhi
2.	ITA No.1911/Del/2018	2013-14	DCIT(Int. Tax.)	Toyota Tsusho Corporation
3.	ITA No.1513/Del/2020	2015-16	Toyota Tsusho Corporation	DCIT(Int. Tax.)
4.	ITA No.1908/Del/2020	2015-16	ACIT Circle – 3(1)(1) International Taxation New Delhi	Toyota Tsusho Corporation
5.	ITA No.1508/Del/2020	2016-17	DCIT(Int. Tax.)	Toyota Tsusho Corporation
6.	ITA No.1514/Del/2020	2016-17	Toyota Tsusho Corporation	DCIT(Int. Tax.)

Assessee by	Shri Vishal Kalra, Adv. Ms. Sumisha Murgai and Ms. Kashish Gupta, CAs
Revenue by	Dr. Shalini Verma, CIT-D.R. and Shri Surender Jatav, Sr. D.R.

Date of hearing:	09.07.2026
Date of Pronouncement:	21.09.2026

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER :

The present set of cross-appeals comprises three appeals preferred by the assessee and three cross-appeals filed by the Revenue, challenging the respective orders passed by the Commissioner of Income Tax (Appeals)-43, New Delhi, under section 250 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). These proceedings span across three distinct Assessment Years (AY), adjudicated by the Assessing Officer, DCIT, Circle–3(1)(1) (International Taxation), New Delhi (hereinafter referred to as "the AO"), as detailed below:

i. Assessment Year 2013-14: Involves the CIT(A) order dated 14.12.2017, which emanates from the assessment order dated 27.01.2017 passed by the AO under section 143(3) read with section 144C(13) of the Act.
ii. Assessment Year 2015-16: Involves the CIT(A) order dated 18.02.2020, arising from the assessment order dated 05.02.2019 passed by the AO under section 143(3) read with section 144C(13) of the Act.
iii. Assessment Year 2016-17: Involves the CIT(A) order dated 18.02.2020, arising from the assessment order dated

24.01.2019 passed by the AO under section 143(3) read with section 144C(13) of the Act.

2. Since the above captioned six appeals were heard together and the facts in issues are identical, all the six appeals are being disposed of by this common order for the sake of convenience and brevity. We first take up the AY 2013-14, as the lead case.

3. Assessee has raised following grounds of appeal in **ITA No.1828/Del/2018 for A.Y. 2013-14** :

> *1. That on the facts and in the circumstances of the case and in law, the disallowance and/or denial of claims and/or relief, imposition of tax and interest with reference thereto, upheld by the Ld. CIT(A) has been grossly unjustified, erroneous and unsustainable.*
>
> *2. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has failed in comprehending the facts of the Appellant's case and erroneously held the following:*
>
> *2.1 That the Ld. CIT(A) has erred in upholding that the Appellant has a Supervisory PE in India in terms of Article 5(4) of India-Japan Double Taxation Avoidance Agreement ("DTAA" or "Tax Treaty") in respect of expatriates seconded to Toyata Lakozy Auto Pvt. Ltd.*
>
> *2.2 That the Ld. CIT(A) has erred in misinterpreting the terms of the agreement for assignment of personnel entered into between the Appellant and Toyata Lakozy Auto Pvt. Ltd. (hereinafter referred as secondment agreement) and holding that the Appellant has definite and designated role in defining the duties to be undertaken by the seconded employees.*
>
> *2.3 That the Ld. CIT(A) has erred on facts and in law in not appreciating from the terms of secondment agreement that the seconded employees were managing and overseeing the business operations of Toyota Lakozy Auto Pvt. Ltd.*
>
> *2.4 Without prejudice to the above, the Ld. CIT(A) has erred in attributing 75 percent of the revenue of INR 12,08,155 received from Toyota Lakozy Auto Pvt. Ltd. to the alleged PE in India.*
>
> *2.5 The Ld. CIT(A) grossly erred in not appreciating that the Appellant did not receive any supervisory service fees from Toyata Lakozy Auto Pvt. Ltd. during the year under consideration which could be attributed to alleged Supervisory PE.*

3. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that the supply of product and installation thereof are distinct and separate activities.

3.1 That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that offshore supplies being concluded outside India are not taxable in India.

4. That the Ld. CIT(A) has erred in facts of the case and in law in not appreciating the fact that reimbursement of expatriate salary of INR 2,08,41,050 was wrongly offered to tax in the return of income by the Appellant.

4.1 The Ld. CIT(A) has erred in facts of the case and in law in not excluding the amount of INR 2,08,41,050 being pure reimbursements from the taxable income of the Appellant and not granting the refund of tax wrongly deducted on the said reimbursement of INR 2,08,41,050.

