Shanghai Electric Group Co. Ltd., Noida vs Dcit (International Taxation), New ... on 14 July, 2017

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G", NEW DELHI
BEFORE SH. R. K. PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

ITA No. 224/Del/2015
(Assessment Year: 2007-08)
ITA No. 225/Del/2015
(Assessment Year: 2008-09)
ITA No. 226/Del/2015
(Assessment Year: 2009-10)
ITA No. 227/Del/2015
(Assessment Year: 2011-12)
ITA No. 3552/Del/2015
(Assessment Year: 2010-11)
ITA No. 58/Del/2017
(Assessment Year: 2012-13)
ITA No. 59/Del/2017
(Assessment Year: 2013-14)

Shanghai Electric Group Co. Ltd. C/o M/s SRBC 7 Associates LLP 4th & 5th Floor, Plot no. 2B, Tower-2 Sector-126, Noida, UP.	Vs.	DCIT Circle-3,(1)(2) International Taxation, New Delhi
PAN : AAPCS1357N (Appellant)		(Respondent)

Appellant by : Sh. Deepak Chopra,
Ms. Manasvini Bajpai,
Sh. Ankul Goel, Advs.
Respondent by : Sh. Anuj Arora, CIT, DR

Date of hearing : 02.05.2017
Date of pronouncement : 14.07.2017

ORDER

PER BEENA A. PILLAI, J.M :

1. The present appeals have been filed by assessee for relevant assessment years, against final assessment orders passed by Ld. AO, pursuant to directions of DRP, the details of which are as under:

S. No. Asst. Year Date of Date of Passed U/s.

		DRP directions	Impugned order by Ld.AO	
1.	2007-08	28/11/14	04/12/14	147/148/143 (3)
2.	2008-09	28/11/14	04/12/14	147/148/143 (3)
3.	2009-10	28/11/14	04/12/14	147/148/143 (3)
4.	2010-11	10/04/15	05/05/15	143 (3) r.w144C
5.	2011-12	28/11/14	04/12/14	143 (3)
6.	2012-13	24/11/16	07/12/16	143 (3) r.w144C
7.	2013-14	24/11/16	07/12/16	143 (3) r.w144C

Brief facts of the case are as under:

2. Assessee is a foreign company, incorporated under the laws of People's Republic of China, and is engaged in the business of supply of Boiler, Turbine and Generator (BTG) equipments to various companies for setting up of power plants in India. Ld. Counsel submitted that, assessee filed its return of income for onshore services rendered in India for assessment year 2010-11 wherein it had offered to tax the remuneration arising from supervisory services under the provisions of section 44 BBB of the Act. He submitted that no portions of income arising from offshore Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 supplies were offered to tax since the sale of BTG equipments was concluded outside India. He submitted that no portion of profit arising from offshore sales was liable to be taxed in India. Ld. Counsel submitted that it was on the basis of assessment made for assessment year 2010-11 that the Ld. AO reopened preceding assessment years from assessment year 2007-08 to 2009-10.

We shall 1st deal with facts as observed by authorities below for assessment year 2010-11, which is being considered as the lead case. The grounds raised by assessee for A.Y: 2010-11 are as under:

Re: General Grounds

1. That the assessment order passed by the Assessing Officer ("AO") under section 143(3) read with section 144C of the Income Tax Act, 1961 ("the Act") is bad in law, void ab-initio and in contravention of the settled position of law. 1.1 That the AO erred in completing assessment at a total income of Rs. 81,82,49,730 as against the returned income of Rs.

77,274,388.

Re: Taxability of onshore service

2. That the AO erred in taxing income arising from onshore services under the head "business profits" solely on the premise that the Appellant had accepted the existence of a PE. 2.1 That the AO has erred in holding that onshore revenue from erection, commissioning, testing and supervision of erection/commissioning/testing of BTG equipment was not eligible for taxation under section 44BBB of the Act. 2.2 That the AO has erred in facts and law in not appreciating that the Appellant has rendered onshore services in connection with turnkey power projects awarded to the Indian customers Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 and as such under the provision, the appellant was not required to undertake the turnkey project itself. 2.3 That without prejudice, the AO has erred in determining profits from onshore services at an arbitrary net profit rate of 25% without considering the segmental profit rate of 1.69% in global financials of the appellant.

2.4 That without prejudice, the AO has erred in taxing revenue from onshore services at an arbitrary net profit rate of 25% as against the global profitability of 8.29%.

Re : Taxability of Offshore supply

3. That on the facts and circumstances of the case, the AO grossly erred in bringing to tax revenues arising from off-shore supplies to tax in India.

3.1 That the AO grossly erred in law in treating the offshore supply contracts entered into by the Appellant as being works contract.

3.2 That the AO grossly misconstrued the terms of the offshore supply contracts entered into by the Appellant which were predominantly for the purposes of supply of boilers, steam turbine, generator set and auxiliaries and not for designing any equipment in India.

3.3 That the AO grossly erred in law in assuming that the supply of off shore equipment was necessary and incidental to design, manufacture and erection in India without bringing any evidence on record that any designing or manufacturing had taken place in India.

3.4 That the AO misconstrued and misapplied the judgment of the jurisdictional High Court in the case of CIT Vs. Mitsui Engineering and Ship Building (259 ITR 248) which disapproved the revenues stand to segregate a portion of revenue towards designing so as to bring such revenue to tax in India under section 9(l)(vi) of the Act when the price paid was for supply of machinery.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 3.5 That the AO also grossly erred on facts and in law in concluding that the off shore portion of supplies was attributable to the supervisory PE of the Appellant in India when such PE, if any, came into existence much after the supply had taken place.

3.6 The AO also grossly erred in concluding that the Appellant had carried out the business of design, manufacture, supply, supervision of equipment from a fixed place of business in India without bringing any evidence on record in support of such conclusions.

3.7 That the AO also erred in concluding that all transactions including supply of equipment had taken place with the involvement of the PE in India and for this reason profits arising on off shore supplies were attributable to the PE in India.

3.8 That the AO has erred in assessing that the Appellant has undertaken site survey, geological survey, soil testing, inland transportation of BTG equipments in India which in fact has not been undertaken by the Appellant.

3.9 That the AO has erred in concluding that PE in India has been involved in conducting training of project owner personnel in India completely ignoring the fact that such trainings had been conducted outside India. 3.10 That the AO has erred in facts and in law in concluding that pre-bid activities like bid preparation, negotiation, signing of contract and site survey conducted in India results in constitution of fixed place PE and part of the profits should be attributed to such operations when such activities are non- revenue bearing.

3.11 That without prejudice the AO also erred in assuming the total profitability from offshore supplies at 8.29 % of the gross amount and not considering the segmental profit rate of 1.69% while attributing 25% of such profits to tax in India.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017

4. That the AO grossly erred in law in levying interest under section 234B and 234C of the Act.

5. That the AO also erred in initiating penalty proceedings under section 27(1)(c) of the Act for alleged concealment/furnishing inaccurate particulars of income in relation to offshore supplies revenues.

3. Brief Facts for the year under consideration are as under:

> Assessee filed its return of income for the year under consideration on 28.09.2011 declaring a total income of onshore revenue from supervisory services amounting to Rs.7,35,30,835/-under section 44 BBB of Act. During the course of assessment proceedings assessee filed revised computation declaring total income of Rs.7,72,74,388/-. Return was processed under section 143(1) of the Act, and notice under section 143(2) and 142(1) along with detailed questionnaire, was issued and served upon the assessee. In response to these notices, representatives of assessee appeared before Ld. AO from time to time and case was discussed.

4. Ld.AO observed that during year under consideration assessee had engaged in execution of contracts with the following parties:

1. Rosa Power Supply Company Ltd.

2. Reliance Infrastructure Ltd. (formerly known as Reliance Energy Ltd.)

3. EMCO Energy Ltd.

4. Jindal Steel and Power Ltd.

5. JSW Steel Ltd.

6. JSW Energy Ltd.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017

5. It was also observed that assessee had provided supervisory services for erections/commissioning of BTG equipments at project owners site. It was also observed that assessee offered supervisory service fee received under section 44 BB B of the Act. Ld. AO accordingly issued show cause vide order sheet entry dated 11.12.2012, wherein assessee was asked to submit the basis for claiming income from offshore supplies as not taxable in India. Before Ld. AO assessee submitted that:

• no portion of income from supply of equipments is received directly or indirectly by it in India;

• no portion of income accrues or rises to it in India; and • no portion of income could be deemed to accrue or arise in India,

6. It was submitted by assessee that, by virtue of Explanation 1 to section 9 of the Act, which inter alia clarifies that in case of such business of which all the operations are not carried out in India only such part of income shall be deemed to accrue or arise in India as is reasonably attributable to the operations of the business carried out in India and that it has not received any portion of income pertaining to offshore supply in India, as the entire consideration was received in foreign currency through wire transfers/letter of credit outside India. Assessee thus, submitted that, no portion of consideration of offshore supply can be received or could be deemed to have been received in India. Assessee submitted that transfer of title in BTG equipments supplied by assessee, takes place in favor of buyers outside India, and hence Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 the same substantiates the fact that income from offshore supply, cannot be said to accrue or arise in India. In this regard assessee placed reliance upon the provisions of Sale of Goods Act, 1930, and

significance of Bill of Lading. Assessee submitted that the sale of equipments have been effectuated with the buyers independently from outside India on principal to principal basis. Assessee placed heavy reliance upon the decision of Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Co. Ltd. reported in 288 ITR 408, CIT vs. Hyundai Heavy Industries Co. Ltd., reported in (2007) 291 ITR 482 and decision of Delhi Tribunal in the case of LG Cable Ltd vs. DIT reported in 113 ITD 113. Apart from these decisions, assessee relied upon various other decisions which are as under:

• DITvs. Ericsson AM. (Delhi High Court) (343 ITR 370) • DIT vs. Nokia Networks OY [ITA No. 512/ 2007;1138/ 2006; 503/ 2007; 505/2007- Delhi High Court] • JSC Technoprow Export vs. DIT [A.A.R. No. 827 of 2009] • Commissioner of Income tax vs. R.D. Agganval and Co. [(1965) 56ITR 20 (SC)] • Mewar Textile Mills ltd (91 ITR 542) (SC) • Income Tax Officer v. Shri Ram Bearings Lid, [(1997) 224 ITR 724 (SC)] • ACIT vs. Andhra Pradesh Power Generation Corpn. Ltd. [2QQ9-

TIOE-346-1TAT-HYD] Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 • Xelo Pty Limited vs. DDIT [(A.A.R.) ITA Nos. 4107, 4108, 4380, 4381/Mmn/2002] • Deepak Cables (India) Limited [AAR No. 940 c/2003] • Hyositng Corporation [AAR No. 773 of 2008] further affirmed by Hon'ble Delhi High Court [WP (C) No. 2765/2010 and CM. No. 5515/2010] • SEPCO III Electric Power Construction Corporation [Application No. 1 of 2011 in AAR No. 1008 of 2010] • IS Cable Ltd. IAAR No. 858-861 of 2009] • Joint Stock Company Foreign Economic Association "Technoproui Export" [AAR No. 827 of 2009] • Technip Italy SPA vs. Addl C1T [ITA No, 434 (Del.) 2010].

7. Assessee placed reliance upon the double taxation avoidance agreement (DT AA) between India and China to submit that income from offshore supply is not liable to be taxed as per the provisions of India China DTAA. It was submitted that as per Article 7 (2) of India China Tax Treaty, attribution of profit to PE cannot be determined on assumption basis as PE is a distinct and separate enterprise having its own profits and distinct from foreign company. It has been submitted that only so much of profits of assessee having economic nexus with PE in India can be taxed in India. Assessee further submitted that during the assessment year 2010- 11 assessee's employees rendered supervisory services in India for more than 183 days. Accordingly it was submitted that as per Article 5 (2) (j) of India China tax treaty, assessee had supervisory Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 PE in India, which has already been offered to tax u/s.44BBB of the Act.

8. Subsequently assessing officer issued notice to assessee to show cause as to why income from supervisory services should not be taxed as fee for technical services(FTS), in response to which assessee submitted vide letter dated 19.03.2013, that assessee was engaged in rendering services in connection with construction of project being power plant in India and activities of supervision of erection testing and commissioning of the power plant, against which assessee received revenues were covered by exclusionary clause of definition of FTS. Assessee submitted that income derived by assessee in respect of supervisory activities cannot be treated as FTS as defined under the Income

tax Act 1961. According to assessee, section 44 BBB of the Act is applicable to a non-resident, who is engaged in any one of the following business in connection with a turnkey power project;

9. Civil construction, Erection of plant or machinery, testing of plant or machinery, and commissioning of plant or machinery. Assessee placed reliance upon the decision of Hon'ble Supreme Court in the case of CIT vs. Hyundai Heavy Industries Co. Ltd. (supra), wherein Hon'ble Court held that, revenues from installation and commissioning are taxable on deemed income basis under section 44 BB (which is in pari materia to the deeming provisions of section 44 BBB and applies in case of foreign companies engaged in the business of civil construction etc in certain turnkey power projects) of the Act.

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10. Ld. AO thereafter analyzed the contracts in order to ascertain true nature of income received from different contracts. After considering the submissions advanced by assessee, Ld.AO observed as under:

> • the assessee entered into contractual agreement for supply of boiler, turbine and generator equipment to various companies (project owners) setting up power plants in India; • there are offshore supply and onshore services; • from the perusal of scope of activities it is seen that assessee is carrying out all the drawings, design and engineering along with supervising the commissioning and erection of BTG equipments;
>
> • from the scope of activities, it is clear that these are of the nature of composite contract activity and activities have been dissected just for the purpose of tax avoidance; • the sius of work is in India and objective of composite nature of work is to provide the goods in deliverable and acceptable State to owners in India.
>
> • Although contractual activity is so prepared to show delivery of equipment outside India, but title and custody of equipment passes only at port of receipt in India where representative of owner/buyer check and intimates deficiencies etc., to for replacement.

11. Ld.AO observed that some of the clauses in the contract indicate that assessee has rendered technical services for its Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 performance and setup of a power plant in working condition. It was also observed that the responsibility of the assessee is discharged only on issue of take over certificate by the project owner upon successful completion of all the performance guarantee tests to be conducted at the project site. Ld.AO observed that assessee was liable to pay liquidated damages in case of any shortfall in performance, after retests. Ld. AO held that it was not a simple case of supply of goods where some services were required to be carried on by assessee, incidental to sale. He observed that designing, manufacturing and supervision, erection and

commissioning of BTG equipments were complete responsibility of assessee under the same contract. It was also not a case where separate contract was signed by different parties to execute a project.

12. Ld. AO placed reliance upon the decision of Hon'ble Delhi High Court in the case of CIT vs. Mitsui engineering and shipbuilding Co Ltd reported in 259 ITR 248 wherein the contention was that the finding that the contract for designing, engineering, manufacturing, shop testing and backing up to F.O.B. port of embarkation could not be split up since the entire contract was to be read together and was for one complete transaction. It was in such set of facts and circumstances that Hon'ble Court held that, it was not possible to apportion the consideration for design on one part and the other activities on the other part

13. Ld. AO proceeded to attribute profits from offshore supply to the supervisory PE of assessee in India. Ld. AO observed that in the Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 instant case existence of PE is in the form of supervisory PE, is not in dispute. Ld. AO therefore went into analysing the fact of assessee. It was found that assessee was engaged in the activities of drawing and designs, manufacturing, supply of equipment, marketing and related activities like training owner personnel and supervision of erection, instillation and commissioning. Ld. AO observed that drawings, design and manufacturing of equipment was done outside India but marketing and related activities and supervision of erection and commissioning was carried out in India. Ld.AO thus concluded that the supervisory PE of assessee in India, was directly involved in supervision and supply of BTG equipments, needed to set up a fully functional power plant. He thus passed draft order computing profits at 8.1%, on the basis of global profit and loss A/c and attribution of such profit to Indian operations towards the role of supervisory PE, at 25% .

14. Against the draft assessment order, assessee filed objections before DRP, who upheld the attribution at 25% to the PE in India, in respect of offshore supply of BTG equipments.

15. Aggrieved by directions of DRP, assessee preferred appeal before this Tribunal.

16. In the meantime, Ld.DIT International Taxation-II, New Delhi, issued notice under section 263 dated 11.04.2014 to show cause as to why the assessment order may not be treated as erroneous in so far as judicial to the interest of revenue on following issues:

> A. Taxability of receipts on account of supervisory services under section 44 BBB of the act; and Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 B. Existence of Permanent Establishment.

17. Ld. DIT(IT)-II, held that assessee is not entitled to be taxed under section 44 BBB for onshore services and further held that income from supervisory PE in respect of onshore service revenue via assessee is taxable in India as business income with attribution at 25% on gross basis.

18. Against this order of Ld. DIT (IT)-II assessee did not prefer any appeal and accepted the same.

19. Order passed by Ld. AO, pursuant to directions of DRP, was appealed by assessee before this Tribunal. This Tribunal vide order dated 05.09.2014 in ITA No. 344/Del/2014 set aside the assessment to Ld. AO with certain directions as under:

> "8. Section 44 BBB is applicable for computing the profits and gains a foreign company is engaged in the business of civil construction or in certain turnkey power projects. Thus, assessee is taking contradictory stand while offering income in respect of supervisory service agreement and in respect of equipment supply agreement. Moreover the contention of Ld. DR that all the agreements relating to equipment supply and supervisory contract were not furnished before the assessing officer has not been denied by Ld. counsel. He offered to furnish those agreements before us but when certain crucial agreements were not before the assessing officer, it would be appropriate that 1st those agreements are examined by the assessing officer and thereafter, he may take a view in accordance with law. If assessee is not satisfied with the view taken by assessing officer, he may avail appropriate remedy as may be permissible in law. In view of the above, we set aside the orders of authorities below and restore the matter to the file of assessing officer. We direct him to allow adequate opportunity to the assessee to produce all the agreements Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 in respect of equipment supply as well as supervision of erection of those equipments. We also direct the assessee to produce all these documents and any other document, evidence or explanation which may be relevant for determination of taxable income of the assessee. Thereafter, the assessing officer is directed to pass the order in accordance with law. We also observe that if the lessee is not satisfied with the order of assessing officer and filed objections before the DRP, tended DRP will pass a speaking order is considering the assessee's objection in accordance with law."

20. Against this order of this Tribunal assessee preferred an appeal before Hon'ble High Court. Hon'ble High Court by order dated 23.02.2015 in CM No. 1861/2014 and 2293/2015 in ITA No. 688/2014 remanded the matter to DRP, for adjudication with directions as under:

> "6. This court notices at the outset that in the present case, whilst framing the initial draft assessment order on 28/03/13, the assessing officer deemed it expedient to confine the scrutiny to a certain subject matter. Finally the assessment order was made after taking into account the order of the DRP which was naturally determined in turn by the reference in the draft assessment order. Thereafter, the DRP issued notices under section 263 and made his final order on 29/08/2014. Even at this stage, the DRP did not deem it expedient to enlarge the scope of the scrutiny for a Y 2010-11. The DRP's determination in the circumstances, concerning the A.Y: 20010-11, made earlier on 30/10/13, stood. It is a matter of record that the revenue did not choose to either reopen the assessment in any manner not call into question

the decision of the DRP in terms of section 253 (2A) which enables revenue to approach the ITAT in respect of any of its grievances against the order of the DIT. This provision was supported Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 by Finance Act, 2012 w.e.f. 01/07/12 - i.e. He. Before the draft assessment order was made in respect of A Y 2010-

11. In these circumstances, we are of the opinion that the restricted remand to the AO was not justified. At the same time, this court is not persuaded to the submissions of revenue that the assessee considered the entirety of circumstances for the other years in its order dated 28/11/14 which lead to the final assessment order dated 04/12/2014, which is in turn is a subject matter of the assessee's appeal before the ITAT, the latter course is the most appropriate one. This is because the ITAT's impugned order in this case followed by the DRP was cryptic in its order and had nothing to say in respect of draft assessment order, initially framed on 28/03/13. In the circumstances and given the fact that the entirety of the circumstances were gone into two stages i.e. when the first draft assessment order was made and subsequently under section 263, the course of action urged by the revenue given that it also did not articulate grievance of the DRP's order is not appropriate. It would be in the fitness of things that the matter is remitted to the DRP rather than AO which would consider the matter referred to it (on 28/03/2013) and after hearing the submissions of the parties deal with them with proper reasoned order, but in accordance with law. The DRP shall endeavour to complete its proceedings and make final order within 8 weeks from today. It goes without saying that AO shall (on receipt of DRP's order) passed the final assessment in accordance with law as mandated in the income tax act."

21. Accordingly DRP pursuant to directions of Hon'ble Delhi High Court, dealt with the objections raised by assessee in form 35A, dated 15/04/13 against draft assessment order passed by Ld. AO dated 28.03.2013, which are as under:

"1. Ld. AO has erred on the facts and law in alleging that receives from offshore supply of equipment are taxable in India:

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 I. while holding that offshore supply receipts are taxable in India, the Ld.AO has erred in law and facts that the 2 separate contracts entered with project owners for supply and supervision are composite contracts II. that the supply which constitutes 99.75% of the total value of 2 contracts taken together is incidental to the supervision services which constitutes less than 0.25% of the total contract value III. without prejudice to our arguments that 2 contracts are separate if the contract is treated as composite contracts then supervision services are incidental to offshore supply and are not taxable in India

2. That the Ld. AO erred in law and facts in holding that the assessee has a fixed place in India

3. That the Ld. AO erred in holding that the PE was involved in carrying out marketing activities when the PE was involved only in supervising the directions of contracts

4. That the Ld. AO erred in facts in holding that the assessee is involved in the operation of the power project

5. Without prejudice the Ld.AO has erred in alleging that the total profits from offshore supply was 8.29% of gross revenue of offshore supply and not considering the segmental profits of 1.69% and in attributing 25% thereof to India even though no part of the activity relating to offshore supply was carried in India

6. That on the facts and circumstances of the case and in law, Ld. AEO has erred in proposing to initiate penalty proceedings under Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 section 271 (1) (c) of the Act against the assessee, which is bad in law All the above grounds of objections are without prejudice to each other. The assessee craves for leave to add, amend, vary, omit or substitute any of the aforesaid grounds at any time before or at the time of hearing of the objections with the DRP."

The DRP dealt with the objections independently. DRP observed and held as under:

On perusal of contracts entered into by assessee with the project owners, DRP observed that:

• there are 2 separate contracts, however these are in the nature of composite contract instead of turnkey contract as alleged by assessee;

• Undisputedly the assessee has a long presence in India where it is doing activities relating to erection, testing and commissioning of equipment supplied by it; • that the obligation of assessee did not end with supply of BTG equipments, rather it continued and ended only on receipt of 'takeover certificate' issued by project owner, after erection, testing and commissioning of the equipment supplied by it and upon successful performance guarantee tests being conducted at the project site. • That assessee has itself offered revenue from onshore activities as taxable in its return of income under section 44 BB B of the act;

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 • there exists a supervisory PE in India during erection, testing stage under article 5 (2) (j) of India China tax treaty; • As per Article 7 of India China Tax Treaty, business profits of assessee shall be taxable in India if it has a permanent establishment in India. It does not

talk about any special type of PE for the purpose out of various kinds of PE mentioned in article 5 (1)/(2);

• That assessee has executed many contracts in India which were pending for many years. Negotiations for new contracts happened in India, and for these purpose employees of assessee, have come to India on various occasions. It observed that assessee has not furnished many information regarding place where do they stay and period of their stay etc;

• That the equipments supplied is highly customised and manufactured according to the specific requirement of respective project owner. For this intensive site survey, geological survey and soil testing etc., is needed to be done and these operations required presence of assessee's expertise in India for a sufficient duration of time and since assessee is executing several contracts in India these activities in fact become a regular feature throughout the year;

• It is observed that supply contracts also have a clause for training of personnel of project owner by assessee and assessee is responsible for offloading and transportation of Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 equipment from port of arrival in India to place of installation. Assessee was contractually responsible for repairs and warranty obligations under supply contracts and for these purpose for which assessee needs to have someplace in India from or through which these activities could be carried out;

• The panel agreed with the submissions of assessee that even if the contract is a composite contract, profit can be attributed to only those operations which are carried out in India through PE. Though actual manufacturing of equipment has occurred outside India, several operations which are necessary for meeting with the supply obligations have been carried out in India for instance these are bid preparation, negotiation and signing of contract, site surveys, site preparation, data collection, consultation with owners, repairs and warranty services etc. DRP then concluded as under:

> • perusal of the terms of the contract shows that obligation of assessee does not end after supply of BTG equipments, rather these continue and end only after erection, testing and commissioning of equipment supplied by it, and until the performance guarantee tests were performed successfully at all project site and project owners issues that takeover certificate to assessee as a proof of final acceptance of BTG. It was thus concluded that it was a composite contract Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 • The assessee has a long presence in India where it is doing activities relating to erection, testing and commissioning of equipments supplied. These activities are economically significant and profit earning which cannot be considered in isolation. Rather, it is a continued relationship between assessee and the project owners in India. Assessee is coming to India for negotiation of contracts. The activities included like site visits and various site/geological surveys to be conducted, and therefore the criteria is as prescribed by Hon'ble Supreme Court in the case of

CIT vs R.D Agarwal & Co., reported in (1965) 56 ITR 20 for existence of business connection in India are fulfilled. Therefore, contracts become taxable in India under the domestic law, as there existed a business connection in India.

• It has been held that it was established in India prior to start of supply of equipment in India and existence of a fixed place PE is not a pre-rquisite for bringing business profit to tax in India any kind of PE as mentioned in Article 5 of the DTAA would be enough to bring the profits arising from supplies to tax in India, if profits are directly or indirectly attributable to PE.

• Although the manufacturing is done outside India, activities like bid preparation, negotiation and signing of contracts, site surveys, site preparation, Data collection, consultation with owners, repairs and warranty services etc could only be carried out through PE in India. Thus DRP concluded that the Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 said activities needed assessee to remain in India, and thus has to be brought to tax in India.

• It was further observed that assessee did not furnish any information with regard to place and period of stay of expats. As negotiations of new contract happened in India, the protracted negotiation, signing of contracts, site surveys, erection, commissioning, periodical reviews and consultation with owners, presence of employees of assessee was required. DRP thus concluded that assessee knew about such necessity for deputing employees and that even where no project office was available, the hotel were such employees stayed, will constitute a permanent establishment of business in India. • It further held that the equipments manufactured by assessee were highly customised according to specific requirement. Assessee was also responsible for offloading and transportation of equipment from port of arrival in India to place of installation and repairs and warranty obligation under supply contract.

• As per DTAA, business income is taxable in India only by virtue of existence of PE and as PE exists in present case DRP held that income from supply contract were taxable in India.

22. Based on the observations and directions of DRP, Ld. AO passed impugned assessment order, against which, assessee is in appeal before us.