4.2 The Ld. CIT(A) has erred in law in concluding that once the amount has been offered for tax and assessed accordingly, the assessee cannot revert during the course of assessment to state that such sum is not taxable.

The Appellant craves leave to add, amend, alter, delete, rescind, forego or withdraw any of the above grounds of appeal either before or during the course of the proceedings before the Hon'ble Tribunal in the interest of the justice. The aforesaid grounds are mutually exclusive and without prejudice to each other.

4. Revenue has raised following grounds of appeal in **ITA No.1911/Del/2018 for A.Y. 2013-14** :

1. "Whether on the facts and in the circumstances of the case, CIT(A) has erred in holding that the assessee company was having its PE in India only in the case of M/s Toyota Lakozi Auto Private Ltd, ignoring the facts that the expatriates of the assessee company were available in India in respect of all other contracts for supervision and access of all expatriates for all the contracts cannot be ruled out?

2. Whether on the facts and in the circumstances of the case, CIT(A) has erred in holding that the assessee company was having its PE in India only in the case of M/s Toyata Lakozi Auto Private Ltd., ignoring the fact that the employees of the Assessee were available in India for more than 183 days for same nature of work as that being carried out in the case of M/s Toyota Lakozi Auto Private Ltd?

3. Whether on the facts and in the circumstances of the case, CIT(A) has erred in holding that the assessee company was having its PE in India only in the case of M/s Toyota Lakozi auto Private Ltd., ignoring the facts that all the contracts of the assessee company *were composite and integrated contracts which include offshore supply, erection, commissioning and final trial run of the equipments and therefore a portion of the profit earned on offshore supply needs to be attributed to the PE of the assessee?*

4. *Whether on the facts and in the circumstances of the case, CIT(A) has erred in holding that the receipts of the assessee are taxable as FTS, ignoring the facts that the assessee company constitutes its PE in India and the said receipts are connection with the PE of the assessee and are taxable as per provisions of Section 44DA of IT Act, 1961 read with Article 7 of DTAA between India and Japan.*
5. *Whether on the facts and in the circumstances of the case, CIT(A) has erred in holding that the income in the form of loan agreement fee is not taxable in India ignoring the fact that the assessee company was having its PE in India and the said revenue was accrued and arisen in India.*
6. *Whether the CIT(A) erred in not commenting on treatment to be given to undisclosed receipt of the assessee from M/s Denso India Ltd*
7. *The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal."*

4.1 The assessee has filed an application for admission of additional evidence under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963. The additional evidence is with regard to the fact that the expatriate i.e., Yuji Kuroki and Kensuke Yamada were seconded to Toyota Lakozy Auto Pvt. Ltd and working under the control and supervision of Toyota Lakozy Auto Pvt. Ltd.

5. The brief facts of the case is that the Assessee is a company incorporated and fiscally domiciled in Japan and is eligible to claim the benefits of the India-Japan Double Taxation Avoidance Agreements ("DTAA"). During the relevant year, the Assessee was engaged in trading activities and earned income from supervision services, software usage fees, technical fees, commission income and offshore

supply of goods to Indian entities. The Assessee filed its return of income declaring income of Rs 33,76,12,807/- taxable, on gross basis, as fees for technical services ("FTS") under Article 12 of the India-Japan DTAA as follows:

S No	Nature of Service	Amount	Tax Traetment
1	Onshore services	31,76,87,043	Offered as FTS
2	Receipts from secondment agreement	2,08,41,050	Offered as FTS
3	Loan Agreement Fees	88,310	Not offered for tax
4	Offshore supply	286,12,89,930	Not offered for tax
5	Reimbursement of expense received	1,02,88,238	Not offered for tax

5.1 During assessment proceedings, the Assessing Officer ("AO") held that assessee constituted a Supervisory Permanent Establishment ("PE") in India under Article 5(4) of the DTAA read with the provisions of section 9(1) of the Act and consequently, attributed various receipts, including FTS income, offshore supply profits and loan guarantee fees, to the PE in view of section 44DA of the Act read with Article 7 of the DTAA as follows:

i) The AO held that 75% of the revenue declared as FTS (Rs. 33,85,28,093) is attributed to the PE in India which comes to Rs. 25,38,96,070/- and treated the same as FTS connected with the PE of the assessee in India and is taxed accordingly.

ii) The AO further computed the profit on offshore supply of Rs. 286,12,89,930/-, under Rule 10 of IT Rules, 1962 @ 10% which comes to Rs. 28,61,28,993/-. The AO then attributed the 35% of the said profit to the PE of the assessee company in India. The said profit of Rs. 10,01,45,148/- is treated as the income of the PE of the assessee in India, taxable @ 40% (plus applicable surcharge and education cess).

6. The Commissioner of Income Tax (Appeals) ["CIT(A)"] granted substantial relief by holding that no Supervisory PE existed in respect of most Indian customers and deleted additions relating to offshore supply profits and loan guarantee fees. However, the CIT(A) sustained the existence of Supervisory PE in relation to Toyota Lakozy Auto Pvt. Ltd. ("TLAL") and attributed a portion of receipts thereto.

7. The Assessee is in appeal against the findings adverse to it, whereas the Revenue has challenged the relief granted by the CIT(A).

8. Grounds of appeal no. 1 in Assessee's appeal for AY 2013-14 (similar ground i.e. ground 1 raised in Assessee's appeal for AYs 2015-16 & 2016-17) are General.

Grounds of appeal no. 5 of Revenue's appeal for AY 2015-16 are General.

Grounds of appeal nos. 2 to 2.5 in Assessee's appeal and ground of appeal nos. 1 and 2 in Revenue's appeal for AY 2013-14 (similar grounds i.e. 2 to 2.5 raised in Assessee's appeal & 1 & 2 of Revenue's appeal raised in AYs 2015-16 & 2016-17)-Grounds pertaining to the supervisory PE.

9. With respect to Grounds of appeal nos. 2 to 2.5 in Assessee's appeal and ground of appeal nos. 1 and 2 in Revenue's appeal for AY 2013-14, regarding Supervisory PE, the ld counsel of the assessee submitted as under:

A) **Conditions prescribed under Article 5(4) are not satisfied**

i) Article 5(4) of the India-Japan DTAA provides that a Supervisory PE can arise only where supervisory activities are carried on in India for more than six months and in connection with a building site, construction, installation or assembly project. Thus, both conditions are cumulative and mandatory.

ii) Consequently, mere presence of employees in India does not create a Supervisory PE unless the supervisory activities are linked with a qualifying installation, construction or assembly project and continue beyond the prescribed threshold period.

iii) The AO, for the subject assessment year, issued notices under section 133(6) of the Act to various Indian parties, to whom the Assessee provided services during the relevant year, and prepared the following list of Japanese expatriates who were allegedly present in India for providing services to its customers in India (refer page 114 of the paper book):

S. No.	Name of the Company to whom services rendered	Name of the Japanese expatriate	No. of Days in India
1	Toyota Lakozy Auto Pvt Ltd	Yuji Kuroki	307
		Kensuke Yamada	365
2	Toyota Kirloskar Auto Parts	Kato	131
		Iwato	116

		Yonemoto	65
		Hara	65
		Ozawa	86
		Sudo	93
		Yamamoto	44
		Horikawa	57
3	TT Assembly India Pvt Ltd	Nobushige Hydo	08
		Jungi Higa	05
		Takayuki Yamamoto	05
4	Mitsubishi Electric Automotive India Pvt Ltd	Toshigi	10
5	AT India Auto Parts Pvt Ltd	Kazuma Terado	07

iv) The AO contended that the Assessee has a Supervisory PE under Article 5(4) of the India-Japan DTAA on account of presence of its employees in India for almost entire year for providing supervisory services (refer pages 115 to 117 of the paper book).

v) The CIT(A), relying on the decision of the jurisdictional High Court in the case of CIT vs Sumitomo Corporation: [2016] 382 ITR 75 (Delhi), held that the number of days of presence of employees cannot be aggregated but requires to be seen from the date of first arrival to the date of last departure or the period of installation activity. Consequently, the CIT(A) held that the Assessee does not have supervisory PE in respect of Toyota Kirloskar Auto Parts ("TKAP"), TT Assembly India Private Limited, Mitsubishi Electric Automotive India Private Limited and AT India Auto Parts Limited (refer para 4.2.3 of the CIT(A) order at page 90 of the paper book read with rectification order passed by the CIT(A) at pages 9-10 of the paper book).

vi) It is reiterated that the AO erroneously aggregated the stay of all employees and treated the cumulative employee-days as the duration of the project.

vi) The project in relation to TKAP commenced on 28 October 2012 and concluded on 08 April 2013. Even considering the project from commencement to completion, the duration does not exceed the threshold under Article 5(4). Further, after removing overlapping periods, the actual presence in India works out to only 154 days. In relation to other projects as tabulated above, it is self-explanatory that the threshold under Article 5(4) is not breached.

viii) It is settled law that the duration test must be applied project-wise and not employee-wise. Common days cannot be counted multiple times merely because several employees were present simultaneously.