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23. Before dealing with the arguments advanced by both the sides we shall briefly state the factual position as recorded by authorities below in each of the assessment years under consideration. Assessment year 2007-08 to 2009-10

24. Assessee did not file return of income for assessment year 2007-08, 2008-09 and 2009-10. Accordingly, notice under section 148 was issued on 26.03.2013 requiring assessee to file its return of income for the respective assessment years, after recording the reasons which are reproduced as hereunder:

> "M/s Shanghai Electric group company Ltd (SEC) is a company incorporated under the laws of People's Republic of China and is engaged in the business of supply of boiler, turbine and generator (BTG) equipments to various companies (project owners) setting up of a plants in India.
>
> During the assessment proceedings for assessment year 2010-11, F EEC was engaged in exclusion of contracts with the following: Rosa Power Supply Co. Ltd., Reliance Infrastructure Ltd (formerly known as Reliance Energy Ltd) EMCO Energy Ltd, Jindal Steel & Power Ltd, JSW Ltd & JSW Energy Ltd. SEC has also provided supervisory services for erections/commissioning of such equipments at project owners site. The election and commissioning is done by 3rd parties in India appointed by the project owners. The assessee has offered supervisory service fee received under section 44 BB B of the act. During course of assessment proceedings it has been established that offshore supplies are taxable leaving a detailed finding that the contract entered was a composite contract and a profit of 8.29% has been taken as profit earned (on the basis of global profit rate) by the company and 25% of such profits has been attributed to permanent establishment (PE) in India.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Also, during the course of assessment proceedings for a Y 2010-11, vide letter dated 13/03/13, the assessee has filed details of offshore supplies for a Y 2007-08 amounting to USD4, 36,79, 200.30 and onshore services for a Y 2007-08 amounting to USD 26,88,000/- and taxability of both needs examination. Also profit attributable to PE has not been offered for taxation. Besides, as per record available assessee has not filed return of income for a Y 2007-08 and as per Explanation 2 (a) of section 147 of the Act, the assessee has escapement of income, chargeable to tax.

In view of the above, the Assessing Officer (AO) has reasons to believe that income chargeable to tax in excess of One lakh rupees has escaped assessment within the meaning of section 147/148 of the I.T. Act, 1961."

25. Similar reasons were recorded with the statistics for the assessment years 2008-09 and 2009-10. Against these reasons recorded assessee filed objections towards the initiation of reopening of proceedings which were disposed of after due consideration by Ld. AO.

26. During the reassessment proceedings Ld. AO observed that assessee had entered into following contracts for the respective assessment years the details of which are as under:

S. No.	Asst. Year	Details of Parties with whom Contracts were executed

1. 2007-08 1. Reliance Energy Ltd.

2. JSW Energy Ltd.

2. 2008-09 1. Reliance Energy Ltd.

2. JSW Energy Ltd.

3. JSW Steel Ltd.

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4. Rosa Power Supply Company Ltd.

5. JSW Energy (Ratnagiri) Ltd.

6. Jindal Steel and Power Ltd.

3. 2009-10 1. Reliance Energy Ltd.

2. JSW Energy Ltd.

3. JSW Steel Ltd.

4. Rosa Power Supply Company Ltd.

5. JSW Energy (Ratnagiri) Ltd.

6. Jindal Steel and Power Ltd.

27. Ld. AO observed that assessee had provided supervisory services for erections/commissioning of such equipments at the project owner's site. It was observed that assessee offered supervisory service fee received under section 44 BBB of the Act. In respect of the supply of BTG equipments, assessee had contended that since these are offshore supplies, the income earned were not taxable in India. Ld. AO, based on the findings and observations of his predecessor for assessment year 2010-11, attributed 25% of profit based on global profitability statement accruing from offshore supply to PE in India.

28. Against the draft assessment order passed for these assessment years assessee filed its objection before the DRP.

29. Ld. DRP based its observations, depending upon order passed for assessment year 2010-11. Accordingly DRP issued enhancement notices, to show cause as to why supervisory receipts should

not be taxed considering 25% net profit rate. DRP held that it is quite Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 reasonable to estimate the net profit at 25% of supervisory receipts. The DRP also noted that assessee had agreed to this net profit rate in the order under section 263 for assessment year 2010-11. It accordingly directed the Ld. AO to compute taxable profits out of supervisory receipts at 25%. Pursuant to these directions Ld. AO passed the impugned assessment order for assessment years 2007- 08, 2008-09 and 2009-10.

Aggrieved by the impugned assessment order is assessee is in appeal before us now.

Assessment year 2011-12

30. During the reassessment proceedings Ld. AO observed that assessee had entered into following contracts for this assessment year, the details of which are as under:

S. No. Asst. Yr Details of Parties with whom Contracts were executed

1. 2011-12 1. Reliance Energy Ltd.

2. JSW Energy Ltd.

3. JSW Steel Ltd.

4. Rosa Power Supply Company Ltd.

5. JSW Energy (Ratnagiri) Ltd.

6. Jindal Steel and Power Ltd

31. Ld. AO observed that assessee provided supervisory services for erections/commissioning of such equipments at the project owners site. It has further been observed that assessee has offered supervisory service fee received under section 44 BBB of the Act. In respect of the supply of BTG equipments, assessee had contended that since these are offshore supplies hence were not taxable in Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 India. Ld. AO, based on the findings and observations of his predecessor for assessment year 2010-11 attributed 25% of profit based on global profitability statement accruing from offshore supply to PE in India.

32. Against the draft assessment order passed for these assessment years assessee filed its objection before the DRP.

33. As the assessee could not furnish original site records maintained during erection commissioning and testing of BTG equipment and not maintaining specific books of accounts in India it therefore upheld addition made by Ld. AO, applying 25% of the net profit rate for taxing the

onshore service revenues and not computing the supervision fees under section 44 BBB of the Act. Pursuant to these directions, Ld. AO passed the impugned assessment order for assessment years 2011-12.

34. Aggrieved by the impugned assessment order is assessee is in appeal before us now.

35. Thus it is observed from the records that from assessment year 2008-09, 2009-10 and 2011-12 Ld. AO reopened the assessment based on the findings of his predecessor in assessment year 2010-11.

Assessment year 2012-13 & 2013-14

36. During the reassessment proceedings Ld. AO observed that assessee had entered into following contracts for the respective assessment years the details of which are as under:

S. No. Asst.Yr Details of Parties with whom Contracts were executed Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017

1. 2012-13 1. Butibori Project & 2. Rosa I project 2013-14 3. Rosa II project

4. Ratnagiri project

5. Jindal project

6. Warora Project

7. Chandrapur project

8. Laguna project

37. Ld. AO observed that assessee provided supervisory services for erections/commissioning of equipments supplied by it, at the project owners site. It was observed that assessee offered supervisory service fee received, under section 44 BBB of the Act.

38. However in respect of supply of BTG equipments, assessee contended that, since these were offshore supplies, hence were not taxable in India. Ld.AO, based on the findings and observations of his predecessor for assessment year 2010-11, attributed 25% of profit based on global profitability statement accruing from offshore supply to PE in India. Against draft assessment order, for these assessment years assessee filed objection before DRP.

39. DRP based on its observations made in assessment year 2010- 11, issued enhancement notice to show cause as to why, supervisory receipts should not be taxed, considering 25% net profit rate. As assessee did not furnish any accounts pertaining to supervisory PE, DRP held that it is quite

reasonable to estimate the net profit at 25% to the supervisory receipts. The DRP also noted that assessee had agreed to this net profit rate in the order under section 263 for assessment year 2010-11. It accordingly directed Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Ld.AO to compute taxable profits out of supervisory receipts at 25%. Pursuant to these directions Ld.AO passed impugned assessment order for assessment years 2012-13 & 2013-14.

40. Aggrieved by the impugned assessment orders, assessee is in appeal before us for all the above assessment years.

41. Ld. Counsel at the outset submitted that, all the grounds raised in the years under consideration before us are similar and identical based on same facts. He submitted that Ground Nos. 1 and 1.1, are general in nature, which do not require adjudication, Ground No. 2 raised in all the assessment years under consideration, regarding taxability of received from onshore services under section 44BBB of the Act is not pressed. Accordingly we do not intend to adjudicate this ground.

Ground No. 3 relates to taxing of offshore supply in India, Ground No. 4 is on levy of interest under section 234B and C of the Act; and Ground No. 5 is an initiation of penalty proceedings under section 271(1)(c) of the Act, is premature at this stage.

42. The main issue that needs to be addressed is in respect of taxability of offshore supply in India. Ld.Counsel in written submission dated 04.05.2017 has formulated following issues for our consideration:

> 1. Whether the contracts for offshore supplies and provisions of onshore services were composite contracts?

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2. Whether the title in goods is passed outside India or in India upon completion of the testing, commissioning of the BTG equipment and upon issue of completion certificate?

3. Whether there existed a business connection of the appellant in India?

4. Whether in terms of Explanation 1 r.w section 9 (1) (i) of the Act, any portion of the profits arising from offshore supplies were taxable in India?

5. Whether there existed a PE of the appellant in India?

6. Whether any portion of profits arising from offshore supplies was taxable in India in terms of article 7 (1) of the DTAA between India and China?

7. Alternatively, if there existed a supervisory PE of the appellant in India in terms of providing on shore services (supervision of erection/commissioning etc), whether the profits arising from offshore supplies could be attributed to such PE in India?

43. In our considered opinion on answering the above issues the entire controversy involved in these appeals could be resolved. Ld. Counsel submitted as under:

44. From the submissions filed in the paper book, Ld. Counsel referred to certain agreements, for examining scope of work and terms and conditions of contracts, entered into by Assessee. Reference in this regard was made to the chart titled as "Details of scope of erection, commissioning, performance guarantee tests and supervision services"

> submitted by Ld. Counsel, during the course of arguments which has been once again filed in a summarised manner on 02.05.2017. This Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 chart contains page numbers referring to certain clauses of agreements like covenants/recitals, scope, contract Price, mode of payment, INCOTERMS, drawings, warranty, transportation and arbitration. However, what is of seminal importance is, where transfer of title in goods took place. Scope of work for Yamuna Contract and Kinda Contract as illustrated by Ld. Counsel is as under below:
>
> Yamuna Contract (at serial No. 1 of the Chart submitted by the Assessee) (at page 335 of the Paper book part II for assessment year 2007-08)

45. It has been submitted that this contract was between Reliance Energy Ltd. (Purchaser), Shanghai Electric (Group) Corporation and Shanghai Electric Group Co. Ltd., and the contract is for equipment and mandatory spares supply and service contract. It was submitted that this contract provides the process of setting up of a 2 x 300 MW thermal power plant at Yamuna Nagar for Haryana Power Corporation Ltd.,(Owner). It was submitted by Ld. Counsel that as per the contract, the Owner has selected the Purchaser (i.e. Reliance Energy) for construction of the facility/plant in the manner described in the contract between the Owner and Purchaser.

46. It has been submitted that, the Contractor has submitted an offer for supply of Boilers, Turbines, Generators and Auxiliaries (referred to as the BTG Package) for the facility/plant.

47. Ld. Counsel submitted that the scope of work is described in Article 4.2 at page 338 that divides scope of work between the parties in two parts (a) the first part (of Shanghai Corporation) Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 which shall cover the supply of all equipment and materials including associated accessories and mandatory spares related to BTG package of CFR Kandla Port basis. Ld. Counsel submitted that Clause 5 of the contract provides the break-up of the price where the off shore supplies and services are separately provided for (On shore services to be provided by. a related party).

49. Ld. Counsel then referred to next project being Kinda Contract in the list. Ld. Counsel submitted as under:

> Kinda Contract - For supply of Boilers and Steam Turbine Generators (at serial No. 2 of the Chart submitted by the Assessee) (agreement at page 920 of the Paper book part 11 for assessment year 2010-11)

50. Ld. Counsel submitted that this contract is between JSW Energy (Vijainagar) Ltd. (Owner) and Shanghai Electric Corporation. Owner intends to build a 2 X 300 MW Power project and requires supply of Boilers, Steam Turbine Generators set and Auxiliaries (BTG) for the project. It has been submitted that Owner has appointed TATA Consultancy Engineers Ltd. as project engineer.

51. In the second chart submitted by Assessee gives details of scope of work, price, service contracts, in terms, warranty, and transportation have been separately provided.

52. Ld. Counsel submitted that these contracts would show; the Owners were building power plants in India and as such required Assessee to provide BTG equipment. He submitted that this intention of parties is apparent from a plain reading of contracts. Ld. Counsel referred to other agreements having similar clauses Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 and submitted that these contracts are not for execution of "work" as Revenue is contending, so as to bring them within the category of composite contracts. Ld. Counsel placed reliance upon the decision of Hon'ble Supreme Court in the case of Ishikawajima Harima (supra), to distinguish the decision relied upon by Ld. CIT. DR delivered by Hon'ble Supreme Court in the case of Hindustan Shipyard (supra). Hon'ble Supreme Court in Hindustan Shipyard(supra) categorised contracts as works contracts where it is a contract for work in which the use of materials is accessory or incidental to execution of the work. Ld. Counsel submitted that this is not the situation in the assessee's case. He submitted that intention of the parties is to acquire and to provide BTG equipment, and that these contracts and not for execution of any work, as is being made out by Revenue.

53. Referring to various paragraphs from the decision of Hon'ble Supreme Court in the case of Ishikawajima Harima (supra) Ld. Counsel submitted that:

> "What is of seminal importance here is that the conclusion of the Court that even where there are composite contracts, the principle of attribution has to be applied. He submitted that Hon'ble Court also held that, where different parts are clearly identifiable, it cannot be held that the, profits arising from off shore supplies were liable to be taxed in India. Thus, whether the contracts were composite or not are of no consequence."

54. Ld. Counsel placed reliance on the decision of jurisdictional High Court in the case of LG Cable Vs. DIT reported in 197 Taxman

100. Ld. Counsel in the written submission dealt with this Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 decision as under:

The nature and scope of work in that case was as under-

Briefly the factual matrix giving rise to the present appeal is as follows. The respondent LG Cable Ltd. ("LGCL") is a company incorporated under the laws of South Korea having its registered office at ASEM Tower (19-20F), 159 Samsung Dong, Gangnamgu, Seol 135-090 Korea. LGCL was awarded two contracts on 26th Feb., 2001 by the Power Grid Corporation of India Ltd. ("PGCIL"). The first was for onshore execution of the Fibre Optic Cabling System Package Project under the System Co-ordination and Control Project for the Eastern Region involving onshore services. including erection/installation. testing and communicating. etc., of the fibre of the cabling system. The second contract was (or offshore supply of equipment and offshore services. During the financial year 2001-02, LGCL had set up a "project office" in India after obtaining requisite approval from the RBI. The services under the onshore contract were rendered by LGCL through its project office in India for which separate books of account were maintained by the Assessee. The income attributable to the activities carried out in India in connection with onshore contract was offered to tax on a net income basis in the return of income filed by the Assesse in terms of arts. 5 and 7 of the Double Taxation Avoidance Agreement ("DTAA") between lndia and Korea. As regards offshore supply contract, however, it was claimed by the Assessee that this income was not liable to tax in India as the income wholly accrued or arose in Korea. It was also claimed that the entire contract was carried out in Korea and was subject to income tax in Korea. The transfer of title along with the attendant risks had entirely passed on to PGCIL The findings of the CIT(A) in the case of LG Cables are submitted to be as under-

"The assessee impugned the above assessment in appeal before the CIT (A), rehydrating its submission that Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 the transfer of title in the equipment supplied by it had taken place in favour of PGCIL outside India and hence income of offshore supply equipment could not be said to accrue or arise in India. After comparing and contrasting both the agreements and in particular art. 6 thereof, the CIT(A) held as under:

"4.1 From the combined reading of art. 6 of both the agreements, the facts emerge:

(1) Notwithstanding the award of work under two separate agreements, the contractor (the appellant) has the overall responsibility for the execution of all the work right from the beginning till the end.

(2) Notwithstanding the award of work under two separate agreements, in case of default or breach under one contract the same shall automatically be deemed to be a default or breach under both the contracts', This means that if there is a default in any part of one contract by the appellant, both the contracts are liable to be cancelled.
(3) Notwithstanding the award of work under two separate agreements, it was agreed by the appellant that the equipment/material supplied by it to PGCIL under the first contract, when erected and commissioned by the appellant under the second contract shall give satisfactory performance in accordance with the provisions of the contract. This condition has been specified in art, 6 of the onshore erection contract. This clearly shows that even in the onshore erection contract it is the responsibility of the appellant that the materials/equipment supplied by it under the offshore equipment supply contract shall give satisfactory performance. The same responsibility has been cast on the appellant in art. 6 of the offshore supply of equipment also.

(4) Notwithstanding the award of contract under two separate agreements, the contractor (appellant) shall achieve successful completion of the project under both contracts and successful taking over the project by PGCIL.

"

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6. The CIT(A) held that it was clear from the foregoing that the two contracts were not independent of each other as claimed by the Assessee, that there was interrelation and inter-dependence between the two agreements and that one could not exist without the other. Thus, the CIT(A) concluded that though there were two agreements, in fact, it was a composite contract for supply of equipment as well as execution, erection and installation of equipment in India. He further observed that a colourable device had been adopted by the Assessee to conceal its real tax liability. The supply of offshore equipment was inextricably linked with the operations to be carried in India. He, therefore, held that the decision of the AAR in the case of Ishikawajima Harima Heavy Industries Co. Ltd., In re (supra) was applicable to the facts of the case. Applying art. 7 of the DTAA, the CIT(A) held that the income from the offshore sale of goods could be deemed to be accrued to Assessee in India and was taxable in India in terms of s. 9(1)(i) of the Act. The computation of income of the Assessee at Rs. 1,05,48,950 made by the AO as well as the levy of interest under ss. 234B and 234C by the AO was also upheld. Resultantly, the appeal filed by the Assessee was dismissed.

The findings of the High Court were as under-

"28. As regards the payment for the performance of the activities within India, the contract price aggregating to INR 59982,160 plus US dollars 88,400 was specifically and separately fixed by art. (2) of the contract titled "Contract price in terms of payment". This consideration was separate from the consideration for the supply of equipment and there appears to be no justification to intermingle the two. The

consideration for the offshore supply of equipment, it is repeated at the risk of repetition, accrued when the goods were sold. The performance of duties as envisaged in the second contract, viz., the erection contract, by no stretch of imagination can be conceived to postpone the transfer of property under para 31.2 of the agreement, which property passed on to the Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 buyer simultaneously with the "loading on to the mode of transport to be used to convey the plant and equipment from the country origin to the country of import". Although the entire consideration was not paid on shipment of equipment, but non-payment of a part of the price could not prevent the transfer of equipment. The passing of the property to the purchaser, as rightly held by the Tribunal had, nothing to do with the payment of the entire price of the equipment. The passing of the property to the purchaser, as rightly held by the tribunal had, nothing to do with the payment of the entire price of the equipment to the seller. Even otherwise a substantial amount in this case was paid to the seller outside India and the Tribunal observed that for the unpaid price the purchaser could have resorted to the provisions of s. 46 of the Sale of Goods Act, which read as under: (1) Subject to the provisions of this act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such has by implication of law-

(a) A lien on the goods for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, right of stopping the goods in transit after he has parted with the possession of them;

(e) A right of resale as limited by this Act. (2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-

extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. "

29. Thus, the mere fact that 15 per cent of the payment was to be retained by the PGCIL to be paid 30 days after operational acceptance on erection and completion of the system cannot be construed to mean that the title in the goods did not pass to the buyer in the country of origin.

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30. Then again, in our considered opinion, undue importance cannot be attached to the fact that the agreement imposed on the Assessee-company the obligation to hand over the equipment functionally completed. This obligation has been rightly construed by the Tribunal to be in the nature of a trade warranty and the Tribunal in

this regard has rightly observed as follows:

"14.1 But in the case in hand, there is no power either with the seller (the Assessee) or with buyer (PGCIL) to repudiate the contract. Warranty is to give equipment after erection in the running condition. The normal trade warrantees could not be mixed up and taken as a right of repudiation or right of disposal of equipment with the buyer or with the seller. The property in equipment having been passed on handing over the equipment to the ship with the delivery of documents to the bank under irrevocable letter of credit, the terms referred to above could not affect the passing of the property."

Thus when goods were transferred outside India, the taxable income accrued outside India. It being not attributable to any operation carried out in India, no portion of the same was taxable in India. "

31. We may note also that the buyer's right to examine and repudiate the goods in law does not by itself indicate that the property in the goods had not passed, as is evident from the provisions of s. 59 of the Sale of Goods Act, which read as under:

"59. Remedy for breach of warranty-(1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may-

(a) Set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) Sue the seller for damages for breach of warranty. (2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 him from suing for the same breach of warranty if he has suffered further damage. "

32. The aforesaid position was accepted in the case of KweiTek Chao vs. British Traders & Shippers Ltd 2 Q.B. 459 (QB) which was duly approved by the Supreme Court in the case of Mahabir Commercial Co. Ltd (supra) wherein it was held as under:

" ..... Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee whether named by the buyer or not for the purposes of transmission to the buyer and does not reserve the right of disposal he is deemed to have unconditionally appropriated the goods to the contract. The buyer's assent to the passing of the property in the said circumstances is implied and that when the seller dispatches the goods and delivers them to the common carrier for purposes of transit to the buyer, the common carrier not only receives the goods as agent of the buyer but also assents to the appropriation made by the seller. Where however the

intention is clearly indicated and the carrier assents it is immaterial by what document the consignment is effected In cases where the seller bears the freight for the transmission of the goods free of cost to the buyer, the property in the goods passes to the buyer as soon as they are sent to the carrier, though there may be a provision that they are to be paid for by the buyer on behalf of the seller after the arrival of the goods. But where however the seller exercises a right of disposal or where he agrees to deliver the goods at their destination, the carrier is the seller's agent and the delivery is not a final appropriation. The intention of the parties is therefore one of the important elements in determining the situs where the property passes to the buyer in pursuance of the contract. The decided cases are of little help and are only illustrative of the principles which are applicable for determining when the goods are unconditionally appropriated to the contract. In the case of transactions of sale of goods between the buyer and seller living in two Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 different countries, the contract may envisage, the seller sending the goods through a carrier and the payment being made either at that place or at the place where the buyer resides. In such a transaction the banks have come to play an important part and the bankers' commercial credit system facilitates merchants domiciled in different countries and assures payment to the seller on the one hand and delivery of the goods contracted for to the buyer on the other. This is done by means of what are known as letters of credit which under the terms of the contract the seller may insist on the buyer to provide for in a bank doing business in the place of the seller's domicile .... "

35. In the final analysis we have no hesitation in holding hat viewed from any angle, the fact situation in the instant case is almost identical to that in the' case of Ishikawajma (supra) and the law as enunciated by the Supreme Court in the said case will squarely apply to the facts of the present case. If at all there is a difference, the facts in the present case stand on a better footing than in Ishikawajma (supra). In Ishikawajma (supra) there was a turnkey contract with four separate component activities, viz., offshore supply, offshore services, onshore supply and onshore services awarded by Petronet LNG to a consortium of companies led by the Japanese company Ishikawajma-Harima. In the instant case there are two separate contracts i.e., offshore supply and the onshore services contract awarded by the PGCIL to the respondent- Assessee. As in the said case the considerations for offshore contract and onshore contract are separate and distinct from each other, in as much as the consideration in the case of offshore supply contract was received outside India through the mechanism of a letter of credit in foreign exchange while the consideration for onshore contract was received, for the most in Indian rupees with a nominal amount in foreign currency, the latter being for training charges. The title to the equipment supplied from outside India was transferred in favour of PGCIL outside India. In the case of Ishikawajma (supra), it was Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 transferred on the high seas but in the instant case, it was transferred in the country of origin itself as soon as the goods were loaded upon the mode of transfer to be used to convey the plant and machinery, i.e., the shipping vessel, even prior to the goods reaching the high seas. Once the title was transferred in the aforesaid manner, there was no provision either in the

agreement or in law providing a recourse to the respondents to take back the title.

55. Ld. Counsel submitted that the issue of composite contracts has been analysed threadbare by Hon'ble Supreme Court, as well as the jurisdictional High Court and as such what the revenue is now contending is reinventing the wheel. He submitted that the legal position is well settled. He pointed out that the above position has consistently been followed even by the Authority for Advance Rulings (AAR).

56. Ld. Counsel relied on a decision delivered by AAR in the case of JSC Foreign Economic Association (322 ITR 409) (AAR). He submitted that In this case the AAR considered the issue on more or less identical circumstances and facts. To highlight the contentions of AAR certain relevant sections of the said ruling has been referred to which is reproduced hereunder for reference.

57. The facts as noted by AAR in that case are as under-

> "The applicant is a company incorporated in Russia and also is tax resident of that country. It is one of the leading companies in the field of power project construction and export of electric power and is further engaged in the business of construction and commissioning of power project. In response to the tender floated by the National Thermal Power Corporation (NTPC), the applicant Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 successfully bid the tender and three separate following contracts are entered into with the NTPC :
>
> (1) Offshore supply contract- Contract No. CS-9558-102-2-FC-

COA-4520 dt. 25th March, 2005. ('Offshore supply contract No. 4520') for design, engineering, manufacture, inspection and testing at supplier's works, packing, forwarding and dispatch from manufacturer's works to the port of disembarkation in India of all offshore plant and equipment including mandatory spares. (2) Onshore supply contract-Contract No. CS-9558-102-2-SC-COA-4521 dt. 25th March, 2005.

(3) Onshore services contract-Contract No. CS-9558-102-2-TC- COA-4522 dt. 25th March, 2005. In this case we are concerned only with the offshore supply contract No. 4520 and therefore, it is unnecessary to delve into other contracts. The value of the offshore supply contract is US$ 391,121,452 (Rs. 17,084,185,023) to be paid in foreign currency in execution of offshore supply contract. According to the applicant, the transaction of offshore plant and equipment etc. was completed outside India and that the property in goods passed to NTPC outside India and no portion of income from the offshore supply accrues or arises to the applicant in India or received from the NTPC within India and therefore it is not liable to pay any tax under the IT Act.

(1) The Authority made the following observations while adjudicating on the issue-

(2) The applicant banks its support mainly on the judgment of the Supreme Court in Ishikawajma (supra) and also the ruling of this Authority in Hyosung Corporation, (2009) 314 ITR 343 (AAR). The Hon'ble Supreme Court in Ishikawajma's case (supra) has held as follows:

> (1) That only such part of the income, as is attributable to the operations carried out in India can be taxed in India.
>
> (2) Since all parts of the transaction in question, i.e. the transfer of property in goods as well as the payment, were carried on outside the Indian soil, the transaction Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 could not have been taxed in India.
>
> (3) The principle of apportionment, wherein the territorial jurisdiction of a particular State determines its capacity to tax an event, has to be followed (4) The fact that the contract was signed in India is of no material consequence, since ail activities in connection with the offshore supply were outside India, and therefore cannot be deemed to accrue or arise in the country.