B) **No Supervisory PE exists in relation to Toyota Lakozy Auto Pvt. Ltd.**

(i) Toyota Lakozy was not carrying on any installation or assembly project

i) The finding of the CIT(A) that a Supervisory PE existed in relation to Toyota Lakozy is contrary to Article 5(4) of the DTAA. Toyota Lakozy is merely an authorized dealer engaged in retail trading and sale of Toyota vehicles refer pages 1 to 3 of the compilation of papers volume-2. It is not engaged in any construction activity, installation project, assembly project or building site work. Form 3CEB and the supporting documents on record clearly establish that Toyota Lakozy is engaged in automobile dealership activities only (pages 589 to 596 of the paperbook).

ii) Neither the AO nor the CIT(A) has identified any installation or assembly project undertaken by Toyota Lakozy during the relevant year. In the absence of fulfilment of this foundational requirement, Article 5(4) of the DTAA cannot be invoked.

iii) Reliance is placed on the decision of the Delhi Tribunal in FCC Co. Ltd. v. ACIT: ITA Nos. 54 & 8960/Del/2019 placed at pages 60 to 69 of compilation of papers - volume 2. wherein it was held that where employees merely render technical services and there is no installation or assembly project in existence, no Supervisory PE can arise notwithstanding the duration of stay of employees in India. Similar principles have been recognized in National Petroleum Construction Co. vs DIT (International Taxation): [2016] 238 Taxman 40 (Del) and GFA Anlagenbau Gmbh vs ADIT: [2014] 34 ITR(T) 73 (Hyd).

C) **No income can be attributed even assuming PE exists**

i) Without prejudice to the above contention that the Assessee does not have a Supervisory PE in India, it is respectfully submitted that even if PE is said to exist in Assessee's case, then also no income can be attributed to the Assessee on account of the PE as the Transfer Pricing Officer ("TPO") had analysed the international transactions undertaken by the Assessee during the year and accepted them at arm's length by drawing no adverse inference (refer pages 121 to 123 of the paperbook).

ii) Reliance in this regard is placed on the decision of Hon'ble Supreme Court in the case of DIT (International Taxation) vs Morgan Stanley & Co.: [2007] 162 Taxman 165 (SC), wherein the apex Court has held that attribution should not be made to the permanent establishment when the transactions have been analysed by the TPO and the same are found at arm's length.

10. Grounds of appeal nos. 3 and 3.1 raised in Assessee's appeal for AYs 2013-14, 2015-16 and 2016-17-Grounds pertaining to offshore supply made by the Assessee - Since relief in this regard has been provided by CIT(A), the Assessee has inadvertently raised these grounds and is not pressing.

11. Grounds of appeal nos. 3 & 4 raised in Revenue's appeal for AYs 2013-14, 2015-16 & 2016-17)-Grounds pertaining to offshore supply made by the Assessee. The ld AR submitted as follows:

i) During the relevant year, the Assessee supplied goods aggregating approximately INR 286.12 crores to Indian entities.

Nature	**Amount (INR)**	**Name of the Buyer**	**Page Reference**
Sale of Traded Goods	2,15,78,16,861	Toyota Tsusho India Private Limited	Refer page 451 & 452 of the paper book
Sale of Spares	53,57,333	Toyota Tsusho India Private Limited	

Sale of Capital Goods	62,56,06,150	Toyota Tsusho India Private Limited	
Sale of Raw Material	6,25,52,000	Toyotsu Rare Earths India Private Limited	
Sale of Spares	99,57,586	TT Assembly India Private Limited	
Total	**2,86,12,89,930**		

ii) These supplies comprised traded goods, capital goods, raw materials and spares. The evidence on record, including invoices, bills of lading, bills of entry and import documentation, conclusively demonstrates that:

- The contracts for supply were concluded outside India;
- Property and title in goods passed outside India;
- The consideration was received outside India;
- Goods were imported by Indian buyers in their own capacity:
- Transactions were undertaken on a principal-to-principal basis.

Thus, no part of the operations relating to offshore supply was carried out in India.

iii) Under sections 5(2) and 9(1)(i) of the Act, income of a non-resident can be taxed only to the extent it accrues or arises in India or is attributable to operations carried out in India. Since the entire supply transaction stood completed outside India, no income therefrom can be said to accrue or arise in India.

iv) The AO proceeded on an erroneous assumption that offshore supply and supervisory services formed part of a composite arrangement. No material whatsoever has been brought on record to substantiate such conclusion.

v) In fact, substantial supplies consisted of raw materials, traded goods and spares in respect of which no supervisory services could possibly be rendered. Therefore, the allegation that offshore supplies depended upon supervisory activities is factually incorrect.

vi) Further, it is pertinent to note that the transaction pertaining to sale of raw materials/ goods has been scrutinized by the TPO and has been considered to be at arm's length and no adverse inference has been drawn by the TPO. The copy of order passed by the TPO is enclosed at pages 121-123 of the paper book.

vii) Reliance on Supreme Court decision in the case of Ishikawajima-Harima Heavy Industries Ltd.: (2007) 288 ITR 408 (SC), the Hon'ble Supreme Court held that offshore supply profits are not taxable in India where:

- Transfer of property occurs outside India;
- Payments are received outside India; and
- Offshore supply activities are performed outside India.

The Court further held that existence of a PE does not automatically justify taxation of offshore supply profits. The said principle has subsequently been followed in:

- LG Cable Ltd.: (2007) 288 ITR 408 (SC)
- Linde AG 44 taxmann.com 244 (Del)
- Pirelli Cavi Sistemi Telecom S.P.A 46 taxmann.com 216 (Hyd)
- Ion Geophysical Corporation (TS-455-ITAT-2016 Delhi ITAT)

Accordingly, offshore supply profits cannot be subjected to tax in India.

viii) Even for the sake of argument, but not admitting, that Assessee has a PE in India; profits earned by the Assessee from offshore supply cannot be attributed to the alleged supervisory PE as no goods were sold/ supplied to TLAL (i.e. only party in which case supervisory PE was upheld by the CIT(A) and challenged by the Assessee vide the subject appeal before this Hon'ble Tribunal). This is because Para 6 of the Protocol to India-Japan DTAA clarifies the scope of the term 'directly or indirectly attributable to the PE', as referred in paragraph 1 of article 7 of the DTAA, state that only profits arising from transactions in which PE has been involved shall be regarded as attributable to the PE to the extent appropriate to the part played by the PE in those transactions.

ix) The said principle has also been upheld by the apex Court in the case of Ishikawajima-Harima Heavy Industries Ltd. (supra), the relevant extracts from the decision are reproduced as under.

> "66. Article 5.3 provides that a person is regarded as having a permanent establishment if he carries on construction and installation activities in a Contracting State only if the said activities are carried out for more than six

months. Paragraph 6 of the Protocol to India Japan Tax Treaty also provides that only income arising from activities wherein the permanent establishment has been involved can be said to be attributable to the permanent establishment. It gives rise to two questions, firstly offshore services are rendered outside India; the permanent establishment would have no role to play in respect thereto in the earning of the said income. Secondly, entire services having been rendered outside India, the income arising therefrom cannot be attributable to the permanent establishment so as to bring within the charge of tax.

67. For attracting the taxing statute there has to be some activities through permanent establishment. If income arises without any activity of the permanent establishment, even under the DTAA the taxation liability in respect of oversea services would not arise in India."

(emphasis supplied)

Alternate Submission - Attribution by AO is wholly arbitrary

x) Without prejudice, even if any attribution exercise were permissible, the approach adopted by the AO is entirely arbitrary. The AO has:

- Assumed a global profit ratio of 10%; and
- Attributed 35% thereof to the alleged PE.

xi) No FAR analysis, economic study, comparable data, factual material or reasoning supports either of these figures. Therefore, even on an alternative basis, no attribution as made by the AO can survive.

xii) Without prejudice to the contention that the Assessee does not constitute any PE under Article 5 of the Tax Treaty, even if it is held that the Assessee has a PE in India then also the attribution of profits should be restricted only in relation to activities carried out in India. In this regard, reliance is placed Clifford Chance vs. DCIT: [2009] 318 ITR 237 (Bom):

"The territorial nexus doctrine plays an important part in the assessment of tax. Tax is levied on one transaction where the operations, which may give rise to income, may take place partly in one territory and partly in another territory. Income arising out of India in more than one jurisdiction would have territorial nexus with each of the jurisdiction on actual basis. If that be so, it may not be correct to contend that the entire income accrue or arise in each of the jurisdiction."

12. Ground of appeal nos. 4 to 4.2 of the Assessee's appeal for AY 2013-14 (similar ground raised in AY 2015-16 as ground of appeal nos. 4 to 4.2): Grounds pertaining to reimbursement of expatriate salary of INR 2,08,41,050, the ld AR submitted as follows:

i) The Assessee received ₹2,08,41,050 from Toyotsu Rare Earths India Pvt. Ltd. ("TREI") towards reimbursement of expatriate salary (refer page 456 of the paperbook). The expatriates were seconded to TREI and worked for TREI. Salary was initially paid by TTC merely as a matter of administrative convenience and was subsequently recovered from TREI on a cost-to-cost basis without any markup.

ii) The Transfer Pricing Officer himself accepted that such reimbursement was made on a cost-to-cost basis and satisfied the arm's length standard (refer page 261 of the paperbook).