This Authority had an occasion to deal with such type of case in Hyosung Corporations case (supra) and the relevant passage is extracted below:

> "10.1 The above events would indicate that the title to goods stood transferred to Power Grid outside the territory of India. The title passed on to Power Grid well before the goods reached the Indian Port or the territorial waters of India. The bill of lading contains the name of Power Grid as the consignee. The documents were presented to the applicant's banker for negotiation soon after the goods were shipped FOB and bill of lading was issued. Two days later, the amount equivalent to 70 per cent of the value was transferred to the applicant's account on the same day. This modus operandi is in accordance with para 2.4.4 of the LOA. The bill of entry which was prepared about 15 days after shipment also shows Power Grid as the importer. Even in the insurance policy taken by the applicant Power Grid has been named as the beneficiary. The customs duty was paid by or on behalf of Power Grid before the goods were taken delivery. These facts unerringly lead to the conclusion that in accordance with the contractual stipulations, the transfer of title to the equipment and materials took place while the goods were outside the territory of India. The events match with the nomenclature offshore supply contract' and the express stipulation that the transfer of title to equipment and materials shall pass on to Power Grid at Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 FOB Port of shipment with the negotiation of shipping documents. It is worthy of note that the applicant has not reserved the right of disposal during transit or otherwise.
>
> The fact that the applicant is not relieved of the responsibility for loss or damage to the goods until the final take over and acceptance of the goods and that the goods are

> left in the custody of the applicant till the stage of erection and installation are not inconsistent with the Power Grid having already become the owner of equipment well before the goods reached the Indian Port. These are special safeguards which Power Grid wanted to have keeping in view the operational exigencies and overall obligations of the applicant under the contract. It is trite that risk need not pass simultaneously with the title to goods. There could be special stipulation between the parties in this behalf. As rightly pointed out by the learned counsel for the applicant, the applicant, by taking care of goods at the site in India till installation, assumed the capacity of a bailee. As regards the stipulation that the supplier shall continue to be responsible for the quality and performance of the goods until the final take over on testing of the equipment, it cannot be construed to be a condition which postpones the transfer of title to the goods till that time. It is more in the nature of warranty provision in the contract. "

Further, after referring to the decision of Supreme Court in Ishikawajma (supra), it observed:

> "10.7 It may be noticed that the clauses in the contract considered by the Supreme Court also contained an obligation on the part of the contractor to retain custody and control of equipment and to take due care of equipment and to take due care thereof until provisional acceptance of the work. Moreover, installation of equipment was also to be carried out by the contractor. In spite of these features, the Supreme Court came to the conclusion that the offshore supply of goods which took place outside India does not give rise to any taxable income in India under the provisions of the Act. The applicant's case even stands on a better Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 footing inasmuch there is a separate and exclusive contract with the applicant for the supply of goods offshore. "

6. The facts of the present case and the salient features of contract are almost the same and the said ruling which followed the decision of Supreme Court in Ishikawajma's case (supra) fully supports the applicant's case. In this case, the bill of lading filed by the applicant shows that the port of loading is Ilyichevsk, in Ukraine and the port of discharge at Haldia in India. The description of cargo is also indicated therein. In another bill of lading the port of loading is Novorossiysk in Russia and port of discharge at Haldia in India. The copies of bill of entry are also filed by the applicant. These go to show that the consignee/importer is NTPC. The commercial invoice has also been filed. It shows that the invoice was raised a few days after shipment and all the material documents including sight draft, bill of lading, freight paid memo, insurance certificate were enclosed.

The terms of contract and the above documents go to show that the transaction of offshore plant and equipment was completed in the high seas and the property in goods passed to the NTPC outside India. As per cl. 31 of General Conditions of Contract the ownership of plant and equipment supplied under the ownership contract No. 4520 shall pass on to NTPC upon lading on the ship and upon endorsement of the dispatch documents in favour of the NTPC. The consideration of sale of offshore was remitted to the applicant directly outside India by means of establishing LlC. Hence no

portion of consideration for offshore supply was received or could be deemed to have been received in India and therefore not liable to tax. Further no income accrues or arises in India to the applicant attracting income-tax.

58. Ld. Counsel placed reliance upon decision of Hon'ble Delhi High Court in the case of DIT Vs. Ericsson AB (343 ITR 470) and submitted that observations made by Hon'ble High Court have Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 bearing on the issue at hand. He submitted that Hon'ble Court held as under:

> The place of negotiation. the place of signing of agreement. or formal acceptance thereof or overall responsibility of the Assessee are irrelevant circumstances. Since the transaction relates to the sale of goods. the relevant factor and determinative factor would be as to where the property in the goods passes. In the present case. the finding is that property passed on the high seas. Concededlv. the goods were manufactured outside India and even the sale has taken place outside India. Once that fact is established. even in those cases where it is one composite contract (though it is not found to be so in the present case) supply has to be segregated from the installation and only then would question of apportionment arise having regard to the express language of S. 9(1)0). which makes the income taxable in India to the extent it arises in India. Merely because the activities, namely, the supply activity and the installation activity are to be carried out by two separate companies who are part of the same group cannot result in the transaction being treated as one composite transaction This is more so when both the entities perform their own independent obligations, receive appropriate separate remuneration and, as found by the Tribunal, are not financially or technically dependent on each other. Further, all of them are assessed in respect of the income that has accrued to them and even the Revenue has, in the course of its arguments, accepted that it is not their case that only one assessment has to be made treating the transaction as one works contract.
>
> Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017

59. Ld. Counsel submitted that on the issue of whether transfer in favour of purchaser happens only after the acceptance test is complete has been dealt by Hon'ble Delhi High Court in the case of DIT vs. Nokia Networks OY(358 ITR 259) as under-

> "The terms of contract make it clear that acceptance test is not a material event for passing of the title and risk in the equipment supplied It is because of the reason that even if such test found out that the system did not conform to the contractual parameters, as per article 21.1 of the Supply Contract, the only consequence would be that the Cellular Operator would be entitled to call upon the Assessee to cure the defect by repairing or replacing the defective part. If there was delay caused due to the acceptance test not being complied with, Article 19 of the Supply Contract

> provided for damages. Thus, the taxable event took place outside India with the passing of the property from seller to buyer and acceptance test was not determinative of this factor".

60. He submitted that in Nokia (supra) Hon'ble Delhi High Court observed as under:-

> Thus the places of negotiation. the place of signing of agreement or formal acceptance thereof or overall responsibility of the Assessee are irrelevant circumstances. Since the transaction relates to the sale of goods. the relevant factor and determinative factor would be as to where the property in the goods passes. In the present case, the finding is that property passed on the high seas. In the present case, the goods were manufactured outside India and even the sale has taken place outside India. Once that fact is established, even in those cases where it is one composite contract (though it is not found to be so in the present case) supply has to be segregated from the installation and only then would question of apportionment arise having regard to the expressed language of s. 9 (1) (i) of Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 the Act, which makes the income taxable in India to the extent it arises in India."

61. He submitted that, from well settled legal position, submissions advanced by Revenue to raise issues of place of signing of contract, place of negotiation, acceptance tests etc. have no legs to stand on. It is apparent that no profits arising from off shore supplies could be brought to tax in India in the present case.

62. On the issue of whether any portion of the profits from off shore supplies was taxable in India in terms of Section 9 read with Explanation 1 of the Act, Ld. Counsel in rejoinder submitted as under:

63. He submitted that the fundamental issue which requires consideration of the Hon'ble Tribunal is, whether the non-resident Assessee in the present case was taxable in India in respect of the profits, arising from off shore supplies. He referred to provisions of section 5 of the Act defining the scope of total income. Section 5(2) of the Act provides as under-

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which-

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

64. Ld. Counsel submitted that, provisions of sub-section 2(a) of section 5 are not applicable on the facts of the case, since title of goods has been transferred outside India on CFR basis INCOTERMS 2000. The payments also have been received by Assessee outside India. He then referred to the provisions of sub-section 2(b) of Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 section 5, which deals with the

accrual of income or deemed accrual of income to such non-resident Assessee in India. Ld. Counsel referred to Section 9 of the Act which deals with 'Income deemed to accrue or arise in India". He submitted that provisions of section 9(1) of the Act provides for all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India ....

65. Ld. Counsel submitted that, income does not accrues or arises in the hands of assessee through or from any "business connection"

> in India. It has been submitted that, while passing draft order, Ld. AO did not anywhere hold that there existed a business connection of Assessee in India. He submitted that after holding that the contracts were composite in nature and could not be split up, Ld.AO proceeded to hold the existence of a supervisory PE and attributed income to such PE which has upheld by DRP.

66. Ld. Counsel thus tried to emphasis that there is no scope of applicability of section 9 of the Act. He submitted that as per settled principle of law, that in absence of any finding of existence of a business connection, Assessee could not be brought to tax in India. He further submitted that, without prejudice, and assuming but not admitting that there did exist a "business connection" of Assessee in India, the principle of attribution would immediately become applicable as envisaged in Explanation 1 and 3 to section 9(1) of the Act.

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67. It was submitted that, what is of seminal importance and crux of the issue involved herein is that, the entire endeavour of the Revenue is to bring portion of the profits arising from the offshore supplies to tax in India. Ld counsel submitted that what is critical to keep in mind is, the event of supply of BTG equipment. It is an admitted factual position that the manufacture of the BTG equipment happened outside India. Thus, what is left is to determine as to whether the taxable event of transfer of goods to the customers happened in India or such event happened outside the Indian territories.

68. It has been submitted that term CFR has been explained as Cost and Freight (CFR) and means that the seller pays for transportation to the port of shipment, loading and freight. The buyer pays for the insurance and transportation of the goods from the port of destination to his factory. The passing of risk occurs when the goods pass the ship's rail at the port of shipment.

69. Ld. Counsel tried to establish that title and risk in goods passed on outside India. It has been submitted that this position has not been disputed by the Revenue. He submitted that authorities below are of the opinion that since these are composite contracts the liability of the Assessee does not end here and continues till the actual handing over after completion of PG testing. It has been submitted that this argument of Revenue has been discarded by Hon'ble Supreme Court as well as

the jurisdictional High Court, and it has been held that this is not a determinative test. Ld. Counsel then went to the submit the play Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 between the provisions of section 9 read with Explanation 1 and 3 of the Act which has been dealt with in decision of Hon'ble Delhi High Court in the case of Nortel Networks India International Inc. Vs. DIT (386 1TR 353).

70. It was submitted that this was a case where this revenue sought to tax the profits arising from off shore supplies in India by alleging that there existed a business connection in terms of section 9 of the Act. He submitted that this issue was considered and answered by the Court as under:-

> 43. It is apparent from the plain reading of Section 9(1) of the Act that all income which accrues or arises through or from any business connection in India would be deemed to accrue or arise in India. In CIT v. R.D. Aggarwal & Co.: (1965) 56 ITR 20 (SC), the Supreme Court observed that business connection would mean "a relation between a business carried on by a non-resident and some activity in the taxable territories which are attributable directly or indirectly to the earnings, profits or gains of such business However, by virtue of Explanation 1 to Section 9(1) of the Act, only such part of the income which is reasonably attributable to operations carried out in India would be taxable.

Thus, if it is accepted that the Assessee has received only the consideration for the equipment manufactured and delivered overseas, it would be difficult to uphold the view that any part of Assessee's income is chargeable to tax under the Act as no portion of the said income could be attributed to operations in India.

44. There is little material on record to hold that Nortel India habitually exercises any authority on behalf of the Assessee or Nortel Canada to conclude contracts on their behalf. There is also no material on record which would indicate that Nortel India maintained any stocks of goods or merchandise in India from which goods were regularly delivered on behalf of the Assessee or Nortel Canada. Thus, by „ virtue of Explanation 2 read with Explanation 3 to Section 9(l)(i) of the Act, no part of Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Assessee's income could be brought to tax under the Act. It is only when a non-resident Assessee's income is taxable under the Act that the question whether any benefit under the Double Taxation Avoidance Treaty is required to be examined.

47. As noticed earlier, there seems to be no dispute that the title to the equipment passed in favour of Reliance overseas. However, the AO, CIT (A) and ITAT did not consider the same to be relevant as according to them, the equipment continued to be in the possession of the "Nortel Group' till its final acceptance by Reliance. In our view, even if it is accepted that the equipment supplied overseas continued to be in possession of Nortel India till the final acceptance by Reliance, the same would not imply that the Assessee's income from supply of equipment could be taxed under the Act. Clause (a) of Explanation 1 to Section 9(l)(i) of the Act postulates the principle of apportionment and only such income that can be ~ reasonably attributed to operations in India would be chargeable to tax under the Act. The position in Ishikawajima-Harima Heavy Industries (supra) was also similar.

There too, the equipments were supplied overseas and the contractor continued to retain control of equipment and material till the provisional acceptance of the work or the termination of the contract.

71. Ld. Counsel submitted that mere existence of a business connection is not enough to trigger taxability in India and that to apply the principle of apportionment as envisaged in Explanation 1 and 3 to section 9(1) of the Act, there must be some activity carried out in India relating to the off shore supplies. Ld. Counsel submitted that no evidence has been brought on record to show that some portion of activities relating to off shore supplies were carried out in India. It has been submitted that on this ground alone no profit arising from off shore supplies could be brought to tax in India. Ld. Counsel submitted when taxability is not established under the provisions of the Income Tax Act, there Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 cannot be any recourse to the provisions of DTAA to Impose Tax on assessee.

72. Ld. Counsel submitted as mandated in several judgments of the jurisdictional High Court as well as the Apex Court once there does not arise any taxability of Assessee under provisions of the Act itself, there is no requirement for us to examine the provisions of the DTAA. The Assessee also relied on the following judgments in support of this contention-

Ishikawajima-Harima Heavy Industries Ltd. Vs. DIT [2007] 288 1TR 408 (SC)(Pg. 1593/ Para 89) DIT Vs. Nokia Networks OY [2013] 358 ITR 259 (DEL)(Para 28/ Pg 1697) DIT Vs. Ericsson A.B. [2012] 343 ITR 470 (DEL) (Para 47/ Pg. 21 of copy of judgement provided on 2.05.2017)

83. Reliance was also placed on the decision of the jurisdictional High Court in the case of Linde AG Vs. DIT (365 ITR 1) (Delhi) where in this context the Hon'ble Court held as under-

> "73. It is apparent that the above questions are in two parts. The first being whether the income received/receivable in respect of the specified items of work is liable to tax in India under the provisions of the Act. The second part is whether the income received in respect of the specified items of work is taxable under the DTAA. Double Taxation Avoidance Agreements do not contain any charging provisions by virtue of which income tax is levied. Income tax is charged by virtue of Section 4 read with Section 5 of the Act. It is only in the event that an assessee is liable to pay tax under the Income Tax Act (de hors any Double Taxation Avoidance Asreements) that the question of examining whether the assessee is entitled to any benefit under the relevant Double Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Taxation Avoidance Agreement would arise. Any income which is not liable to tax under the normal provisions of the Act would not be bought to tax only by virtue of a Double Taxation Avoidance Agreement. It would thus, be essential to first examine whether any amount receivable/received by Linde in respect of design and engineering or for supply of equipment is liable to tax under the Act. In the event, a portion of income is not exigible to tax under the Act, it would not be necessary to consider whether the

DTAA is applicable.

73. Thus, Ld. counsel concluded by submitting that in absence of taxability under the provisions of the Act, no portion of the profits arising from off shore supplies could be brought to tax in India in the present case.

On the contrary, Ld CIT DR submitted as under:

74. During the course of hearing Ld. CIT (DR) submitted that he would raise three contentions sequentially which are as under:

1. On composite nature of contract entered into by assessee;

2. Existence of PE in India;

3. Attribution to income to such PE.

On composite nature of contracts.

75. The first contention of Ld. CIT (DR) was that, contracts entered into by assessee with the Project owners were composite contracts. In support of this contention, he referred to Rosa -I Contract. Referring to terms of the contract, Ld. CIT DR submitted that the contract were for Engineering, Procurement and Construction (EPC). The Ld. CIT (DR) alleged that there were post bid negotiations to arrive at such an elaborate contract and for such negotiations the presence of Sr. Personnel of assessee would have been required Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 in India. It was also submitted that scope of work awarded to assessee was the BTG Package which required assessee to deliver a functional unit Ld. CIT DR submitted that since erection commissioning of BTG package was done under the supervision of assessee, it is evident that the package was implemented in India. It was also submitted that since assessee contractually was required to meet, entire performance guarantee tests and to get the acceptance certificate from the owner, the work would be delivered in a functional shape. He submitted that scope of work of assessee was an integrated works contracts.

76. Similar observations were made by him in respect of Butibori Project to establish the scope of work under the contract was a composite works contract. Ld. CIT.DR relied upon the decision of;

• Hon'ble Supreme Court in the case of Hindustan Shipyard Ltd. Vs. State of Andhra Pradesh (2000) 6 SCC 579; • Madras High Court in the case of Ansaldo Energia SPA 178 Taxmann 57;

Ruling of the Authority for Advance Ruling in case of Roxar Maximum Reservoir Performance WLL 207 Taxmann Page 293/349 ITR 189.

77. Ld. CIT DR submitted that the goods have been actually delivered to the project owners within the territories of India as per the port of destination agreed upon between the parties in the

respective agreements. The Ld. CIT.DR submitted that while objections raised by assessee were pending before DRP, the DRP repeatedly called upon assessee to furnish information and Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 documents relating to invitation to tender, RFP, minutes of meeting, correspondence regarding negotiations of the Agreement, details of expenses incurred in India etc. It was submitted that these documents would have a bearing on whether assessee had a PE in India which were not complied with.

Permanent Establishment

78. He filed a detailed written submission of his arguments which is placed on record. While submitting arguments to prove the existence of PE Ld. CIT.DR submitted that there is an overlap in respect of period in which supplies were made, and supervision surveys commenced. In the written submission filed by him he had submitted that it was undisputed that assessee had a supervisory PE in India, ever since January, 2007. Ld. CIT.DR emphasized that, keeping in view Article 5(1) read with Article 5(2) (j) of DTAA, the supervision PE had to be aggregated as under Article 5(2)(j). He submitted that the term permanent establishment includes a building, site or construction installation or assembly Project or supervisory activities in connection there with, where such site project or activities continued for a period of more than 183 days,. Ld. CIT DR placed reliance upon the decision of Hon'ble Delhi High Court in the case of E-Funds IT solution reported in (2014) 364 ITR 256, to buttress his arguments.

Attribution of profit:

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79. Under this head Ld. CIT DR submitted the bottom line case by placing reliance on the decision of Hon'ble Delhi High Court in the case of POSCO Engineering and Constructions Company Ltd. Vs. ADIT reported in 2014 Taxmnn.com 500 (Delhi Tri).

80. He submitted that the price of equipment included compensation for certain activities which were carried out at site. He submitted that the contracts entered into by assessee with the project owners are indivisible in nature and that the responsibility of the assessee does not end with mere supply of BTG equipment but is extended to provide supervisory services in India for erection of power plant, income received by assessee from offshore supply is deemed to have been received in India and therefore the same is attributable to the supervisory PE in India.

Rejoinder by Ld. Counsel:

81. In rejoinder to the submissions by Ld. CIT DR, Ld. Counsel submitted that as regard the question of whether the contracts were of a composite nature or not, looses significance in view of the judgment of the Hon'ble Supreme Court in the case of Ishikawajima

- Harima Heavy Industries Ltd. Vs. DIT [(2007) 288 ITR 408. Ld. Counsel submitted that the decision relied upon by Ld. CIT.DR in the case of Ansaldo Energia (supra) has also been discussed by Hon'ble Delhi High Court LG Cable (2011) 237 CTR 138 and it was distinguished. He submitted that similar plea was taken by Revenue before the Authority for Advance Rulings in the case of Joint Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Stock Company Foreign Economic Association 322 ITR 409. The AAR in Para 39 of its decision dealt with the contention of Revenue that the main equipment to be installed at the site is a boiler, and the piecemeal equipment and the parts required for assembling the boiler have no independent existence and therefore, the supplies, equipment and material are integrally connected with the erection of the boiler in India. The AAR rejected this argument which was made to distinguish the judgment in Ishikawajima - Harima Heavy Industries Ltd. (Supra) and held that there was nothing in law which prevented the parties from entering into a contract for sale of material for a specified consideration although they were meant to be utilized in the fabrication and installation of complete plant or unit.

82. Ld. Counsel referring to the decision Vodafone International Holdings reported 341 ITR 1, relied by Ld.CIT DR submitted that for the purpose of income the "look at test" must be applied. Reliance was placed on AAR Ruling in Roxar Maximum Reservoir Performance WLL(supra) where the authority apparently seems to have applied the "look at" test and concluded that the Hon'ble Supreme Court's decision of Ishikawajima Harima Heavy Industries Ltd.(supra). Ld.Counsel submitted that it would be relevant to address the issue which the Ld.CIT.DR has raised regarding shifting of profits to offshore contracts as was the case in Ansaldo (supra). Ld.Counsel submitted that there is no such allegation in the present case and revenue received in respect of supervision activity Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 were in excess of 77 crores. He submitted that, none of the averments made out by Ld.CIT DR have any bearing on this matter.

83. Ld. Counsel then referred to the decision of the Hon'ble Supreme Court in Hindustan Shipyard Ltd. Vs. State of Andhra Pradesh (2000) 6 SCC 579, which has been relied by Ld. CIT DR. It is submitted by Ld. Counsel that the assessing officer had also referred to this judgment to draw a conclusion that the facts of the present case were fitting in the two of the categories, which referred to a contract for work in which the use of material is accessory or incidental to the execution of the work. Ld. Counsel submitted that assessee's case is that it is essentially a contract for supply of goods where some work is required to be done as incidental to the sale. He further submitted that the decision of Hindustan Shipyard Ltd. (supra) has been considered by Hon'ble Supreme Court in the case of Ishikawajima - Harima Heavy Industries Ltd. (supra) wherein, Hon'ble Supreme Court observed that, it is only for the purposes of taxation that the terms of contract are required to be construed. He submitted that the Court therein observed that a turn-key contract may involve supply of materials used in execution of contract for price as also for use of the materials by works and labor but same may have no relation with the taxability. Eventually, the Hon'ble Supreme Court applied the test of territorial nexus and the principle of attribution to conclude that no portion of the profits arising from the offshore supply could be brought to tax in India.

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84. Ld. Counsel submitted that even if it is assumed that the contracts entered into by Assessee were composite contracts, what really has to be seen is whether any portion of the activity relating to offshore supplies were carried out in India. He further submitted that, it is a settled principle of law that in a supply contract the revenue arises only once the supplies has been made and does not arise at any preceding or subsequent stage. He thus submitted that the assumptions and presumptions of the revenue regarding place of negotiation, signing of contract, completion of acceptance test are of no consequence. Ld. Counsel drew our attention on the decision of this Tribunal in the case of DCIT Vs. Roxon OY (2007) 106 ITD

489. It was submitted that this decision has been rendered in context of the principle of attribution where a PE also comes into existence and was a case of supplies under a turn-key contract. He submitted that the principle of attribution has been explained in the judgment and basically it is held that what can be brought to tax in India is only the profits arising from the activities carried out in India. Ld. Counsel emphasized that provisions of Section 9 read with Explanation 1 canvases this approach, which is in consistence with Double Tax Avoidance Agreements. He submitted that in a recent judgment of the Delhi High Court in the case of Nortel Networks India International Inc. (2016) 386 ITR 353 on the facts of that case, Hon'ble High Court held that profits arising from offshore supplies cannot be brought to tax in India given the specific mandate of Explanation 1, which is the attribution rule.

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85. On the issue of existence of permanent establishment, Ld. Counsel submitted as under:

> Ld. Counsel submitted that, as regards Ld. CIT.DR's contentions that there was an overlapping of the offshore supplies and supervision activities for erection and commissioning, it is pointed out that same has been clearly indicated as such in the chart submitted by Assessee before this Tribunal, and is not a new material fact being brought to the attention of this Hon'ble Tribunal. He submitted that in-spite of the fact that there may be an overlapping period between the offshore supplies and the supervision services, the department, still has to apply the test of attribution, as far as the offshore supplies is concerned. Ld. Counsel submitted that the fundamental principle which has been enunciated by the Court repeatedly is that whether provisions of domestic law are applied or DTAA, still one has to satisfy the attribution rule and it is only the profit arising from such activities carried out in India that can be brought to tax in India. He submitted that in the entire submission made by the Ld. CIT DR, not a word has been said as to how any activity pertaining to the offshore supplies was carried out in India. Ld.Counsel, submitted that the argument of an overlapping period lacks substance and has no bearing on the matter.

86. Ld. Counsel then adverted to the argument of Ld. CIT.DR, regarding the inter play between Article 5 (2) and Article 5 (1) of the DTAA i.e. to say that if any instance of Permanent Establishment as Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 contained in Article 5 (2) is prevalent, then automatically it constitutes a fixed place of business within the meaning of Article 5 (1) of the DTAA and hence profits arising from offshore supplies should be brought to tax in India. It is submitted by Ld. Counsel that reading and understanding of Department, qua the provisions of Article 5 are totally incorrect. He submitted that the decision relied upon by the DR of the Delhi High Court in the case of E- funds IT Solution (supra), does not lay down this principle. Ld. Counsel submitted that Ld. CIT DR relied on para 25 of the said decision, and has more specifically laid emphasis where the court observed that a mine, oil or gas well or a plantation or a factory in most cases would satisfy requirements of Article 5 (1). Ld. Counsel submitted that a close reading of para 25 of the decision, would clearly show that Hon'ble court has specifically held that to create a location PE, the requirements of Article 5(1) should be independently satisfied. He submitted that the observations of the Court were rendered in context of examples of a mine, and oil or gas well, a quarry or any other place of extraction of natural resources and were not even examined by the Court in the context of sub- clause (j) which relates to building site or construction, installation or assembly project or supervisory activities in connection therewith. He submitted that second line of paragraph 25 clearly shows this and hence the proposition that Ld.CIT.DR extracted out of this paragraph does not exist.

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87. Ld. Counsel submitted that the contention put forth by the Ld. CIT.DR regarding the existence of a fixed place PE owing to a supervision PE is completely misplaced. He submitted that correct enunciation of law regarding the inter play between the provisions of Article 5(1) and Article 5 (2) of the treaty has been explained by Mumbai ITAT in the case of Linklaters LLP Vs. ITO [(2010)132 TTJ 0020/(2011) 9 ITR 217]. Ld. Counsel submitted that assessee has taken a plea that the provision of Article 5 (2) where specific instances of PE had been indicated would have to also meet the requirements of Article 5 (1) and as such in order to establish PE in India in terms of Article 5 (2) the condition of Article 5(1) i.e. Fixed Place PE must also be satisfied. He submitted that in Para 84 of the judgment while recording the contentions of the revenue, the court took note of the contention put forth by revenue, that once conditions laid out in Article 5 (2) was satisfied, nothing further was required to hold the existence of a PE. As regards the contention of revenue it was submitted that the provisions of Article 5(1) and 5 (2) do not have to be read together. It was submitted by Ld. Counsel that if, conditions of Article 5 (1) are to be read with the ones stipulated in Article 5 (2), then that would make Article 5(2) otiose and unnecessary. He submitted that Article 5(2) cannot be read on a standalone basis. Ld. Counsel referred to the observations made by this Hon'ble Tribunal in Linkletters LLP (supra) as under:-

"88. The face's admitted omitted where the Article 5(1) of the India UK tax treaty refers to the requirements of, what is often termed Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 as, basic rule PE. This refers to a fixed place of business through which business of the enterprise is wholly or partly carried out.

Elaborating upon the scope of this provision, a co-ordinate Bench of this Tribunal, in the case of Airline RotablesLtd. UK v. Joint Director of Income-tax 40 DTR 226 and after analysis of earlier decisions of this Tribunal in the cases of Western Union Financial Services Inc. v.Asstt. DIT [2007] 104ITD 34 (Delhi) and Motorola Inc. v. Dy. CIT[2005] 95 ITD 2691 (Delhi) (SB), has observed that, "There are three criterions embedded in this definition - physical criterion i.e., existence of physical location, subjective criterion, i.e., right to use that place, functionality criterion, i.e., carrying out of business though that place. It is only when these three conditions are satisfied, a PE under the basic rule can be said to have come into existence ".

89. Article 5(2), however, consists of two heterogeneous categories of permanent establishments. The first category consists of illustrations of what would constitute a PE, even under the basic rule, and the second category consists of, what can be termed as, extensions of the basic rule and deemed permanent establishments. While clauses (a) to (i) of article 5(2), in our humble understanding, form part of the former category, i.e., illustrative of the basic rule, clauses (j) and (k), as we understand, form part of the second category, i. e., extensions of the basic rule. The descriptions in these two categories are listed under separate sub-articles in OECD Model Conventions, UN Model Convention Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 and even under US Model Conventions. The very fact that these two categories have been segregated in these model conventions also shows that these two categories belong to different genus....