iii) It is respectfully submitted that Toyota group is following similar arrangement in case there is secondment of employees. In Toyota Boshoku's case for assessment years 2013-14, 2015-16 and 2016-17, the Hon'ble Bangalore Bench of the Tribunal, held that employees seconded to Indian entity were regarded as its employees and reimbursement to non-resident AE by Indian entity would not be in the nature of FTS, but would be in the nature of 'salary', and therefore, reimbursements would not be chargeable to tax in the hands of the AE. Relevant citations are as under:
- Toyota Boshoku Automotive India (P.) Ltd. vs DCIT: [2022] 138 taxmann.com 166 (Bangalore)
- Toyota Boshoku Automotive India (P.) Ltd. vs DCIT: [2022] 145 taxmann.com 141 (Bangalore)

iv) Numerous judicial precedents including Tekmark Global Solutions LLC: [2010] 38 SOT 7 (Mum), Abbey Business Services: [2020] 122 taxmann.com 174 (Kar), Burt Hill Design: [2017] 79 taxmann.com 459 (Ahm) and Faurecia Automotive Holding: ITA No. 784/PUN/2015 have held that reimbursement of salary costs of seconded employees does not constitute taxable income in the hands of the foreign entity.

v) Further, salary income has already suffered tax deduction under section 192 in the hands of the concerned expatriates. The same amount cannot simultaneously be taxed again as FTS in the hands of TTC.

No estoppel against law

vi) The CIT(A) rejected the claim merely on the ground that the Assessee had originally offered the amount to tax in its return. It is settled law that there can be no estoppel against statute. A receipt which is not taxable in law cannot become taxable because of an erroneous admission made by an assessee. Reliance is placed on:

- Balmukund Acharya: [2010] 310 ITR 310 (Bom)
- CIT vs Bharat General Reinsurance Co. Ltd. [1971] 81 ITR 303 (Del)
- SR Koshti vs CIT (2005) 276 ITR 165 (Guj)
- Mrs. Shamshun Mukhtar Shaikh vs ACIT (ITA No. 18/Pnj/2013)
- ITO vs Khandelwal Laboratories Pvt. Ltd. (ITA No. 3721/Mum/2009)

Therefore, the reimbursement of expatriate salary deserves to be excluded from taxable income.

13. With respect to Ground of appeal no. 5 of Revenue's appeal for AY 2013-14 pertaining to income in the form of loan agreement fee, it is submitted as under:

i) The loan guarantee fee of INR 88,310 received from TREI was attributed by the AO to the alleged Supervisory PE. The attribution is ex facie unsustainable. The alleged PE itself pertains to supervision services, whereas loan guarantee fees arise from entirely separate financing arrangements. The Revenue has not identified any nexus whatsoever between the alleged PE and the earning of loan guarantee fee. Accordingly, the CIT(A) rightly deleted the addition and the same deserves to be sustained.

14. With respect to Ground of appeal no. 6 of Revenue's appeal for AY 2013-14 pertaining to undisclosed receipt of the Assessee from M/s Denso India Ltd it is submitted that the Assessee had accepted the addition and not disputed it before the CIT(A), thus, the subject ground raised by the Revenue is infructuous.

15. Per contra, the ld DR relied on the order of the AO.

16. We have heard the rival submissions and have perused the materials on record. The main issue for our adjudication is whether the assessee has Supervisory PE in India under Article 5(4) of the India-Japan DTAA on account of the fact that assessee provided supervisory activities through its technical employees/Japanese expatriates who were present in India for providing services to its customers in India for more than a year. As the AO has invoked the Article 5(4), it would be appropriate, at this juncture to reproduce the Article 5(4) of the India-Japan DTAA as under:

ARTICLE 5

PERMANENT ESTABLISHMENT

> *1.* For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
> *2.* The term 'permanent establishment' includes especially ******:
> *3.* A building site or construction, installation or assembly project constitutes a permanent establishment only if it lasts for more than six months.
> *4.* An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it carries on supervisory activities in that Contracting State for more than six months in

connection with a building site or construction, installation or assembly project which is being undertaken in that Contracting State.
5. *******

17. A careful perusal of Article 5(4) of the India-Japan DTAA shows that a Supervisory PE can arise only where supervisory activities are carried on in India for more than six months in connection with a building site, construction, installation or assembly project. We find that the condition of six months and supervisory activities "***in connection with a building site, construction, installation or assembly project***" are cumulative and mandatory. In the instant case, the AEs wise project and days is tabulated as under:

S. No.	**Name of the Company to whom services rendered**	**Name of the Japanese expatriate**	**No. of Days in India**
1	Toyota Lakozy Auto Pvt Ltd	Yuji Kuroki	307
		Kensuke Yamada	365
2	Toyota Kirloskar Auto Parts	Kato	131
		Iwato	116
		Yonemoto	65
		Hara	65
		Ozawa	86
		Sudo	93
		Yamamoto	44
		Horikawa	57
3	TT Assembly India Pvt Ltd	Nobushige Hydo	08
		Jungi Higa	05
		Takayuki Yamamoto	05
4	Mitsubishi Electric Automotive India Pvt Ltd	Toshigi	10
5	AT India Auto Parts Pvt Ltd	Kazuma Terado	07