.....90. A plain reading of article 5(2) of India-UK tax treaty, in the light of the above discussions, clearly shows article 5(2) of India- UK tax treaty is a mixture of what is usually contained in article 5(2) and article 5(3) in all major model conventions i.e., UN Model Convention, OECD Model Convention an US Model Convention. The clauses consisting in article 5(2) of India-UK tax treaty are, therefore, not homogeneous and these clauses do not belong to the same genus. One cannot therefore proceed on the basis, as has been urged by the learned senior counsel for the Assessee, that some degree of uniformity in treatment of all these sub- clauses is warranted. What applies to clauses (a) to (i) of this article does not necessarily also apply to articles (i) and (k) of this article 5. As regards the first category of permanent establishments, i.e., under clauses {a) to (i), OECD Model Convention Commentary which is also adopted by the UN Model Convention Commentary, does state that the second paragraph of model conventions, "it contains a list, by no means exhaustive, of examples, each of which can be regarded, prima facie, constituting a permanent establishment", and that "as these examples are to be seen against the background of general definition given in paragraph 1, it is assumed that the Contracting States interpret the items listed, 'a place of management', 'a Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 branch', 'an office' etc., in such a way that such places constitute permanent establishment only if they meet the requirement of paragraph 1". Even by the OECD Model Convention Commentaries, however, this theory is not extended to the items in second category i.e., (i) and (k }. So far as paragraph 3 of the OECD Model Conventions dealing with these items are concerned, OCED Model Convention Commentary states as follows :--

> "This paragraph provides expressly that a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve

> months. Any of those items which does not meet this condition does not of itself constitute a permanent establishment, even if there is within it an installation, for instance an office or a workshop within the meaning of paragraph 2, associated with the construction activity. Where, however, such an office or workshop is used for a number of construction projects and the activities performed therein go beyond those mentioned in paragraph, it will be considered a permanent establishment if the conditions of the article are otherwise met even if one of the projects involved . . . lasts for more than 12 months."

[Emphasis supplied]

91. It is thus clear that, even as per the OECD Model Convention, one of the items included in article 5(2), i.e., 5(2)(j), of India-UK tax treaty is such that it would not constitute permanent establishment under the basic rule of Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 article 5(1), and it is only on account of deeming fiction provided by the provision of article 5(2)(j), it can be treated as a permanent establishment. We are in considered agreement with this analysis in OECD Model Convention Commentary, and, for this reason, we are unable to approve learned counsel's argument that article 5(2) of India- UK tax treaty only provides examples of situations covered by article 5 (1), (emphasis supplied)

88. Ld. Counsel controverted the contention of Ld. CIT. DR regarding continuous existence of PE ever since January 2007 owing to the overlapping of the time periods of the supplies and supervision services and the argument that the supervision was a core revenue generating business activity and that such supervision income was through such PE. He submitted that it has no bearing on the matter because what needs to be determined in the present cases is that, in-spite of the existence of the supervisory PE, whether any part of the activity relating to offshore supplies was carried out in India. He submitted that Ld. CIT. DR has not been able to bring any evidence on record that, any portion of such activities was carried out in India. He submitted that even if there was an existing Supervisory PE ever since January 2007, still no profits arising from the offshore supplies could be brought to tax in India.

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89. Ld. Counsel very strongly emphasized that the question of going into the DTAA would arise, only if taxability of the Assessee has been established under the provisions of Section 9(1) of the Income Tax Act. He submitted that whole question of whether there was a PE or not, and whether profits arising from the offshore supplies could be brought to tax, would be redundant, if taxability is not established in Section 9(1). He placed reliance on the observations by Hon'ble Delhi High Court in the case of Nortel Networks India International Inc. Vs. DIT (supra) wherein, dismissed the plea that the profits arising from offshore supplies were being brought to tax in India by the Department, owing to the allegation of a fixed place of a business in the form of the Indian subsidiary. Hon'ble High Court examined the provisions of Section 9 read with Explanation 1, and while following the

settled principle of law in terms of the judgment of the Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd. Vs. DIT (supra), held that under Section 9 of the Act itself, taxability was not established and hence there was no occasion to even refer to the provision of DTAA. He submitted that this position was earlier enumerated by Hon'ble Delhi High Court in the case of DIT Vs. Nokia Networks [(2013) 358 ITR 259] wherein Hon'ble Court held that in the absence of any activities relating to the offshore supplies being carried out in India, no portion of such profits could be taxed in India under Section 9 of the Act.

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90. Ld. Counsel controverted revenue's submission that title in the equipment did not pass to the owner till the final acceptance of the BTG Package was not completed. He submitted that stand of the revenue has already been dealt with by the jurisdictional High Court in the case of DIT vs. L.G. Cable Ltd.(supra), wherein in paragraph 29 & 30 the Hon'ble High Court has held as under:

> "29. Thus, the mere fact that 15% of the payment was to be retained by the PGCIL to be paid 30 days after operational acceptance on erection and completion of the system cannot be construed to mean that the title in the goods did not pass to the buyer in the country of origin.
>
> 30. Then again, in our considered opinion, undue importance cannot be attached to the fact that the agreement imposed on the Assessee-company the obligation to handover the equipment functionally completed. This obligation has been rightly construed by the Tribunal to be in the nature of a trade warranty and the Tribunal in this regard has rightly observed as follows:"

91. He submitted that the contention of Ld. CIT. DR regarding composite nature of contracts as well as transfer of title not being complete till the final acceptance by owners has no legs to stand on. Ld. Counsel submitted that the arguments advanced by Ld. CIT. DR are nothing but an effort to reinvent the wheel, which has been functioning normally ever since the decision of the Hon'ble Supreme Court in the case of Ishikawajima - Harima Heavy Industries Ltd. (supra.)

92. On the issue attribution of profits Ld. Counsel submits as under:

> Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Ld. Counsel referred to the written submission filed by Ld. CIT DR, wherein reliance has been placed on the POSCO Engineering & Construction Co. Ltd. (supra) judgment. Ld. CIT DR had referred to Butibori Project and Rosa-I project. He submitted that this reliance was placed only to establish that supervision activity was relating to the PG testing of the BTG Package and not any other activity, thus, would result in income to be attributed to such activity. Ld. Counsel submitted that Hon'ble Supreme Court in the case of CIT Vs. Sun Engineering Works (P.) Ltd. [(1992) 198 ITR 27], specifically shunned the

practice of reading judgments out of context, and without appreciating the difference in facts. Ld.Counsel submitted that Ld. CIT DR has compared Apples with Oranges, without explaining the scope of work in POSCO Engineering & Construction Co. Ltd. (supra). Ld. Counsel submitted that facts in POSCO Engineering & Construction Co. Ltd. (supra) are that POSCO Engineering, Nagarjuna Construction Company and Steel Authority of India, formed a consortium for setting up of a Blast Furnace Complex in West Bengal. He submitted that this Tribunal therein dealt with the question raised by Department, whether the contract in that case was a composite contract. Ld. Counsel submitted that in the facts of that case there were four contracts being, offshore supplies of equipment, onshore supply of equipment, onshore services and design and engineering services He submitted that the Tribunal therein noted that, one contract had been entered into by the Assessee with Steel Authority of India wherein the preamble of contract indicated that it had been entered Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 into for setting up a Blast Furnace Complex. Thereafter, the Tribunal noted that each activity has been demarcated, and prices has been indicated in the contract and then came to the conclusion that the Assessing Officer was not correct in holding that it was a composite contract devoid of any bifurcation towards onshore offshore supplies and services.

93. Ld. Counsel submitted that emerging principle from the decision of POSCO Engineering & Construction Co. Ltd. (supra) was that, if the components are distinctly identifiable even in a single contract it cannot be considered as composite contract. This finding of the Tribunal was rendered by following the Supreme Court judgment in the case of Ishikawajima Harima Heavy Indutries (supra). This Tribunal in POSCO (supra) on these specific facts observed that, simply because supply of equipment and rendition of services is to one party, for a common purpose, it could not be treated as a composite contract. Ld.Counsel further submitted that, this Tribunal then proceeded to examine, whether income from offshore supply of equipment could be brought to tax in India. There the DR took a plea that, if sale consideration included compensation towards rendering of some services in connection with installation and commissioning of equipment of India, then to that extent income should be brought to tax in India. In Para 4.7.2, this Tribunal also noted the position of revenue that transfer of title outside India was not relevant and it was the performance guarantee which was important and decisive of the taxability of Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 income. As has been the consistent position of the Department, Ld. Counsel submitted that DR failed to show any such activity, and Tribunal notes in the said paragraph that the DR kept harping on the general submissions that the construction of the plant which included offshore supplies could not have been completed without involvement of PE. Ld. Counsel submitted that in Para 4.7.2 (lc) , Ld. CIT DR's contention were noted by the Tribunal on the facts of that case in offshore supply contract, that the Assessee therein was to provide training, instillation, testing, commissioning of such equipment in India which showed that the Assessee was required to put the equipment in a deliverable state in India. He submitted that the Tribunal noted in this paragraph the contention of the revenue that since so many activities were to be done in India in connection with the training, installation and commissioning of the equipment, the property in the equipment would pass only on completion of

such activities in India. In Para 4.7.2 (ld), the Tribunal gave its finding that on the facts of that case there was material on record to indicate that apart from training the Assessee was obliged to carry out certain activities associated with the erection and commissioning of the equipment in India.

94. Ld. Counsel submitted that in the case of POSCO(supra), Tribunal addressed the question that, irrespective of such activities in India the decisive question to be answered was whether the title in the goods passed in India or offshore. Ld. Counsel submitted that revenue's arguments were rejected by Tribunal by following the Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Special Bench decision in the case of Motorola Inc v. DCIT [2005] 95 ITD 269 as well as that of the Supreme Court in Ishikawajima (supra) judgment.

95. The next question decided by Tribunal in POSCO was whether the sale price included any consideration for services rendered or to be rendered in India. While referring to the summary of prices in Para 4.7.2 (2.b) , the Tribunal found that the schedule of summary of prices included Foreign supervision charges which were Supervision charges in India during Erection, Start up, Commissioning and Performance Guarantee Tests. It was in this context that the Tribunal came to the conclusion in Para (2.d) that certain revenues had to be attributed on account of the alleged activities carried out in India which were built into the overall price of the equipment.

96. Coming to the facts of the present case, Ld. Counsel submitted that there are separate contracts for Onshore services (barring Rosa), where it is clearly provided that assessee shall be providing supervision services in respect of Erection, Commissioning, Performance Guarantee testing etc. He submitted that there are instances, where apart from providing supervision services in respect of these activities, the actual erection, commissioning, performance, guarantee and PG testing was done by the Assessee in India. Ld. Counsel submitted that all profits arising on account of these activities in India have already been offered to tax and as such there is no revenue which pertains to any Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 activities carried out in India which has already not been offered and brought to tax by the department. Thus, according to him reliance placed on POSCO(supra) by Ld.CIT.DR is of no consequence and does not apply to the facts of the present case.

97. Ld. Counsel Submitted that much emphasis was paid by Ld. CIT.DR on training of the owner's personnel by Assessee vis- a- vis the operation of BTG equipment. This submission by Ld. CIT. DR was in support of his overall contention that, if original price of the equipment included certain activities to be carried out in India then the same should be brought to tax in India. Ld. Counsel submitted that the entire endeavor of Ld. CIT.DR is to confuse the facts, with the ultimate objective of seeking a remand. It was submitted by Ld. CIT.DR that a bare perusal of the Botiboori project, terms and conditions where the prices in respect of the said project indicated that lump-sum price indicate, (a) a price of 111 Million Dollars as full consideration for the equipment supply price on CFR Indian Port, and (b) a price of 4 Million Dollars has been given as full consideration for the aggregate services price for the erection of turbine and generator, supervision of erection of balance BTG Package, supervision of testing and commissioning, conducting of performance testing,

training of owner's personnel.

98. Ld. Counsel submitted that from the contract it can be seen that the component of training is already included in the services portion, for which separate value has been indicated. Thus, the Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 entire case of the revenue that training was built into the price of the equipment falls flat into its case.

99. Ld. Counsel referred Kinda Phase IV contract, which is on Page 1280 in Vol.-II of Paper book for Assessment Year 2012-13 and 2013-14. He submitted that in this contract, the scope of contract has been given on Page 1287 which provides for supply of BTG equipment to the owner. The contract price is given in Clause 13 on Page 1304 which is USD 106 Million 25,000 only which includes USD 150000 towards training of the owner's personnel as provided in Clause 40. Clause 40 of the agreement is at Page 1327 of the Paper book which provides that the supplier, i.e the Assessee shall provide training in English to the owner's personnel for 10 months in People Republic of China. Thus, the argument of the DR that training was carried out in India is unsubstantiated and at best only a wild and general averment which the Department usually makes, as noted by the Tribunal in POSCO(supra) judgment in para 4.7.2 (l.b). This averment is further substantiated by the Kinda Supplement contract which is at Page No. 1073 of Paper book Vol.-Ill for Assessment Year 2010-1,1 where again Clause 40 of the Agreement on Page 1119 provides the training has to be carried out in China. Similar Clause is found in the Ratnagiri Contract at Page 117 of Paper book Vol.-III for Assessment Year 2010-11 where again Clause 40 on Page 1182, it is provided that training has to be provided in China.

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100. Ld. Counsel submitted that in view of the above, it has been established beyond doubt that the allegations made by Ld. CIT. DR are baseless and correct picture is, that where training has been included in the offshore supply price, such training has been conducted in China and in all cases where training was to be provided in India it has been included in the onshore services portion and has already been offered to tax.

101. Ld. Counsel Submitted that, to be fair to the Department, there are certain contracts namely (i) the Hisar Contract at Page 980 in Vol.-II of the Paper book relating to the Assessment Year 2010-11, where the scope of work has been given on Page 989 Clause I. He submitted that a closer perusal of scope of work reveals that at point no. g, that the training of owner's personnel for use of the equipment is included in the price of the contract.

102. Ld. Counsel submitted that in first blush it would be seen that the training would form part of the offshore supplies but a closer scrutiny of the contract reveals otherwise. He submitted that on Page 1022 of the same Paper book, the general conditions of the contract provides for training to be provided at site for a period of 9 months and which is generally to be provided for training the personnel to be able to operate the equipment. Ld. Counsel submitted that the question which arises

is, whether this can be the training having its own existence or whether such activity has to be treated as merely incidental to the supply of equipment. Ld. Counsel submitted that this peculiar aspect was considered by the Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Hyderabad Bench of the Tribunal in the case of Pirelli Cavi E Sisteni vs. ACIT (2014) 151 1TD 19. In para 13 (C) of its judgment, the Tribunal has accepted the submission of assessee therein, that imprinting of training of personnel is only incidental to supply, and is not a revenue generating activity separately. He submitted that similar observations were made by the Hon'ble Delhi High Court in the case of Linde AG Vs. DDIT (2014) 365 ITR l(Del), where the question that was being considered was that, whether in a case of supply, activities relating to design and engineering could be separately brought to tax as fee for technical services. In pares 94 and 95, Hon'ble Court was of the opinion that in every contract for manufacture and installation there are certain services which are inextricable linked with such manufacture, installation and supply and cannot be separately evaluated for treating them as fee for technical services. While doing so, Hon'ble Court referred to the decision of AAR in the case of Rotem Company, 279 ITR 165.

103. Ld. Counsel thus concluded the rebuttal in respect of Ld. CIT.DR's argument relating to training services, by trying to establish that, where training services were included in the offshore supply portion, they were carried out in China and where the training was to be done in India it formed part of the onshore services portion of the contracts for which revenue has already brought to tax. He also submitted that, be that as it may, in view of the settled principles of law, such training activities were Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 inextricably linked to the supply portion and were incidental, not being revenue generating activity separately.

104. He submitted that Ld. CIT. DR referred to Botiburi Project where mechanical completion testing has been discussed and has tried to emphasise the point that the supervision of erection and commissioning by Assessee would not include these tests. Ld. Counsel referred to the discussion in POSCO's (supra) Judgment in para 4.7.2 (2.d), in the context of examination of taxability of training charges. The Court has given an example and come to the conclusion that where training costs, form part of the offshore supplies, the price has to be split to determine the revenue attributable to training. In para (2.h) the Tribunal discussed the element of testing and inspection at site and has held that if the charges for the same are not included in any other component in price, then these have to be considered as part and parcel of the same price which would require its splitting up to determine the amount attributable to such testing charges in India. Since the information was not available, the Tribunal found it fit to restore the matter to the A.O. to make such determination.

105. Ld. Counsel referred to the facts of Butibori Project, and submitted that Article 10 on Page 117 covers the Acceptance Procedures. Article 10.1.1 deals with the contractor performing Shop Tests at the place of manufacture. Article 10.2 deals with mechanical completion. Ld. Counsel submitted that the Ld. CIT DR tried to emphasise the point that since the contractor was assisting Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 in mechanical completion and such activities were not forming part of the onshore services, some portion of the revenues were to be attributed to India. He submitted that the

provisions of the contract have not been carefully referred to and as such wrong conclusion have been drawn. He submitted that endeavor of Ld.CIT.DR was to somehow establish that apart from the PG testing, certain other tests were being carried out by assessee in India, for which revenue needed to be attributed. Ld. Counsel submitted that close reading of Clause 10.2 on Page 117 which refers to Mechanical Completion reveals that the contractor i.e. assessee was only required to assist the purchaser in mechanical completion activities of the BTG Package. Clause 10.3.1 on Page 118 provides that the contractor shall assist the purchaser in preparing (i) mechanical completion check lists for the BTG Package and (ii) a plan of pre-commissioning tests for the systematic checking. Clause 10.3.2 provides that the contractor shall assist the purchaser in performing the Pre-Commissioning Tests to demonstrate that such BTG Package confirms to the requirements of the contract. Clause 10.4 refers to the contractor assisting the purchaser in preparing a mechanical completion report. Clause 30.5 refers to Initial Operation it is provided that the contractor shall supervise the purchaser's testing the unit for continuous operation for 14 days. Ld. Counsel submitted that it is clear that all that the contractor was doing was assisting the purchaser in carrying out these tests and this activity form part of the overall supervision activity and that there is no substance in the argument of Ld. CIT DR that the assessee was Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 carrying out any activity in India for which the price was built in the overall price of offshore supplies.

106. He submitted that certain Clause in Butibori Project emphasises that there are certain tests which were being carried out in India, for which Ld. CIT.DR submitted that price was built into the offshore supplies. Ld. Counsel referred to Clause 10 on Page 529 which refers to site Tests. He submitted that bare perusal of Clause 10.01 states that on completion of installation and commissioning of equipment, the following checks shall be carried out with the maximum available load ..... This in itself is evident of the fact that these activities are post the installation and commissioning and are forming part of the PG testing which Ld. CIT. DR has fairly admitted that all revenues pertaining to PG testing have been offered to tax. Ld. Counsel submitted that there is no substance in the argument of the DR that certain tests have been carried out in India which do not form part of the onshore services contract.

107. Ld. Counsel then addressed the next issue raised by Ld. CIT. DR while placing reliance on the POSCO (supra) judgment is on the clause relating to liquidated damages. Ld. Counsel submitted that having referred to Article 9, Ld. CIT DR has stated that by definition, liquidated damages arise in India and as such by necessary implication this is a revenue generating activity as the price of the equipment would include a provision for such damages. He submitted that bare perusal of Article 9 would show that the Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 liquidated damages are provided for in respect of the delay in the delivery of equipment and liquidated damages for the steam turbine generator, steam turbine heat, steam turbine efficiency and auxiliary power consumption. To some up Ld. Counsel submitted that liquidated damages could be levied by the owner in the event the Assessee delayed the delivery of the equipment and secondly if the equipment did not perform in terms of specifications given by the owner. Ld. Counsel submitted that assessee fails to understand that if it was required to suffer liquidated damages, it would actually be a cost in his hands and not a revenue generating activity. Also, in every business transaction relating to supplies, performance guarantee

are always tendered without recourse to which the user of the equipment would never be able to secure his rights in the event the equipment was defective or did not perform in terms of the specification. Ld. Counsel submitted that question which needs be considered is that the levy of liquidated damages is a contingency and being a contingent event can the department take the plea that there is some profit embedded in the sale price of the equipment? Similar is the case for warranties and latent defect.

108. Ld. Counsel submitted that these are again contingent events, i.e. it may or may not happen. The very fact that there is an uncertainty attached to it, the same cannot be a basis for bringing any profits to tax in India on account of offshore supplies.

109. Ld. Counsel submitted that all these issues do not have any bearing on the matter since what is to be considered transfer of title Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 in goods which has taken place outside India and thus no taxable event took place in India. Whether the Assessee may have to incur subsequent costs on repair, warranties etc. do not have any bearing on the said taxable event i.e. offshore supplies. Be that as it may, these product warranties etc. are normal trade warranties which are attached to all equipment whether it is for industrial use or personal use. Ld. Counsel placed reliance on the decision of the Delhi High Court in the case of L.G. Cable Ltd. (supra).

110. Ld. Counsel submitted that as far as the decision of the Tribunal in POSCO's case is concerned the Tribunal failed to considered the decision of the jurisdictional High Court in the case of LG Cable, and as such to that extent, the observation of the Tribunal and the conclusions are per incurium, and cannot be relied upon. He submitted that it would also be relevant to refer to Para 9 of the submission filed on 13.04.2017 by Ld,CIT. DR, where in his understanding, even the liability of bearing insurance during the construction, erection, warranty and latent defects periods shall be a revenue generating activity requiring attribution. He thus submitted that for the reasons stated above, this also has no bearing on the transfer of title of equipment outside India and hence this argument has no substance.

111. Ld. Counsel controverted the argument of Ld. CIT.DR, regarding income from design and Engineering Service that could be attributed. He submitted that, what is of importance on the facts of the present case is regarding terms of the scope of work.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Assessee was required to supply only BTG equipment and the drawing and designs and the scope of work covered the designing and engineering part only as incidental to the supply of equipment. He submitted that Ld. CIT DR relied on Butibori Project where the scope of work has been given on Page 2 and the intention of the parties has been expressed in so many terms and where the contractor has expressed its willingness and the purchaser desires that the contractor shall provide supply of and services for BTG equipment. He submitted that predominant scope of work covers the design, engineering, manufacturing etc. Thus, the facts of POSCO's case are completely different because in that case designing and engineering was of the complete plant and for which separate revenue was attributed. On the facts of that case, the Assessee pleaded that since

the drawing and designs related to the equipment thus revenue attributable to the said activity could also not be brought to tax in India. This argument was rejected by the Tribunal. To support the above contentions Ld. Counsel drew our attention Rosa 1 Contract where at Page 1269 in para 6.9, manufacturing drawings have been defined. The Clause specifically provides for the contractor to provide to the employer or the engineer in-charge over the project, the manufacturing drawings, designs, calculations and practices etc. This clearly evidences that the drawing and designing was only related to BTG equipment and not for the power project as a whole and as such the observations made in the POSCO case are of no consequence. He submitted that further even in the Butibori Project, the designing and engineering Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 is discussed at Page 99 and Clause 2.3.1 specifically provides that the contractor shall be responsible for the designing and engineering of the BTG Package which confirms to the design criteria including safety and environmental standard set forth in the technical specifications for this contract. The term technical specifications has been defined on Page 94 and means the general specifications, technical documents and specifications and design criteria setting out a description and specification for the works.

112. Ld. Counsel further to illustrate this he referred to JSW Contract on Page 1082, where the term drawings has been explained in Clause 3.11 which provides that the drawings shall mean auxiliary and instrumental supply under the contract and includes any drawings furnished and/or provided by the owner or the engineer as a basis for proposal and forming part of specification. He submitted that similarly, in Butibori Project the term drawings have been discussed. Here also it is prescribed that the drawings refers to the drawing furnished by the purchaser to the contractor and engineering data and drawings submitted by the contractor during the progress of the work. Ld. Counsel submitted that all these would establish beyond doubt that the designing and engineering was not a separate activity, but was incidental to the supply of equipment and was not a separate revenue generating activity, unlike the facts in POSCO's case.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017

113. Ld. Counsel relied on the decision of the Hon'ble Delhi High Court in the case of Linde AG Vs. DDIT (supra), wherein in para 94, similar issue has been considered and it has been held as under:

> "It is submitted that the work relating to design and engineering is inextricably linked with the manufacture ana1 fabrication of the material and equipment to be supplied overseas and this work was also performed wholly outside India. These submissions have not been evaluated. Question no. (ii) framed for consideration of the Authority invites a ruling on the basis that the offshore services falling within the scope of services by Linde are inextricably linked with (he Offshore supply of equipment and material and cannot be considered as technical services on a standalone basis. This is a question of fact which would have to be considered at an appropriate stage. However, if it is accepted that the services provided by Linde relating to design and engineering are inextricably linked with the manufacture and fabrication of the

material and equipment to be supplied overseas and form an integral part of the said supplies, then the services rendered by Linde would not be amenable to tax under Section 9(1)(vii) of the Act. Consideration for such services would not be considered as "Fees for Technical Services" for the purposes of Section 9(1)(vii) of the Act.

114. We have perused the submissions advanced by both the sides in the light of records and the judicial precedents relied upon by them placed before us. Assessee has filed before us respondent's paper book which has been verified and examined carefully.

115. During the course of hearing held on 21.03.2017, 22.03.2017, 23.03.2017, 10.04.2017, 12.04.2017, 01.05.2017 and 02/05/2017, both Ld. Counsel as well as Ld. CIT.DR advanced Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 various arguments both oral as well as written, submissions, rejoinder, a summary of which have been reproduced hereinabove. Ld. Counsel as per his submissions on the last date of hearing, submitted on 15.05.2017, detailed submission incorporating the oral arguments advanced by Ld. Counsel himself, oral arguments advanced by Ld. CIT. DR in the light of written submissions, and the rejoinder of Ld. Counsel. It was agreed by Ld. CIT.DR that, on receipt of the same, by him or his office, in the event any further submission needs to be advanced by Department, the same would be completed on or before 30/05/17. It has been agreed upon by both the sides that, nothing would be submitted in writing by either parties beyond 30.05.2017. We have not received any further submissions from Ld. CIT.DR, as on 30.05.2017. Hon'ble Delhi High Court was pleased to grant extension vide order dated 18.05.2017, to pass order in these appeal by 30.06.2017, We proceed to decide the issues on the basis of materials placed on record as well as the noting made by us while the matter was being heard in the court.

116. Detailed submissions advanced by both the sides have been reproduced hereinabove however; in a nutshell the same is summarized as under:

Ld. Counsel emphasised as under:

• Two transactions and its considerations have been bifurcated contractually into supplies effected and services rendered. It has been submitted that the supply of equipments have been dealt with separately and services rendered for supervision, installation/commissioning of the project has been dealt with Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 separately in the agreement. Ld. Counsel further submitted that for the purposes of supervision being the service agreement in all the contracts, the revenue received by assessee has been offered to tax. However as the supply of equipments have taken place out of India on CIF/F.O.B. INOTERMS 2000, the same cannot be held to be taxable in India directly or indirectly.

Whereas contentions advanced by Ld. CIT.DR, were: • Ld. CIT.DR objected to the interpretation of contracts as carried out by the Ld. Counsel. According to Ld. CIT.DR, assessee has conducted its business operations from supervisory/fixed PE in

India and thus has established business connection within the meaning of Explanation 2 and 3 to clause (i) of sub section 1 of section 9 of Income tax Act.

Ld. CIT.DR contended that Permanent Establishment stood established, as per article 5 of Indo-China tax treaty. • Ld. CIT.DR submitted that the agreements entered into by assessee with various project owners for setting up of power plants in India are composite contract though entered into separately. He submitted that separate agreements entered into for supply of equipment as well as service contract, however on perusal of these contracts, it can be ascertained that these are mutually inclusive with each other. • He further submitted that delivery of equipments would not be completed till the goods are supplied and commissioned on site which eventually was the responsibility of assessee. • Ld. CIT.DR submitted that, goods having been sold offshore hence not taxable in India, cannot be accepted, as these goods has finally arrived at the project site in India and has been utilised for the purposes of setting up of power project by assessee itself.