18. We find from the above table, except for M/s Toyota Lakozy Auto Pvt Ltd, the Japanese expatriate have rendered their services for various companies in India, for less than six months. Moreover, with respect to the project in relation to TKAP, the duration from on 28 October 2012 to 08 April 2013 has remained unrebutted. This project, from commencement to completion, does not exceed the threshold of more than six months, under Article 5(4). In relation to other projects also, as tabulated above, we find that the threshold under Article 5(4) is not breached.

19. Furthermore, it is settled law that the duration test must be applied project-wise and not employee-wise and that the common days cannot be counted multiple times merely because several employees were present simultaneously. The hon'ble jurisdictional Delhi High Court in the case of ***CIT vs Sumitomo Corporation***: [2016] 382 ITR 75 (Delhi), held that the number of days of presence of employees cannot be aggregated but requires to be seen from the date of first arrival to the date of last departure or the period of installation activity. In the instant case however, the AO has aggregated the stay of all employees and treated the cumulative employee-days as the duration of the project, which is not sustainable in the eyes of law. Following ***CIT vs Sumitomo Corporation***, we find no infirmity in the

decision of the CIT(A) that the Assessee does not have supervisory PE in respect of Toyota Kirloskar Auto Parts ("TKAP"), TT Assembly India Private Limited, Mitsubishi Electric Automotive India Private Limited and AT India Auto Parts Limited as the threshold of more than six months under Article 5(4) is not breached.

20. In the instant case, not only the presence of assessee's employees in India does not exceed six months, there is no evidence or materials gathered by the AO to demonstrate that the assessee employees were engaged in supervisory activities in connection with ***any building site, construction, installation or assembly project***. Mere presence of assessee's employees would not create a Supervisory PE unless the supervisory activities are linked with a qualifying construction, installation or assembly project and continue beyond the prescribed threshold period of six months.

21. That leaves us with M/s Toyota Lakozy Auto Pvt Ltd, to whom the two employees of the assessee had rendered services and have spent more than six months. We find that though the employees were rendering service for more than six months, the other cumulative and mandatory condition of service being rendered in connection with ***a building site, construction, installation or assembly project***, has not been established. The AO has nowhere shown, with any cogent

evidence, that M/s Toyota Lakozy is not merely an authorized dealer engaged in retail trading and sale of Toyota vehicles but is engaged ***in any building site or construction activity, installation project, assembly project***. On the other hand, the assessee has been able to show from evidence such as Form 3CEB and the supporting documents on record that M/s Toyota Lakozy is engaged in automobile dealership activities only. Following the decision of the Delhi Tribunal in ***FCC Co. Ltd. v. ACIT***: ITA Nos. 54 & 8960/Del/2019 and ***National Petroleum Construction Co. vs DIT (International Taxation)***: [2016] 238 Taxman 40 (Del) and ***GFA Anlagenbau Gmbh vs ADIT***: [2014] 34 ITR(T) 73 (Hyd) wherein it was held that where employees merely render technical services and there is no installation or assembly project in existence, no Supervisory PE can arise notwithstanding the duration of stay of employees in India, we hold that M/s Toyata Lakozy also do not establish a supervisory PE of the assessee in India. As we have held that assessee has no supervisory PE in India, there is no question of attributing the income of the assessee on account of PE. Assessee's Ground no 2 and its sub-grounds are allowed while ground 1 and 2 of Revenue is dismissed.

22. With respect assessee's ground 3 and ground 3 and 4 of Revenue regarding taxability of offshore supply made by the Assessee, the

assessee has not pressed the same as it was granted relief by the CIT(A). We therefore dismiss the assessee ground 3 as not pressed.

23. On the issue of off-shore supply, we find that during the relevant year, the Assessee supplied goods aggregating approximately INR 286.12 crores to Indian entities as follows:

Nature	**Amount (INR)**	**Name of the Buyer**	**Page Reference**
Sale of Traded Goods	2,15,78,16,861	Toyota Tsusho India Private Limited	Refer page 451 & 452 of the paper book
Sale of Spares	53,57,333	Toyota Tsusho India Private Limited	
Sale of Capital Goods	62,56,06,150	Toyota Tsusho India Private Limited	
Sale of Raw Material	6,25,52,000	Toyotsu Rare Earths India Private Limited	
Sale of Spares	99,57,586	TT Assembly India Private Limited	
Total	**2,86,12,89,930**		