• Ld. CIT.DR submitted that there is no dispute regarding Service PE existing in India, for the relevant transaction. And therefore income has deemed to have arisen in India through this business connection directly and indirectly. He submitted that for the purposes of Paragraph 1 of Article 7 of DTAA between India and China, that are directly or indirectly Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 attributable to permanent establishment includes profits arising from transactions in which the permanent establishment has been involved and such profit shall be regarded as attributable to the permanent establishment to the extent appropriate to the part played by the permanent establishment in those transactions even if those transactions are made or replaced directly with overseas head office of the enterprise rather than with the permanent establishment.

117. Our entire exercise revolves around the issue, whether there existed a Business connection of assesee in India, and if so whether the supply of BTG equipment by assessee and payments received by assessee for supply could be attributed to the supervisory PE under deeming provision of section 9 of the Act. Bearing in mind all the prepositions advanced by both the sides stated above, we will examine the facts of the present case vis -a-vis the agreements entered into between assessee and project owners as per the directions of Hon'ble High Court.

118. Before taking up the issues in hand, it is imperative to set out important portions of all contracts for 2 reasons;

(a) the issue can be considered only on the basis of intention of parties to the contracts the terms and conditions agreed upon on the basis of submissions advance.

(b) Coating one portion of the clause from here and there on selective basis would not be the appropriate way to consider the issue involved.

119. It is matter of record that during the assessment years under consideration, assessee entered into 14 contracts, for Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 purposes of supply of BTG equipments as well as

supervision of erection/installation, commissioning and performance testing at the project site in India as the case may be. Assessee through their personnel have been present in India since December 2004, which is evident from the 1st contract entered into by assessee with Reliance Energy Ltd.

Terms of Contracts and Analysis Kinda:

120. This is a contract between assessee and JSW Energy Ltd., for purpose of supply, as well as setting up of a 2 x 300 MW power plant in Toranagallu Village, Bellary district, Karnataka.

Assessee has entered into two contracts with the owner, being:

1. "Supply of Boilers and Steam Turbine Generator Set and Auxiliaries" placed in the paper book Part -II for assessment year 2010-11;and

2. "Services Contract" placed at pages 1894 to 1918 in the paper book part III for A.Y.2010-11.

Both these agreements have been executed between the parties on 20/06/06.

121. It has been submitted by the Ld. Counsel that assessee has received payments separately for supply of BTG equipments as well as for services rendered under the service contract. It has been argued that since the BTG equipments has been supplied outside Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 the territories of India and the payments received lease under a separate contract, it cannot be deemed to have been arisen in India. He thus submitted that the payments received by assessee for supply of BTG equipments cannot be taxed in India.

122. On the contrary the Ld. CIT.DR submitted that the agreement entered into by assessee with JSW Energy is actually a composite contract and therefore the payments alleged to have been received by assessee cannot be considered to be not arising in India.

123. To resolve this controversy we thought it proper to analyse the clauses agreed upon by both the parties in both the contracts entered into by assessee with JSW Energy Ltd.

First, we shall take up the contract for "Supply of Boilers and Steam Turbine Generator Set and Auxiliaries".

124. Clause 1 of the contract reads the scope of contract in a nutshell. It has been agreed upon between parties in sub clause 1.1 that the scope of supply of BTG equipments and auxiliaries would be as per Annexure-2 of the contract. Reading of Clause 1.2, suggests that along with supply, the contract requires assessee for performing or providing or furnishing or causing the provision, furnishing and performance of such additional or incidental items necessary in order for the supplier to satisfy the performance guarantee and warranties set forth in the contract and to supply

the equipment and make the equipment operable and capable of Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 performing as specified in the specifications or as otherwise necessary in order to comply with the requirements of this contract, then the same shall be considered as a part of the scope of supply.

125. Clause 1.3 requires a supplier to perform all its obligations and responsibilities under the supply contract at its own risk, cost and expenses. And that the supplier would also ensure functioning of equipments for intended purpose as per the contract.

126. Clause 3.25 defines Port of Destination which means Chennai, for consignment coming by sea and is Bangalore for consignment by air.

127. Clause 3.27 defines project site which means the actual site where the project is to be set up.

128. Clause 10.4.1 that any royalties and fees for patents covering materials, articles, characters, devices, equipment or processes used in the equipment shall be deemed to have been included in the contract price. It has also been agreed that the supplier shall indemnify the owner against any infringement of any patents involved in and in case of an award of damages the supplier shall pay all sums as may be required under such award in respect of the equipments.

129. Contract Price has been considered in Clause 12.2 which reads as under:

> "12.2 The contract price includes all costs necessary for the supply of equipment and compliance with performance Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 guarantee and warranties. The contract price includes any and all direct indirect and ancillary charges course and expenses of whatsoever nature, suppliers tax (whether direct, indirect or ancillary) incurred by or imposed on the supplier in any supplying the equipment, all profits licence, royalty and other fees the cost of all mandatory spare parts, accessories, consumable materials and special tools to be provided under the contract as per division of work in Annexure -2, design and drawings, engineering, manuals manufacturing, inspection, shop testing, supplier of spares and other supplies, packing loading, forwarding, shipping and unloading at the port of destination."

12.3 the contract price for supplies CFR INCOTERMS 2000 12.4 the contract prices inclusive of right in respect of the equipment 12.5 the contract price excludes any duties and taxes in India and withholding taxes.

14.2 Transportation the supplier shall be responsible for packing, loading, transporting, unloading at the port of destination all equipment, without limitation the supplier shall be responsible for loading and shipping equipment and or other material. It is also acknowledged by the supplier that the responsibility set out in this clause are included in the contract prices.

In respect of clause relating to transfer of title it has been agreed between the parties as under:

> 14.5 Transfer of Title 14.5.1 "Transfer of Title" in respect of equipment and materials supplied by supplier pursuant to the terms of the contract shall pass pass on to the owner at the port of loading of the equipment.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 14.5.2 the transfer of title shall not mean acceptance, and the consequent takeover of equipment. The supplier shall continue to be responsible for the risk to quality and performance of such equipment and/or materials and for their compliance with the specifications until takeover in terms of the performance warranties.

130. On a joint reading of clause 14.5.1 and 14.5.2 it is very clear that the supplier/assessee continues to have control over the equipments while in transit and there is no actual custody of the equipments by the buyer from the supplier outside India. From the clauses referred herein above the supplier is solely responsible for delivery of the equipments to the territory of India each time they are loaded on the ship. It is also agreed between the parties that the entire cost incurred by assessee on behalf of the owners. The assessing officer has done what has been agreed between the parties. As per clause 26 the contract is completed only when the warranty period expires or the supplier has issued a certificate for commercial use of the equipment after the completion of performance guarantee test.

131. Clause 38.1 refers to Mode of Payment which is as under:

> "38.1 Mode of Payment the payment 75% of the contract price amounting to USD 141, 300, 000 shall be made through irrevocable automatic revolving letter of credit. The value of the revolving letter of credit shall be for 25% of such value which amounts to USD 35,325,000. The letter of credit shall be opened by the owner and accepted by the supplier within 3 months from the effective date. The format of letter of credit shall be as per schedule-V. The letter of credit Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 issuing bank shall be a leading repeated bank such as the state bank of India, Canara bank, IDBI bank which shall be acceptable to the supplier. The advance payment amounting to USD 16, 956, 000 and milestone payment of rule USD 30, 144, 000 shall be made by telegraphic transfers/Swift."

132. 38.2 Payment Schedule

(a) the breakdown of the contract price shall be as per schedule VI

(b) the owner shall make payments as per schedule IV.

Schedule VI has not been placed on record as on the relevant page, it has been mentioned as the Supplier shall submit it within two weeks.

Schedule IV is placed at page 972 Schedule IV -payment schedule

1. Contract price and terms of payment 1.1. As full and composite compensation for the suppliers performance of the work and obligations under this contract, the owner shall be to the supplier a fixed lump sum referred to as the contract price including ocean right up to the port of destination in India as per clause 12 of general conditions of contract. The contract price for this contract on CFR basis is USD 188,400,000 (One hundred and Eighty Eight million Four hundred thousand only). The breakup of total contract price shall be as per schedule VI.

1.2. Terms of payment on supply of equipment and mandatory spare 1.2.1. 9% of the contract price amounting to USD16,956,000 shall be paid as advance payment (interest-free) on fulfillment of the following by the supplier:

> • signing of the contract Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 • submission of invoice for advance payments • submission of advance bank guarantee equivalent to 9% of the total contract price as per schedule I 1.2.2. 16% of the contract price amounting to USD30,144,000 shall be paid towards milestone payment as follows:
>
> • USD 5,400,000 in January 2007 • USD 5,400,000 in February 2007 • USD 5,400,000 in March 2007 • USD 5,400,000 in April 2007 • USD 5,400,000 in November 2007 • USD 3,144,000 in December 2007 1.2.3. 60% of the contract price amounting to USD113,040,000 per individual package as shown in the building breakup (schedule VI) shall be paid on dispatch, against satisfactory evidence of shipment.

1.2.4. 5% of the contract price per individual package as shown in the breakup of contract price (schedule VI) shall be paid on receipt of related documentation for the erection of the equipment supplied in case the documents are received in advance at the shipment is delayed then the payment for the same shall be made along with the delivery of equipment;

1.2.5. 10% of contract price each unit as shown in the breakup of contract price (scheduleVI) shall be paid on issuance of taking over certificate or deemed takeover date of each unit. 1.3. Mode of payment:

> 1.3.1. The payment towards advance and milestone payments had been made through telegraphic transfer/Swift. All other payment under this contract shall be paid through an irrecoverable letter of credit (L/C) payable at site as per schedule V. The L/C shall be established through a band acceptable to the supplier. 1.3.2. The revolving L/C shall be received by the supplier within 3 months from the effective date of the contract.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 1.3.3. L/C may be confirmed at the option of the supplier. All cost

charges connected with the L/C shall be borne by the owner except following to the account of the supplier:

> • confirmation charges, if any • negotiating charges due to the bank of the supplier • extension charges if due to reasons only attributable to the supplier
>
> 133. It is very pertinent to observe that in clause 1.3 of the payment schedule being mode of payment it is only the payment towards advance and the milestone payment mentioned in sub clause 1.2.2 in the schedule that shall be paid through telegraphic transfers/Swift. And it has been agreed that all other payments under the contract shall be made through irrevocable letter of credit payable at site as per schedule V (format of letter of credit and exited page 974 -978).
>
> 134. Clause 47 of the agreement at page 956 deals with Training of owners personnel. It says that the supplier shall provide the training to 40 man months and that the supplier shall provide a reasonable office space for this purpose at the locations where these services are being performed. It is also been agreed that equipment specific training is included in the contract price.

It has been agreed by the supplier to furnish a security for the performance of the equipment supplied by assessee in lieu of which the supplier provides a bank guarantee to the owner which shall be valid until the expiry of warranty period of each unit under the contract.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017

135. Clause 53 (performance security) the intention of the parties appears to be very clear that the supplier is responsible for the performance of the equipment supplied by it to the owner and that the supplier shall be responsible for the care of equipment, materials and supplies as per CFR INCOTERMS 2000.

Service Contract

136. Between the same parties placed at page 1894 executed on 28.06.2006.The scope of services under this contract has been agreed upon in Schedule 1 placed at page 1911 of paper book part IV which are as under:

> Schedule 1: scope of services
>
> 1. Site Services These services shall be rendered by SEC as part of the overall project management service. The services shall broadly include but not be limited to the following:

• Erection and commissioning supervision staff has to be deployed by SEC from start of direction of main plant equipments till completion of the project. Deployment schedule for supervisory staff shall be mutually discussed and agreed between JSWEL and SEC • BG test for boiler, turbine and generator shall be carried out by SEC. Any special tools, tackles and instrument shall be arranged by SEC.

Providing support services to the SEC's supervisory staff example construction of site offices, temporarily stores, transport to work site for SEC'S personnel, insurance cover, watch and ward for security and safety of the materials under SEC's custody etc as required.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Maintaining proper documentation of all the site activities pertaining to SEC as specified by JSWEL.

137. Clause 8 of this agreement reads as under:

8. Transportation, receiving, Handling and Storage 8.1. SEC shall provide all necessary information to JS WEL for JSWEL's property handling, storing, utilising and disposing of any project materials considered has added under the governmental or local law, regulation, statute or ordinance in effect at the job sites. 8.2. SEC shall provide supervision services to JSW in unloading, inspection, storage and preservation of materials and equipment in the scope of supply of SEC. Necessary storage handling reservation manual shall be provided by SEC.

138. This clause makes it further clear that assessee is involved even in unloading, inspection of sites for the purposes of erection of project in India. This further establishes control of assessee over the equipments supplied by it under the supply contract.

Kinda Supplement

139. This agreement has also been entered into between assessee and JSW Steel Ltd. dated 24/08/07, on similar terms and conditions as stipulated herein above in identical manner. This agreement has been placed at page 1073 of paper book III, filed for assessment year 2010-11 Kinda Pahse IV

140. This agreement has also been entered into between assessee and JSW Steel Ltd., dated 14.03.08, on similar terms and Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 conditions as stipulated herein above in identical manner. This agreement has been placed at page 1073 of paper book III, filed for assessment year 2010-11.

A Plain and cumulative reading of terms and conditions of these contract entered into between assessee with owner for all the above referred contracts clearly shows that it was one and the same transaction. One cannot be read in isolation with the other. The supply of equipments was same contract. In fact supply was part and parcel of the main contract and the same cannot be severed and treated differently. The service Contract entered was in fact for the purpose of meeting out expenses by assessee in terms of its employees in India.

Hisar:

141. Assessee entered into agreement with Reliance energy Ltd, called as "Equipment and Mandatory Spares Supply & Services Contract Agreement", on 05.02.2007 for setting up of 2 x 600 MW thermal power plant at Hissar Hariyana. This agreement has been placed at page 980-1072 of paper book part -II, for assessment year 2010-11.

142. Article 2 defines the scope of work to consist all the work to be performed as detailed in division of work document between assessee and reliance which has been enclosed as Annexure A.

143. Clause 4.1 it has been agreed by the contract/assessee that the contract is awarded to them on single source responsibility Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 basis and the contract/assessee is bound to perform total contract in its entirety.

144. Clause 4.2 it has been agreed that the contract shall be performed in 2 parts; the 1st part shall be where the contract shall supply all the equipments and materials including associated accessories and mandatory spares related PTG package on CFR Kandla Port. It has also been agreed that the contractor shall be responsible for the entire scope of work constituting the 1st part of contract and the 2nd part of contract and that any breach under or with respect to either of the part of contract shall automatically constitute to be deemed breach.

In respect of delivery of goods the terms that have been agreed between the parties have been narrated in the scope of work under Ocean transportation at page 991 which reads as under:

8. Ocean transportation

145. The contractor shall be responsible for the transport of the plant and equipment from their place of origin to the port of destination in accordance with CFR INCOTERMS 2000.

146. The contractor shall check the capacity and availability of the loading facility which will be utilized in connection with the transport operation.

The shipment of all the consignment relating to equipment and materials will be arranged by the contract of.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Supplier will also ensure that the consignments are shipped by vessel of the following classification but not limited to.....

The contractor shall arrange shipment of all imported materials and equipment from the port of export to Kandla, Gujarat Indian port. However in case of any emergency, the materials and equipment can be shipped to Mumbai Port subject to prior approval of taint from purchaser. In case of air shipment the destination airport shall be New Delhi.

Further the term 'contract price', 'equipment contract price' has been defined in the contract at page 1023 as:

> "Contract price shall mean the lump sum price quoted by the contract in its offer with addition and deletion as may be a creed and incorporated in the contract agreement for the scope of works shall be treated as the contract price."

Equipment contract price shall mean the CFR value of the imported equipment and the material and delivery at site (inclusive of packing, forwarding and transit insurance and transportation up to site) prize of in the genius equipment and material"

> 3.4 Taxes and Duties 3.4.1 the contract shall bear and pay all taxes, duties, levies and charges assessed on the contract, its subcontractors or their employees by all relevant municipal, state or national government authorities in connection with the contract applicable to the local portion.
>
> The contract shall supply all equipment/material on CFR Indian port basis. The contract shall pay all taxes and duties in the country of origin of goods. The purchaser shall bear the cost of customs duty and CVD in India (if applicable), Madurai and transit insurance and transportation from Indian port to site."

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Laguna

147. This contract has been entered into between assessee and reliance energy Ltd, dated 27.02.2008, on similar and identical terms. This agreement has been placed at page 1552 of paper book- IV filed for assessment year 2010-11.

148. From the above understanding between the parties under both these contracts establishes that assessee was responsible for supply of goods till the port in India and thereafter was in total control of these acute mints during the election/installation of the power project.

Rosa I

149. This contract has been executed between assessee and Rosa power Supply Company, for setting up 2 x 300 MW Thermal Power Plant Rosa at Uttar Pradesh. This contract has been placed at page 1226-1352 of paper book, Part-III for assessment year 2010-11. This contract is entered into between assessee along with Utility Energytech and Engineers Pvt.Ltd., (UEEPL), (being consortium members) and collectively called as contractor with the owner/Employer, being Rosa power supply company.

The recital in which the understanding between the parties performing work are as under:

> AND WHEREAS SEC had submitted its offer and employer after examining the offer shortlisted SEC for award of EPC and after subsequent discussions and negotiations agreed to award the EPC to Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 the consortium of SEC and UEEPL on terms and conditions contained in this contract for engineering, procurement and construction activities for the project and the documents referred to therein, which have been mutually accepted by both the parties and reduced into writing being these presents.
>
> Article 2: Contract Documents 2.1 the following documents together with the respective attachments and appendices (hereinafter referred to as "contract documents") shall together constitute this contract between the employer and the contract and the term "contract" in all such documents shall be construed accordingly.

A. The contract and the append assessed to are:

> Appendix I (a)& (b) breakdown of the contract price and mandatory spares Appendix II terms of payment and letter of credit B. Division of work (Annexure-A) and terminal point Annexure-B), other documents (Annexure C) and delivery schedule and liquidated damages (Annexure D) between SEC and Rosa for BTG package C. Division of work (Annexure A) and terminal point Annexure F) other documents (Annexure G) between UEEPL and Rosa for balance EPC works D. Conditions of contract E. Specifications referring to the technical documents (section 2- section 12) signed on 22/02/04 F. Consortium agreement G. Tender issued by the employer I. S EC's proposal Article 3 Conditions and Covenants 3.1 as mutually agreed between the consortium members and consented by the employer, the scope of work is divided into 4 parts Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 and this contract shall accordingly operate as a combination of following contracts;

the 1st part (hereinafter called the 1st contract) which shall cover supply of all equipment and materials for 2 sets of boilers, turbines and generators including associated accessories and mandatory spares, sourced outside India on CFR Indian port (Kandla) basis. The 2nd part (hereinafter called the 2nd contract) which shall cover supervision of rejection, supervision of

commissioning and performance guarantee testing of the equipment and material covered under 1st contract.

The details S EC's scope of work, that is the 1st contract and the 2nd contract has been stipulated and defined in Annexure A and Annexure-B and Annexure C. .....

The scope of work under the 1st and the 2nd contract shall hereinafter also be referred to as the "BTG package" which shall be confined to Annexure-A and Annexure-B and Annexure C and the scope of work under the 3rd and 4th contract shall hereinafter also be referred to as the "balance EPC works".

The scope of work applicable for S EC is more specifically set forth in Annexure A attached hereto and the terminal points for SEC is more specifically set forth in Annexure-B attached hereto and other documents as per Annexure see attached hereto ..... 3.2. SEC shall be fully responsible for the BTG package; and UEEPL shall be fully responsible for the entire scope of work constituted or forming part of the 3rd and 4th contract.

3.3 It is expressly understood and agreed that this contract is awarded to the consortium members on a nonintegrated basis. Each consortium members shall bear the several responsibilities and liabilities respectively imposed by this contract and for the avoidance of doubt, each consortium members shall be solely responsible to the employer for its own scope of work and responsibility and liability as defined in Annexure A to D for SEC and Annexure A to G for UEEPL Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 under this contract and it satisfactory performance in accordance with the specifications and parameters under the contract. 3.4 Each consortium member shall be responsible for the execution of its scope of work in accordance with the provisions of the contract. In executing its scope of work each consortium member on an individual basis shall owe a duty to the employer to ensure that all the plant, material and equipment used by 8 and the design (to the extent necessary) thereof is fit for the purpose of for which it is required and that all the work undertaken by such concerted member is executed in a good and work man like manner by appropriately scaled, qualified and experienced personnel.

If any part of the works performed by a consortium member within its scope of work, (including drawings and information prepared by the said consortium member) shall be or become defective and required to be dispatched it, displaced, modified or repaired in any way in order to comply with the terms and conditions of the contract, then such consortium member shall be solely responsible for and bear the cost of dismantling, replacement, modification or despair as may be required and shall coordinate on an individual basis with the employer in respect of such remedy will work. 3.5 is expressly understood and agreed under this contract that, liability of S EC shall be basic on and limited to the section prize of the BTG package only and not the entire value of the contract. SEC's contractual liability for the time for completion and liquidated damages for the 1st contract and the 2nd contract and more specifically defined under Annexure D to this contract. 3.6 notwithstanding anything to the contrary stated herein above, employer shall be solely responsible for the payment of SEC for the BTG package and UEEPL for the balance EPC work respectively. There would not be any

payment transaction between S EC and UEEPL.

.....

Article 4 (a) Contract Price Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 the contractor agrees that it shall perform or cause to be performed the entire scope of work of the contract for fixed and lump sum consideration of USD 208, 500, 000 (US dollar 208 million and five hundred thousand only) would and INR 11, 267, 700, 000 (Indian Rs.Eleven billion 267 million and Seven hundred thousand only) inclusive of all applicable Indian taxes and duties ("contract price") payable by employer to the contractor. The above contract price would be divided among following contracts as under: 4.1 contract price for as per 1st contract (1st contract price) USD 159, hundred, 000 (US dollar one hundred fifty nine million one hundred thousand only) on CFR Indian port (Kandla), (Incoterms 2000). Net of Indian taxes (import tax and VAT and other applicable taxes). However, S EC shall be liable for the duties and taxes applicable in China.

4.2 contract price as per 2nd contract (2nd contract price): USD 8, 400, 000 (US dollar 8 million and 400,000 only) net of Indian taxes (withholding tax, service tax and other applicable taxes). .....

Appendix I has not been placed in the paper book for our reference. Appendix II is the terms of the payment schedule according to which payment in respect of the contract started as on the date when the following events occurred:

> 1.2 terms of payment on supply of equipment and mandatory spares:
>
> 1.2.1 5% of 1st contract price shall be paid as 1st initial advance (interest-free) on fulfillment of the following by the contract:
>
> • signing of the contract • submission of invoice for the 1st initial advance of 5% of the 1st contract price • submission of an unconditional bank guarantee equal into 5% of the 1st contract price as per the Annexure towards advance payment bond Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 • submission of an unconditional bank guarantee equivalent to 15% of the 1st contract price as per Annexure towards performance security The above referred terms read with the other terms of payment does not indicate any separate reference to offshore supply and onshore services provided by assessee.
>
> In respect of the contract price and terms of payment for 2nd contract which has been produced at page 1241 of the paper book reads as under:
>
> 2. contract price and terms of payment for 2nd contract 2.1 as full and complete compensation for the contract's performance of work and obligations under this

> contract, the employer shall pay the contract of fixed lump sum fee for services rendered to as the 2nd contract price as per Appendix I. 2.2 Terms of payment • signing of the contract • submission of invoice for the 1st initial advance of 5% of the 1st contract price • submission of an unconditional bank guarantee equal into 5% of the 1st contract price as per the Annexure towards advance payment bond • submission of an unconditional bank guarantee equivalent to 15% of the 1st contract price as per Annexure towards performance security
>
> 150. It is observed that under both these parts the assessee is providing with unconditional bank guarantee towards performance and security. Had the intention of the parties was to consider the supply independently without having any connection with that of services rendered by assessee in India, assessee would not have agreed for providing an unconditional performance and security guarantee towards the supply of equipment also. This implies that Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 the supply is in extremely linked/connected to the services rendered by assessee in terms of direction of the project.

In the paper book assessee has not placed the division of work (Annexure 8) and terminal point (Annexure-B), other documents (Annexure C).

The next document placed at page 1254 is the conditions of the contract wherein specific references made to the following clauses:

> Clause 1.1: Definitions "Contract" means the agreement between the employer and the contractor for the execution of the works incorporating the conditions, specifications, employers drawings and contract is drawings, priced and completed schedules, tender and such further documents as may be expressly incorporated therein.
>
> "Contract agreement" means a document recording the terms of the contract between the employer and the contractor.
>
> "Contract price" means are some stated in the contract agreement as payable to the contractor for the execution of the works as may be adjusted from time to time pursuant to the contract.
>
> "Contract's Risk" means the risk defined in sub clause 37.3 "Final Certificate of Payment" means a certificate to be issued by the engineer to the employer in accordance with sub clause 33.10 Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 "Performance Security" means the security in the form set out in Appendix I to be provided by the contractor in accordance with sub clause 10.1 securing the due performance of the contract by the contractor.

"Plant" means machinery, apparatus, materials and all things to be provided under the contract for incorporation in the work.

"Provisional takeover" means the takeover of a section of the works pursuant to sub clause 28.5 and provisionally taken over shall have the corresponding meaning.

"Risk Transfer Date" means the date as determined in sub clause 38.2 where the risk or loss of or damage to the work passes from the contractor to the employer in accordance with sub clause 39.1 "Site" means a place or places provided or made available by the employer where work is to be done by the contract or to which plant is to be delivered, together with so much of the area surrounding the same as the contract shall with the consent of the employer use in connection with the works otherwise than merely for the purpose of access.

6.5 Erection Information The contractor shall provide with the times stated in the contract or in the program drawings showing how the plant is to be affixed and any other information required for:

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 a. preparation by the contract of suitable foundations or other means of support; and b. providing suitable access on the site for the plant and any necessary equipment to the place where the plant is to be erected; and c. making necessary can connections to the plant.

6.6 Operation and Maintenance Manual The contractor shall supply operation and maintenance manuals together with drawings of the works as built. These shall be in such detail as well enable the employer to operate, maintain, adjust and repair all parts of the works and shall be in such form as stated in the contract.

28.7 Consequence of Failure to Pass Test on Completion If a section fails to pass the tests on the reputation thereof under the sub clause 28.5.1 and has not made to even the minimum acceptable limit, the engineer after due consideration with the employer and the contractor shall be entitled to:

a. order for the reputation of the test under the condition of sub clause 28.5; or b. reject the works and such section notwithstanding that either section of the works may have been taken over or provisionally taken over, in which even the employer shall do the ex-illusion of any remedy under clause 45 be entitled to recover all sums paid in respect of the works, together with the cost of Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 dismantling the sets, clearing the site and returning the plant to the contractor, otherwise disposing off in accordance with the contractor's instructions; or c. issue at taking over certificate if the employer so vicious notwithstanding the works are not complete or the sections/works do not meet even the minimum

acceptable standards in which case the contract or shall pay such sums as are due under the provisions of clause 60 or the contract price shall be reduced by such amount as may be agreed by the employer and the contractor failing agreement as may be determined by arbitration.

37.3 Contractor's Risk The contractor's risk are all risks other than those identified as employer's risk and force major risk.

Care of the works and passing of risk 38.1 Contractor's responsibility for the care of the works The contractor shall be responsible for the care of the works of any section thereof from the commencement date until the risk transfer date applicable thereto under sub clause 38.2 The Contractor shall also be responsible for the care of any part of the works upon which any outstanding work is being performed by the contractor pursuant to clause 30 until completion of such outstanding work.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Risk Transfer Date The risk transfer date in relation to the work or a section thereof is the earliest of either:

a. the date of issue of taking over certificate or b. with respect to the relevant section only the date of provisional takeover or c. the date when the engineer is deemed to have sure the taking over certificate or the works are deemed to have been taken over in accordance with clause 29 or d. the date of expiry of the notice of termination when the contract is terminated by the employer or the contractor are in accordance with these conditions.

Rosa II

151. This contract has been executed between assessee and Rosa Parks supply company limited for setting up of 2 x 300 MW thermal power plants at Utterpradesh, being Rosa -II. The said agreement has been entered into between the parties on 23.03.2008 on similar terms and conditions as has been reproduced hereinabove.

Yamuna

152. This project is entered into by assessee with Reliance energy Ltd on identical terms of payments and scope of work.

153. Thus on perusal of the contracts being Rosa -I and Rosa II, it is blatantly clear that there is only one contract to be executed by Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 assessee for the entire erection, commissioning and successful running of the above project. The design, engineering, supply, assembly, erection and installation are interlinked and everything culminates into one plant. Assessee has to

formulate its own design and engineering as per the requirement placed by the owner/employer based on which the plants and materials are procured. There are no bifurcations between supply and erection/installation in the contract. And Ld. Counsel's reliance on one portion clause 4 of the main contract is an artificial bifurcations which is flawed. The assessee is responsible for selection and supply of materials, shipping to the site and installation and all works, commissioning and placing the plant into service.

Butiburi Project:

154. This contract has been entered into by assessee with Vidarbha industries power Ltd being the owners of this project to be set up at Butiboori, Nagpur, Maharashtra.

155. The owner has appointed Reliance Infra Projects (UK) Ltd., a company incorporated under the laws of United Kingdom's as purchaser, being the subsidiary of Reliance Infrastructure Ltd.,. The understanding between the parties are that Reliance infra projects UK shall procure the equipments and provide all necessary services to be rendered outside India. Whereas Reliance infrastructure Ltd would be the EPC contractor to undertake to Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 design, engineer, procure, construct, Utrecht, test and commission the project and provide the project management services in the manner specified in contract.

156. In this Triparte agreement assessee has agreed its willingness to provide the purchaser the BTG equipments and to provide supply of and services for boilers turbines and generators including associated accessories and auxiliaries and commissioning spares, maintenance tools and tackles and consumables of one unit of 300 MW capacity. The contract being the assessee shall also provide covering design, engineering, manufacturing, procurement, supply, transportation to designated Indian port, a direction of turbine and generator (main body) supervision of direction for balance BTG package, supervision of testing and commissioning, conducting of performance testing, training of purchasers/owners personnel and final completion of the BTG package as detailed in Appendix 10 Division of Work and Appendix 11, Terminal points in accordance with the terms and conditions specified in the contract.

Appendix 10, Division of Work is placed at page 35-48 of Part -2 of paper book filed for assessment year 2012-13 and 2013-14.

It has been agreed between the parties that the effective date of the contract shall be the date on which the following events occur:

• the contractor (assessee) and the purchaser (reliance infra project UK) has signed the contract;

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 • the contractor has submitted the performance guarantee being 5% of the contract price;

• contractor has submitted advance payment guarantee being 5% of the contract price; and • an advance payment of 5% of the contract price has been received by the contract.

157. It is observed that assessee has received lump-sum payment of US $ 111,000,000 as full consideration from the purchaser for equipment supply price on CFR Indian port basis. A detailed breakup of price for this project has been listed at appendix 1 placed at page 8-10 of paper book. On perusal of the same it is observed that payments for the purposes of services rendered being supervision service for injection, a direction for turbine and generator, services for performance guarantee tests, commissioning, training has been aggregated at USD4,000,000. The payment schedule for the purposes of equipment supply price has been placed as Appendix 5 at page 14-17 of paper book. It is very interesting to note that though there is a segregation of prise for supply of equipment and services rendered for erection; supervision etc 5% of the final payment of supply of equipment, would be paid on issuance of the final completion certificate by the purchaser.

158. The parties have also entered into a General Condition Contract (GCC), placed at page 79-163 of paper book Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017

160. Article 2 of the GCC specifies the contractor's (assessee) work and obligations. Here it has been agreed that assessee shall provide all work, supplies and services necessary for design, engineering, manufacturing, procurement, supply, transportation to designated placed in India on CFR basis (" INCO 2000), erection of turbine and generator, supervision of election for balance BTG prep package, supervision of testing and of commissioning, conducting of performance testing, training of owners/purchasers personnel, achievement of provisional raking over and final completion of BTG package.

161. On perusal of Article 2 at page 96- 99, it is discernible that the training of owners/ Purchaser's Personnel for operation and maintenance of the equipment is upon assessee and the entire cost of working conditions of its supervisors is upon assessee itself.

Article 4 provides for training of owners personnel at page 105-

106.

162. On perusal of these clauses it is clear that assessee is to provide training to the personnel of owners engineers at site through classroom lectures on the equipment and the project.

Article 20 deals with the title in goods and passing of risk,

163. Article 22 deals with Shipment on perusal of these articles assessee is to provides various details in respect of the goods reaching the port of destination in India, the date of arrival approximate weight and volume of the shipment, the name, flag and Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 the owner of the vessel of the shipment is by sea or the description of the aircraft of the shipment is by air.

164. Further the clause reveals that the contractor would be paid under the letter of credit only after the packing list and invoices are received by the owner.

165. Under the clause ocean transportation in article 22.12, it is the responsibility of the contractor for the transport of equipments from their place of origin to the port of destination in accordance with CFR" Inco terms 2000.

166. The contractor has to provide various guarantees like advance bank guarantees, and performance guarantee to the owner in terms of the quality of the equipments provided.

167. Ld. Counsel vehemently argued that considerations have been bifurcated into supplies and service contract rendered separately. However on perusal of the agreement nowhere it suggests that the contract bifurcation is available. There is no mention of 2 transactions. The fact is that the contract ascribes the entire scope of work and it is incorrect to pick up one particular clause to show that it represents an independent scope of work.

168. On perusal of all contracts, commonly it has been observed that in the payment schedule the payments are received at various stages. For example in KINDA Project, (relevant clauses which have been reproduced herein above), it is observed that 15% of the total payments received by assessee in the supply of equipment contract Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 is on completion of performance guarantee tests. It is also observed that assessee with some of the project owners has separately received payment under Service contract, which it has been submitted to have been offered to tax in India. On a co-joint reading of both these agreement, it appears to us that payments are linked with each other at different stages of design, drawing, supply and commissioning of the entire project. We, therefore under such facts and circumstances of the case before us, do not hesitate to hold that, activities rendered by assessee are inextricably linked with each other, and all the

responsibility from supply till successful commissioning of projects, rested on assessee. We observe a continuous activity is being carried on by the assessee from supply of equipments till the setting up of the power projects. It is also observed in the payment clause agreed upon between the parties under contract for supply of equipments, that the prise of service contract has been loaded thereon.

169. Ld. Counsel has been harping upon the argument that goods have been delivered to the buyer (owner of the project) outside Indian territories, in high sea as per INCOTERMS 2000. Before venturing into the aspect of where exactly the goods have been delivered by assessee, it is imperative to understand what INCOTERMS 2000 are. International Commercial Terms are a series of international trade terms that are being used worldwide to divide the transaction costs and responsibilities between the seller and the buyer and reflect state-of-the-art transportation practices.

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170. Incoterms deal with the questions related to the delivery of the products from the seller (exporter) to the buyer (importer). This includes the carriage of products, export and import clearance responsibilities, who pays for what, and who has risk for the condition of the products at different locations within the transport process. Incoterms are always linked to a physical location and has nothing to do with the transfer of ownership. INCOTERMS 2000 are internationally accepted commercial terms defining the respective roles of the buyer (Importer) and seller (Exporter) in the arrangement of transportation and other responsibilities and clarify when the ownership of the merchandise takes place. These terms are incorporated into export-import sales agreements and contracts worldwide and are a necessary part of foreign trade.

171. The main objective of Incoterms2000 defines the responsibilities and the obligations of a seller (Exporter) and a buyer (Importer) within the framework of international contracts of trade concerning loading, transport, type of transport, insurances and delivery. Its first function is about a distribution of transport charges. The second role of the Incoterms 2000 is to define the place of transfer and the transport risks involved in order to justify the ownership for support and damage of goods by shipments sent by the seller (exporter) or the buyer (importer) in an event of execution of transport.

Incoterms, safeguard the following issues in the Foreign Trade contract or International Trade Contract:

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a) To determine the critical point of the transfer of the risks of the seller to the buyer in the process forwarding of the goods (risks of loss, deterioration, robbery of the goods) allow the person who supports these risks to make arrangements in particular in term of insurance.

b) To specify is going to subscribe the contract of carriage that is to say the seller or the buyer.

c) To distribute between the seller and the buyer the logistic and administrative expenses at the various stages of the process.

d) To define who is responsible for packaging, marking, operations of handling, loading and unloading of the goods or the potting and the discharge of the containers as well as the operations of inspection.

e) To fix respective obligations for the achievement of the formalities of exportation and /or importation, the payment of the rights and taxes of importation as well as the supply of the documents.

INCOTERMS are most frequently listed by categories like, FOB, CIN, CFR, FCA, FAS etc.,

172. Ld. Counsel has submitted before us that entire transaction has taken place as per CFR basis INCOTERMS 2000. Even as per agreements, goods have been transferred to buyer on CFR basis Incoterms 2000 by assessee. CFR - the abbreviation would mean Cost & Freight (named port of destination). Cost and Freight means that the seller (exporter) delivers when the goods pass the ship's rail in the port of shipment. The seller (exporter) must pay the costs and freight necessary to bring the goods to the named port of Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 destination and the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller (exporter) to the buyer (importer).

173. Under such circumstances, it is imperative to examine in each contract what has been the discharge point of the BTG equipments as agreed between the parties. We have referred to relevant clauses of the agreements and the definitions relevant for the purposes of ascertaining delivery point of BTG equipments under each contract and it has been observed that the delivery of the BTG equipments has to be effectuated by assessee to the respective ports as per agreements though the title in the goods as per the bill of lading has been transferred to the owner of the project outside India prior to the shipment date.

174. In the paper book filed for assessment year 2010-11, assessee has placed copies of;

• certificate of origin at page 2026, bill of lading at page 2027, bill of entry for home consumption at page 2028 pertaining to invoice dated 02/11/09 at page 2039, Delivery terms CFR Chennai Seaport/Bangalore airport India;

• certificate of origin at page 2030, bill of lading at page 2031, bill of entry for home consumption at page 2032 pertaining to invoice dated 19/09/10 at page 2033, Delivery terms CFR Chennai Seaport/Bangalore airport India; and Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 • certificate of origin at page 2034, bill of lading at page 2035, bill of entry for home consumption at page 2036 pertaining to invoice dated 19/08/09 at page 2037, Delivery trems- CFR Visakhapatnam, INCOTERMS 2000

175. In all the above referred invoices, the shipper/suppliers/beneficiary carries the name of assessee, on the certificate of origin exporter is the assessee, consignee is - 'made out of order of industrial development bank of India Ltd.' in the case of document relating to invoice dated 02.11.2009 and 19.09.2010 and in case of the certificate of origin issued against invoice dated 19.08.2009, shows the consignee to be Jindal steel and power Ltd.

176. Bill of lading shows the fright to be prepaid, shipper being the assessee and consignee has been referred to as-' made out of order of industrial development bank of India Ltd .' in all the 3 cases referred herein above; similar is the noting recorded in bill of entry placed at the respective pages.

177. On analysis of the above documents it appears that assessee was responsible for payment of the entire customs duty in respect of the goods shipped from China to the respective port of discharge mentioned in the bill of lading and the bill of entry which has been issued by the Indian customs house. In the bill of lading placed at page 2035 where the equipments have been shipped through the shipping Corporation of India Ltd being the shipping house. However the customs duty has been borne by assessee, which is clear from the document.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017

178. If the sale of equipment has taken place on high sea outside India as submitted by Ld. Counsel, then how is that assessee is paying custom duty in India and delivering the same to its project site ?

179. It is further pertinent to note that in the agreements entered into by assessee with various project owners, payment in the contract schedule are not related with sale of equipments. But payments are linked with the different stages like signing of contract, raising of invoice, submission of invoice for advance payments, submission of advance bank guarantee, submission of performance bank guarantee, design, drawing, successful commissioning of power plant. In all, the payments are related to entire work entrusted upon assessee includes, supervisory services that assessee has to render in India. It has been consistently observed in all contracts that, major milestone in payment schedule does not mention about supply/sale of BTG equipments, but recognizes incidents like signing of contracts, raising invoice, submitting of performance Bank Guarantee by assessee to the project owner, Submitting of Advance Bank Guarantee by assessee to the project owner, engineering/architectural works, supply of equipments, testing of equipments and commissioning of the power plant followed by issuance of performance guarantee test certificates. This shows the nature of contract being one and indivisible, as no separate value for supply/sale of equipments has been recognized as a milestone.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017

180. For the sake of convenience we are reproducing Payment schedule agreed upon by assessee with the Project owner under the KINDA Project at page 972 of paper book Schedule IV -payment schedule

2. Contract price and terms of payment 2.1. As full and composite compensation for the suppliers performance of the work and obligations under this contract, the owner shall be to the supplier of fig lump sum referred to as the contract price including ocean right up to the port of destination in India as per clause 12 of general conditions of contract. The contract price for this contract on CFR basis is USD 188,400,000 (One hundred and Eighty Eight million Four hundred thousand only). The breakup of total contract price shall be as per schedule VI. 2.2. Terms of payment on supply of equipment and mandatory spare 2.2.1. 9% of the contract price amounting to USD16,956,000 shall be paid as advance payment (interest-free) on fulfillment of the following by the supplier:

> • signing of the contract • submission of invoice for advance payments • submission of advance bank guarantee equivalent to 9% of the total contract price as per schedule I 2.2.2. 16% of the contract price amounting to USD30,144,000 shall be paid towards milestone payment as follows:
>
> • USD 5,400,000 in January 2007 • USD 5,400,000 in February 2007 • USD 5,400,000 in March 2007 • USD 5,400,000 in April 2007 Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 • USD 5,400,000 in November 2007 • USD 3,144,000 in December 2007 2.2.3. 60% of the contract price amounting to USD113,040,000 per individual package as shown in the building breakup (schedule VI) shall be paid on dispatch, against satisfactory evidence of shipment. 2.2.4. 5% of the contract price per individual package as shown in the breakup of contract price (schedule VI) shall be paid on receipt of related documentation for the erection of the equipment supplied in case the documents are received in advance at the shipment is delayed then the payment for the same shall be made along with the delivery of equipment; 2.2.5. 10% of contract price each unit as shown in the breakup of contract price (schedule) shall be paid on issuance of taking over certificate or deemed takeover date of each unit.
>
> 2.3. Mode of payment:
>
> 2.3.1. The payment towards advance and milestone payments had been made through telegraphic transfer/Swift. All other payment under this contract shall be paid through an irrecoverable letter of credit (L/C) payable at site as per schedule V. The L/C shall be established through a band acceptable to the supplier.
>
> 2.3.2. The revolving L/C shall be received by the supplier within 3 months from the effective date of the contract.

2.3.3. L/C may be confirmed at the option of the supplier.

All cost charges connected with the L/C shall be borne by the owner except following to the account of the supplier:

• confirmation charges, if any Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 • negotiating charges due to the bank of the supplier • extension charges if due to reasons only attributable to the supplier

181. The above referred format is the standard format followed in all the contracts, be that it be the Butibori contract, Ratnagari Contract, or Kinda Phase IV contract which has been specifically relied upon by Ld. Counsel. Ld. Counsel vehemently argued that there are two independent transactions and the consideration has been bifurcated contractually into supply of equipment and rendering of supervisory services, and that the transaction of supplies has been completed upon the consignment leaving the port of origin. He placed reliance upon Butibori Contract, Ratnagiri Contract Kinda Phase IV contract to substantiate his argument. But on reading of the Payment schedule, we do not agree with this argument advanced by Ld.Counsel. Reason being that, there is no specific demarcation of value of equipments supplied by the supplier/assessee. The entire payment has been bifurcated on percentage basis of the total 'contract price' paid for the entire scope of work which ends with issuance of taking over certificate by the project owner.

182. This leads to a major question, whether on the basis of facts and circumstances in the present case, sale and supply of BTG equipment to the buyer could be considered to have been completed outside India. Section 19 of Sale of Goods Act, makes it clear that property in good passes when the parties intended to pass.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 It was submitted by Ld. Counsel in rejoinder to Ld.DR's submission as under;

"It is a settled principle of law that in a supply contract the revenue arises only once the supplies has been made and does not arise at any preceding or subsequent stage."

183. That being the circumstances, in each and every contract entered into by assessee with project owners, why would terms in payment schedule start with assessee providing Performance Bank Guarantee, assessee providing an Advance Bank Guarantee (the performer of which has been attached as an Annexure/Appendix to each and every contract) and then the Owner issuing a percentage of contract price as advance, without there being an identifiable payment exclusively made for supply of equipments.

Transfer of Tile Transfer of title in respect of Equipment and materials supplied by the supplier present to the terms of contract shall pass on to the owners, on CFR Basis (Incoterms2000).

Transfer of Title shall not mean completion of the contract. The supplier shall continue to be responsible for the risk to, quality and performance, of such equipment and/or materials and for their complaint with the contract specifications until Take-over, in terms of the Performance warranties.

The above referred clause is common to all 14 arguments.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Warora Agreement This agreement is placed at page 1737 of paper book part IV for A. Y. 2010-11. Between assessee and EMCO Article 2.10 - Packing and Transportation Article 4 - Contract Price & Payments.

Assessee offers Advance payment bonds, Performance Bond.

Article 11 - Title & Risk of Lacs Article 12 - Insurance.

Ratnagari Project.

This agreement is placed at Paperbook Part-III for A.Y. 2010-11, entered into between assessee and JSW Energy Ltd.

Reference is made to clause - 10- Shipping and Forwarding Clause 10.2 - Transportation which is to be carried on by Assessee on CFR basis.

10.4. Transfer of Title.

Wherein there is a rider in sub clause 10.4(b) that Transfer of Title shall not mean acceptance and consequent takeover of Equipment. The supplier shall continue to be responsible for the risk to quality and performance of such equipment and/or materials and for their compliance with specification until take over in terms of performance guarantee.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Similar is the understanding between Assessee and owner under Chandrapur Project and Jindal 2 Project placed at page 1343 of paperbook part- IV for A. Y. 2011-12 and Page 1873 paperbook part IV for A. Y. 2010-11.

184. On the basis of above analysis in respect of each contract, we reject the argument advanced by Ld. Counsel that the agreements entered into by assessee with the project owners was essentially a contract for supply of goods, where some work is required to be done as incidental to sale.

185. Ld. Counsel placed heavy reliance upon the decision of the Special Bench of this Tribunal in the case of Motorola Inc. (supra) to emphasise that title in the goods when passed on to the buyer outside India and payments have also been received by the seller outside India, such income received would be offshore supply and could not be deemed to have accrued or arisen in India merely because there is an existence of supervision PE in India. On perusal of the decision of special bench in Motorola Inc. (supra), it is observed that the Tribunal after perusing the contract entered into between the parties therein, was of the opinion that the intention of the parties, insofar as the title in the goods were concerned, passed on to the buyer outside India was very clear. Similar was the observation of this Tribunal in POSCO(supra), as assessee therein entered into three different contract and the sale of equipment and transfer of title on the buyer was explicit and the payment for sale Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 of equipment could be identifiable and the entire payment of value of goods supplied was received outside India.

186. Coming to the facts of the present case, the moment assessee/seller agreed to give a performance Bank Guarantee, clause relating to failure to pass Test on completion makes assessee liable for successful functioning of the BTG equipment in India upon installation on site. None of the contracts specifies clear intention of parties to transfer the title and the goods outside India. In fact the seller/ Assessee was having complete control over the goods inclusive of Risk while in transit as well as once Equipments reaches the respective site. All agreements required assessee to bring the BTG equipments to discharge port located in India in proper condition as assessee has issued a Performance Bank guarantee to the respective owners. This further strengthens the intention of parties that assessee could not have taken chance of any kind of damage being caused to the equipments, while in transit. The delivery of shipment has taken place on CFR basis, would imply that assessee was responsible to deliver the goods to the buyer at the port in India and the risk of any damage/loss would shift to the buyer only on the goods reaching the port of India. Thus title in the goods did not get transferred to the buyer outside India. All the contracts placed in the paper book specifies a schedule, which clearly emphasise, 60% as advance of the total contract price which includes income received by assessee towards Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 supervision services rendered in India. There are no clear payments made to assessee in terms of value of goods.

187. On the basis of above discussions, we do not agree with the contention of Ld. Counsel that the facts of the present case are even seemingly identical with the facts of the case that was before Special Bench of this Tribunal in Motorola Inc. (supra).

COMPOSITE CONTRACTS The agreements entered into by assessee with its clients in India is in the nature of a Composite Contract. On perusal of various clauses of agreements referred to hereinabove, it is amply clear that the dominant intention of the parties was to set up a power plant in India at various locations under the supervision of assessee. And as assessee was also specialized in manufacturing of equipments required for setting up of Power plant, assessee was involved in supply of the same. It is clear from the plain reading of agreements that the parties had agreed to construct Power plants of certain capacity. None of the agreements are executed exclusively for sale of BTG equipments.

Further it is observed that under one project assessee has entered into two agreements; one for supply and another for supervision. On perusal of clauses under both the parts, it is clear that both the agreements are inextricably linked with each other.

215. Hon'ble Supreme Court's observation in the case of Bharat Sanchar Nigam Ltd. v. Union of India [2006] 3 STT 245 are relevant Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 to understand the "dominant nature of an agreement". The relevant portions of the same has been extracted herewith:

> "The reason why these services do not involve a sale for the purposes of Entry 54 of List - II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366 (29-A) continues to be:
>
> Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is "the substance of the contract'. We will, for the want of a better phrase, call this the dominant nature test."

(Emphasis Supplied)

216. Coming to the facts of the present assessee, the substance of all contracts very clearly indicates to be composite in form, as there is no division in the contract in respect of supply and services, as advocated by Ld. Counsel, and payments are not separately linked with services and supply, but is to be made on the basis of stages of completion of the contract irrespective of the equipments brought at the project site.

217. We draw our support from the decision of Authority of Advance Ruling in case of Roxar Maximum Reservoir Performance Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 WLL (supra), had relied upon the judgment in Ishikawajma Harima, and held that:--

> "A contract has to be read as a whole. The purpose for which the contract is entered into by the parties is to be ascertained from the terms of the contract. In the case on hand, ONGC clearly called for a contract for "services for supply, installation and commissioning of 36 manometer gauges". The purpose of the contract is the installation of the gauges at site to enable ONGC to carry out its operations. I have quoted earlier the relevant portion of the contract. On a reading of the same, there

> cannot be any doubt that that the contract in question was for erection and commissioning of 36 manometer gauges for the use of ONGC. The contract is clearly not one for sale of equipment. Nor is it one for mere erection of the equipment. It is a composite contract for supply and erection at sites within the territory of India. What is paid for by ONGC is for the supply and erection done in India. The payment is received by the applicant for the performance of the contract as a whole in India. It is, therefore, clear that the income to the applicant accrued in India."

218. Thus looking at the facts from any angle, in our considered opinion already expresses the intention of parties to the agreement, regarding final delivery of equipments was in India. Thus by applying "dominant nature test" applied by Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. v. Union of India (supra), and the ratio of substance over form that has been considered by Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 the authority of advance ruling in the case of Roxar Maximum Reservoir Performance WLL (supra) we do not have any hesitation in holding that the transfer of title to the equipments has taken place in India.

219. The issue now that arises is, whether the sale price includes any consideration for services rendered or to be rendered in India. The Ld. CIT DR submitted that certain costs for carrying on with certain activities in India in respect of erection of the power plant is inbuilt in the contract price.

220. On perusal of various agreements entered into between the parties before us with assessee, we observe that assessee has trained personnel regarding the functioning/handling/maintenance of BTG equipments which is an admitted position. By and large it is observed that assessee has not been separately compensated for providing training have expressly agreed that cost of training would be included in the total contract price. In our considered opinion, it does not help the assessee in any case, as training given to owners personal is finally consumed in India. Whether the payment is paid separately or not, and whether it has been given in India and or in China, does not change the situs of consumption of such services rendered by assessee. This leads to the conclusion that the training cost is included in the sale price charged for the supply of BTG equipments. Further certain clauses indicate that assessee is responsible to incur expenses towards tests and inspection at project sites in India, conduct repair during defect liability period Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 which is again in India etc. This again indicates that the cost so incurred is subsumed in the supply cost of the equipments, which cannot be ruled out. To be more specific, we refer to KINDA Project, where the supply schedule of equipments includes, training of personnel, selected by project owner (more specifically detailed in Schedule III 966 to 971 of paper book, the same has been reproduced herein above while discussing the terms of agreement). The training of Personnel admittedly has taken place in and outside India. Ld Counsel placed reliance upon following decision to advocate that providing training does not have its own existence and such activity has to be treated as merely incidental to the supply of equipment;

• Decision of Hon'ble Delhi High Court in the case of Lind AG vs. DDIT(supra);

• Decision of this Tribunal in the case of Pirelli Cavo E Sisteni vs. ACIT (supra); and • Advance Ruling in case of Rotem Company (supra).

221. We have hereinabove referred to various clauses in agreements where assessee provides training to the owner's personnel, the cost of which is agreed to have been included in the contract prise. In the decisions relied upon by Ld. Counsel, the facts are different. Further, each and every agreement has been executed for setting up of power plant in India at various locations and supply of equipments are incidental to the erection and instillation activity. The major milestone mentioned in the payment Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 schedule does not mention about supply/sale of BTG equipments, but it recognizes architectural works, providing of designs, testing of equipments, furnishing of complete operating manuals, installation and commissioning and obtaining of take over certificate.

222. Hon'ble Supreme Court in the case of Ishikawajima Harima heavy industries Ltd versus DCIT (supra) has observed that primary tests to determine as to whether the contract in question was a composite to one for execution of a turnkey project being:

> a) whether the offshore and onshore elements of the contract are so inextricably linked, that the breach of the offshore element would result in the breach of the whole contract ?
>
> b) whether the dominant object of the contract is the execution of a turnkey project and the question whether the title to the goods supplied passes offshore or within India is secondary to the execution of the contract ?

223. Analysing the present facts of the case in the light of the above referred tests, it is in conformity with the observations that has been upheld by Hon'ble Supreme Court in the case of Ishikawajima Harima (supra) which when applied to the facts of the present case would be the same, as under:

> • Each component of the contract was directly related to the performance of the integrated contract as, violation and/or Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 breach on the part of the parties thereto would affect the entire contract;
>
> • the contract itself providing for milestone dates the breach of any of the terms thereof would result in the breach of the entire contract and not just a particular ob ligation; • does the turnkey project contemplated a permanent establishment admittedly in India and in that view of the matter explanation appended to section 9 (1) (i) of the act is directly applicable;
>
> • the appellant has business connection in India and in that view of the matter the casual connection between offshore supply and onshore services being interlinked with the entire project is explicit;

• by reason of DTAA, the parties thereto can always locate the jurisdiction to tax the entire income attributable set to such permanent establishment to the country in which it is established;

• supply of goods whether offshore or onshore as well as rendering of services whether offshore or onshore are attributable to the turnkey project and thus it would be wrong to contend that in terms of Article 7 of DTAA, no tax could be levied upon the assessee.

As has been observed by Hon'ble Supreme Court in the case of Ishikawajima Harima (supra);

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 "the concept of turnkey execution of the project involves total and complete responsibilities of the persons undertaking the contracts for commissioning the project and they are accordingly required to furnish performance guarantee is for the timely completion."

224. To be clearer we shall refer to section 19 of Sales of Goods Act which reads as under:

"Section 19 (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in goods is to pass to the buyer."

225. Clause (2) of these section states that for purpose of ascertaining intention of parties in a contract, regards shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. In any sale transaction, risk passes with property. Thus, the goods agreed to be sold remain at the seller's risk until the property in goods are actually passed on to the buyer. Therefore, when property or risk is to pass, is a question that depends on the intention of the contracting parties. If a contract Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 provides for a specific method, place or time of passing of property or risk or both, it has to be concluded accordingly.

226. In the facts of present case, intention of parties is that the property in BTG equipments will pass only when it reached the project site and is successfully put to function without any defect. It is for that reason that assessee gives Performance Bank Guarantee and Advance Bank Guarantee to Owners of the project, much before any payment is made to assessee. If that not be the case, then there would have been no question of retaining effective control by assessee over the equipments till

it reached the project sites, and further while erection/installation activities are carried on irrespective of whether the erection/installation activities are carried on by assessee or by any other party under the supervision of assessee. Assessee would not have been responsible for bearing such high risk, and protecting owner by providing the performance guarantee etc., till completion of the entire work of erection under the contract.

Judicial Precedents relied on by Ld.Counsel

227. Ld. Counsel heavily relied on the decisions in the case of Ishikawajma - Harima Heavy Industries Ltd. (supra), LG Cable (supra) Nokia Networks OY (supra), Ericson EB(supra), Lind AG(supra), Nortel Networks(supra) as regards the facts relating to transfer of title, the contract, responsibilities of supplier, and role of PE.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 a. In the case of Ishikawajma - Harima Heavy Industries Ltd. (supra) the supply segment and service segment were specified in different parts of the contract. The equipment supplied stood transferred upon delivery thereof outside India on high sea basis. All parts of the transaction in question, i.e. the transfer of property in goods as well as the payments, were carried outside India. The permanent establishment was not involved in the transactions. As regards offshore supply it was held that since all parts of the transaction in question, i.e., the transfer of property in goods as well as the payment, was carried outside the Indian soil, the transaction could not have been taxed in India. In this case the Hon'ble Court had reproduced all relevant clauses of the contract to show that clause 14.8 showed separate payment in US dollars and Indian rupees depending on the nature of supply viz. offshore supply and offshore services and onshore supply and onshore services. Exhibit D-2.1 mentioned that offshore supply was the price of Equipment & Material (including cost of engineering, if any, involved in the manufacturing of such Equipment & Material) supplied from outside India on CFR basis. Exhibit D-2.2 was for offshore services, Exhibit D-2.3 was for onshore supply and Exhibit D- 2.4 was for onshore services. Article 13.3.2 specifically referred to the cost and offshore supplies. The insurance was in owner's name. Then the Court concluded "obligations under the contract are distinct one. Supply obligation is distinct and Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 separate from service obligation. Price for each of the component of the contract is separate. Similarly, offshore supply and offshore services have separately been dealt with. Prices in each of the segment are also different. The very fact that in the contract, the supply segment and the service segment have been specified in different parts of the contract is a pointer to show that the liability of the appellant there under would also be different." The Court had identified two basic issues for consideration: (a) the taxation of price of goods supplied, by way of offshore supply price of which is specified in Ex. D, clause 2.1; and (b) the taxation of consideration paid for rendition of services in the contract as offshore services at Ex. D. There was clear and distinct bifurcation in the contract between offshore and onshore works based on which issues were decided. The Hon'ble Court had also noticed in CIT v. Mitsui Engg. & Ship. Building Co. [2003] 259 ITR 248/[2002] 123 Taxman 182, it was held that it was not possible to apportion the consideration design on one part and the other activities on the other part as the prices paid to the assessee was not the total price which covered all the stages involved in the supply of machinery. The Hon'ble

Court noted that the case of Ishikawajma Harima was clearly distinguishable from the facts of Mitsui since the payments for offshore and onshore supply of goods and services was in itself clearly demarcated and cannot Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 be held to be a complete contract that had to be read as a whole and not in parts.

b. In the case of LG Cables(supra) there were two separate contracts, one for offshore supply and other for onshore services. Hon'ble Court observed that as per the agreements between the parties therein, the property in the goods would pass on to the buyer as and when the seller loads the equipment onto the mode of transport for transportation from the country of origin. It was further observed that the PE had no role to play in the execution of offshore supply contract and as a matter of fact was set up for sole purpose of enabling the purpose of the onshore services contract, which was a separate one.

c. In the case of Nokia GSM(supra) equipment manufactured in Finland was sold to Indian Telecom Operators from outside India on a principle to principle basis, under independent buyer and seller arrangement. Installation activities were undertaken by Indian subsidiary under its independent contracts with Indian Telecom Operators.

Per Contra In the facts of the present case, supply as well as supervision activity is carried on by assessee in India and further assessee has total control and domain over the equipments supplied as well as the site where instillation and erection of plants at site take place, until successful commissioning of the project.

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017

d) In the case of DIT vs. Ericson AB (supra), facts before Hon'ble Delhi High Court were as under:

> 228. The assessee, a Swedish company, entered into contracts with ten cellular operators for the supply of hardware equipment and software. The contracts were signed in India. The supply of the equipment was on CIF basis and the assessee took responsibility thereof till the goods reached India. The equipment was not to be accepted by the customer till the acceptance test was completed (in India). The assessee claimed that the income arising from the said activity was not chargeable to tax in India. The AO & CIT (A) held that the assessee had a "business connection" in India u/s 9(1)(i) & a "permanent establishment" under Article 5 of the DTAA. It was also held that the income from supply of software was assessable as "royalty" u/s 9(1)(vi) & Article 13. On appeal, the Special Bench of the Tribunal (Motorola Inc 95 ITD 269 (Del)) held that as the equipment had been transferred by the assessee offshore, the profits there from were not chargeable to tax. It was also held that the profits from the supply of software was not assessable to tax as "royalty".

229. On appeal to the High Court, Hon'ble Court dismissed Revenue's appeal by observing as under:

(i) The profits from the supply of equipment were not chargeable to tax in India because the property and risk in goods passed to the buyer outside India. The assessee had not performed installation service in India. The fact that the contracts were signed in India could not by itself create a tax liability. The nomenclature of a "turnkey project" or "works contract" was not relevant. The fact that the assessee took "overall responsibility" was also not material. Though the Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 supply of equipment was subject to the "acceptance test"

performed in India, this was not material because the contract made it clear that the "acceptance test" was not a material event for passing of the title and risk in the equipment supplied. If the system did not conform to the specifications, the only consequence was that the assessee had to cure the defect. The position might have been different if the buyer had the right to reject the equipment on the failure of the acceptance test carried out in India. Consequently, the assessee did not have a "business connection" in India. The question whether the assessee had a "Permanent Establishment" was not required to be gone into.

However the facts of the assessee before us is not the same as in the case of DIT vs. Ericson AB (supra). Per Contra

230. The assessee before us has executed contracts for erection, commissioning and successful performance of the project to be set up at various sites in India. It is for the purpose of this project that the assessee supplied the BTG equipments. Further admittedly there is a business connection in India by way of supervision PE, established for supervising the erection and commissioning work carried out by assessee in India. On these two grounds, this decision relied upon by Ld.Counsel cannot be of any help to assessee, as they are factually different.

e) In the case of Lind AG vs.DDIT(supra), facts before Hon'ble Delhi High Court were as under:

231. In the instant case Linde AG, Linde Engineering Division, Pullach, Germany ("Linde") and Samsung Engineering Company Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Ltd., Seoul, Korea ("Samsung") formed a consortium to bid for a particular project that was being floated by ONGC Petro Additions Limited ("Project Owner"). Linde and Samsung ("collectively referred to as the "Consortium") had technical expertise in their respective fields and had jointly submitted the bid in order to fulfil the requisite criteria.

232. Thereafter, the proposal submitted by the Consortium was accepted by the Project Owner and the notification of award was issued to the Consortium for execution of the project. The project involved design, engineering, procurement, construction, installation, commissioning and handing over the plant located in India.

233. Linde filed an application for an advance ruling pertaining to the taxability of payments made to Linde, before the Authority for Advance Rulings ("AAR").

234. The AAR passed adverse ruling against Linde stating that the liability of the Consortium for due performance of the contract towards the Project Owner was joint and several. Further, it was held that the contract was an indivisible contract incapable of being divided. On this basis, the AAR held that income received by Linde for offshore supply of equipment and designing was taxable in India.

235. Aggrieved by the ruling of AAR, Linde filed a writ petition before Hon'ble High Court, where following two issues were considered:

> Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 • Whether the Consortium constitutes an AOP under section 2(31) of the Income-tax Act, 1961 ("ITA"), and is hence liable to be taxed accordingly?
>
> • Whether income of Linde arising out of offshore supply of equipment and preparation of related designs is taxable in India under the ITA or under the Double Taxation Avoidance Agreement entered into between India and Germany ("India - Germany DTAA")?

236. This Hon'ble High Court after examining the agreement between the Consortium and the Project Owner ("Contract"), the Memorandum of Understanding between Linde and Samsung ("MoU") as well as internal agreement between Linde and Samsung ("Internal Agreement").

Under the Contract, Linde performed the following functions:

> a) Design and engineering of equipment for manufacture outside India, and
>
> b) supply of equipment and related materials outside India.

237. While Hon'ble High Court made key observations on the taxability of payments made to Linde, the matter was remanded back to the AAR for determination of whether Linde has a permanent establishment ("PE") in India or not. The relevant extract are as under:

> "82. The facts obtaining in the present case are quite similar to the facts as in the case of Ishikawajma-Harima Heavy Industries Ltd.(supra). It is indisputable that as far Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 as obligations of Linde and Samsung are concerned, the Contract is an indivisible one. However, for the purposes of tax, the Contract does specify the amounts that are payable with respect to the various activities carried on by Linde /Samsung. Income may accrue or arise at various stages and on account of varied activities. In case of a nonresident tax entity any income

which accrues or arises from an activity outside India, would not be taxable unless the same falls within the deeming provision contained in Section 9(1) of the Act. In these circumstances, following the decision of the Supreme Court in Ishikawajma-Harima Heavy Industries Ltd's. case (supra), it would not be apposite to consider the contract as a composite one for the purposes of imposition of tax under the Act.

83. The Authority concluded that although, payments for each item or work were specified or that the amounts payable for the work to be performed by individual members of the Consortium was recognized under the Contract, the same would not alter the nature of the Contract in any manner. The Authority concluded that the Contract would have to be considered as one indivisible contract and the income from the same would be taxable in India as the object of Contract was to set up a facility in India. The Authority further held that the MOU entered into between Linde and Samsung could not be understood to be overwriting the Contract or the object of the Contract. With respect to the Internal Consortium Agreement, the Authority held that the same was at best only an internal arrangement between Linde and Samsung and could not be referred to for determining the nature of the Contract. The Authority was of the view that the Contract being a composite contract, a 'dissecting approach' was not permissible. Having found that the contract was an indivisible one, the Authority concluded that it was not open for Linde to plead that the sale of equipment and machinery and designing of the project and equipment should be treated as an offshore transaction. The Authority referred to the decision of the Supreme Court in the case Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 of Vodafone International Holdings B.V. (supra) in support of its view that since in law the liability for performance of the Contract by Linde and Samsung was joint and severable, the Contract must be read as an indivisible one for the purposes of tax."

On the above facts Hon'ble High Court observed and held as under:

84. In our view, the approach as well as the conclusion of the Authority is flawed. First of all, the Authority erred in proceeding on the basis that the contract as a whole was the subject of taxation. The subject matter of taxation was not the Contract between the parties but the income that the petitioner derived from the Contract. Thus, the situs of the object of the Contract would not be as relevant as determining the situs where the income of Linde had accrued or arisen. By virtue of Section 4 of the Act, income tax is charged in respect of the total income of a person. By virtue of Section 5 of the Act, the scope of total income of a non-resident is limited to income which is received or deemed to be received in India and income which accrues or is deemed to accrue or arise in India. It, therefore, follows that the object of inquiry would have to be to determine whether any income of Linde accrued or arose in India or whether any income could be deemed to accrue or arise in India. The fact that the contractual obligations of Linde were not limited to merely supplying equipment, but

> were for due performance of the entire Contract, would not necessarily imply that the entire income which was relatable to the Contract could be deemed to accrue or arise in India.
>
> 85. The principle of apportionment of income on the basis of territorial nexus is now well accepted. Explanation 1(a) to section 9(1)(i) of the Act also specifies that only that part of income which is attributable to operations in India would be deemed to accrue or arise in India. It necessarily follows that in cases where a contract entails only a part of the operations to be carried on in India, the assessee would not Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 be liable for the part of income that arises from operations conducted outside India. In such a case, the income from the venture would have to be appropriately apportioned.

The Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd. (supra) had considered this aspect and held that merely because a project is a turnkey project would not necessarily imply that for the purposes of taxability, the entire contract be considered as an integrated one. The taxable income in execution of a contract may arise at several stages and the same would have to be considered on the anvil of territorial nexus. The decision in the case of Ishikawajma-Harima Heavy Industries Ltd. (supra) is clearly applicable to the facts of the present case as in that case also the contract in question was for a turnkey project where the object was to setup a Liquefied Natural Gas (LNG) receiving, storage and degasification facility. Indisputably, insofar as obligations of parties are concerned, this contract was also an indivisible contract. The Supreme Court held that for the purposes of determining the taxability, it was necessary to enquire as to where the income sought to be taxed had accrued or arisen. The impugned ruling is thus clearly contrary to the decision of the Supreme Court in Ishikawajma-Harima Heavy Industries Ltd's. case (supra).

86. The reference of the Authority to the decision of the Supreme Court in the case of Vodafone International Holdings B.V. (supra) is also not apposite. In that case, the Supreme Court was considering a matter which, inter alia, involved a transfer of a capital asset outside India which was sought to be taxed by the Income Tax Authorities under Section 9(1)(i) of the Act. The subject matter of controversy was a transaction of sale and purchase of a share of an overseas company (capital asset). This capital asset was sold by a non-resident company to another non- resident company. The Revenue contended that the capital gains arising from this transaction was exigible to tax under the Act by virtue of Section 9(1)(i) of the Act as the Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 transaction also implied transfer of control and assets of the Indian subsidiary of the overseas company, whose share had been sold and purchased. The Supreme Court observed that the last sub-clause of Section 9(1)(i) of the Act referred to income arising from "transfer of capital asset in India". The Court further explained that Section 9(1) of the Act created a legal fiction which had a limited scope and could not be expanded. Accordingly, transfer of capital asset situated outside India could not be taxed by virtue of Section 9(1)(i) of the Act. The expression "look through" had been used by the Supreme Court in this context. The relevant extract of the judgment is as under:--

> "90. We have to give effect to the language of the section when it is unambiguous and admits of no doubt regarding its interpretation, particularly when a legal fiction is embedded in that section. A legal fiction has a limited scope. A legal fiction cannot be expanded by giving purposive interpretation particularly if the result of such interpretation is to transform the concept of chargeability which is also there in Section 9(1)(i), particularly when one reads Section 9(1)(i) with Section 5(2)(b) of the Act. What is contended on behalf of the Revenue is that under Section 9(1)(i) it can "look through" the transfer of shares of a foreign company holding shares in an Indian company and treat the transfer of shares of the foreign company as equivalent to the transfer of the shares of the Indian company on the premise that Section 9(1)(i) covers direct and indirect transfers of capital assets.
>
> 91. For the above reason, Section 9(1)(i) cannot by a process of interpretation be extended to cover indirect transfers of capital assets/property situate in India. To do so, would amount to changing the content and ambit of Section 9(1)(i)."

87. In the present case also, Linde has contended that it being a nonresident is not liable to pay tax in India and the sweep of Section 9(1) of the Act cannot be extended to income which has not accrued or arisen in India.

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88. The Supreme Court also reiterated the "look at"

> principle as was enunciated in W.T. Ramsay Ltd. v. IRC [1981] 1 All ER 865 (HL). That matter related to a combination of transactions where gains in one transaction were sought to be counteracted by another, so as to avoid tax. The set of transactions was designed to create an artificial loss in one transaction which was counteracted by a gain in another. The House of Lords' dismissed the appeal of the tax payer by holding that the Courts would "look at" the entire combination of transactions. It was held that the Revenue or the Courts were not limited to consider the genuineness or otherwise of each individual transaction in the scheme but could consider the scheme as a whole. The contentions being considered by the Supreme Court in the Vodafone International Holdings B.V.'s case (supra) as well as the House of Lords' in W.T. Ramsay Ltd. (supra) were in respect of schemes which were contended to be for the purposes avoiding tax. The Supreme Court held that the "look at" principle must be applied to see the transaction as it existed and piercing of the Corporate Veil was not necessary where the transactions were genuine and had commercial substance. In the present case, there is no controversy which involves lifting of the corporate veil or "looking at" any scheme to find whether a transaction is a sham or has any substance. Both the Revenue and Linde are accepting the Contract as it stands and the controversy only revolves around the situs of the income accruing or arising from the contract. To our minds, the Authority has read the principles applied by the Supreme

> Court in Vodafone International Holdings B.V'S. case (supra) completely out of context.

Income from Offshore Supplies

89. In the present case, the Contract involves supply of equipment, materials and spares by Linde. The contract specifically provides that the ownership of the material to Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 be supplied by Linde would be transferred to OPAL upon FOB shipment. Article 7 of the Contract is quoted below:--

> "7.1.1 Ownership of materials shall be transferred to the Company upon FOB shipment for imported supply and FOT for local supply subject to Contractor takes full responsibility for any damage / loss during the course of transportation until acceptance of works. 7.1.2 Deleted 7.1.3 Ownership of the construction Equipment used by the Contractor and its subcontractors in connection with the Works shall remain with the Contractor and its sub- contractors."

90. FOB is an abbreviation of "Free on Board" and clearly indicates that the ownership of the material to be supplied by Linde would transfer to OPAL, the moment, the materials were placed for shipment. The petitioner had pointed out that shipping Documents/Bill of Lading also recorded the name of Linde as a Consignor and OPAL as a Consignee. In terms of the Contract, Linde and Samsung were fully responsible for any damage/loss during the transportation of the equipment and material. However, the same would not in any manner contradict the position that the ownership of the material in question was transferred to OPAL overseas. The petitioner has also submitted that the payment for design and engineering, supply, insurance and spares and consumables was to be paid to Linde in Euros and for the balance onshore work the payments were to be made in INR. According to the petitioner, this also indicated the portion of work that was required to be done overseas.

94. It has been contended by Linde that the above steps are only for the purposes of manufacturing and fabricating the equipment that was to be supplied overseas. It is submitted that the work relating to design and engineering is inextricably linked with the manufacture and fabrication of the material and equipment to be supplied overseas and Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 this work was also performed wholly outside India. These submissions have not been evaluated. Question no. (ii) framed for consideration of the Authority invites a ruling on the basis that the offshore services falling within the scope of services by Linde are inextricably linked with the Offshore supply of equipment and material and cannot be considered as technical services on a standalone basis. This is a question of fact which would have to be considered at an appropriate stage. However, if it is accepted that the services provided by Linde relating to design and engineering are inextricably linked with the manufacture and fabrication of the material and equipment to be supplied overseas and form an integral part of the said supplies, then the services rendered by Linde would not be amenable to tax under Section 9(1)(vii) of the Act. Consideration for such services would not be

considered as "Fees for Technical Services" for the purposes of Section 9(1)(vii) of the Act. This view has also been expressed by the Authority Rotem Co., In re [2005] 279 ITR 165/148 Taxman 411 (AAR). The relevant extract of the said decision reads as under:--

> "16. The principle which emerges from the decisions in the aforementioned cases is that in a contract for manufacture, installation, sale or supply of goods the element of services will always be present. Where services are inextricably linked with manufacture, installation, sale or supply, they cannot be evaluated for the purpose of FTS; it is only where services are separable and independent that the FTS will be assessable."

95. It is clarified that in order to fall outside the scope of Section 9(1)(vii) of the Act, the link between the supply of equipment and services must be so strong and interlinked that the services in question are not capable of being considered as services on a standalone basis and are therefore subsumed as a part of the supplies. Given the fact that its Linde's case that the consideration for the supplies are separately specified, this aspect would require Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 a closer scrutiny and determination of facts, which we do not propose to do in the present proceedings.

96. It is clarified that in the event, it is found that the offshore services rendered by Linde are not inextricably linked to the manufacture and fabrication of equipment overseas so as to form an integral part of the supply of the said equipment, the income arising from the said services would be taxable in India as fees for technical services. By virtue of Section 9(1)(vii) of the Act, fees for technical services paid by a resident are taxable in India (except where such fees are payable in respect of services utilised by such person in business and profession carried outside India). In view of the Explanation to Section 9(2) as substituted by Finance Act 2010 with retrospective effect from 01.06.1976, the decision of the Supreme Court in Ishikawajma-Harima Heavy Industries Ltd's. case (supra), in so far as it holds that in order to tax fees for technical services under the Act the services must be rendered in India, is no longer applicable. Therefore, in the event the services in question are not considered as an integral and inextricable part of equipment and material supplied, it would be necessary to examine whether any relief in respect of such income would be available to Linde by virtue of the DTAA between Germany and India.

238. It is very pertinent to observe that, in a typical case like that of assessee, view has to be taken on the basis of agreements and terms of the contract entered into by assessee as has been observed in all the decisions, of Hon'ble Delhi High Court in order to come to a conclusion of transfer of title as well as continuance of assessee's responsibility from supply to erection and successful functioning of the plant at various sites agreed to have been constructed under assessee's supervision in India. There cannot be any decision which Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 would be factually identical to facts of assessee mutatis mutandis, in order to adopt the ratio laid down by various High Courts as well as Hon'ble Supreme Court. In fact all decisions of Hon'ble High Court relied by Ld. Counsel are based on the specific facts where Hon'ble court has laid down propositions after analysing the intention of the parties on the basis of contract/agreements entered into between them.

f) Ld. Counsel placed his reliance on the decision of Nortel Networks India International Inc.Ltd Vs.DIT reported in 386 ITR 353.

Facts of in Nortel Networks are as under:

239. The assessee-company was incorporated in the USA and was a tax resident of USA. It was a part off Nortel Group which was stated to be a leading supplier of hardware and software for GSM Cellular Radio Telephone Systems. The assessee was a step-down subsidiary of 'Nortel Canada'.

Nortel Canada also had an indirect subsidiary in India, namely, 'Nortel India'. Nortel Canada also had a Liaison Office in India called 'Nortel LO'.

240. Nortel India negotiated and entered into three contracts with 'Reliance', namely, Optical Equipment Contract ('the Equipment Contract'), Optical Services Contract ('the Services Contract') and the Software Contract ('the Software Contract'). On the same date, Nortel India entered into an agreement assigning all rights and Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 obligations to sell, supply and deliver equipment under the Equipment Contract to the assessee. Reliance and Nortel Canada were also parties to the assignment contract and in terms thereof, Nortel Canada guaranteed the performance of the Equipment Contract by the assessee (Assignee). In terms of the assignment contract, Reliance placed purchase orders directly on the assessee and also made all payments for the equipments supplied directly to the assessee.

241. The equipments supplied to Reliance were manufactured by Nortel Canada. The same was invoiced by the assessee directly to Reliance and consideration for the same was also received directly by the assessee. It was asserted by the Assessing Officer that the equipment supplied to Reliance was sourced from Nortel Canada at a much higher price than the price charged to Reliance and this resulted in the assessee suffering a loss during the relevant period.

242. The Assessing Officer was of the view that the assessee had been incorporated solely with the motive to evade the taxes arising out of supply contract in India and in substance, the contracts were performed by Nortel Canada along with its LO and Nortel India, acted in unison to identify, negotiate, appraise, secure, execute, manufacture, supply, install, commission and provide warranty and after sales service in respect of the contract entered into with Reliance.

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243. On the basis of such findings, Assessing Officer concluded that Nortel India and Nortel LO constituted assessee's PE in India (both Fixed Place PE as well as Dependent Agent PE).

244. The Commissioner (Appeals) upheld the order of Assessing Officer that office of Nortel LO and Nortel India would constitute a fixed PE of the assessee in India as the assessee and Nortel Canada were one and the same entity. The Commissioner (Appeals) further held that keeping in view the

facts of the case, 50% of assessee's estimated profits could be attributed to the PE in India.

245. On the given set of facts Hon'ble High Court observed as under:

> "The controversy whether the assessee has a PE in India is interlinked to the finding that Nortel India had discharged some of the obligations of the assessee under the Equipment Contract. Whilst, the revenue authorities have held that the contracts entered into with Reliance - the Equipment Contact, Software Contract and Services Contract - are essentially a part of the singular turnkey contract, which the assessee contends to the contrary. Further, the revenue authorities have held that a part of the Equipment Contract assigned to the assessee was, in fact, performed by Nortel India. This too, is stoutly disputed by the assessee. The question whether the assessee has a PE in India is clearly interlinked with the issue whether Nortel India or Nortel LO had performed any of the functions or discharged any of the obligations assumed by the assessee."

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246. It is not disputed, on the contrary it has been expressly admitted that the contracts entered into with Reliance were negotiated by Nortel India and neither Nortel LO nor assessee were involved in negotiations with Reliance. There is also no material on record which would indicate that Nortel LO or the assessee had participated in any negotiation with Reliance. The facts on record indicate that Nortel India had negotiated the contracts with Reliance, and Nortel Canada had executed a deed of guarantee (referred to as a 'Parent Guarantee') guaranteeing the performance of all the three contracts.

247. It was under these circumstances that Hon'ble High Court came to the conclusion that assessee did not have a permanent establishment in India and therefore no part of supply could have been attributed to earning of income in India.

Per Contra

248. The common facts in all above decisions as compared to the facts in the present case are:

> • In these cases there were separate contracts for offshore supply and onshore services or such distinction was specific with supply obligation being distinct from service obligation. There is no such distinction in the present case.
>
> • In these cases price for each component was separately specified. However, cost value centre in the present case mentions the price of entire contract.
>
> Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 • In all these cases all parts of transactions

were completed outside India but in the present case the sale was not completed outside India.

• In Ishikawajma Harima the insurance for goods supplied was in owner's name whereas in this case the insurance was in assessee's name, covering the risk till completion.

• In all these cases PE had no role to play in offshore supply as observed by Hon'ble High Court whereas in this case, admittedly there exists a superiority PE and assessee was involved. in design, selection and procurements of materials to be used in the facade related work in India, clearance of goods through customs in India and payment of customs duty in India.

249. The agreements placed before us are clearly of composite nature for providing services. The scope of work listed in each agreements describes the nature of work in detail(which has been reproduced herein above), and a simple reading of work and responsibilities of assessee shows that contract is one. The assessee before us has admitted to have a supervisory PE in India and that assessee was directly involved in the entire supervisory work carried out in India. Assessee was responsible for the successful functioning of the projects in India under each and every contract, which is discernable on careful reading of the contracts. Therefore in our considered opinion factually the case of assessee is different from the facts that has been considered by Hon'ble High Court in Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Nortel Networks (supra) and does come for rescue in assessee's case.

BUSINESS CONNECTION

250. The next issue that arises is regarding taxability of prise for offshore supply of equipment in India. Assessee being a non- resident, section 5 (2) would be applicable, as it deals with the scope of total income of non-resident and provides that subject to the provisions therein, the total income of non-resident from whatever sources is received or eased deemed to have been received in India or accrue or arising in India during such year. It is the case of Revenue that income from offshore supply has been deemed to have been received by assessee in India. Section 9 enlists certain incomes which are deemed to accrue or arise in India, which has been specifically dealt to it in clause (ii) to (vii) of section 9 (1). Section 9 (1) (i) mandates that all income accruing or arising whether directly or indirectly through or from any business connection in India or through or from any property in India or through or from any asset or source of income in India or through the transfer of a capital asset situated in India shall be deemed to accrue or arise in India.

252. The relevant provisions of the I.T. Act having a bearing on the question are extracted hereunder:

Section 9(1)(i):

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 "(1) The following incomes shall be deemed to accrue or arise in India--

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through or from any money lent at interest and brought into India in cash or in kind or through the transfer of a capital asset situate in India."

253. It is seen that the expression "business connection" occurs in s. 9(1)(i) of the act. The expression "business connection" is not defined in the I.T. Act, though the word "business" is defined. The expression "business connection" has been considered in several cases.

In CIT v. Remington Typewriter Co. (Bombay) Ltd., AIR 1931 PC 42, a question arose whether there was a business connection between the assessee-company and the foreign company. The facts were that the assessee purchased the goodwill of its business in certain territory in India and towards consideration of the same allotted 60,000 shares to the non-resident company in the assessee-company. The capital of the assessee was divided into 60,000 shares only and by allotment of 60,000 shares to the non-resident company, the non-resident company became the owner of all the shares. It was held that the ultimate and complete control of the assessee was vested in the foreign company which owned all its shares and hence a business connection existed between the assessee and the non-resident company.

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254. A Full Bench of the Rangoon High Court observed in CIT v. Visalakshi Achi [1937] 5 ITR 448 (Rang) [FB] that the expression "business connection" must denote a connection which produces, by itself, all profits or gains and not a mere state or condition which was favorable to the making of profits.

In Bangalore Woollen, Cotton and Silk Mills Co. Ltd. v. CIT [1950] 18 ITR 423 (Mad), Hon'ble Madras High Court, construing the word "business connection", observed as follows (p. 433):

"In order to constitute a business connection there must be some continuity of relationship between a person in British India who makes profits and the non-resident who receives them.....A business connection, therefore, may arise by reason of the existence of a branch of the non-resident company or organisation in British India or by the existence of a factory or even by the existence of an agent.....The business connection may be even a connection arising out of financial relations. The non-resident business and the resident business may be two separate legal entities and they may be closely connected or associated either by reason of some common control or by reason of the non- resident company or firm financing

> the resident company or firm. The goods of a non-resident company may be sold by a broker or commission agent residing in British India or the person resident may render various services to the non- resident or conduct business activities. These are some of Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 the factors which result in a business connection within the meaning of the section."

255. Hon'ble Supreme Court had occasion to consider the expression "business connection" in Anglo-French Textile Company Ltd. v. CIT (No. 2) [1953] 23 ITR 101 (SC) and it was observed as follows :

> "An isolated transaction between a non-resident and a resident in British India without any course of dealings such as might fairly be described as a business connection does not attract the application of section 42, but when there is a continuity of business relationship between the person in British India who helps to make the profits and the person outside British India who receives or realises the profits, such relationship does constitute a business connection."

256. In CIT v. R.D. Aggarwal & Co. (1965) 56 ITR 20, Hon'ble Supreme Court had considered the scope of the expression "business connection", and it was observed as follows (pp. 24 & 28):

> "The expression 'business' is defined in the Act as any trade, commerce, manufacture or any adventure or concern in the nature of trade, commerce or manufacture, but the Act contains no definition of the expression 'business connection' and its precise connotation is vague and indefinite. The expression 'business connection' Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 undoubtedly means something more than 'business'. A business connection in section 42 involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity in the taxable territories: a stray or isolated transaction is normally not to be regarded as a business connection. Business connection may take several forms: it may include carrying on a part of the main business or activity incidental to the main business of the non-resident through an agent, or it may merely be a relation between the business of the non-resident and the activity in the taxable territories, which facilitates or assists the carrying on of that business. In each case, the question whether there is a business connection from or through which income, profits or gains arise or accrue to a non-resident must be determined upon the facts and circumstances of the case.
>
> A relation to be a 'business connection' must be real and intimate, and through or from which income must accrue or arise whether directly or indirectly to the non-resident. But it must in all cases be remembered that by section 42 income,

> profit or gain which accrues or arises to a non Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 resident outside the taxable territories is sought to be brought within the net of the income-tax law, and not income, profit or gain which accrues or arises or is deemed to accrue or arise within the taxable territories. Income received or deemed to be received, or accruing or arising or deemed to be accruing or arising within the taxable territories in the previous year is taxable by section 4(1)(a) and (c) of the Act, whether the person earning is a resident or non-resident. If the agent of a non-resident receives that income or is entitled to receive that income, it may be taxed in the hands of the agent by the machinery provision enacted in section 40(2). Income not taxable under section 4 of the Act of a non-resident becomes taxable under section 42(1) if there subsists a connection between the activity in the taxable territories and the business of the non-resident, and if through or from that connection income directly or indirectly arises.....
>
> The expression 'business connection' postulates a real and intimate relation between trading activity carried on outside the taxable territories and trading activity within the territories, the relation between the two contributing to the earning of income by the non-resident in his trading activity".

257. In CIT v. Hindustan Shipyard Ltd. [1977] 109 ITR 158 (AP) a Division Bench of this court had construed the word "business Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 connection". The facts in this case were that;- The non-resident company supplied diesel engines with accessories. The terms of the sale were that 90% of the value must be paid against original set of documents, to be submitted duly to the State Bank of India within fifteen days and the balance within six months. The net price included 5% commission payable to the non-resident company at Bombay. The property was to pass to the purchaser on delivery on board. The engine was agreed to be erected by the staff of the purchaser under the supervision of the erector and a supervising engineer was placed at the disposal of the purchaser by the non- resident company.

It was held that; "business connection" can be said to be established when "the thread of mutual interest runs through the fabric of the trading activities carried on outside and inside the taxable territory and there must be real and intimate connection between the two. The commonness of interest may be by way of management control or financial control or by way of sharing profits".

258. Having regard to the facts of the said case, the Hon'ble Court held that there was no business connection between the assessee and non-resident company, as the services rendered by non-resident company were connected with the effective fulfillment of the contract of sale and were merely incidental to the contract.

259. We are of the opinion that the activities referred to in the agreements placed before us satisfy/establishes "business connection" of assessee in India. There is an element of continuity Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015

ITA No. 58 & 59/Del/2017 between the businesses by assessee from supply to successful commissioning of the Plants. It is not a case of a mere stray or isolated transaction, as contended by Ld. Counsel, when assessee has agreed to render technical/supervisory co-operation for construction, erection of power plant at various locations.

260. At this juncture it is relevant to mention that the general provision bringing income from any business connection in India within the sweep of section 9 (1) (i), has been explained by way of Explanation 1 (a) of the Act that, in the case of a business of which all the operations are not carried out in India, the income of business deemed under this clause to accrue or arise in India. It shall be only such part of income as is reasonably attributable to the operations carried out in India. A careful reading of section 9, together with the Explanations thereto, makes it clear that the statutory test for determining the place of accrual of income is not the place where these services are rendered but where those services are utilized". The crux of the above provision insofar as is relevant to the facts of the present case is that assessee is liable to tax, if it earns business income from the operations carried out in India.

261. In a nutshell we observe that:

> Assessee is supplying BTG equipments to customers in India and is wholly responsible for erection/installation/successful commissioning of equipments. The contracts are negotiated and conclude in India by a team consisting of persons from PE in India Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 and Assessee in China. The expatriates from Shanghai China come to India to provide technical support services to PE in India. All these activities go on to establish that the appellant has business connection in India within the meaning of section 9(1)(i) of the Act. The assessee is doing business activities in India which are not isolated instances rather these represent real and intimate relationship between activities of assessee done outside India and these done inside India. The business operations being done in India by the appellant are revenue generating as these operations are required to earn the contract and to meet with contractual obligations. Therefore, all the parameters of business connection as prescribed by various judicial authorities as mentioned supra are satisfied. Even the assessee has not taken any contention before AO during assessment stage that it does not have business connection in India.
>
> EXISTANCE OF SUPERVISORY PE IN INDIA

262. Ld. Counsel relied upon decision of this Tribunal in the case of Linklaters LLP (supra) in rejoinder, to submit that provisions of Article 5 (2) where specific instances of PE had been indicated, would have to also meet the requirements of Article 5 (1). Ld Counsel by placing reliance upon Linklaters LLP (supra) submitted that, in order to establish PE in India in terms of Article 5 (2), conditions of Article 5 (1) must also be satisfied. In the written submission Ld. Counsel has extracted relevant paragraphs that suggest this preposition. To our understanding paragraph 91 referred by Ld. Counsel does not come to rescue assessee and Shanghai Electric Groups Co. Ltd. Vs.

DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 further do not support the arguments advanced by him, which has been reproduced herein below:

> "91. It is thus clear that, even as per the OECD Model Convention, one of the items included in article 5(2), i.e., 5(2)(j), of India-UK tax treaty is such that it would not constitute permanent establishment under the basic rule of article 5(1), and it is only on account of deeming fiction provided by the provision of article 5(2)(j), it can be treated as a permanent establishment. We are in considered agreement with this analysis in OECD Model Convention Commentary, and, for this reason, we are unable to approve learned counsel's argument that article 5(2) of India-UK tax treaty only provides examples of situations covered by article 5 (1).
>
> 92. UN Model Convention Commentary, dealing with article 5(3) which is in pari materia with article 5(2)(j) and (k) of India UK tax treaty, makes the position even more clear.
>
> 93. According to this analysis in the UN Model Convention Commentary, article 5(3)(b) of UN Model Convention, which is materially similar to the provisions of article 5(2)(k) of India- UK tax treaty, extends to the areas not covered by the OECD Model Convention. Obviously, a permanent establishment under basic rule cannot be said to be not covered by the OECD Model Convention. According to the UN Model Convention Commentary, the scope of this provision extends beyond the scope of permanent establishment under the basic rule. For that reason also, the assessee's suggestion that article 5(2) of India-UK tax treaty should only be read as a bunch of illustration of permanent establishments under the basic rule set out in article 5(1), could not be accepted.
>
> 262. Similar is the situation in the facts of the present case where the India -China DTAA, is concerned. Article 5 of India China DTAA discusses about the existence of permanent establishment which is reproduced here under.
>
> Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 ARTICLE 5(2) herein are not to be read only as a bunch of illustrations of PE.
>
> ARTICLE 5 : Permanent establishment -
>
> (1) For the purposes of this Agreement, 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 :
>
> (a) a place of management;
>
> (b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(g) a warehouse, in relation to a person providing storage facilities for others;

(h) a farm, plantation or other place where agriculture, forestry, plantation or related activities are carried on;

(i) an installation or structure used for the exploration or exploitation of natural resources, but only if so used for a period of more than 183 days;

(j) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 183 days;

(k) the furnishing of services other than technical services as defined in Article 12 (Royalties and Fees for Technical Services), by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, but only if activities of that nature continue within that other Contracting State for a period or periods aggregating more than 183 days. (3).....

(4) Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom the Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 provisions of paragraph 5 apply - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, has and habitually exercises an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

UN Model Convention (hereinafter referred to as UN MC) 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 :

(a)A place of management;

(b)A branch;

(c)An office;

(d)A factory;

(e)A workshop; and (f)A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

(3) The term "permanent establishment" also encompasses :

(a)A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months;

(b)The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than six months within any twelve-month period.

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263. On a combined reading of Article 3 (a) (b) of UN MC and Article 5 (2) of India or China DTAA, provides expressly that a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months. Any of those items which does not meet this condition does not by itself constitute a permanent establishment, even if there is within it an installation, for instance an office or a workshop within the meaning of paragraph 2, associated with the construction activity. Where, however, such an office or workshop is used for a number of construction projects and the activities performed therein go beyond those mentioned in paragraph, it will be considered a permanent establishment if the conditions of the article are otherwise met even if one of the projects involved, lasts for more than 12 months.

264. Thus on the question of existence of PE, to the facts of the present case, the contentions of Ld. Counsel cannot be accepted for the following reasons:

• Para 2 of Article 5 of DTAA provides the circumstances under which permanent establishment arises in a Contracting State. Para 2 provides for specific instances over and above the general provisions contained in para 1 of Article 4 e.g., duration of

construction contract, furnishing of services other than technical services, etc. It is a well accepted principle that specific provisions prevail over the general provisions. Therefore, if the conditions provided in para 2 of Article 5 are satisfied, it will amount to a Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 permanent establishment, irrespective of the fact whether the general provisions of article 5(1) cover such a situation or not.

• The permanent establishment under Article 5(2)(j), encompasses a building site, a construction, assembly or installation project or supervisory activities in connection therewith, only if such site, project or activities last more than six months(183 days), which is an admitted position in all the contracts entered into by assessee in the previous years, relevant to assessment years under consideration.

Thus the supervisory PE of assessee existed in India from the time Indian clients contracted with assessee to carry out the work of supply, supervision, erection, intellation and successful commissioning of plants. Thus, splitting of this transaction under supply and services will be wholly artificial and neither will it have a rational basis, nor can it be recognized for the purposes of commutation of profits attributable to the PE.

ATTRIBUTION OF PROFITS.

Article 7 deals with the business profits, which has been reproduced hereunder:

" Article 7 -Business Profits

1. The profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other Contracting State but only so much of Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 them as is directly or indirectly attributable to that permanent establishment.

The provisions of this paragraph shall, however, not apply if the enterprise proves that the above activities could not have been undertaken by the permanent establishment or have no relation with the permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. Insofar as the tax law of a Contracting State provides with respect to a specific business activity that the profits to be attributed to a permanent establishment are to be determined on the basis of a deemed profit, nothing in paragraph 2 shall preclude that Contracting State from applying those provisions of its law, provided that the result is in accordance with the principles contained in this Article.

4. In determining the profits of a permanent establishment, there shall be allowed as deduction expenses which are incurred for the purposes of the business of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere in accordance with the provisions of tax law of that Contracting State.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of paragraphs 1 to 5, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

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7. Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article."

265. Article 7 (1) states that profits can be taxed in India only to such extent that is attributable to the PE in India. In other words if there is no PE then business profits of assessee cannot be taxed in India. On the facts of the present case, the assessee has already admitted of existence of Service PE in India, while submitting for assessment year 2010-11, as per Article 5 of India - China DTAA. The written submissions placed in the paper book before us also substantiate the position. This in no way restricts our finding that in any of the earlier assessment years the payments made towards supply and services rendered in India are separate. Ld. CIT DR has presented a chart before us which suggests that assessee's representatives were present in India since 2007 onwards and therefore all the payments made in respect of each contracts entered into by assessee with various project owners during the respective assessment years has to be construed in the similar manner.

266. It is further observed that the position under DTAA is analogues to the position as expressed in Explanation (1) (a) to section 9 (1) (i) of the Act. The sum and substance of both these provisions under DTAA as well as Indian Income tax Act is that, only that part of business income of assessee can be charged to tax in India which is attributed to the operations carried out in India, due to the business connection as per section 9 (1) of the Act or is Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 attributable to the PE as per Article 7 of DTAA. To our mind the position is very clear under DTAA as well as the Indian

Income tax Act, that the principle of apportionment of income with reference to territorial nexes is not only explicit but also forms an integral part of both section 9 (1) of the Act read with Explanation (1) (a) as well as Article 7 of DTAA. If a particular income is not attributable to the operations carried out in India thereby not having any territorial nexes with India, then a non-resident cannot be charged to tax for that income.

Per contra, if a particular income is attributable to the operations carried out in India and has territorial nexes with India, then there can be no escape from charge of such income to tax.

267. In the present case before us assessee having entered into a Composite contract which is relatable to the operations carried out in India and partly to outside India a proportionate part of income which is so relatable to the operations carried out in India has to be charged to tax.

268. The extension of taxability of profits of PE by including profits directly or indirectly attributable, is akin to the provisions of Article 7(1)(b) and 7(1)(c) of the UN MC which provides that in addition to the 'profits attributable to the permanent establishment' the taxability of PE profits will also extend to '(b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 activities carried on in that other State of the same or similar kind as those effected through that permanent establishment'. The connotations of 'profits indirectly attributable to permanent establishment' will extend to these two categories. These categories clearly incorporate a force of attraction rule. The basic philosophy underlying the force of attraction rule is that when an enterprise sets up a permanent establishment in another country, it brings itself within the fiscal jurisdiction of that another country to such a degree that such another country can properly tax all profits that the enterprise derives from that country whether the transactions are routed and performed through the PE or not.

269. The provisions of Article 7(1) of India China DTAA, include same results as sought to be achieved by article 7(1)(c) of UN MC. As to the scope of this provision, one may find guidance from the UN MC Commentary in this regard.

270. Therefore, the connotations of 'profits indirectly attributable to permanent establishment' do indeed extend to incorporation of the force of attraction rule being embedded in article 7(1). In addition to taxability of income in respect of services rendered by the PE in India, any income in respect of the services rendered to an Indian project, which is similar to the services rendered by the permanent establishment, is also to be taxed in India in the hands of the assessee, irrespective of the fact whether, such services are rendered through the permanent establishment, or directly by the general enterprise. There cannot be any professional services Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 rendered in India which are not, at least indirectly, attributable to carrying out professional work in India. This indirect attribution, in view of the specific provisions of India-China tax treaty, is enough to bring the income from such services within ambit of taxability in India. The twin conditions to be, thus, satisfied for taxability of related profits are:

(i) the services should be relatable to the services rendered by the PE in India; and (ii) the services should be 'directly or indirectly attributable to the Indian PE', i.e., rendered to a project or client in India.

To the facts of the present case, both these conditions stands satisfied.

The extension of taxability of profits of PE by including profits directly or indirectly attributable, is akin to the provisions of Article 7(1)(b) and 7(1)(c) of the UN MC, which provide that in addition to the 'profits attributable to the permanent establishment' the taxability of PE profits will also extend to '(b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment'. The connotations of 'profits indirectly attributable to permanent establishment' will extend to these two categories. These categories clearly incorporate a force of attraction rule. The basic philosophy underlying the force of attraction rule is that when an enterprise Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 sets up a permanent establishment in another country, it brings itself within the fiscal jurisdiction of that another country to such a degree that such another country can properly tax all profits that the enterprise derives from that country whether the transactions are routed and performed through the PE or not.

In effect, profits relating to services rendered by assessee, whether rendered in India or outside India, in respect of Indian projects are taxable in India, and are attributable to the supervisory PE of assessee in India, as they are effectively connected with each other.

Attribution of Income computed by Ld.AO Based on FAR analysis, activities performed by PE, was summarized by AO is under:

- Drawing & Designing;
- Manufacturing;
- Supply of Equipments;
- Marketing and related activities;
- Supervision & related activities.

Ld.AO computed attributed 25% from offshore supply to be accruing from off shore supplies to PE in India, based on Global profitability statement submitted by assessee, for assessment year under consideration, as under:

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 (A.Y.2007-08) Particulars FY 2006-07(AY

2007-08) Gross offshore supply revenues 4,36,79,200.00 (USD(A) Exchange rate @ 43.77 on 30.03.2007 43.77 Gross offshore supply revenues Rs. 1,91,18,38,584.00 (INR)(A*B) Profit on the basis of Global profit and Rs. 15,48,58,925.30 loss account (8.1%) Attribution in India (%) 25% Taxable Income Rs. 3,87,14,731.33 Tax Liability @ 42.23% Rs. 1,63,49,231.04 ITA no. 225/Del/2015 (A.Y. 2008-09) FY 2007-08 Particulars Gross offshore supply revenues (USD) (A) 23,28,84,198.00 Exchange rate @ 39.52 on 31.03,2008 (B) 39.52 Gross offshore supply revenues (INR) (A*B) Rs. 9,20,35,83,504.96 Profit on the basis of Global profit and loss account (6.89%) Rs. 63,41,26,903.49 Attribution in India (%) 25% Taxable Income Rs. 15,85,31,725.87 Tax Liability @ 42.23% Rs. 16 69 47 947.84 Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 ITA no. 226/Del/2015 (AY 2009-10) FY 2008-09 Particulars AY 2009-10 Gross offshore supply revenues (USD) (A) 44,97,99,756.00 Gross offshore supply revenues (EURO) (A) 2,50,86,420.00 Exchange rate @ 50.53 on 31.03,2009 (B) 50.53 Exchange rate @ 66.70 on 31.03.2009 (B) 66.70 Gross offshore supply revenues (INR) (A*B) Rs. 24,40,16,45,884.68 Profit on the basis of Global profit and loss account (5.53%) Rs. 1,34,94,11,017.42 Attribution in India (%) 25% Taxable Income Rs. 33,73,52,754.36 ITA no. 3552/Del/2015 (A.Y.2010-11) Income as per revised computation filed on 11.12.2012 - Rs. 7,72,74,388/-

(u/s 44BBB of the Act) Income from offshore supply -Rs. 625,063,759.71/-

Particulars	FY 2009-10
Gross offshore supply revenues (USD)(A)	520,649,916.69

Gross offshore supply revenues (EURO)(B) 115,602,104.74 Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Gross offshore supply revenues (INR) = 30,150,785,284.23 (A)*exchange rate @ 50.53 + (B)*exchange rate @ 66.70 Profit on the basis of Global profit and loss 2,500,255,038.86 account (@8.29%) Attribution in India (%) 25% Taxable Income 625,063,759.71 /-

Tax Liability @ 42.23%	263,964,425.73

ITA no. 227/Del/2015

(AY 2011-12)

Particulars	FY 2010-11
Gross offshore supply revenues (USD) (A)	25,72,57,618.00
Gross offshore supply revenues (EURO) (A)	3,89,86,186.00
Exchange rate® 44.23 on 31.03,2011 (E)	44.23
Exchange rate @ 62.36 on 31.03.2011 (B)	62.36

Gross offshore supply revenues (INR) (A*B) Rs. 13,80,96,83,003.10 Profit on the basis of Global profit and loss account (5.78%) Rs. 79,81,99,677.58 Attribution in India (%) 25% Taxable Income Rs. 19,95,49,919.39 Tax Liability @ 42.23% Rs.8,42,69,930.% Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 ITA no. 58/Del/2017 (AY 2012-13) Particulars FY 2011-12 Gross offshore supply revenues (USD) (A) 39,92,37,285.00 Gross offshore supply revenues (EURO) (B) 1,86,57,376.00 Exchange rate of USD on 31.03.2012 (Al) @ 50.71 Exchange rate of Euro on 31.03.2012 (Bl) @ 67.44 Gross offshore supply revenues (Rs) (AxAl + Rs. 21,50,35,76,160 BxBl) in aggregate Profit on the basis of Global profit and loss account (6%) Rs. 1,29,02,14,569 Attribution in India (%) 25% Taxable Income (X) Rs. 32,25,53,642 ITA no. 59/Del/2017 (AY 2013-14) Particulars FY 2012-13 Gross offshore supply revenues (USD) (A) 11,74,67,337.00 Gross offshore supply revenues (EURO) (B) 55,52,259.00 Exchange rate of USD on 31.03.2013 (Al) @ 53.98 Exchange rate of Euro on 31.03.2013 (Bl) @ 68.69 Gross offshore supply revenues (Rs) (AxAl + BxBl) in aggregate Rs. 6,72,22,71,551 Profit on the basis of Global profit and loss account (8.57%) Rs. 57,60,98,671.94 Attribution in India (%) 25% Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 Taxable Income (X) Rs. 14,40,24,667.98

271. Assessee in ground 6.9 of appeals for assessment years under consideration, has contended that segmental profit rate submitted to be applied, instead of global profit rate. However, Ld.Counsel has not submitted any justification to adopt the segmental profits. He has also not demonstrated any illegality in the computation adopted by Ld.AO. It is observed that Ld.AO has followed the global profitability based upon the ruling of Rolls Roys (supra) and attributed 25% of global profit accruing from the offshore supplies to PE in India Accordingly ground no.6.9 raised by assessee in all the appeals are dismissed.

The next issue raised by assessee is in respect of levy of Interest u/s234 B of the Act.

272. The case of the assessee is that, it is a non-resident company and payments received by assessee should have suffered tax deduction at source, by the payer, who was required so to do under Section 195 of the Act. The obligation upon the payer to deduct tax at source, before making remittances to the non-resident assessee, was absolute. The undisputed fact in the present case remained that the tax on entire income received by assessee was required to be deducted, at appropriate rates by the respective payers under section 195. Had the payer made the deduction of tax at the appropriate rate, the net tax payable by Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017 the assessee would have been Nil. Thus, there was no liability to pay advance tax by the assessee.

High Court of Delhi in the case of Jacabs Civil Incorporated/Mitsubishi Corporation reported in [2011] 330 ITR 578 /[2010] 194 Taxman 495 (Delhi) on identical issue, held as under:

> "This clause categorically uses the expression "deductible or collectible at source" and it is this clause which is incorporated by the Uttaranchal High Court in the said judgment (Supra) in the manner already pointed above. The scheme of the Act in respect of non-resident is clear. Section 195 of the Act puts an obligation on the

payer, i.e., any person responsible for paying to a non- resident, to deduct income-tax at source at the rates in force from such payments excluding those incomes which are chargeable under the head 'Salaries'. Therefore, the entire tax is to be deducted at source which is payable on such payments made by the payee to the non-resident. Section 201 of the Act lays down the consequences of failure to deduct or pay. These consequences include not only the liability to pay the amount which such a person was required to deduct at source from the payments made to a non resident but also penalties, etc. Once it is found that the liability was that of the payer and the said payer has defaulted in deducting the tax at source, the Department is not remedy-less and, therefore, can take action against the payer under the provisions of section 201 of the Income- tax act and compute the amount accordingly. No doubt, if the person (payer) who had to make payments to the non-resident had defaulted in deducting the tax at source from such payments, the non-resident is not absolved from payment of taxes thereupon. However, in such a case, the non-resident is liable to pay tax and the question of payment of advance tax would not arise. This would be clear from the reading of section 191 of the Act along with section 209 (1) (d) of the Act. For this reason, it would not be permissible for the revenue to charge any interest under section 234 B of the Act."

Shanghai Electric Groups Co. Ltd. Vs. DCIT ITA No. 224 to 227/Del/2015 ITA no. 3552/Del/2015 ITA No. 58 & 59/Del/2017

273. Respectfully following the above decision of Hon'ble Jurisdictional High Court in the case of Jacabs Civil Incorporated/Mitsubishi Corpn. (Supra) the interest charged u/s 234 B in present facts of the case stands deleted. Hon'ble Delhi High Court has considered the issue in case of DIT vs.G E Energy Parts Inc reported in (2015) 56 Taxmann.com 190. Hon'ble High Court has followed the view in case of Jacobs Civil Incorporated/Mitsubishi Corpn. (Supra). Ld.AO is directed to recompute income chargeable to tax in accordance with law following the above decisions.

Accordingly Ground relating to section 234B stands allowed. In respect of Ground raised on penalty under section 271(1)

(c), as this is premature, the ground stands dismissed.

In the result appeals filed by assessee for assessment years 2007-08 to 2013-14 stands partly allowed.

Order pronounced in the open court on 14th July, 2017.

Sd/-	Sd/-
(R. K. PANDA)	(BEENA A. PILLAI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER
Date: 14.07.2017	
@mit.	