We further note that the AO considered the offshore supply and supervisory services as a composite arrangement. We do not find that the AO has gathered any materials to substantiate such conclusion. We also note that these supplies comprised traded goods, capital goods, raw materials and spares and the assessee has been able to demonstrate through evidences such as invoices, bills of lading, bills of entry and import documentation, that the contracts for supply were concluded outside India; Property and title in goods passed outside

India; The consideration was received outside India; Goods were imported by Indian buyers in their own capacity and that the transactions were undertaken on a principal-to-principal basis. The assessee was able to show that no part of the operations relating to offshore supply, was carried out in India and therefore, the income arising out of such transactions are not covered under sections 5(2) and 9(1)(i) of the Act. Following the Supreme Court decision in the case of ***Ishikawajima-Harima Heavy Industries Ltd***.: (2007) 288 ITR 408 (SC), wherein it was held that offshore supply profits are not taxable in India where Transfer of property occurs outside India; Payments are received outside India; and Offshore supply activities are performed outside India, we hold that profits arising out of offshore supply cannot be subjected to tax in India and there is no reason to interfere with the decision of CIT(A). Ground 3 and 4 of the Revenue is dismissed.

24. With respect to Ground of appeal nos. 4 to 4.2 of the Assessee's appeal for AY 2013-14, the ld DR relied on the AO’s order.

25. We find that in the instant case, the amount of Rs 2,08,41,050 is paid by the assessee towards salary to the expatriate working for M/s Toyotsu Rare Earths India Pvt. Ltd. ("TREI"). The assessee had seconded these employees to TREI. Subsequently, the said amount was reimbursed by TREI on a cost-to-cost basis without any markup. We

also note that TPO has not disputed that such reimbursement was made on a cost-to-cost basis. We also note that the coordinate bench of ITAT, Bangalore in the case of ***Toyota Boshoku Automotive India (P.) Ltd. vs DCIT*** (supra) have held that employees seconded to Indian entity were regarded as its employees and reimbursement to non-resident AE by Indian entity would not be in the nature of FTS, but would be in the nature of 'salary', and therefore, reimbursements would not be chargeable to tax in the hands of the AE. Respectfully following the same, we hold that the reimbursement of salary costs of seconded employees does not constitute taxable income in the hands of the assessee. Ground 4 of assessee is allowed.

26. We further find that the CIT(A) rejected the claim of reimbursement merely on the ground that the Assessee had originally offered the amount to tax in its return. We find that the hon'ble Delhi High Court in ***CIT vs Bharat General Reinsurance Co. Ltd***. (supra) and hon'ble Bombay High Court in ***Balmukund Acharya*** (supra) have held that there can be no estoppel against statute and a receipt which is not taxable in law cannot become taxable because of an erroneous admission made by an assessee. We accordingly hold that the reimbursement of expatriate salary be excluded from taxable income.

27. Ground of appeal no. 5 of Revenue's appeal for AY 2013-14 pertains to income in the form of loan agreement fee. We find that the AO's sole reason for addition is that the assessee has PE in India. We have already held that the assessee has no PE in India. In view of the same, the addition made is deleted and the decision of the CIT(A) is upheld. Ground 5 of Revenue is dismissed.

28. Ground of appeal no. 6 of Revenue's appeal for AY 2013-14 pertaining to undisclosed receipt of the Assessee from M/s Denso India Ltd, has been accepted by the assessee before the CIT(A) itself. Thus, the subject ground raised by the Revenue is dismissed as infructuous.

ITA Nos.1513/Del/2020 (Assessee's appeal for AY 2015-16)
ITA 1908/Del/2020 [Revenue's appeal for A.Y. 2015-16]
ITA 1514/Del/2020 (Assessee's appeal for AY 2016-17)
ITA Nos.1508/Del/2020 [Revenue's appeal for A.Y. 2016-17]

29. As the facts and circumstances of ITA Nos.1513 & 1908/Del/2020 [A.Y. 2015-16] & ITA Nos.1508 & 1514/Del/2020 [A.Y. 2016-17] are identical/similar to the facts of AY 2013-14, therefore, the decision rendered herein above for AY 2013-14, applies mutatis mutandis to the facts of the instant case also. The grounds are assessee are accordingly allowed whereas that of Revenue is dismissed.

30. In the result, the appeal of the assessee in ITA Nos.1828/Del/2018; ITA Nos.1513/Del/2020 & 1514/Del/2020 are partly allowed. The appeal of the Revenue in ITA 1911/Del/2018 ITA Nos.1908/Del/2020 & ITA Nos.1508/Del/2020 are dismissed.

Order pronounced in the open court on 21.09.2026

Sd/-	Sd/-
(VIKAS AWASTHY)	**(NAVEEN CHANDRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 21.09.2026

*Priti Yadav, Sr. Ps**

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI