M/S. Mitsui & Co. Ltd., New Delhi vs Ddit, New Delhi on 7 January, 2020

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : E : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA Nos.2801 & 4329/Del/2011
Assessment Years : 2006-07 & 2007-08

ITA No.794/Del/2012
Assessment Year : 2008-09

DDIT, Circle-3(1), International Taxation, New Delhi.	Vs	Mitsui & Co. Ltd., Plot No.D-1, 4th Floor, Salcon Ras Vilas, District Centre, Saket, New Delhi. PAN: AAACM5469Q

ITA Nos.4367/Del/2011
Assessment Year : 2007-08

ITA No.795/Del/2012
Assessment Year : 2008-09

Mitsui & Co. Ltd., Plot No.D-1, 4 th Floor, Salcon Ras Vilas, District Centre, Saket, New Delhi. PAN: AAACM5469Q	Vs.	DDIT, Circle-3(1), International Taxation, New Delhi

(Appellant) (Respondent)

Assessee by : Shri Ved Jain, Advocate,
Shri Ashish Goel &
Shri Himanshu Aggarwal, CAs

Revenue by : Shri G.K. Dhall, CIT, DR

Date of Hearing : 09.10.2019
Date of Pronouncement : 07.01.2020

ORDER

PER R.K. PANDA, AM:-

dated 28th March, 2011passed by the CIT(A)-7, New Delhi, relating to Assessment Year 2006-07. ITA No.4329/Del/2011 filed by the Revenue and ITA No.4367/Del/2011 filed by the assessee are cross appeals and are directed against the order dated 25th July, 2011 of the CIT(A)-7, New Delhi relating to A.Y. 2007-

08.

2. ITA Nos.794/Del/2012 filed by the Revenue and ITA No.795/Del/2012 filed by the assessee are cross appeals and are directed against the order dated 3rd October, 2011 of the CIT(A)-21, New Delhi, relating to A.Y. 2008-09.

3. Since common issues are involved in all these appeals, therefore, these appeals were heard together and are being disposed of by this common order for the sake of convenience.

4. Facts of the case, in brief, are that the assessee is a foreign company incorporated in Japan and is one of the biggest trading house of the world. It is ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 involved in trading from needle to airplane engines. It has established a Liaison Office in New Delhi and undertakes several projects in connection with big industrial installations and power projects. It filed its return of income on 13th December, 2006 declaring total income at Rs.2,71,37,369/-. During the course of assessment proceedings, the AO noted that the assessee has received consideration for executing two projects, namely, Teesta & Purulia Projects. The assessee has entered into contracts with National Hydroelectric Power Corporation Ltd. (NHPC) for carrying out Electrical & Mechanical Works of "Teesta H.E. Project"

[3 X170 MW (Stage-V) (Sikkim, India)]. These agreements are -

a) First Contract - For CIF/CIP Supply of all offshore equipments and materials including Mandatory Spares for Lot-6 Electrical & Mechanical works of Teesta FIE Project (Stage-V).

b) Second Contract - For Ex-works supply of all equipments and materials of Indian origin for Lot-6 Electrical & Mechanical works of Teesta HE Project (Stage-V).

c) Third Contract - For providing all onshore services in respect of all equipments supplied under First & Second Contract and other services for Lot-6 Electrical & Mechanical works of Teesta HE Project (Stage-V).

5. The assessee has also entered into contracts with West Bengal State Electricity Board, Calcutta (WBSEB) in respect of Purulia Pumped Storage Project. These agreements are:

a) Contract for Erection, Testing and Commissioning of Equipment and Materials in respect of Electro Mechanical Equipment (Lot 6.1) of Purulia Pumped Storage Project.

b) Contract for supply of equipment and materials in respect of Electro Mechanical Equipment (Lot 6.1) of Purulia Pumped Storage Project.

6. In the notes attached to the statement of assessable income, the assessee stated that taxable income from execution of the above projects has been computed @ 10% of the gross receipts u/s 44BBB of the Income-tax Act, 1961. The AO asked the assessee to furnish the details of offshore supplies made during the year under Teesta and Purulia projects in response to which the assessee furnished the following details:-

Amount (in JPY) Teesta Project 1,853,557,282 Purulia Project 4,464,413,098

7. From the details furnished by the assessee, the AO noted that the assessee has entered into three contracts with NHPC on 6th December, 2001. Contract-1 is in respect of offshore supplies, Contract-2 is in respect of onshore supplies and Contract-3 is in respect of onshore services. He, therefore, asked the assessee to explain as to why the revenues from offshore supplies under the first contract should not be attributed to the project office of the assessee in India and taxed in accordance with the various provisions of the Act read with the relevant provisions ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 of the DTAA entered into between India and Japan. He also asked the assessee to explain as to why the revenues from third contract i.e., 'Provision of onshore services' should not be treated as 'Fees for technical services' in terms of section 9(1)(viii) of the provisions of the relevant DTAA and taxed in accordance with the provisions of section 44D read with section 115 of the IT Act. 7.1 The assessee made a detailed submission explaining as to why such offshore supplies should not be attributed to the project office in India. However, the AO was not satisfied with the arguments advanced by the assessee and held that on reading of section 44BBB, 10% of the amount paid or payable whether in or outside India to the assessee or any person on his behalf on account such civil construction, erection, testing or commissioning shall be deemed to be the income chargeable to tax under the head 'Profit and gains from business or profession.' Accordingly, the income received for offshore supplies in respect of Teesta and Purulia projects are chargeable to tax @ 10%. He further held that everything directly or indirectly relating to the said business should be considered under the ambit of section 44BBB of the Act. He accordingly concluded that income for the purpose of this section should also include offshore receipts for the supply of equipment. He noted that the assessee is engaged in offshore supplies as well as onshore supplies in respect of Teesta and Purulia projects. It is also engaged in the installation and commissioning of such equipments supplied. The submission of the assessee that offshore supplies are made by the HO i.e., Mitsui & Co. Ltd., to ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 NHPC and WBSEB directly and that the project offices has no role to play in the offshore supplies and, therefore, no profits from such offshore supplies can be attributed to the project office in India in respect of these two projects was rejected by the AO. He examined the various clauses of the contract and came to the conclusion that the assessee is receiving consideration from their employers i.e., NHPC and WBSEB for the execution of the

projects. A part of such consideration is in foreign currency and the balance is in INR. Therefore, according to the AO, the assessee has a business connection in India u/s 9(1)(i) of the Act. The AO further examined the existence of a PE in India within the meaning of Article 5 of the Indo-Japan DTAA. According to the AO, the assessee has not denied that it does not have any PE in India. The project office of the assessee in India, according to the AO constitutes a PE in India under Article 5(2) r.w. Article 5(1) of the DTAA. Further, the assessee has also a PE in India under Article 5(3) of the DTAA as it is engaged in installation project which has exceeded the duration of six months. He rejected various explanations given by the assessee and observed that in the immediately preceding assessment year, identical issue was involved where it has been held that LO's of the assessee in India constitutes fixed PE under Article 5(1), 5(2)(c) of the DTAA and Dependent Agency Permanent Establishment (DAPE) under Article 5(7) of the DTAA as the LO excises the authority to conclude contracts and secure orders in India wholly for the assessee. It was further held in the said assessment year, as an alternative stand that Mitsui & ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 Co. India Pvt. Ltd. (MIPL) also constitutes DAPE of the assessee under Article 5(7) of the DTAA. However, the A.O. adopted the figure extracted from sales of LO to arrive at the taxable income under this head for the A.Y. 2005-06.

8. Since the facts of both these assessment years i.e. A.Y 2005-06 and the present assessment year are same, the AO held that the LOs of the assessee in India constitute fixed PE in India under Articles 5(1), 5(2)(c) of the DTAA and DAPE under article 5(7) of the DTAA as has been held in A.Y 2005-06. Further, alternatively MIPL also constitutes DAPE of the assessee as has been held in A.Y 2005-06. Further, alternatively MIPL also constitutes DAPE of the assessee as has been held in A.Y. 2005-06. For the purposes of arriving at the profits attributable to Indian Operations, combined figures of LOs and MIPL were adopted.

9. The assessee was asked to furnish the details of the sales made through the LOs in India. The assessee furnished the details and also took the plea that the offshore supplies in respect of the Teesta & Purulia projects have also been included in such sales through LOs in India. The AO asked the assessee vide letter dated 26.12.2008, to substantiate its claim. However, the assessee could not provide any documentary evidence so as to prove that the offshore supplies in respect of Teesta & Purulia Projects are already included in the turnover of the LO. Therefore, the AO held that no benefit can be given to the assessee on this ground.

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012

10. The AO noted that in the consolidated accounts the assessee has shown profit rate of 5.486%. Also, during the year, as per the assessee, total sales in India related to LOs, P.O.s and MIPL are JPY 64,193,681,300. Out of which, turn over of JPY 546,257,232 and JPY 6,317,970,380 belong to the LOs and the P.O.s, as above. This according to the AO leaves remaining turnover of JPY 47,918,415,401 which is attributed to MIPL. Based on these numbers, the AO computed the profits attributable to the P.E. as under:

	LOs	MIPL	T
Total Trading T.O. in India (JPY)	9,957,295,519	47,918,415,401	

Gross Profit @ 5.486%	546,257,232	2,628,804,269
Converted into INR @ 0.3786	206,812,988	995,265,296
Taxable Profits attributable to Indian Operation @ 50%	103,406,494	497,632,648
Less: Expenses incurred at Indian Offices	148,437,821	
Less Commission paid to MIPL		260,217,178
NET ADJUSTABLE INCOME	(45,031,327)	237,415,470
Les: deduction u/s 44C @5%		
TOTAL INCOME FROM P.E. (INR)		

With the above remarks income of the assessee is computed as under:

1. Income as per Return of Income-A INR 27,137,369

2. Add: 10% of offshore supplies (Para 4.10 above)-B INR 239,198,358

3. Total Profits from LOs-C INR 182,764,936

4. Total Income (A+B+C) INR 449,100,663 ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012

11. The AO accordingly determined the total income of the assessee at Rs.44,91,00,663/-.

12. In appeal, the ld.CIT(A) held that the provisions of section 44BBB of the IT Act cannot be applied for subjecting to tax the income from offshore supplies in respect of Teesta and Purulia projects. According to him, offshore receipts in the present case cannot be subjected to tax merely on the ground that the assessee has chosen to be assessed on presumptive basis. According to him, the question whether such receipts will be taxable in India will have to be considered independently on their own merits. He accordingly deleted the addition of Rs.23,91,98,358/- made by the AO being profit @ 10% of the offshore supplies. The relevant observations of the CIT(A) at para 3.6 onwards reads as under:-

> "Determination 3.6 I have carefully considered the written submission made on behalf of the appellant, the findings of the Assessing Officer in the assessment order and the facts on record. As can be seen from the memorandum of the Finance Bill, 1989 the legislative intent behind the introduction of section 44BB was simplification in the matter of determination of the income accruing or arising in India to a foreign company which often involved complications. As held by the Hon'ble ITAT, Delhi Bench in case of Saipem S.P.A.vs DCIT(supra), the provision of Section 44BB were intended only to replace the system of computation of income earlier envisaged by

the application of the provision of Sections 28 to 41 and Sections 43 and 43 A of the Act. It was not to replace the provision of Section 5 of the Act, which would remain intact and was not to be superceded by the provision of section 44BB. The provisions of section 44BBB are para- materia with the provision of section 44BB. The order of the Tribunal, therefore, applies also to Sections 44BBB. The non-obstante clause with which Section 44BBB starts only supercedes Sections 28 to 44AA.

3.7 In this context reference may also be made to the judgment of the Supreme Court in CIT vs. Hyundai Heavy Industries Company Ltd. 291 ITR 482 (SC). This was a case which related to Section 44BB of the Act, where an ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 agreement was entered into by ONGC with M/s Hyundai Heavy Industries Co. Ltd., a non-resident foreign company incorporated in South Korea. The contract was divisible into two types of operations, one being fabrication in Korea and other of installation in India. The main question was whether profits accruing to the assessee from activities performed outside India were chargeable to tax in India. After a detailed discussion the Apex Court held that the profits that accrued to the Korean Enterprise for the Korean operations was not taxable in India. Another question was with regard to the quantum of profits embedded in the Indian operations. On this issue, the Apex Court observed as under

"13 The assessee appeared before the Department and submitted that its income from Indian operations be computed under section 44BB or under Instruction No. 1767 issued by the Central Board of Direct Taxes. Under the said instruction, in cases where the sales take place outside, as in this case, only 10 per cent of the gross receipts in respect of the activities of installation, commissioning etc. performed in India will be taxable. In view of the stand taken by the assessee, we are of the view that the Commissioner of Income-tax (Appeals) was right in computing the taxable profits at 10 per cent of the gross receipts in respect of the activities of installation, commissioning etc. performed in India....

15. For the aforestated reasons, we hold as follows :

(a) In the facts and circumstances of the case, profits, if any, from the Korean Operations (designing and fabrication) arose outside India, hence not taxable.

(b) As regards the quantum of profits embedded in the Indian Operations attributable to the Indian PE of the assessee, we hold that the CIT(A) was right, in the facts and circumstances of this case, in attributing the profits to the Indian PE at 10 per cent of the gross receipts in respect of its activities of installation, commissioning etc. performed in India. The same shall be taxable accordingly."

The Court examined the provision of Section 44BB, which like Section 44BBB, was also the provision for computation of income on presumptive basis. The ratio which emerges from this judgement is that Section 44BB cannot be interpreted to mean that once the income is computed on the presumptive basis, as envisaged under this section, all the receipts, even though they may not be

taxable in India, would be included for computing income on presumptive basis. This is clear from the finding given in paras 15(a) and 15(b) above. The income from operations outside India has been ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 held to be non-taxable (as per para 15 (a)} and income only from operations attributable to Indian Permanent establishment has been held to be taxable in India @ 10% on presumptive basis {as per para 15(b)}. Thus, the offshore receipts in the present case cannot be subjected to tax merely on the ground that the appellant has chosen to be assessed on presumptive basis. The question whether such receipts will be taxable in India will have to be considered independently on their own merits which is the subject matter of separate arguments which follow hereinafter. It is, therefore held that the AO was not justified in holding that Section 44BBB requires that the offshore receipts have necessarily to be taxed in India. As a result, Ground of appeal No. 1 & 1.1 are allowed granting relief of Rs.23,91,98,358/-."

13. The ld.CIT(A) further held that the income from offshore supplies in respect of Teesta and Purulia projects were not liable to be taxed under the provisions of Article 7 r.w. paragraph 6 of the protocol to the DTAA of India and Japan. The relevant observations of the CIT(A) on this issue reads as under:-

> "4.4. I have carefully considered the written submission made on behalf of the appellant, the findings of the Assessing Officer in the assessment order and the facts on record. I have also perused the case laws relied upon by the appellant as well as by the Assessing Officer. The appellant has relied upon the decision of the Hon'ble Delhi High Court in Director of Income Tax vs. LG Cables Ltd. (2011) 237 CTR (Del)438: 50 DTR (Del) 1,where identical issue has been examined. From the judgement of the Hon'ble Delhi High Court in LG Cables Ltd. (supra), it is seen that all the reasons given by the AO are settled by the ratio laid down by the said judgment. The Hon'ble Delhi High Court has followed the judgement of the Apex court in Ishikawajma Harima Heavy Industries Ltd. v. Director of Income-tax [2007] 288 ITR 408. The case of the appellant is indeed on a stronger ground. Unlike the case of Ishikawajma (supra), in the present case, separate contracts were entered into in respect of offshore supply, onshore supply and for services in respect of contract for erection, testing and commissioning of equipment. Clause 31.1 of the contract with NHPC unequivocally clarifies that the title of properties in the goods was transferred outside India as soon as the goods were loaded in the ship and the shipping documents were handed over to the nominated bank. There are no other terms in the contract which were inconsistent with clause 31.1 which describes the event of delivery. The sale was completed outside India and the income thus accrued outside India. The Permanent Establishment had not played any part in the offshore supply of the equipments. Although entire consideration was not paid on delivery of equipment such non-payment did not prevent the transfer of goods. The fact ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 that the agreement imposed on the assessee, the obligation to handover the equipment functionally completed was in the nature of trade warranty and no undue importance could be given to such provision in the agreement. The scope of work of offshore and onshore contracts were separate. On a proper analysis of the salient features of the contract, as explained in the written

submissions, none of the reasons contained in para 6 of the assessment order in respect of the NHPC contracts contradict the proposition that income from offshore supply was not taxable in India. The reasoning given in clause (vii) of para 6 also does not advance the case of the AO, so long as particular material was supplied outside India and the delivery thereof has been taken outside India. The Purulia Project also has similar facts and for the similar reasons the taxability of the offshore supply also is not liable to be taxable in respect of this contract.

4.5 The appellant has also placed reliance upon the judgment in CIT vs. Hyundai Heavy Industries Company Ltd.(supra). The facts of that case are identical and for the reasons given by the Hon'ble Supreme Court the relevant portion of which had been quoted in para 14.1 of the submissions of the appellant, the offshore supplies in the present case are not liable to tax in India.

4.6 The AO has relied upon the judgment in the case of Ansaldo Energia SPA vs ITAT(2009) 310 ITR 237 (Mad): 222 CTR (Mad)55.The said judgment has been distinguished by the Hon'ble Delhi High Court in the case of LG Cables (supra), the relevant portion of which have been extracted by the appellant in its reply in paras 15 & 15.1. Needless to mention that Ansaldo's case is not applicable to the facts situation in the present case also as has been held in the case of LG Cables (supra).

4.7 The AO has applied the rule of force of attraction by referring to Paragraph 6 of the Protocol of DTAA between India and Japan. The rule of force of attraction was held not to be applicable by the Apex Court in the cases of CIT vs. Ishikawajma Harima Heavy Industries Ltd. (supra) and Hyundai Heavy Industries Company Ltd. (supra). The rule of force of attraction has also not been upheld in the case of Asia Satellite by the Delhi High Court which has also been quoted by the appellant in para 12.3. For the cumulative reasons it is held that rule of force of attraction does not apply in the present case because of the non-involvement of Permanent Establishment in the transaction of offshore supplies.

4.8. Thus for all these reasons and as the appellant has repelled the contentions advanced by the Assessing Officer with cogent material and evidence, it is held that no income is liable to tax in respect of the offshore supplies and Ground of appeal No.1.2 is allowed. The addition of Rs.23,91,98,358/- is deleted for the aforesaid reasons also.

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012

14. The ld.CIT(A) further held that the liaison office of the assessee does not constitute a PE. He relied on the order of his predecessor for the preceding assessment year. The relevant observation of the CIT(A) on this issue at para 5 of his order reads as under:-

" 5. Ground of Appeal No. 2 relates to the grievance of the appellant against the action of the AO in treating the Liaison Office (L.O) as "Permanent Establishment" in India and subjecting it to tax under the head "business income". I have carefully considered the findings of the Assessing Officer and the written submissions made on behalf of the Appellant. I find that the identical issue in the appellant's own case was decided by the undersigned in favour of the appellant vide orders dated 24-11-2010 in Appeals No. 85/2010-11 and 83/2010-11, for the assessment years 2004-05 and 2003-04 respectively and also vide orders dated 09-11-2010 and 12-11- 2010 for the assessment years 1998-99 and 1999-2000 respectively. In assessment year 2005-06 also the issue has been decided in favour of the appellant vide order dated 24.2.2011 in Appeal No. 86/2010-11. As the facts and circumstances of the case are pari materia with the case of the appellant in assessment years 1998-99, 1999-2000, 2003-04 ,2004-05 and 2005-06, for the reasons as discussed in the aforesaid orders of the undersigned, it is held that the Liaison Office does not constitute a "Permanent Establishment" and there was no income liable to tax in India. In this context, it may be apposite to reproduce the findings of the undersigned in Para 4.4 of the appellate order for assessment year 2003-04 referred to above :-

"4.4 I have carefully considered the submissions made on behalf of the appellant and have also looked into the records. Perusal of the assessment order passed by the Assessing Officer shows that it has been completed following the combined order passed by the CIT(A) for the assessment years 2000-01and 2001-02 on 18-2-2005. The order of the CIT(A) has been set aside by the Hon'ble Tribunal. In their order the Tribunal has dealt with the contentions of the revenue as also the appellant and after looking into the material discovered in the course of survey gave a finding both in law and on facts and specifically held that LO does not constitute a P.E. liable to tax in India. The Hon 'ble Tribunal concluded the order thus :

"In conclusion, we hold that the income tax authorities erred in holding that the L.O. income liable to tax in India. The action of the lower authorities is not justified, both on account of the subsisting order of the Special Bench of the Tribunal in the assessee's case for assessment years 1980-81 as also our afore stated discussion.

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 Since the A.O. has relied entirely on the order passed by the CIT(A) for the assessment years 2000-01 and 2001-02 , which stands reversed by the ITAT, respectfully following the orders of the Hon'ble ITAT for the assessment year 2001-02, as well as for the assessment year 2002-03, for the reasons as discussed in the aforesaid orders of the ITAT, it is held that L.O. does not constitute a P.E. and it has no income liable to tax in India. As a result, Grounds of Appeal No. 3 to 6 are allowed'."

Accordingly, it is held that the Liaison Office (LO) does not constitute a "Permanent Establishment" and there was no income liable to tax in India. As a result, Ground of Appeal No. 2 is allowed.

15. The ld.CIT(A) also held that no income is liable to be attributed in India even if Mitsui & Com Pvt. Ltd. (MIPL) constituted a Dependent Agency Permanent Establishment (DAPE) in India and, accordingly, deleted the addition of rs.18,27,64,936/- made by the AO by observing as under:-

> 6.1 I have carefully considered the findings of the Assessing Officer and the written submissions made on behalf of the Appellant. I find that the identical issue in the appellant's own case was decided by the undersigned in favour of the appellant vide dated 24.2.2011 in Appeal No. 86/2010-11 for assessment year 2005-06. As the facts and circumstances of the case are pari materia with the case of the appellant in assessment year 2005-06, for the reasons as discussed in the aforesaid order of the undersigned, it is held that MIPL does not constitute a "Permanent Establishment" and there was no income liable to tax in India. In this context, it may be apt to reproduce the findings of the undersigned in Para 5.4 and 5.5 of the appellate order for assessment year 2005-06 referred to above:-
>
> "5.4 I have carefully considered the written submission made on behalf of the appellant, the findings of the Assessing Officer in the assessment order and the facts on record. The Assessing Officer has placed reliance on the order of the IT AT, Bombay Bench in DDIT vs. Set Satellite (Singapore) Pte Ltd. (2007) 106 ITD 175(Mumbai): (2007) 108 TTJ (Mumbai)445 which has been set aside by the Hon'ble Bombay High Court by their judgment dated 22nd August, 2008 reported in 307 ITR 205 (Bombay):218 CTR (Bom) 452: 173 Taxman 475:11 DTR 313(Bom). The matter is directly covered by that judgment in which the Bombay High Court has followed the judgment of DIT, International Taxation, Vs Morgan Stanley & Co. (2007) 292 ITR 416 (SC). The AO has no doubt taken note of the judgment of the DIT, International Taxation vs Morgan Stanley & Co. (supra), but he has referred to that ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 judgment to state that the attribution of profits would depend upon the functional and factual analysis in each case.
>
> 5.5 In this regard it has been clarified on behalf of the appellant that in the present case the Transfer Pricing Officer has specifically stated in his order that transfer pricing documentation, which contains the functional and economic analysis of comparables and of the assessee, has been examined and placed on record and in view of the functional and economic analysis of the assessee and of the comparables no adverse inference was drawn. The AO has also endorsed that after examination of company's transfer pricing documentation and the functional and economic analysis contained therein, the transfer pricing adopted by the company in respect of international transaction (which was accepted by TPO) was being followed by him. Both these orders u/s 92 CA(3) and 143(3) of the Act were passed subsequent to the assessment order passed by the AO(the subject-matter of the present appeal). Both the orders fortify the contention of the appellant that the functional and factual analysis has been undertaken in the present case. Accordingly, the test as laid down by the Hon'ble Supreme Court in Morgan Stanley's case has been followed in positive

> manner in the present case. Hence, it is held that no income is liable to be attributable in India even if M/s Mitsui & Co. India (P) Ltd.) is taken as Dependent Agency PE in India. Ground of appeal No. 6 is, therefore, allowed. "

6.2 My attention was also drawn to the report in Form No. 3CEB in terms of section 92E of the Act read with Rule 10E of the Income Tax Rules, 1962 annexed to the return of income by M/s Mitsui & Co. India (P) Ltd.(MIPL), according to which it was reported by the Chartered Accountant that all the transactions between Mitsui Japan and Mitsui India are on arm's length basis. This shows that functional and factual analysis was undertaken and the test laid down by the Hon'ble Supreme Court in DIT, International Taxation, Vs Morgan Stanley & Co. (2007) 292 ITR 416 (SC) has been followed. There being no more income that can be attributed to the operations of Mitsui Japan in India, the order on this ground for the preceding year applies to this year also. Accordingly, it is held that no income is liable to be attributable to tax in India even if MIPL is taken as Dependent Agency PE in India. As a result, the Grounds of appeal No. 3 and 3.1 are allowed and the addition of Rs. 18,27,64,936/- as income attributable to the PE is deleted. In view of findings made above Grounds of appeal No. 3.2 to 3.5 have become infructuous and do not require any adjudication."

16. Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal by raising the following grounds of appeal:-

> ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 " 1. On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the provisions of section 44BBB of the IT Act, 1961 cannot be applied for subjecting to tax the income from off-shore supplies in respect of Teesta Purulia Projects and has therefore erred in deleting the addition of Rs. 23,91,98,358/-made by the AO.
>
> 2. On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the income form offshore supplies in respect of Teesta and Purulia Projects were not liable to taxed under the provisions of Article 7 read with paragraph 6 of the protocol to the DTAA between India and Japan.
>
> 3. On the facts of the and in law, the Ld. CIT(A has erred in holding that The Liaison Office of the assessee does not constitute PE.
>
> 4. On the facts of the case and in law, the Ld. CIT(A) erred in holding that no income is liable to be attributed in India even if Mitsui & Co. India Pvt. Ltd. (MIPL) constituted a Dependent Agency Permanent Establishment (DAPE) of the assessee in India and has therefore erred in deleting the addition of Rs. 18,27,64,936/-.

The appellant craves to add, amend, modify or alter any grounds of appeal at the time or before the hearing of appeal"

17. The ld. DR strongly objected to the order of the CIT(A) in granting relief to the assessee. He submitted that upto A.Y. 2005-06 the Tribunal has decided the issue in favour of the assessee.

However, the facts for the present A.Y. 2006-07 and onwards are different from the facts of the case upto 2005-06. He submitted that the finding of the AO that project offices/projects undertaken by the assessee constitute PE under Article 5(1), 5(2)(c), 5(3) and 5(4) of the DTAA was not challenged before the CIT(A) or ITAT during A.Y. 2005-06 and, therefore, has attained finality. Further, there is no dispute regarding the AO's finding in para 5.9 at page 19 of the order for A.Y. 2006-07 i.e., the project office constitutes a PE under Article 5(2) r.w. Article 5(1) and the assessee also has a PE under Article ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 5(3) of the DTAA. These findings of the AO have not been challenged by the assessee before the CIT(A) and, hence, has attained finality. He submitted that the receipts from Teesta and Purulia projects are eligible for presumptive taxation u/s 44BBB of the Act. The assessee had offered to tax u/s 44BBB receipts from Teesta project in the form of "onshore services" and receipts from "equipment supply" during A.Y. 2005-06 which was accepted by the AO during A.Y. 2005-06. Further, there is also no dispute regarding the finding and decision of the AO that the agreements between the assessee and WBSEB and NHPC are in the nature of composite agreements/one agreement for the purpose of executing the Purulia and Teesta Projects qua section 44BBB. He submitted that there is no dispute to the fact that the income from the consideration received from the contract with WBSEB for Purulia project and contract with NHPC for Teesta project have been offered to tax by the assessee and accepted by the Revenue u/s 44BBB. There is also no dispute to the fact that the provisions of section 44BBB are pari materia with the provisions of section 44BB. Further, the said conclusions of the CIT(A) are no longer res integra in view of the decision of the Hon'ble Supreme Court in the case of Sedco Forex International Inc., 2017-TII-38-SC-INTL. He submitted that since, in the present case, it is not in dispute that the contracts are composite contracts and parts of the receipts from these contracts are offered to tax by the assessee itself u/s 44BB of the Act, therefore, the amount paid or payable to the assessee whether in or out of India irrespective of whether towards "offshore ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 supply" or towards "onshore services" become income u/s 5 and 9 of the Act by fiction created u/s u/s 44BBB of the Act.

18. Without prejudice to the above, he submitted that the offshore supplies are also taxable qua PE under Article 5(1), 5(2)(c), 5(3) and 5(4) of the DTAA. Referring to the various clauses of the contracts between the assessee and WBSEB and NHPC, he submitted that clearly it not only establishes their unitary and composite nature, but also the active involvement of the PE in the form of project office in the execution of such contracts. Since both the agreements between the Mitsui & Co. and WBSEB are identical, the ld. DR drew the attention of the Bench to the details with respect to NHPC contract which, according to him, will be applicable equally to WBSEB contract. The ld. DR drew the attention of the Bench to the following facts in his written synopsis:-

> " Composite Contract with NHPC -
>
> The assessee entered into 3 contracts with NHPC on 6.12.2001 -
>
> i. First Contract for the Supply of all Offshore Equipments and Materials including mandatory Spares, [p.14-17 of PB for 06-07; however, only page-1 of this contract is available & details on value and other terms and conditions are not available] ii. Second Contract for Ex-works Supply of all Equipments and Materials of Indian

origin, [p.18-21 of PB for 06-07; however, only page-1 of this contract is available & details on value and other terms and conditions are not available] iii. Third Contract for providing all Onshore Services in respect of all Equipment supplied under First & Second Contract and Other Services, [p.22- 174 of PB for 06-07; however, only Vol-1 (ref-p.26) is available & details of other volumes are not available] ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 The AO in the assessment order has brought out and highlighted various features present in the three contracts with NHPC that establishes the contracts to be the part of one indivisible composite contract. A few of such important indicators are -

§ The project was implemented by NHPC under 5 International competitive biddings by splitting the project works into contract packages from Lot-2 to Lot-6, [p.167 of PB 06-07] Assessee was awarded contract in respect of Lot-6 [ref. p. 14,17,18,21,25 &27 of PB 06-07] towards Electrical Mechanical works which consists of design, manufacture, supply, erection, testing, commissioning of 3x170 MW generating units, [p.167 of PB 06-07] ☐The situs of the work is in India and objective of composite nature of work is to provide the 'facilities' in deliverable and acceptable state to the employers in India.

☐Subject Matter of Contract - "...Contractor's obligations cover the provision of all 'Plant & Equipment' and the performance of all 'Installation Services' required for the design, the manufacture (including procurement, quality assurance, installation, pre-commissioning and delivery) of the Plant & Equipment and the installation, completion, commissioning and performance testing of the facilities...," [cl.7.1 of GCC, p.105] Thus, the obligation of assessee did not end with supply of Plant and Equipment, 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 of the 'Facilities' being conducted at the project site.[Contractor's Responsibilities - cl.9 of GCC ,p.l07] ☐"Facilities" means the Plant & Equipment to be supplied and installed, as well as the Installation Services including design, fabrication, manufacture, supply, transportation, erection, testing and commissioning to be carried out by the Contractor under the Contract, [cl.1.1 of GCC, p.98] § "Plant & Equipment" means permanent plant, equipment, machinery, apparatus, articles and things of all kinds to be provided and incorporated in the Facilities by the Contractor under Contract (including spare parts to be supplied by the contractor under GCC Sub-Clause 7.3 hereof), but does not include Contractor's equipment, [cl.1.1 of GCC, p.99] ☐ "Installation Services" means all those services ancillary to the supply of Plant & Equipments for the Facilities, to be provided by the Contractor under the Contract e.g. transportation and provision of marine or other similar insurance, inspection, expediting Site preparation works (including the provision and use of Contractor's equipment and the supply of all construction materials required), installation, testing, pre-commissioning, commissioning, ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 operations, maintenance, the provision of operations

and maintenance manuals, training etc.[cl.1.1 of GCC, p.99]"

☐Presence of Cross-fall Breach Clause in respect of all the above 3 contracts, [cl.3 of Notification of award by NHPC, p.49; Cl.5.2 of Special Conditions of Contract, p.55;]As per the Notification of Award, the contractor "...shall also be fully responsible for the works to be executed under the second contract and first contract and it is expressly understood and agreed by you that any breach under the second contract and/or first contract shall automatically be deemed as a breach of this third contract and vice versa and any such breach gives us a right to terminate the first/second contracts and recover damages there under as well terminate this contract and recover damages under the this third contract as well and vice versa, "[p.49 of PB 06-07 & AO, p.28]The presence of 'Cross-Fall Breach' clause in the notification of the award when read alongside the scope of work envisaged under Lot-6 and the subject matter of the contract as discussed above clearly reflects the intention of the employer that the contracts are envisaged as an indivisible composite contract. This was further reiterated when the Supplementary Conditions of Contract [SCC] provides that "The award of three/two contracts shall not in any way dilute the responsibility of the Contractor.... And a breach in one contract shall automatically be construed as a breach of the other contract." [cl.5.2, p.55 of PB 06-07] ☐The other salient characteristic features of assessee's contract with NHPC are summarized in the following table:

Details	Reference
A. Designing of Plant & Equipment	
Contractor shall execute the basic and detailed design and	p.119 & p.107

GCC 20.1 engineering work in compliance with the provisions of the & 9.1 contract 20.3 Approval of technical documents & designs by EIC p.119 28.4 Defect Liability p.139 15.1 Intellectual Property will be with contractor p.113 15% AO,25 [2.5%+5%+2.5%+5%] After submission/furnishing of design & drawings; reports & data on tests and proof of procurement of major raw materials Manufacturing of plant and equipment as per approved specifications clearly proves the involvement of the PO in such manufacturing process B. Supply, Ownership & Risks GCC p.141 31.1 Ownership of plant and equipment shall be transferred to the employer upon loading on to the mode of transport and upon endorsement of dispatch documents in favor of the employer 31.5 Notwithstanding the transfer of ownership of the plant & p.141 eauipment, the responsibility for care and custody thereof r.w.32 together with the risk of loss and damage thereto shall remain with the contractor ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 32 Contractor shall make good at its own cost anv loss or damage p.141-142 the facilities 31.4 Ownership of anv plant and equipment in excess of the p.141 requirements shall revert to the contractor C. Procurement, Transport & Custom Clearance GCC- Contractor shall manufacture or procure and transport all the p.121 21.1 plant & equipment to the site.

GCC- Contractor shall at its own risk and expense transport all the p.122 21.3 plant & equipment to the site as per mode of transport of its choice 21.3.2 Contractor shall arrange sea shipment p.122 21.3.4 p.124 Contractor shall obtain all approvals for transportation of olant & equipment to the site. It will indemnify and hold harmless the employer from and against any damages to roads & bridges etc. caused by the transport of such equipment to the site. 21.4 Contractor shall, at its own expense, handle all imported plant p.123 & equipment at the point(s) of import and shall handle any

formalities for custom clearance.

D. Insurance [PB for 2006-07][AO, p.26] GCC-34 Contractor shall at its expense take out and maintain p.144-146 insurance fin case employer takes any insurance, it will deduct the cost from the contract price] App-3 Consolidated Insurance coverage for all 3 contracts p.36 E. Watch& Safe keep GCC22. Contractor shall provide and maintain at its own expense all p.127 7 lighting, fencing and watching for the protection of the F. Payment Schedule 10% Interest free advance which will be reduced in proportion to AO, 25 the value of the plant & equipment delivered to the site as evidenced by delivery documents 15% [2.5%+5%+2.5%+5%] AO,25 After submission/furnishing of design & drawings; reports & 65% Delivery at the site AO, 25 5% Completion Certificate AO, 26 5% Operational Acceptance Certificate AO, 26 G. Interpretation & Other provisions GCC7.1 Contractor's obligations cover the provision of all plant & p.105-106;

equipment, performance of all installation services required for AO, p.29 the design, manufacture of the plant & equipment etc. Award-3 "We have also notified you.... for award of other contracts on p.49 you... for complete Lot-6 Electrical & Mechanical works of Teesta HE Project, Stage-V as per specification No, NH/Cont (E&M)/Lot- 6/Teesta-V"

> ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 "You shall also be fully responsible for the works to be p.49, AO, executed under the second contract and first contract and it is p.28 expressly understood and agreed by you that any breach under the second contract and/or first contract shall automatically be deemed as a breach of this third contract and vice versa and any such breach gives us a right to terminate the first/second contracts and recover damages there under as well terminate this contract and recover damages under the this third App-3 Consolidated Insurance coverage for all 3 contracts p.36 Supp, 5.2 p.55 The award of three/two contracts shall not in any way dilute the responsibility of the Contractor.... And a breach in one contract shall automatically be construed as a breach of the other contract.
>
> Supp. 5.4 In case the option is not exercised by the contractor.... Both p.55 contracts shall contain the aforesaid cross-fall breach clause H. PO/PE Installation PE AO, App-4 Time Schedule 1.11.01 to 31.05.06 p.38 17.2 Appointment of Contractor's representative to represent and p.115 act for the contractor 20.1 & Contractor shall execute the basic and detailed design and p.119 & 9.1 engineering work in compliance with the provisions of the p.107 20.3 Approval of technical documents by EIC p.119 28.4 Defect Liability p.139 15.1 Intellectual Property will be with contractor p.113 17.2.4 & Presence of Construction Manager for the duration from p.116 & 22.1.2 commencement of installation facilities till operational p.124 18.1 Presence of Contractor's Organization p.117 22.2 Presence of Contractor's Equipments p.125 App-5 Subcontractors p.39 ☐As evident from the above, not only all three contracts are umbilically linked by a 'cross-fall breach' clause, contractor's obligations cover the provision of all plant & equipment, performance of all installation services required for the design, manufacture of the plant & equipment etc. [General Conditions of

Contract (GCC) cl. 7.1,p.105-106; AO, p.29] ☐Similarly, although much emphasis has been placed by Ld. CIT (A) on Cl.31.1 of the GCC as per which "ownership of plant and equipment shall be transferred to the employer upon loading on to the mode of transport and upon endorsement of dispatch documents in favor of the employed' [p.141 of the PB of 06-07], the said provision is neither absolute nor end all. In fact, it allows itself to be subjected to numerous restrictions imposed by other provisions. Thus -

- "Notwithstanding the transfer of ownership of the plant & equipment, the responsibility for care and custody thereof together with the risk of loss and damage thereto shall remain with the contractor." [GCC, cl.31.5, p.141] ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012

- Contractor shall make good at its own cost any loss or damage to the facilities. [GCC, cl.32, p.141-142]

- Ownership of any plant and equipment in excess of the requirements shall revert to the contractor. [GCC, cl.31.4, p.141] ☐The fact that the risk and ownership of the assessee over the plant and machinery gets transferred/does not get extinguished the moment the goods pass the shipping rail is evidenced by the following provisions -

- Contractor shall manufacture or procure and transport all the Plant & Equipment... to the site. [cl.21.1 of GCC, p.121]

- The Contractor shall at its own risk and expense transport all the Plant & Equipment... to the site by the mode of transport that the Contractor judges most suitable... [cl.21.3.1 of GCC, p.122]

- The Contractor shall arrange sea shipment of all Plant & Equipment and Mandatory Spares.... through a shipping and forwarding agent of Contractor's choice..[cl.21.3.2 of GCC, p.122]

- The Contractor shall be responsible for....transportation of Plant & equipment to the site. The Contractor shall indemnify and hold harmless the employer from and against any claim of damage.... caused by the transport of the Plant & Equipment to the site. [cl.21.3.4 of GCC, p.123]

- The Contractor shall, at its own expense, handle all imported Plant & Equipment at the point(s) of import..[cl.21.4 of GCC, p.123]

- The Contractor shall provide and maintain at its own expense all lighting, fencing and watching...for the proper execution and the protection of the Facilities, [cl.22.7 of GCC, P-127]

- Contractor shall at its expense take out and maintain insurance [cl.34 of GCC, p.144- 146] & Consolidated Insurance coverage for all 3 contracts[App-3, p. 36] ☐ Another factor that points to the fact that the title & risk over the goods remain with the assessee (at least) till the goods reach the site is the payment schedule for the offshore supplies. Thus, Interest free advance (10%) will be reduced in proportion to the value of the plant & equipment delivered to the site as evidenced by delivery documents. [AO, p.25] Similarly, major part of the value of offshore supplies (65%) shall be payableon delivery of the goods at the site. [AO, p.25] Thus, the entire contract is negotiated and executed not on the basis of delivery of supplies outside India, but on the context of delivery at the site. 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 observed that the assessee is providing with functional guarantee towards performance and security. [AO, p.27] 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 ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 unconditional performance and security guarantee towards the supply of equipment also. This implies that the supply is in extremely linked/connected to the services rendered by assessee in terms of direction of the project.

☐As per cl.21.4 of the GCC, Contractor shall, at its own expense, handle all imported plant & equipment at the point(s) of import and shall handle any formalities for custom clearance, [p.123 of PB 06-07] If the sale of equipment has taken place outside India as claimed by the assessee, then how that assessee is is paying custom duty in India and delivering the same to its project site?

To sum up, in the light of the above, the purpose for which the tender was invited by NHPC is not in doubt. It was not for supply of offshore equipments independent of the installation and commissioning. Nor was it for independent installation and commissioning, divorced from the design and supply of the equipments necessary. The presence of features like 'cross- breach clause' as well as 'consolidated insurance coverage for all the three contracts' etc. clearly proves that such a contract has necessarily to be read as a whole and is not capable of being split up. Furthermore, the assessee itself claims that the receipt from the contract is eligible for taxation u/s 44BBB of the Act. If, the offshore supply component is divorced from the contract, as claimed by the assessee, the receipts from services cannot be taxed u/s 44BBB of the Act. On reading the contract in the context of the tender floated and the purpose sought to be achieved, the contract involved herein is a composite contract and it cannot be dissected into parts. Thus, looking at and reading the contract as a whole,

the Ld. CIT (A) erred in accepting the claim of the assessee that a part of the transaction should be treated as a contract for offshore supply that is not liable to be taxed in India. Thus, for the purpose of taxation, the contract must be taken as one, for installation and commissioning of a project in India. In support of its afore stated claims, in addition to the decisions relied upon by AO, revenue relies upon the following decisions:

ü In support of its claim on the indivisibility of the contracts and claim on 'composite contract' revenue likes to rely upon the following decisions

- Mitsui Engg and Ship Building Co Ltd [2003-TII-23-HC-DEL-INTL]

- Shanghai Electric Group Company Ltd [017-TII-119-ITAT-DEL- INTL] ü In support of its claim on the importance and implications of 'cross-fall breach' clause in the contracts, revenue likes to rely upon the following decisions -

- The Indure Ltd and another [2010-TIOL-79-SC-CT]

- M/s Larsen and Toubro Ltd [2015-TIOL-3055-HC-AP-CT] Dongfang electric corporation [2012-TII-66-ITAT-KOL-INTL]

- Decision of Hon'ble West Bengal AAR for GST in Order No. 04/WBAAR/2018-19 dated 11/05/2018 in the case of EMC Ltd.

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 ü In support of its claim on the applicability of provisions of INCOTERMS 2000 & Sales of Goods Act revenue likes to rely upon the following decisions

- M/s Larsen and Toubro Ltd [2015-TIOL-3055-HC-AP-CT]

- Shanghai Electric Group Company Ltd [2017-TII-119-ITAT-DEL- INTL]

- Baker Hughes Asia Pacific Ltd [2014-TII-104-ITAT-DEL-INTL] Involvement of PE -

Analysis of the contracts between the assessee and WSEB and NHPC also clearly reveals the close involvement of the PO not only in the installation, supervision and commissioning of the projects, but also in the offshore supply of plant & machinery. Cl. 17.2 of the contract with NHPC [p.115 of PB for 06- 07] provides for the Appointment of Contractor's representative to represent and act for the contractor. Similarly, Cl.17.2.4 & 22.1.2 provides for the Presence of Construction Manager for the duration from commencement of installation facilities till operational acceptance [p.116 & 124 of PB for 06-07] while Cl. 18.1 provides for the presence of Contractor's Organization, [p.117 of PB for 06- 07] What is more important in this context is that the role of contract's representative in liaising, seeking and obtaining approval of the

Engineer in Chief in respect of technical designs on the basis of which plant and machineries are manufactured. The role of the PO is not limited to the above premanufacture/fabrication processes alone. Once the plant & machinery is manufactured/fabricated as per the approved design & specifications, the PO also takes care of all the processes involving the custom clearance, insurance, transport of the offshore supplies to the site and for the watch and safe keep of the offshore supplies for installation and commissioning.The entire process as envisaged under the contract can be visualized as per the enclosed flow chart.

It has already been stated earlier that the assessee has a PE in the form of Project Office, which has also been accepted by the assessee. Ld. CIT(A), therefore has erred in ignoring the above functions of the PE and allowing relief to the assessee only on the basis of existence and role of MIPL as a DAPE and the TP analysis of the transactions between the assessee and MIPL and completely ignoring ant adjudicating on the issue of attribution of profit to the other forms of PEs as held by the and accepted by the assessee. It may not be out of context that during A.Y. the CIT(A) has also confirmed the action of the AO holding MIPL as DAPE.

19. The ld. DR also relied on the following decisions:-

(i) The Indure Ltd. and Another, 2010-TIOL-79-SC-CT;

(ii) M/s Larsen and Toubro Ltd., 2015-TIOL-3055-HC-AP-CT;

(iii) Shanghai Electric Group Company Ltd., 2017-TII-119-ITAT-DEL-INTL; & ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012

(iv) Dongfang Electric Corporation, 2012-TII-66-ITAT-KOL-INTL;

19.1 He accordingly submitted that the order of the ld.CIT(A) be reversed and that of the AO be restored.

20. The ld. Counsel for the assessee, on the other hand, strongly supported the order of the CIT(A). He submitted that the issue as to whether the liaison office of the assessee does not constitute a PE and that no income is liable to be attracted in India to tax even if Mitsuit & Co. Ltd. Constituted an Dependent Agency Permanent Establishment of the assessee in India has been decided in favour of the assessee by the decision of the Tribunal. So far as the issue relating to Ground of appeal No.1 by the Revenue that the provisions of section 44BBB of the Act cannot be applied for subjecting to tax the income from offshore supplies in respect of Teesta and Purulia projects is concerned, he submitted that the issue stands fully covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in the case of DIT vs. LG Cables Ltd. Reported vide ITA no.703/2009. He submitted that the terms of contract entered into by the assessee are exactly the same in the case of LG Cables Ltd. (supra) and the Hon'ble High Court has threadbare discussed the issue and has decided the issue in favour of the assessee. Therefore, this being a covered matter in favour of the

assessee, the ground raised by the Revenue should be dismissed.

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 20.1 So far as the argument of the ld. AO/DR that the facts of the present case are distinguishable from that of the LG Cables Ltd. (supra) on the ground that in the present case not all part of the transactions have been carried outside India, he submitted that the same is not correct as both the AO as well as the DR have misunderstood the facts of the present case. He submitted that the whole basis for making addition by the AO is the inference made by him that both the contracts for on shore as well as offshore supplies are just an eyewash and in fact this is composite contract He submitted that the Hon'ble Supreme Court in the case of Ishikawajima Harmia Heavy Industries Co. Ltd. vs. DIT (2007) 288 ITR 408, has held that even if the contracts are composite, the offshore supplies having no relation with India cannot be eligible to tax here. He drew the attention of the Bench to the relevant observations of the Hon'ble Supreme Court at para 99 of the order which reads as under:-

> "99. We, therefore, hold as under : Re : Offshore Supply :
>
> (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 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 all activities in connection with the offshore supply were outside India, and therefore cannot be deemed to accrue or arise in the country.

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 (5) There exists a distinction between a business connection and a permanent establishment. As the permanent establishment cannot be said to be involved in the transaction, the aforementioned provision will have no application. The permanent establishment cannot be equated to a business connection, since the former is for the purpose of assessment of income of a non-resident under a Double Taxation Avoidance Agreement, and the latter is for the application of Section 9 of the Income Tax Act.

(6) Clause (a) of Explanation 1 to S. 9(1)(i) states that only such part of the income as is attributable to the operations carried out in India, are taxable in India.

(7) The existence of a permanent establishment would not constitute sufficient 'business connection', and the permanent establishment would be the taxable entity. The fiscal jurisdiction of a country would not extend to the taxing entire income attributable to the permanent establishment. (8) There exists a difference between the existence of a business connection and the income accruing

or arising out of such business connection. (9) Paragraph 6 of the Protocol to the DTAA is not applicable, because, for the profits to be 'attributable directly or indirectly', the permanent establishment must be involved in the activity giving rise to the profits."

21. The ld. Counsel for the assessee filed a detailed rebuttal to the comparative analysis filed by the ld. DR which is as under:-

A. Preliminary Needs no reply.

B. Undisputed/Covered Ld. DR has admitted that ground no. 3 issues. regarding liaison office as PE and ground no. 4 regarding Dependent Agent PE are covered in favour of the assessee.

C. Offshore Supply qua The reliance placed by the Ld. DR on the section 44 BBB judgment of Sedco Forex International Inc. is misplaced. This judgment was on the issue of section 44 BB which is regarding the business of exploration of mineral oils.

As per section 44 BB (1) a sum equals to 10% of the amount specified in sub section (2) is deemed to be profit and gains of such business. In sub section (2) it has been stated that such sum shall include amount ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 paid/payable on account of provision of services and facilities in connection with, or supply of plant and machinery on hire used or to be used in the prospecting for, or extraction or production of mineral oils in India.

Thus, there is specific coverage of the services provided which has to be taken into consideration while computing presumptive income under4his section.

As against this in section 44 BBB which is applicable in respect of business of civil construction, the applicability is of the amount paid or payable on account of civil construction, erection, testing or commissioning only. Hence, the amount of offshore supply is not covered in this section 44 BBB applicable to the assessee.

There is no dispute that third contract entered into by the assessee with NHPC is regarding civil construction, erection, testing or commissioning and on which the assessee has paid taxes under this section.

This section is not applicable in respect of offshore supplies.

It is important to point out that the Ld. DR in its submission has Highlighted in bold a para of the Sedco Forex judgment. This para itself which has been put in bold of page 2 in fact supports the case of the assessee. It is stated 'thus, whereas clause

(a) mentions the amount, which is paid or payable, clause (b) deal with the amount, which are received or deemed to be received in India. ' Thus, Supreme Court clearly held that the amount which is covered in clause (a) only will be within the purview of section 44 BB and not all the payment. It may be relevant to quote para 42 of this judgment which reads as under:

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 "42) It is, however, pertinent to point out that Section 44BB(2) makes certain receipts as "deemed income" for the purposes of taxation in the said provision.

Therefore, aid of thisprovision is to be necessarily taken to determine whether a particular amount will be "income" within the meaning of Section 5 of the Act.

Likewise, Section 44BB(2) also acts as guide to determine whether a particular income is attributed as income occurred in India. Section 44BB of the Act provides for special provision for computing profits andgains. However, that would not mean that if the income is to be computed under this provision, we have to give a go-by to Sections 5 and 9 of the Act. To this extent, remarks of the High Court may not be correct. "

The bold para of the above judgment makes it clear that it is only certain receipts mentioned in sub section (2) of section 44 BB which have to be taken into account for applying section 44 BB. In the present case there is no dispute that the receipts mentioned in section 44 BBB has been taken into account and tax paid by the assessee thereon. The Revenue wants to go beyond and include even those receipts which are not covered by section 44 BB.

D Offshore supply qua PE In this para the Ld. DR has raised the contention that there are composite contracts and hence, AO was justified in taxing offshore supplies. The Ld. DR thereafter on page 4 to page 9 has referred to various clauses of the agreement to make out a case that there is one composite contract which has been splitted into three parts and there is a cross fall breach clause.

In this regard, it is submitted that exactly the similar issue was raised in the case of LG Cables Ltd. In this case, LG Cables ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 Ltd., has entered into a contract with Powergrid Corporation of India Ltd. and has entered into 2 contracts. One was for offshore supply and services and the second was for onshore services. It may be relevant to point out that this contract was entered into on 26.02.2001 and PGCIL was under Ministry of Power as is the case of the assessee where NHPC is under Ministry of Power and this contract was entered into on 06.12.2001. The terms of the contracts are identical as these contracts are drafted and vetted by the Law Ministry, Government of India. A detailed comparative chart demonstrating how the terms are identical is annexed.

It is further submitted that the contentions raised by the Ld. DR were also raised in the case of the LG Cables as is evident from the table made out by the High Court comparing the two contracts entered into by LG Cables with PGCIL. On going through the second column, it may be noted that in this contract also the contractor was overall responsible to ensure the execution of all the two contracts achieve successful completion.

There was a cross fall breach clause in that contract. In para 11 of the judgment the court has taken note of the argument of the counsel that property in equipment passed to the buyer only in India and this property did not pass till equipment was erected and Yielded satisfactory performance in India.

Further, in para 18, the court has categorically held that none of the stipulations of the onshore contract could postpone the transfer of property supplied under the offshore contract.

E Para 1 Page 10 The Ld. DR has tried to make a distinction that in the case of LG Cables there were two contracts whereas in assessee's case ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 there are three contracts. It has been stated that in the absence of no offshore services, services relating to offshore supply are provided from India. This argument is without appreciating the meaning of 'offshore services'. Offshore itself means services provided outside India. Thus, there cannot be any allegation that offshore services have been provided from India. In fact in the present case, onshore services is being provided under third contract on which taxes has been paid and there is no dispute. It may be relevant to point out that in the LG. Cables Ltd. the Hon'ble High Court has referred and! relied upon the judgment of Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd. 288 ITR 408 (SC) and in para 20, there were 5 contracts involving (i) offshore supply, (ii) offshore services (iii) onshore supply, (iv) onshore services (v) construction and erection.

It may be noted that the nomenclatureis not significance. In one contract, there can be offshore supply and offshore services and still the same may be named as offshore supply as is the case of the assessee. It may be relevant to quote para 19 of the LG Cable judgment where the Hon'ble High Court has also quoted the Supreme Court judgment of Ishikawajima- Harima Heavy Industries Ltd. which reads as under:

> "19. The contention of the learned counsel for the Revenue during the course of arguments that offshore supplies are not taxable only in the case of sale of goods simpliciter, and that the contract is a turnkey contract split/divided into offshore and onshore supplies at the instance of the respondent- assessee, in our considered opinion, is not sustainable in view of the authoritative pronouncement of the Supreme Court in the case of Ishikawajma-
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> ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 Harima Heavy Industries Ltd. vs. Director of IT (2007) 207 CTR (SC) 361 : (2007) 288 ITR 408 (SC) wherein it has been held that offshore supplies are not taxable even in the case of a turnkey contract as long as the title passes outside the country and payments are made in foreign exchange.
>
> The Supreme Court in this regard observed as follows: 'The fact that it has been fashioned as a turnkey contract by itself may not be of much significance. The project is a turnkey project. The contract may also be a turnkey contract, but the same by itself would not mean that even for the purpose of taxability the entire contract must be considered to be an integrated one so as to make the appellant to pay tax in India. The taxable events in execution of a contract may arise at several stages in several years. The liability of the parties may also arise at several stages.

> Obligations under the contract are distinct ones. Supply obligation is distinct and 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 segments are also different."

F Para 1.1 Terms of The Ld. DR here has tried to make a payment Page 10 distinction in the terms of payment. It may be relevant to point out that in the case of LG Cables 10% was advance, 75% was progressive payment and 15% was the final payment on completion and operational acceptance.

In the case of the assessee, 10%o is advance payment, 15% is also advance payment on the progress of the equipment drawings in the home country, 65% payment is on delivery and balance 10%) on completion and operational acceptance.

The Ld. DR probably is not able to ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 appreciate the terms of payment stated in item 2, 3, 4 and 5. These are payments to be made in advance on the basis of the progress of the Turbine and Generator drawings which are to be supplied from home country.

Similarly, the Ld. DR has not been able to appreciate price variation clause which is given in appendix 2 to the contract at page

8. On going through the same it may be noted that this is an annexure of first contract and is price adjustment formula for supply of plant and equipment under this contract i.e. offshore supply.

The contractor having quoted the price on the basis of the price of material and labour on the date of the tender, a clause has been inserted to make further payment in terms of this formula. It may be important to point out that all these payments are to be made in foreign currency.

The issue which is important is that these payments are linked to shipment of the supplies and hence, there is no difference in I the terms of payment.

G. Method of payment The Ld. DR has tried to make a distinction page 11 that method of payment is different than LG Cables. It is submitted that method of payment is the same. The only difference is that there the payment was to be made within 30 days of submission of invoice and in the present case it is within 60 days of the submission of invoice.

In LG Cables also, there was a provision for pro-rata payment which means pro-rata shipment meaning thereby all equipments not to be shipped at one go.

Similarly in the present case, there is a provision of pro-rata payment and sub-

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 packages means that part shipment can be made and payment will be received on pro-

rata basis.

In LG Cables, payment was through irrevocable letter of credit. In assessee's case also all payment through irrevocable letter of credit as per clause 3.0 at page 7 of the agreement.

H. Transfer of Ownership It has been stated that the term of transfer para 31.1 page 11 of ownership in the case of the assessee are different than LG Cables. This is factually incorrect, in fact clause no. 31.1 in LG Cables also matches with the clause no 31.1 of assessee's agreement at page 116.

The Ld. DR has tried to point out the difference by referring to the words 'upon endorsement of dispatch documents in favour of the employer'. The same condition was there in the LG Cables as can be seen from the High Court judgment in para 17 where the High Court has observed "The equipment was delivered to the shipping company named in the bill of lading and the bill of lading and other documents were handed over to the nominated bank. Accordingly, with the delivery of the bill of lading to the bank, the property in the goods stood transferred to PGCIL. The cargo insurance policy was obtained by the respondent- assessee and it named the PGCIL as.co-insurer. Clause 31.2 of the contract unequivocally clarified that the respondent-assessee and the PGCIL intended to transfer the title/property in the goods as soon as the goods were loaded on to the ship at the port of shipment and the shipping documents were handed over to the nominated bank where the letter of credit was opened. The sale was complete and unequivocal. There is no condition in the contract which empowers the respondent to keep control of the goods and/or to ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 repossess the same. With the completion of this sale the income accrued outside India." Clause 31.2 of assessee's contract at page 116 matches exactly with the above clause 31.2 referred by the High Court in above para.

As regards clause 31.4 referred by the Ld. DR firstly it is stated that it is identical to LG Cables as can be seen from the numbering. Moreover, this clause needs to be read in full and in the context in which it has been stated. It is important to point out that clause 31.4 is part of the General Conditions of Contract (GCC) which Is common to all three contracts and thus, the application of any clause will be with reference to that particular contract to which it has implication and not to other contract. Accordingly, the first line of this clause 31.4 is meant for onshore supply i.e. supplies from within India under Second contract and not under First contract i.e. Offshore supply. This becomes more clear when we read last line of this clause reads page 116 of the contract "provided quantity of any plant or equipment specifically stipulated in the contract shall be the property of the employer whether or not incorporated in the facilities." The first contract is for offshore supplies and quantity of plant and equipment has been specifically specified in schedule 1 at page 36 to page 38 of the contract. Thus, offshore supplies cannot be returned.

As regards clause 31.5 regarding the risk of loss and damage, the Ld. DR has not appreciated the full contract and the meaning of this clause. This clause has limited meaning of a responsibility which as a bailee the assessee has to take care of plant and equipment while carrying out erection. This does not mean that ownership is that of the assessee. As ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 against this, there are various clauses which provide that in case of any loss the same will be to the account of the employer NHPC and not the assessee as can be seen from

para 32.2 at page 117, 38.1, 38.2 at page 124 of the Contract.

I Page 11 Usha Beltron The Ld. DR has placed reliance on this Ltd. Vs. State of Punjab judgment. In fact this judgment supports the case of the assessee as can be seen from the extract quoted by Ld. DR on page 12 which reads as under:

> "These terms clearly indicate that the property in the goods remain at the risk of the appellant till delivery was completed. It shows that delivery would be completed only after the takeover certificate was issued. As per section 19 of the Sale of Goods Act, 1930, the property in the goods passes when the parties intend to pass. In this case, the contract provides that property in the goods does not pass till after delivery and successful testing and issuance of takeover certificate. Thus, High Court was right in concluding that the property in the goods had not passed at the time the goods entered the Municipal Limits."

On going through the above, it is important to note that in this judgment the Court was trying to infer transfer of ownership in the absence of any clause in the agreement.

The Court has noted that "as per section 19 of the Sale of Goods Act, 1930, the property in the goods passes when the parties intend to pass." Thus, it is the agreement between the parties which will determine when the ownership will pass.

In the present case, clause 31.1 and 31.2 clearly shows that the property in goods will pass when it is loaded on to the mode of transport in the country of origin. Thus, there is no vagueness and this clause will ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 clearly be applicable. On this clause, same view has been taken in the case of LG Cables in para 18 which reads as under:

> "18. Furthermore, as noticed above, the scope of work under the onshore contract was under a separate agreement and for separate consideration. There is, therefore, in our opinion no justification to mix the consideration for the offshore and onshore contracts. None of the stipulations of the onshore contract could conceivably postpone the transfer of property of the equipments supplied under the offshore contract, which, in accordance with the agreement, had been unconditionally appropriated at the time of delivery, at the port of shipment. When the equipment was transferred outside India, necessarily the taxable income also accrued outside India, and hence no portion of such income was taxable in India J AP High Court in the This judgment instead of supporting the case of L&T Ltd. case of the Revenue supports the case of the assessee.
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> On page 13 of the DR submission in para 155, the Court has taken note that "it is not correct to say that risk and title pass simultaneously. There can be agreement for passing of risk before passing of title per se. As per section 19 of the Sale of Goods Act, it is primarily the intention of the parties when the title to the goods is to pass." Thus, it is the intention in the agreement and the present case is clearly stipulated in

clause 31.1 and 31.2.

K. Delhi ITAT in the case The Ld. DR placed reliance on Delhi IT of Shanghai Electric AT in the case of Shanghai Electric Group Group Company Ltd. Company Ltd. It is important to mention here that there was a single composite contract. The Hon'ble ITAT at para 179 observed as under:

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 "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 plant followed by issuance 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. "

In the case relied upon by the Ld. DR, the IT AT observed that in respect of the contracts entered into by Shanghai Electric Group Company Ltd all the payments were related to entire work entrusted upon the company which included, supervisory services that the company has to render in India.

The Hon'ble ITAT in the Shanghai ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 Electric case has observed that there were no identifiable payments exclusively made for supply of equipments and none of the agreements were executed exclusively for the sale BTG equipments.

However, in the assessee's case as evident from appendix 1 of first contract at page no. 6. The entire payments for offshore supply of plant and equipment supplied from abroad is related with sale of equipment. Thus, the facts of the assessee's case are on different footing than that of the Shanghai Electric Group Company.

L Mahavir Commercial The Ld. DR has placed reliance on this Co. Ltd. 86 ITR 417 judgment of Supreme Court where the court observed that "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 above judgment supports the case of the assessee as the intention of the parties in the present case are stipulated in clause 31.1 and 31.2.

22. He accordingly submitted that the contract entered into by the assessee company is on the same line as was contract entered into in the case of LG Cables Ltd. The contract in the case of LG Cables Ltd., was with Power Grid Corporation Ltd., whereas in the assessee's case it is with NHPC. Both these companies are Public Sector Companies and the contracts have been drafted by the Ministry of Power almost at the same time. Referring to the following chart as per his synopsis he submitted that the contract in the case of LG Cable Ltd., and in assessee's case the clauses in both these agreements are similar:-

> ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 "2.11 The following comparative chart of the contract in the case of LG Cable Ltd., and in assessee's case demonstrate that the clauses in both these agreement are similar.

S.No. Contract No. Date of Purpose of Contract Article wise Contract description

1. NH/Cont. 06.12.2001 CIT/CIP Supply of all Article-1 (Description (E&M)/LOT- offshore equipments and of contract 6/Teesta- materials including documents) V/579/2001/1 Mandatory Spares for Article-2 (Contract (First Contract) Lot-6 Electrical & Price and Terms of Mechanical works of Payment) Teesta HE Project Article-3 (Effective date for determining time for completion of the contract) Article-4 (Contract is between Mitsui and NHPC and not with the government of India) Article-5 (List of Appendices which shall form integral part of the agreement)

2. NH/Cont. 06.12.2001 Ex-works Supply of all Article-1 (Description (E&M)/LOT- equipments and materials of contract 6/Teesta- of Indian Origin for Lot- documents) V/580/2001/II 6 Electrical & Article-2 (Contract (Second Contract) Mechanical works of Price and Terms of Teesta HE Project Payment) Article-3 (Effective date for determining time for completion of the contract) Article-4 (Contract is between Mitsui and NHPC and not with the Government of India) Article-5 (List of Appendices which shall form integral part of the agreement)

3. NH/Cont. 06.12.2001 Providing onshore Article-1 (Description (E&M)/LOT- services in respect of of contract 6/Teesta- equipments supplied documents) V/581/2001/III under Article-2 (Contract ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 Price and Terms of payment)

23. Referring to the various clauses of the contract, he submitted that the clauses are identical to that of the case decided by the Hon'ble Delhi High Court in the case of LG Cables and, therefore, the issue stands squarely covered by the decision of the Hon'ble Jurisdictional High Court in favour of the assessee. So far as the decision relied on by the ld.CIT, DR in the case of Sedco Forex International Inc. (supra), is concerned, he submitted that the same case was decided on the issue of section 44BB and not on section 44BBB. As per section 44BB(1), a sum equal to 10% of the amount specified in sub-section (2) is deemed to be profit and gains of such business. In sub-section (2), it has been stated that such sum shall include amount paid/payable on account of provision of services and facilities in connection with or supply of plant and machinery on hire or to be used in the

prospecting for or extraction of or production of mineral oils in India. Thus, in section 44BB, there is specific coverage of the services provided which has to be taken into consideration while computing presumptive income under this section. As against this, in section 44BBB which is applicable in respect of business of civil construction, the applicability is on the amount paid or payable on account of civil construction, erection, testing or commissioning only. Thus, the amount of both the offshore supply is not covered in provisions of section 44BBB. He submitted that in the case of the assessee, the third contract entered into by the assessee with ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 NHPC is regarding civil construction, erection, testing or commissioning and on which the assessee has paid taxes under this section. The provisions of section 44BBB are not applicable in respect of offshore supplies. He submitted that, in fact, the decision relied on by the ld.CIT, DR in the case of Sedco Forex International Inc. supports the case of the assessee wherein at para 47 of the order, it has been stated: "Thus, where clause (a) mentions the amount which is paid or payable, clause (b) deal with the amount which are received or deemed to be received in India.

23.1 He submitted that the Hon'ble Supreme Court in the above decision cited (supra) has held that the amount which is covered in clause (a) only will be within the purview of section 44BB and not all the payments. Para 42 of the judgment makes it clear that it is only certain receipts mentioned in sub-section (2) of section 44BB which have been taken into account for applying section 44BB. He submitted that since, in the instant case, there is no dispute that the receipts mentioned in section 44BBB has been taken into account and tax paid by the assessee thereon, therefore, the AO has gone wrong in including even those receipts which are not covered u/s 44BBB. He submitted that in the case of LG Cables Ltd., there were two contracts whereas in the case of the assessee, there were three contracts. Further, offshore services means services provided outside India. He submitted that there cannot be any allegation that offshore services have been provided from India. In fact, in the present case, onshore services is being ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 provided under a third contract in which taxes have been paid by the assessee for which there is no dispute.

23. So far as the terms of payment in the case of LG Cables Ltd., is concerned, in that case 10% was advance payment, 75% was progressive payment and 15% was final payment on completion of operational acceptance. Against this, in the case of the assessee, it is 10% advance payment, 15% is also advance payment on progress of the equipment drawings in the home country, 65% payment is on delivery and the balance 10% on completion and operational acceptance. Thus, there is no material difference. As regards the basis of price variation/justification in respect of supplies made, this clause does not change the nature of the contract. He submitted that a perusal of the annexure to the contract shows that there is price adjustment formula for supply of plant and equipment under this contract i.e., offshore supply. The contractor having quoted the price on the basis of the price of material and labour on the date of the tender, a clause has been inserted to make further payment in terms of this formula. For this, all payments were to be made in foreign currency. It is important to mention that these payments are linked to shipment of the supply from the country of origin i.e., Japan.

24. So far as the method of payment is concerned, he submitted that it is also same. The only difference is that in the case of LG Cables Ltd., the payments were to be made within 30 days whereas in the present case it is to be paid within 60 days of the submission of the invoice. Further, in the case of LG Cables, there was ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 a provision for pro rata payment which means pro rata shipment meaning thereby all equipments not to be shipped at one go. Similarly, in the present case, there is a provision for pro rata payment and sub-packages means that part shipment can be made and payment will be received on pro-rata basis. In the case of LG Cables, the payment was through irrevocable letter of credit whereas in the case of the assessee also the payments are through irrevocable letter of credit as per clause 3.0 at page 7 of the agreement.

24.1 He submitted that there is no difference in the transfer of ownership to the title and risk. The term of transfer of ownership in the case of the assessee is not different from that of LG Cables Ltd. Referring to various clauses of the agreement vis-à-vis the clauses of the agreement of LG Cables Ltd., he submitted that both are same, therefore, in view of the decision of the Hon'ble Jurisdictional High Court, the matter being covered in favour of the assessee, the order of the ld.CIT(A) be upheld and ground of appeal No.1 and 2 of the appeal filed by the Revenue should be dismissed.

25. So far as the ground of appeal No.3 by Revenue is concerned, he submitted that the issue stands squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case for A.Y. 2005-06 in ITA No.2335/Del/2011, order dated 14th September, 2017. So far as ground of appeal No.4 is concerned, he submitted that the same is also covered in favour of the assessee by the decision ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 of the tribunal in assessee's own case for A.Y. 2005-06. He accordingly submitted that the grounds raised by the Revenue should be dismissed.

26. We have heard the rival arguments made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. So far as grounds of appeal No.1 and 2 are concerned, it is the grievance of the Revenue that the CIT(A) erred in holding that the provisions of section 44BBB of the Act cannot be applied for subjecting to tax the income from offshore supplies in respect of Teesta and Purulia project and further holding that the income from offshore supplies in respect of the above two projects were not liable to be taxed under the provisions of Article 7 r.w. paragraph 6 of the protocol to the DTAA between India and Japan. We find the assessee, in the instant case, is a foreign company incorporated in Japan. It had entered into contracts with NHPC for Teesta project. This comprises of three separate contracts: (a) for offshore supplies; (b) for onshore supplies; and (c) for onshore services. Similarly, the assessee has also entered into contracts with WBSEB in respect of Purulia Pumped Storage Project. This comprises of two contracts, namely, a) for offshore and b) for onshore supplies. We find the assessee offered the income from execution of these projects @ 10% of gross receipts u/s 44BBB of the Act in respect of onshore supplies and also for onshore services. We find the AO was of the view that as per the provisions of section 44BBB, the amount paid or payable whether in India or outside India is chargeable to tax in India. He held that income from offshore ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 supplies is chargeable to tax independent of section 44BB of the Act. For the above proposition, the AO referred to the various clauses of the Agreement entered into by the assessee

and, on this basis, reached to a conclusion that the income from offshore supplies shall be chargeable to tax in India. He further held that everything directly or indirectly relating to the said business should be considered under the ambit of section 44BBB. He, accordingly, concluded that income for the purpose of this section should also include offshore receipts for the supply of equipments.

27. We find the ld.CIT(A), on the issue of applicability of section 44BBB in respect of offshore supplies held that the same is not applicable in respect of payments received outside India for offshore supplies. He also held that as per clause 31.1 of the contract, the title of the properties in the goods was transferred outside India as soon as the goods were loaded in the ship and the shipping documents were handed over to the nominated bank. Thus, the sale was completed outside India. According to him, the PE had not played any part in the offshore supplies of the equipments. He accordingly held that the income in respect of offshore supplies accrued outside India. While holding so, the ld.CIT(A) relied on the decision of the Hon'ble Delhi High Court in the case of LG Cables Ltd. (supra).

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012

28. We do not find any infirmity in the order of the CIT(A) on this issue. We have already reproduced his findings in the preceding paragraphs. So far as the decision relied on by the ld. DR in the case of Sedco Forex International Inc. (supra) is concerned, we are of the considered opinion that the said case is distinguishable and not applicable to the facts of the present case. The issue in the case of Sedco Forex International Inc. (supra) was regarding the applicability of the provisions of section 44BB whereas in the instant case the issue is u/s 44BBB. As per section 44BB(1), a sum equal to 10% of the amount specified in sub-section (2) is deemed to be profit and gains of such business. In sub-section (2), it has been stated that such sum shall include amount paid/payable on account of provision of services and facilities in connection with or supply of plant and machinery on hire used or to be used in the prospecting for or extraction or production of mineral oils in India. Thus, in section 44BB, there is specific coverage of the services provided which has to be taken into consideration while computing presumptive income under this section. However, under the provisions of section 44BBB which is applicable in respect of business of civil construction, the applicability is on the amount paid or payable on account of civil construction, erection, testing or commissioning only. The amount of offshore supply is not covered u/s 44BBB which is applicable to the assessee. In the case of the assessee, the third contract entered into by the assessee with NHPC is regarding civil construction, erection, testing or commissioning and on which the assessee has ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 paid the taxes under this section. Section 44BBB is not applicable in respect of offshore supplies. We find the Hon'ble Supreme Court at para 47 of the order in Sedco Forex International Inc. (supra) has observed as under:-

> "47. Section 44BB starts with non-obstante clause, and the formula contained therein for computation of income is to be applied irrespective of the provisions of Sections 28 to 41 and Sections 43 and 43A of the Act. It is not in dispute that assessees were assessed under the said provision which is applicable in the instant case. For assessment under this provision, a sum equal to 10% of the aggregate of the amounts

> specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head 'profits and gains of the business or profession'. Subsection (2) mentions two kinds of amounts which shall be deemed as profits and gains of the business chargeable to tax in India. Sub-clause (a) thereof relates to amount paid or payable to the assessee or any person on his behalf on account of provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used in the prospecting for, or extraction or production of, mineral oils in India. Thus, all amounts pertaining to the aforesaid activity which are received on account of provisions of services and facilities in connection with the said facility are treated as profits and gains of the business. This clause clarifies that the amount so paid shall be taxable whether these are received in India or outside India; Clause (b) deals with amount received or deemed to be received in India in connection with such services and facilities as stipulated therein. Thus, whereas clause (a) mentions the amount which is paid or payable, clause (b) deals with the amounts which are received or deemed to be received in India. In respect of amount paid or payable under clause (a) of sub-section (2), it is immaterial whether these are paid in India or outside India. On the other hand, amount received or deemed to be received have to be in India."

29. Thus, the Hon'ble Apex court has held that the amount which is covered in clause (a) only will be within the purview of section 44BB and not all the payments. In para 42 of the above judgment, it becomes clear that it is only certain receipts mentioned in sub-section (2) of section 44BB which have to be taken into account for applying section 44BB. In the instant case, there is no dispute to the fact that the receipts mentioned in section 44BBB has been taken into account and ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 tax paid by the assessee thereon. Therefore, it is wrong on the part of the Revenue to include even these receipts which are not covered by section 44BBB.

30. An analysis of the various clauses of the contract between the assessee and WBSEB and NHPC and in the case of LG Cables Ltd., show that the same are similar. We find, in the case of LG Cables Ltd., it has entered into a contract with Power Grid Corporation of India Ltd. And has entered into two contracts. One was for offshore supplies and services and the second one was for onshore services. This contract was entered into on 26th February, 2001 and PGCIL was under

> Ministry of Power as is the case of the assessee where NHPC is also under Ministry of Power and the contract was entered into on 6th December, 2001. The terms of the contracts are similar as these contracts are drafted and vetted by the Ministry of Law, Government of India. The issue raised in the assessment order by the AO were also the issues in the case of LG Cables which is evident from the table in the order passed by the Hon'ble High Court comprising the two contracts entered into by the LG Cables with PGCIL. A perusal of the decision of the Hon'ble High Court shows that in this contract of LG Cables with PGCIL, the contractor was overall responsible to ensure the execution of the two contracts to achieve successful completion. There was a cross fall breach clause in the contract also. In para 11 of the decision, the court has

taken note of the arguments of the ld.

counsel that property in equipment passed to the buyer only in India and this property did not pass till equipment was erected and yielded satisfactory ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 performance in India. In para 18, the Hon'ble High Court has categorically held that none of the stipulations of the on shore contract could postpone the transfer of property supplied under the offshore contract.

31. As regards the issue that in the case of LG Cables, there were two contracts whereas in the case of the assessee there are three contracts are concerned, we find the same is without appreciating the meaning of offshore services. We find merit in the argument of the ld. Counsel for the assessee that offshore services means services provided outside India, therefore, there cannot be any allegation that offshore services have been provided from India. We find in the present case on shore services are being provided under a third contract on which tax has been paid by the assessee for which there is no dispute.

32. As regards the terms of payment in the case of LG Cables Ltd., 10% was advance payment, 75% was progressive payment and 15% was the final payment on completion of operational acceptance. As against this, we find in the case of the assessee, 10% is advance payment, 15% is also advance payment on the progress of the equipment drawings in the home country, 65% payment is on delivery and the balance 10% on completion of operational acceptance. We, therefore, do not find any material difference between the two contracts. As regards the basis of price variation,/adjustment in respect of supplies made, this clause in our opinion does not change the nature of the contract. Further, on going through the annexure ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 to the contract, it is evident that there is price adjustment formula for supply of plant and equipment under this contract that is offshore supply. The contractor having quoted the price on the basis of the price of material and labour on the date of the tender, a clause has been inserted to make further payment in terms of this formula. Further, all these payments were to be made in foreign currency. The issue which is important is that these payments are linked to shipment of the supplies from the country of origin i.e., Japan.

33. We further find the method of payment is also similar. The only difference is that in the case of LG Cables Ltd., the payment was to be made within 30 days of submission of invoice whereas in the present case it is within 60 days of submission of invoice. Further, in the case of LG Cables, there was a provision for pro-rata payment whereas in the present case also there is a provision of pro-rata payment. In the case of LG Cables, the payment was through irrecoverable letter of credit whereas in the case of the assessee also all payments are through irrecoverable letter of credit as per clause 3.0 at page 7 of the agreement.

34. We further find there is no difference in the transfer of ownership to title and risk. The term of transfer of ownership in the case of the assessee is not different than LG Cables. We find Clause 31.1 in LG Cables also matches with the clause 31.1 of the assessee's agreement at page 116. The condition upon endorsement of dispatch documents in favour of the employer in the case of the assessee was

also ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 in the case of LG Cables which has been quoted by the Hon'ble High Court in para 17 which reads as under:-

> "17. That the offshore supply of equipment related to the supply of specified goods discharged from Korea for which the PGCIL had opened an irrevocable letter of credit in the name of the respondent-assessee with a bank in South Korea. The consignor of the equipment supplied from Korea to Haldia Port was the respondent while the importer was the PGCIL. The equipment was delivered to the shipping company named in the bill of lading and the bill of lading and other documents were handed over to the nominated bank. Accordingly, with the delivery of the bill of lading to the bank, the property in the goods stood transferred to PGCIL. The cargo insurance policy was obtained by the respondent-assessee and it named the PGCIL as co-insurer. Clause 31.2 of the contract unequivocally clarified that the respondent-assessee and the PGCIL intended to transfer the title/property in the goods as soon as the goods were loaded on to the ship at the port of shipment and the shipping documents were handed over to the nominated bank where the letter of credit was opened. The sale was complete and unequivocal. There is no condition in the contract which empowers the respondent to keep control of the goods and/or to repossess the same. With the completion of this sale the income accrued outside India. There was neither any material to show that accrual of such income was attributable to any operations carried out in India nor any material to show that the PE of the respondent-assessee had any role to play in the offshore supply of the equipments."

35. Further, we find clause 31.4 in assessee's case is also identical to LG Cables which can be seen from the numbering. Moreover, in our opinion, this clause needs to be understood in the context in which it has been stated. Further, clause 31.4 is part of the general conditions of contract which is common to all three contracts and, thus, the application of any clause will be with reference to that particular contract to which it has implication and not to other contract. Accordingly, the first line of this clause 31.4 in our opinion is meant for onshore supply i.e., supplies from within India under second contract and not under first contract i.e., offshore supply. The first contract is for offshore supply and quantity ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 of plant and equipment has been specified in schedule 1 at page 36 to page 38 of the contract. Thus, offshore supplies cannot be returned.

36. Clause 31.5 regarding the risk of loss and damage has a limited meaning of a responsibility which is bailee. The assessee has to take care of plant and equipment while carrying out erection. This does not mean that ownership is that of the assessee. As against this, there are various clauses which provide that in case of any loss, the same will be to the account of the employer and not the assessee which can be seen from para 92.2 at page 117, 38.1 and 38.2 at page 124 of the contract.

37. So far as the reliance on the decision in the case of Usha Beltron Ltd. v. State of Punjab (2205) 7 SCC 58 on the issue of transfer of title of the goods is concerned, the same, in our opinion, is misplaced. A perusal of the following observation of the decision makes it very clear that the said

decision is not applicable to the facts of the present case.:-

> "These terms clearly indicate that the property in the goods remain at the risk of the appellant till delivery was completed. It shows that delivery would be completed only after the takeover certificate was issued. /As per section 19 of the Sale of Goods Act, 1930, the property in the goods passes when the parties intend to pass. In this case, the contract provides that property in the goods does not pass till after delivery and successful testing and issuance of takeover certificate. Thus, High Court was right in concluding that the property in the goods had not passed at the time the goods entered the Municipal Limits."

38. The issue before the court in this case was to infer transfer of ownership in the absence of any clause in the agreement. The court noted that as per section 19 ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 of the Sale of Goods Act, 1930, the property in the goods passes when the parties intend to pass. Thus, it is the agreement between the parties which will determine when the ownership will pass.

39. In the present case, a perusal of clause 31.1 and 31.2 clearly shows that the property in goods will pass when it is loaded on to the mode of transport in the country of origin. Thus, there is no ambiguity and this clause will clearly be applicable. We find the Hon'ble Delhi High Court on this very issue at para 18 of the order has observed as under:-

> "18. Furthermore, as noticed above, the scope of work under the onshore contract was under a separate agreement and for separate consideration. There is, therefore, in our opinion no justification to mix the consideration for the offshore and onshore contracts. None of the stipulations of the onshore contract could conceivably postpone the transfer of property of the equipments supplied under the offshore contract, which, in accordance with the agreement, had been unconditionally appropriated at the time of delivery, at the port of shipment. When the equipment was transferred outside India, necessarily the taxable income also accrued outside India, and hence no portion of such income was taxable in India."

40. So far as the decision of the Hon'ble Andhra Pradesh High Court in the case of L&T Ltd. (supra), relied on by the ld. DR is concerned, it has been noted that risk, prima facie, passes with the property unless otherwise agreed. Thus, it is the agreement between the parties which determines the passing of the title, therefore, the said decision, in our opinion, is not applicable. So far as the decision of the Tribunal in the case of Baker Hughes Asia Pacific Ltd. (supra) is concerned, a perusal of para 155 of the order of the Tribunal shows that it has taken note that "it is not correct to say that risk and title pass simultaneously. There may be ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 agreement for passing of risk before passing of title per se. as per section 19 of the Sale of Goods Act, it is primarily the intention of the parties when the title to the goods is to pass." Thus, this judgment also endorses the settled law that ownership shall pass as per the intention of the parties. Thus, it is the intention of the agreement and in the present case in clause 31.1 and 31.2 of the agreement, it is clearly stipulated that ownership passes upon loading on to the mode of

transport from the country of origin i.e., Japan. Therefore, there cannot be any dispute about the transfer of ownership having taken place in Japan.

41. So far as the decision in the case of Mahavir Commercial Co. Ltd. Vs. CIT, reported in 86 ITR 417 (SC) is concerned, we find the Hon'ble Supreme Court in the said decision has held that: "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." Thus, in this judgment it is clear that it is the intention of the parties which will determine the situs where the property will pass on. In the present case clause 31.3 shows that the property will pass on in Japan. This is an agreement entered into between the parties which reflect their intention and there is no dispute about such intention between the parties.

42. So far as the decision relied on by the ld. DR in the case of The Indure Ltd. And Another (supra) is concerned, we are of the opinion that the said case is also not applicable to the facts of the present case. In that case, an issue has arisen in ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 respect of the tax liability in the case of import. In para 43, it has been held that Indure Ltd., has imported the goods into India for completion of the project on turnkey basis of NTPC and thus, by virtue of article 286(1)(b) of the Constitution, the same will not be taxable in view of the restriction under this article on imposition of tax on sale or purchase of good where such sale or purchase takes place in the course of import into or export out of the territory of India. This is exactly the case of the assessee here though under different law that income in respect of goods supplied from outside Indie i.e., offshore supplies is not taxable in India.

43. So far as the decision of the Delhi Bench of the tribunal in the case of Shanghai Electric Group Company Ltd., is concerned, the same in our opinion is also not applicable to the facts of the instant case. In para 179 of the said order, the Tribunal has observed as under:-

> "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 ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 indivisible, as no separate value for supply/sale of equipments has been recognized as a milestone."

44. In this case, the Tribunal has observed that in respect of the contracts entered into by Shanghai Electric Group Company Ltd., all the payments were related to entire work entrusted upon the company which included supervisory services that the company has to render in India. It has been observed by the Tribunal that there were no identifiable payments exclusively made for supply of equipments and none of the agreements were executed exclusively for the sale of BTG equipments. However, in the case of the assessee, a perusal of appendix 1 of first contract at page No.6 shows that the payments of offshore supply of plant and equipment supplied from abroad is related with sale of equipment. Thus, the facts of the assessee's case are on different footing than that of Shanghai Electric Group Company. Further, in the present case there are separate contracts for the offshore supplies and onshore supplies and onshore services. Price of each component have been separately specified. The offshore supplies have been completed outside India with ownership as well. Payment is being made through LC outside India. Further, the PE had no role to play in offshore supplies. On all these issues the assessee's case is similar to that of the case in the case of LG Cables Ltd. We find the Hon'ble High Court, after considering the various aspects at para 35 to 37 has observed as under:-

> "35. In the final analysis we have no hesitation in holding that viewed from any angle, the fact situation in the instant case is almost identical to that in the ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 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 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.
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> 36. With regard to the setting up of a PE also, the PE of the respondent in the instant case, as in the case of Ishikawajma (supra), had no role to play in the execution of the

offshore supply contract and as a matter of fact was set up for the sole purpose of enabling the performance of the onshore services contract.

37. The contract, however, in the instant case as in the case of Ishikawajma (supra) would be said to have been successfully performed only after the satisfactory commissioning and erection of the plant and equipments. Since the PE was not at all involved in the transaction of the offshore supply of equipment, the existence of the PE [which as held in Ishikawajma (supra) is for the purpose of assessment of income of a nonresident under the DTAA], would be irrelevant in the instant case. Clause (a) of Expln. 1 to s. 9(1)(i) would not be attracted at all which provides that in the case of a business where all operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. In the instant case there was no operation qua the agreement for supply of equipment, which was carried but in India, and therefore, no income could be deemed to have accrued or arisen in India whether directly or indirectly or through any business connection in India."

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012

45. A perusal of the decision of the Hon'ble High Court in LG Cables (supra) shows that the Hon'ble High Court has dealt with each of the issues raised by the AO in the present case. The Hon'ble High Court has also referred to the decision of the apex court in the case of Ishikawajima Harmia Heavy Industries Co. Ltd. Vs. Director of Income-tax, 288 ITR 408. In the case of Ishikawajima Harmia Heavy Industries Co. Ltd., the Apex Court has held that the existence of PE would not constitute sufficient business connection. It has further been held that there exist a difference between the existence of a business connection and the income accruing or arising out of such business connection. The Apex Court has further held that para 6 of the protocol to the DTAA is not applicable because for the profits to be attributable directly or indirectly, the PE must be involved in the activity giving rise to the profits.

46. In view of the above discussion, we are of the considered opinion that the ld.CIT(A) is correct in holding that the income from offshore supplies is not liable to tax in India both u/s 44BBB as well as under the provisions of Article 7 r.w. para 6 of DTAA between India and Japan. Accordingly, grounds No.1 and 2 raised by the Revenue are dismissed.

47. So far as ground of appeal No.3 is concerned, we find identical issue had come up before the Tribunal in assessee's own case in the immediately preceding ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 assessment year 2005-06. We find the Tribunal, vide ITA No.2335/Del/2011, order dated 14th September, 2017 at para 3.9 of the order has observed as under:-

"3.9 We have heard the rival submissions and perused the order passed by the authorities below. We find that the first ground in the present appeal filed by the

> Revenue is whether the Liaison offices of the assessee in India constitutes its PE in India. We have carefully considered the facts and submissions, we find that in ITA. No.4645/Del/2005, in assessee's own case the tribunal had considered the issue and held as under:-
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> "We have considered the facts of the case and submissions made before us. In paragraph 24 of the order of assessment year 2001-02 the Hon'ble tribunal came to the conclusion that the income tax authorities erred in holding that the liason office had income liable to tax in India. The action of the lower authorities is not justified both on account of the subsisting order of Special Bench of The Tribunal in the case of the assessee for assessment years 1980-81 and 1981-81, as also the aforesaid discussion. In view thereof, it was also held, that the dispute regarding computation of income becomes of academic importance only and, therefore, the same need not be decided. Thus, the appeal of the assessee was allowed. Respectfully following that order, the appeal of the assessee for this year is allowed."

3.10 The learned CIT-DR has fairly conceded that this issue is covered in favour of the assessee by the decision of the ITAT in earlier years whereby it has been held that liaison offices do not constitute PE liable to tax in India. Since the facts and the issue involved are same in the year under consideration, respectfully following the above judgments we hold that the Liaison offices of the assessee do not constitute PE liable to tax in India. Accordingly ground No. 1 is dismissed."

48. Since the facts of the instant case are exactly similar to that of the facts of the immediately preceding assessment year, therefore, in absence of any distinguishable feature brought before us by the ld. DR, we do not find any infirmity in the order of the CIT(A) on this issue. Accordingly, ground No.3 filed by the Revenue is dismissed.

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012

49. So far as ground of appeal No.4 is concerned, we find an identical issue had come up before the Tribunal in assessee's own case in the immediately preceding assessment year. We find the Tribunal, after considering the totality of the facts of the case, has held that no income is liable to be attributed in India even if Mitsui & Co. Ltd., constituted a DAPE in India. The relevant observation of the Tribunal from para 4 of the order reads as under:-

> "4. The second ground is regarding finding of the learned CIT (Appeals) holding that no income is liable to be attributed in India even if MIPL is considered to be Dependent Agent PE in India. On this issue the learned CIT- DR though stated that though in view of the TPO order under Section 92CA (3) holding the transactions between the assessee and the MIPL at arm's length, addition may not be sustainable, yet argued that MIPL be considered as Dependent Agent PE in India in terms of Article 5(7) of DTAA between India and Japan. It was contended by the learned CIT-DR on the basis of the allegation levied by the Assessing Officer in the assessment order that MIPL habitually secures order for the assessee in India and

MIPL is economically dependent on the assessee as major revenue of MIPL is from the assessee company. Accordingly, it has to be examined whether MIPL can be considered to be a Dependent Agent of the assessee company. In this regard it may be relevant to refer to Article 5(7) of DTAA between India and Japan, which reads as under

" 7. Notwithstanding the provisions of paragraphs 1 and 2, where a person--other than an agent of an independent status to whom paragraph 8 applies-is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State, if:

(a) he has and habitually exercises in that Contracting State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 6 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;

(b) he has no such authority, but habitually maintains in the first-

mentioned Contracting State a stock of goods or merchandise from ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 which he regularly delivers goods or merchandise on behalf of the enterprise; or

(c) he habitually secures orders in the first-mentioned Contracting State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control as that enterprise.

8. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that Contracting State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

9. The fact that a company which is resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other. "

4.1 As per above clause (7) a person other than an independent agent is treated as PE if he fulfills any of the three conditions, (a), (b) or (c). It is not the case of the Assessing Officer that MIPL habitually exercised authority to conclude contracts. It is also not the case of the Assessing Officer that MIPL habitually maintains a stock of goods or merchandise. Thus, the condition of

> (a) and (b) are not fulfilled. The third condition in (c) is habitually securing orders for the assessee. In this regard we note that the Assessing Officer has made this allegation on the basis that commission has been paid by the assessee company to the MIPL. On this basis it has been assumed that MIPL is securing orders.This contention of the Assessing Officer does not appear to be correct. As per the agreement which has been quoted by the Assessing Officer in the assessment order, MIPL is supposed to put best effort to collect information with regard to Instant Noodle project etc. to make the best effort to find the best candidate, to attend/take care of the visitor from Japan, to make the best effort to analyze the feasibility report. None of these clauses can be interpreted to mean that MIPL is securing orders. On the basis of this clause the Assessing Officer was wrong in assuming that MIPL is securing orders. The Assessing Officer has not brought any other material to substantiate his allegation that may demonstrate that MIPL has secured orders for the assessee. It is to be noted that this clause (c) uses the word 'habitually secures orders'. Thus, there has to be procurement of orders habitually. As against this the assessee's contention has been that MIPL is only providing support services and it is not securing order on behalf of assessee company. It ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 may be relevant to further mention that the expression 'has' shall mean a legal existence. Whereas 'habitually secures orders' shall mean a systematic conduct on the part of the agent. Thus it is not only a legal right to secure order but also it is to be found, as a matter of fact that agent has habitually secured order.

4.2 Further, in this case the TP study of MIPL was subject matter of examination by the TPO. The FAR (Function performed, Assets deployed and Risk assumed) analysis has been accepted by the TPO. These agreement on the basis of which Assessing Officer has levied the allegation were also before the TPO. Thus, there cannot be any allegation that MIPL has performed any function beyond what has been stated. Functional and economic analysis of the transactions entered into having been examined nothing further can be imputed. The services of MIPL to assessee company were support services similar to the activities of a Liaison offices. This fact gets also supported from the finding recorded by the Assessing Officer himself in the assessment order on page 26 whereby it has been stated by the Assessing Officer that MIPL is functioning in the same manner as the LOs of the assessee are functioning in India. It has already been held that LOs do not constitutes PE in India. Thus, the functioning of MIPL though a subsidiary and a company incorporated in India but its activities vis-a-vis assessee company were akin to liaison office. It does not have authority to conclude contract, it was not maintaining any stocks of goods and merchandise nor it was securing order for the assessee company. In view of the above facts we reject the contention of the learned CIT-DR that MIPL habitually secures order for the assessee company. And accordingly, none of the condition prescribed in Article 5(7) are fulfilled. 4.3 The second contention of the learned DR was that MIPL is economically dependent on assessee company as major revenue of MIPL is from assessee company. We are of the view that this per se cannot be ground to hold that MIPL is a Dependent Agent. For invoking this clause, first one of the three conditions needs to be fulfilled. As we have held hereinabove that MIPL does not get covered as PE under Article 5(7), it cannot be considered to be a Dependent Agent. The learned DR also made a reference to Conventions on

Double Taxation by Klaus Vogel to support its contention that where a person works only for one principle such person is economically dependent on the principal. In these circumstances the agent though not legally but will be bound to obey his principal's instructions and be regarded as being Dependent Agent. This contention of the learned CIT-DR again ignores the basic requirement i.e. fulfilling one of the three conditions. It is also important to note that the DTAA provide for treating a person as Dependent Agent. The DTAA has to be strictly interpreted. The DTAA having prescribed the conditions, no further conditions can be read. What learned CIT-DR is canvassing will mean adding new condition in the DTAA. Further, it may be relevant to note that as per Para 9 of this Article 5 in DTAA, it has been ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 specifically provided that if a company in the contracting state is controlled by a company in the other contracting state that itself shall not itself constitute either of company a permanent establishment of the other. Thus, the fact that MIPL is controlled by the assessee company shall not mean that MIPL is a PE of the assessee company.

4.4 Our view gets supported by the judgement of Hon'ble Delhi High Court in the case of Director of Income Tax And Others Versus M/s E Funds IT Solution And Others 364 ITR 256 Delhi f where the Hon'ble court has held as under

> "31. Paragraphs 4 and 5 of Article 5 relate to creation of agency PE in the second contracting country. Agency replaces fixed place with personal connection. Arvid K. Skaar in his work "Permanent Establishment" has opined that primacy of "location test" of the basic rule is consistent with the conceptual structure of the PE clause itself. An agency will constitute a PE only when a PE cannot be found according to those conditions in the basic rule which are altered or replaced by the agency clause. OECD and UN Model Treaties recognize agency PE. The principle being, that a foreign enterprise may choose to perform business activities itself or through a third person in the other States. An agent is a representative who acts on behalf of another with third persons. International taxation laws recognize and accept two distinct types of agency PE, dependent and independent. Every agent by very nature of principle of agency is to follow principaV's instructions. But this principle is not squarely applicable to DTAAs, as third parties may not be strictly an agent under the domestic law. Further, the aforesaid dependency cannot be the distinguishing factor which determines whether the agency is dependent or an independent agency for the purpose of Article 5 paragraphs 4 and 5 respectively. A dependent agency is one which is bound to follow instructions and is personally dependent on the enterprise he represents. Such dependency must not be isolated or once in a while transaction but should be of comprehensive nature.
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> 32. The "dependency test" as per Arvid A. Skaar requires examination and answer whether the business interest of the principal and the agency have merged. When there is evidence of merging of interest, then power to instruct the agent exceeds a certain level. In such cases the Principal regularly participates in the process of settling current business problems or exercises discretionary power in the said respects. OECD Commentary does not accept dependency based on financial support,

supply of patents etc. as itself creating agency PE. Klaus Vogel on Double Taxation Conventions, Third Edition at page 345 in paragraph 170 states that interdependence must exist in both legal and economic respects but the independence is ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 the main criteria. The expression "independent agent" is used with the words "brokers and general commission agents" in paragraph 5 of Article 5 will, therefore, normally not include agents who have power to conclude contracts. Paragraph 38.1 of the OECD Commentary has been quoted above (see paragraph 15). The commentary elucidates and gives illustrations and tests.

33. Earlier U.N. commentary had deviated in some respect from the OECD commentary and had observed that an agent who was wholly or almost wholly engaged by one principal shall be considered to be a dependent agent. This initial position stated in UN commentary has, however, not been accept in subsequent commentaries. The essential criteria being arms length relationship though engagement with one or a group might serve as an indicator of absence of independence of an agent.

34. Subsidiary by itself cannot be considered to be a dependent agent PE of the Principal, otherwise it would negate the overriding effect of paragraph 6 to Article 5, a provision which precedes and seeks to give recognition to separate legal entity principle associated with juristic incorporated enterprises. However, a subsidiary may become dependent or an independent PE agent provided the tests as specified in paragraphs 4 and 5 are satisfied. A dependent agent is deemed to be PE of the principal establishment under paragraph 4, if one of the three conditions specified in sub-clause (a) to (c) are satisfied. Under sub-clause (a), a dependent agent should have authority and should habitually exercise the said authority to conclude contracts on behalf of the foreign enterprise. What is meant by the term "authority to conclude contract" has been subject matter of controversy on whether participation in negotiations by the agent is sufficient or not. However, this is not relevant for the decision of the present appeals in view of the factual matrix of the present case. Sub-clause (b) refers to an agent who habitually maintains stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the principal enterprise.

In such cases, the agent should also perform some additional activities in its country on behalf of the foreign enterprise which has contributed to the sale of goods or merchandise. Sub-clause (c) applies when the agent habitually secures orders in the said country i.e. where he is located, almost wholly or wholly for the foreign enterprise.

35. Transactions between a foreign enterprise and an independent agent, do not result in establishment of a permanent ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 establishment under paragraph 5 to Article 5 if the

independent agent is acting in ordinary course of their business. The expression "ordinary course of their business" has reference to activity of the agent tested by reference to normal customs in the case in issue. It has reference to normal practice in the line of business in question. However as per paragraph 5 of Article 5, an agent is not considered to be an independent agent if his activities are wholly or mostly wholly on behalf of foreign enterprise and the transactions between the two are not made under arm"s length conditions. The twin conditions have to be satisfied to deny an agent character of an independent agent. In case the transactions between an agent and the foreign principal are under arm"s length conditions the second stipulation in paragraph 5 of Article 5 would not be satisfied, even if the said agent is devoted wholly or almost wholly to the foreign enterprise.

36. In Morgan Stanley (supra) Supreme Court rejected the contention of the Revenue that dependent agency was created after recording that Indian subsidiary had no authority to enter into or conclude contracts on behalf of the foreign establishment / agency. The contracts were entered into in America and were concluded there. Only implementation of those contracts to the extent of back office operations were carried out in India. This legal position is relevant in the present case.

37. In TVM Ltd. vs. Commissioner of Income Tax (1999) 237 ITR 230, Authority of Advance Ruling has interpreted the two expression "has" and "habitually exercises" in the case of dependent agent. It has been observed that the expression "has" may have reference to the legal existence of such authority on terms of the contract between the Principal and the Agent, the expression "habitually exercises" has certainly reference to systematic course of conduct on the part of the agent. Reference to OECD Commentary and Klaus Vogel was made and it has been observed ".... Para. 4 uses two expressions : "has" and "habitually exercises"

an authority to conclude contracts on behalf of the enterprise in question. While the expression "has" may have reference to the legal existence of such authority on the terms of the contract between the principal and agent, the expression "habitually exercises" has certainly reference to a systematic course of conduct on the part of the agent. If, despite the specific provision of the soliciting agreement, it is found, as a matter of fact, that TVI is habitually concluding contracts on behalf of TVM without any protest or dissent, perhaps it could be presumed either that the relevant provisions of the agency contract are a dead letter ignored by the parties or that the principal has agreed implicitly to TVI exercising such powers notwithstanding ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 the terms of the contract. If such a situation is found to exist, then perhaps it could be said that TVI constitutes a permanent establishment for TVM despite the clauses of the contract relied upon."

38. Judgment of the Delhi High Court in the case of Rolls Royce PLC versus Director of Income Tax (International Taxation) (2011) 339 ITR (Del) is a good authority for the proposition that subsidiary can constitute and become a PE of the controlling company. The said decision proceeds on its own peculiar facts and we do not find that any legal principle and the elucidation in the present decision

is contrary to the legal ratio propounded in the case of Rolls Royce (supra). "

4.5 In view of the above, we hold that MIPL is not a Dependent Agent PE of the assessee.

5. The ground 2 raised in Revenue appeal is regarding attribution of the income if MIPL is taken as Dependent Agent PE. Though, this ground becomes academic in nature in view of our finding holding that MIPL is not Dependent Agent PE of the assessee company but since this issue forms part of the ground No. 2 in Revenue's appeal the same is being decided on merit as well.

5.1 The Assessing Officer has made the addition holding that MIPL is a Dependent Agent PE and has computed 50 per cent of the profit in respect of the turnover in India. The learned CIT (Appeals) has deleted the addition holding that Transfer Pricing Officer has specifically stated in his order that Transfer Pricing documentation which contains the functional and economic analysis of comparable and of the assessee, has been examined. The learned CIT-DR was fair enough to point out that the Assessing Officer made the addition since at the time of passing of the assessment order he was not having benefit of the order passed under Section 92CA(3) by the TPO in the case of MIPL and the learned CIT (Appeals) has deleted the addition after taking into consideration the order passed by the TPO which was available to him by that time.

5.2 It is a fact on record that the TPO has carried out functional and economic analysis of the activities performed by MIPL towards the assessee company. No adverse inference has been drawn in respect of the same. All these facts were before the TPO. It is not the case of the Assessing Officer that something beyond has been done. The case of the Assessing Officer is with regard to the functions which were subject matter before the TPO. This issue is also covered by the judgment of the Hon'ble Supreme Court in the case of DIT International Taxation Vs. Morgan Stanley and Co. 292 ITR 416 (SC), ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 where the Hon'ble court has approved the ruling delivered by the authority for advance holding that once a Transfer Pricing analysis is undertaken, there is no further need to attribute profit to a PE. The relevant part of the judgment reads as under:-

" The object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India. Under article 7(2) not all profits of MSCo would be taxable in India but only those which have economic nexus with P.E. in India. A foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the P.E. in India. The quantum of taxable income is to be determined in accordance with the provisions of the Income-tax Act. All provisions of the Income-tax Act are applicable, including provisions relating to depreciation, investment losses, deductible expenses, carry-forward and set-off losses etc.

> However, deviations are made by the DTAA in cases of royalty, interest etc. Such deviations are also made under the Income-tax Act (for example: sections 44BB, 44BBA etc.). Under the impugned ruling delivered by the AAR, remuneration to MSAS was justified by a transfer pricing analysis and, therefore, no further income could be attributed to the P.E. (MSAS). In other words, the said ruling equates an arm's length analysis (ALA) with attribution of profits. It holds that once a transfer pricing analysis is undertaken; there is no further need to attribute profits to a P.E. The impugned ruling is correct in principle in so far as an associated enterprise, that also constitutes a P.E., has been remunerated on an arm's length basis taking into account all the risk-taking functions of the enterprise. In such cases nothing further would be left to be attributed to the P.E. The situation would be different if transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a situation, there would be a need to attribute profits to the P.E. for those functions/risks that have not been considered. Therefore, in each case the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis placed by the taxpayer is exhaustive of attribution of profits and that would depend on the functional and factual analysis to be undertaken in each case. Lastly, it may be added that taxing corp orates on the basis of the concept of economic nexus is an important feature of attributable profits (profits attributable to the P.E.). "

As regard the observations of the Hon'ble Supreme Court that the situation will be different if the Transfer Pricing analysis does not adequately reflect the functions performed and the risk assumed by the enterprise. In the present case as discussed hereinabove the Transfer Pricing analysis adequately reflect the functions performed and the risk assumed. In fact it is on the basis of the same documents and facts on which Transfer Pricing analysis has been carried out, the income ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 is being attributed to the assessee by adopting a different method of computation.

5.4 Our above view is supported by the judgment of the Hon'ble jurisdictional Delhi High Court in the case of Director of Income Tax Vs. BBC Worldwide Ltd. in ITA No. 1341 of 2010, 703 and 705 of 2011 dated 30th September 2011, where the Hon'ble Court has held as under

> "5. After considering the respect arguments, we are of the opinion that no substantial question of law arises in the instant cases as we do not find any justification in interfering with the impugned order of the Tribunal. Following pertinent aspects which emboldened stand out and stare at the face of the Department and shut its case completely
>
> (i) The provisions of transfer pricing was introduced for Finance Act, 2002 from the Assessment Year 2002-03 and therefore, in respect of two appeal for the Assessment Years 2000-01 and 2001- 02, no such FAR Analysis was even required.

(ii) For the Assessment Year 2002-03, FAR Analysis was prepared and submitted by the assessee's agent BWIPL. BWIPL had submitted that it had received commission @ 15% on the gross sale from the assessee for selling marketing advertisement and sponsorship and as per BWIPL, it was a reasonable commission paid on arm's length basis. Matter was referred to TPO under Section 92CA(3) of the Act, who clearly opined that the aforesaid commission paid to BWIPL was ALP. Once it is treated as ALP at the hands of recipient, we fail to understand how a different view can be taken in the case of assessee who had paid the same commission to its agent. Therefore, we fail to appreciate the contention of the Department that the FAR Analysis by the TPO in the case of BWIPL was not relevant.

(iii) Moreover, in the assessee's own case for the Assessment Year 2002-03, transfer pricing reference was made to the TPO under Section 92CA (3) and TPO had opined that no adverse inference/addition could be drawn. Learned counsel for the assessee produced the order dated 31.12.2004 passed by the TPO, in this behalf, inter alia, stated as under :-

" A reference under Section 92CA was received in the case of BWIPL from its assessing officer. All the above mentioned international transactions have been examined at length in the order under section 92CA (3) dated 31st March, 2004, subsequently rectified vide order under section 154 dated 30th November, 2004 in the case of BWIPL for the assessment year 2002-03. In that order, no adverse inference ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 was drawn in respect of the arm's length price of all the international transactions as declared by the assessee except the transaction for availing market services. The arm's length price for the international transaction for availing market support services was determined at Rs.10,90,52,410/- instead of an amount of Rs.7,44,30,694/- as declared by the assessee. However, since this adjustment would have the effect of reducing the income chargeable to tax or increase in the loss, as the case may be, in the case of assessee the provisions of section 92 shall not apply in this case i.e. the effect of the adjustment made in the arm's length price of the transaction availing marketing support services by the assessee shall be ignored while computing the income of the assessee. "

(iv) Even if the next Assessment Year, i.e., 2003-04, the assessee had submitted the account's report in relation to its international transactions. For this year also, reference was made to TPO, which again passed the orders dated 07.3.2006, once again opining that no adverse inference could be drawn in respect of ALP. Following portion of the said order is worthwhile to quote:-

" A reference under Section 92CA was received in the case of BWIPL from its assessing officer. All the above mentioned international transactions have been examined at length in the order under section 92CA(3) dated 09.01.2006. In that order Arm's Length Price of international transaction mentioned above has been revised upward but there is no reciprocal effect in the case of assessee in view of

provisions of sub-section 3 of Section 92 of Income Tax Act.

Hence no adverse inference is drawn in respect of arm's length price of the above mentioned transaction in the hands of assessee company. "

(v) We do not find any merit in the plea of the Department that country-wise accounts have not been made by the assessee and therefore, the deemed rate of taxation at 10% of advertisement revenue as per Circular No. 742 dated 02.5.1996 issued by the CBDT, should be applied to tax the revenue of the Permanent Establishment of the assessee. In this regard, we note that in the course of assessment proceedings, the assessee had prepared its country accounts for India, allocating total revenues and expenses of the assessee to India activity and filed the same before the AO. This fact has been recorded by the Tribunal in its order in Assessment Year 2000-01. In the light of this observation, Circular No. 742 is not applicable in the instant appeal.

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012

16. When the aforesaid factual position is kept in mind, the judgment of the Bombay High Court in Set Satellite (Singapore) Pte. Ltd's, case (supra) is clearly attracted. In that case the High Court has held that if correct ALP is applied and paid, nothing further would be left to be taxed in the hands of the foreign enterprise. In the said case, Morgan Stanley & Co. Inc. 's case (supra) as well as Circular No.23 issued by the CBDT was taken into consideration. The Court was also pleased to record that the commission paid to the agent was 15% services performed by the assessee's agent in India was in line with the existing industry standards in India at the prevalent time. Reliance was also placed on Para 3 of Circular No. 742 dated 02.5.1996 issued by the CBDT, which referred to the fact that the agent's commission from foreign telecasting companies is 15% or so of the gross sum, to contend that the CBDT itself had considered 15% as the normally accepted commission rate payable to agents of the telecasting companies.

17. We are, thus, of the opinion that no question of law arises. "

5.5 The above view has also been taken by the Hon'ble Bombay High Court in the case of DIT Vs. B4U International Holding Ltd. (2015) 374 ITR 453 (Bom- HC) where the Honble court has held as under

" 10. This conclusion of the Commissioner has been upheld by the Tribunal. It noted the rival contentions and in great details. The Tribunal concluded that after referring to the clauses in the agreement between the assessee and B4U that B4U India is not a decision maker nor it has the authority to conclude contracts (see paragraph 29). Further, the Revenue has not brought anything on record to prove that agent has such powers and from the agreement any such conclusion could not have been drawn. Barring this agreement, there is no material or evidence with the Assessing Officer to disprove the claim of the assessee that the agent has no power to conclude the contract. This finding is rendered on a complete reading of the agreement. Thereafter Indo-Mauritius DTAA has been referred to and particularly paragraphs

5.4 and 5.5. and the Tribunal concludes that the requirement that the first enterprise in the first mentioned State has and habitually exercised in that State an authority to conclude contracts in the name of the enterprise unless his activities are limited to the purchase of goods or merchandise for the enterprise is a condition which is not satisfied. Therefore, this is not a case of B4U India being an agent with an independent status. This finding is rendered in paragraph 29 and 30 of the order under challenge. We do not find that the Tribunal's order and which also refers to the Hon'ble ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 Supreme Court decision in Morgan Stanley & Co. (supra) can raise any substantial questions of law.

11. We are not agreement with Mr. Tejveer Singh when he submits that the Supreme Court judgment in the case of Morgan Stanley & Co. will not apply. In that regard he relies upon the conclusion rendered by the Hon'ble Supreme Court. That conclusion is that there being no need for attribution of further profits to the permanent establishment of the foreign company where the transaction between the two was held to be at arm's length but this was only provided that the associate enterprise was remunerated at arm's length basis taking into account all the risk taking functions of the multinational enterprise. Thus, Mr. Tejveer Singh's reliance on these observations in the Supreme Court judgment are strictly on the alternate argument canvassed by the assessee. That alternate argument was that assuming that B4U India is a dependent agent of the assessee in India it has been remunerated at arm's length price and, therefore, no profits can be attributed to the assessee. Mr. Tejveer Singh would submit that the Tribunal failed to note that the situation would be different if the transfer price analysis did not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the permanent establishment for those functions / risks that had not been considered. Mr. Tejveer Singh's argument is that the assessee had not subjected itself to the transfer price regime. Therefore, no assistance can be derived by it from this judgment.

12. In this regard, Mr. Mistri has rightly pointed out that the requirement and in relation to computation of income from international transactions having regard to arm's length price has been put in place in Chapter-X listing special provisions relating to avoidance of tax by substituting section 92 to 92F by the Finance Act of 2001 with effect from 1st April, 2002. Therefore, such compliance has to be made with effect from assessment years 2002-03 relevant to which is the previous year commencing from 1st April, 2002. In any event, we find that the Tribunal has rightly dealt with the alternate argument by referring to the Revenue Circular 742. There, 15% is taken to be the basis for the arm's length price. Nothing contrary to the same having been brought on record by the Revenue before the Commissioner as also the Tribunal, it rightly concluded that the judgment of the Hon'ble Supreme Court in Morgan Stanley & Co. and the principle therein would apply. Similarly, the Division Bench judgment of this Court in the case of Set Satellite (Singapore) Pte. Ltd. v.

Deputy Director of Income Tax (IT) &Anr.

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 [2008] 307 ITR 265would conclude this aspect. Therefore, we are of the opinion that the Tribunal's conclusions and which are consistent with the factual materials and the principles of law laid down above are neither perverse nor vitiated by any error of law apparent on the face of the record. "

5.6 Further, this issue has again come up before the Hon'ble jurisdictional Delhi High Court in the case of Adobe Systems Incorporated Vs. Assistant Director of Income Tax and Anr. (WP) No. 2384/2013 dated 16th May 2016, where the Hon'ble Court has held as under:-

" 23. In view of the above, even if the subsidiary of a foreign company is considered as its PE, only such income as is attributable in terms of paragraphs 1 and 2 of Article 7 can be brought to tax. In the present case, there is no dispute that Adobe India - which according to the AO is the Assessee's PE - has been independently taxed on income from R&D services and such tax has been computed on the basis that its dealings with the Assessee are at arm's length (that is, at ALP). Therefore, even if Adobe India is considered to be the Assessee's PE, the entire income which could be brought in the net of tax in the hands of the Assessee has already been so taxed in the hands of Adobe India. There is no material that would even remotely suggest that the Assessee has undertaken any activity in India other than services which have already been subjected to ALP scrutiny/adjustment in the hands of Adobe India. Thus, in our view, even if the AO is correct in its assumption that Adobe India constituted the Assessee's PE in terms of Article 5(1), 5(2)(l) or 5(5) of the Indo-US DTAA, the facts in this case do not provide the Assessing Officer any reason to believe that any part of the Assessee's income had escaped assessment under the Act. "

5.7 In view of our above analysis and the facts, we hold that the learned CIT (Appeals) was justified in holding that no income is liable to be attributable in India even if MIPL is taken as Dependent Agent PE of the assessee in India. Accordingly, ground No. 2 is dismissed."

50. Since the facts of the impugned assessment year are identical to the facts of the immediately preceding assessment year, therefore, respectfully following the order of the Tribunal in assessee's own case and in absence of any distinguishable features brought before us by the ld. DR, we find no infirmity in the order of the ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 CIT(A) in holding that no income is liable to be attributed in India even if Mitsui & Co. Ltd. Constituted a DAPE of the assessee in India. Accordingly ground of appeal No.4 is dismissed.

51. Ground of appeal No.5 being general in nature, is dismissed.

52. The grounds raised by the assessee are as under:-

"1. That on the facts and in law the Commissioner of Income Tax (Appeals) erred in upholding that Mitsui India Private Limited (MIPL) constituted Dependent Agent Permanent Establishment (DAPE) of Mitsui & Co. Ltd. Japan as per Article 5(7) of the Double Taxation Avoidance Agreement between India and Japan.

2. That without prejudice to the finding that Mitsui India Pvt. Ltd. Constituted Dependent Agent Permanent Establishment the CIT(A) erred in holding that 20% of the gross trading profit was attributable to the operations and functions carried out in India through MIPL as DAPE. 2.1 That without prejudice, in any view of the matter, on facts the quantum of 20% of the gross trading profit as attributable to the operations and functions of MIPL as DAPE in India is high and excessive.

3. That the CIT(A) erred in not considering appellant's contention in Ground No.3.1 to the effect that transaction between the appellant and MIPL being at arms length no further profit is attributable in view of Supreme Court judgement in DIT vs. Morgan Stanley & Co. Inc., 292 ITR 416(SC) and Mumbai High Court judgement in DIT vs. Set Satellite, 218 CTR 452 and rejecting it merely on the ground that Transfer Pricing Officer vide his order u/s 92CA(2) of the IT Act in case of MIPL has not accepted the transaction between the appellant and MIPL being at arms length, which order was not conclusive but subjudice before the Dispute Resolution Panel(DRP).

4. That on the facts and in law orders of AO / CIT(A) are bad in law and void ab-initio.

The appellant prays for leave to add, alter and/or vary the ground(s) of appeal at any time during the pendency of the appeal or at the time of hearing"

ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012

53. After hearing both the sides, we find the ground of appeal No.1 by the assessee relates to the order of the CIT(A) holding the assessee a Dependent Agent Permanent Establishment. After hearing both the sides, we find the above ground raised by the assessee is identical to ground of appeal No.4 raised by the revenue in decision of the Tribunal in assessee's own case for A.Y. 2005-06 have dismissed the ground raised by the Revenue. Following our findings given for A.Y. 2006-07 in Revenue's appeal, this ground raised by the assessee is allowed.

54. In ground of appeal No.2 and 3, the assessee has challenged the order of the CIT(A) in upholding the action of the AO regarding attribution of profit @ 20% of the gross trading profit determined by the CIT(A).

55. After hearing both the sides, we find this issue stands decided in favour of the assessee by the decision of the Tribunal in assessee's own case for A.Y. 2005- 06 where it has been held that the assessee is not a Dependent Agent Permanent Establishment and no income is attributable.

Respectfully following the decision of the Tribunal in assessee's own case for the preceding assessment year, grounds of appeal No.2 and 3 raised by the assessee are allowed.

56. The grounds raised by the Revenue are as under:-

> ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 "1. On the facts and in the circumstances of the case the Ld CIT(A) has erred in holding that the off shore supplies in respect of 'Teesta' and 'Purilia' projects cannot be taxed @10% u/s 44BBB of the IT Act.
>
> 2. On the facts and in the circumstances of the case the Ld CIT(A) has erred in holding that the profits than can be attributed to the PE of the assessee should be 20% and not 50% as determined by the AO.
>
> 3. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the assessee's income from 'Teesta' and 'Purilia' projects should be taxed on cash basis instead of Mercantile basis.
>
> 4. The appellant craves to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal."

57. So far as ground of appeal No.1 is concerned, the same relates to income of offshore supplies in respect of Teesta and Purulia projects.

58. After hearing both the sides, we find this ground is identical to ground of appeal No.1 and 2 in ITA No.2801/Del/2011 filed by the Revenue for A.Y. 2006-

07. We have already decided the issue and the grounds raised by the Revenue have been dismissed. Following similar reasonings, this ground of the Revenue is dismissed.

59. In Ground of appeal No.2, the Revenue is aggrieved by the order of the CIT(A) in holding that the profits that can be attributed to the PE of the assessee should be 20% and not 50%. After hearing both the sides, we find the issue stands covered in favour of the assessee by the decision of the Tribunal in assessee's own case for A.Y. 2005-06 where it has been held that the assessee is not a Dependent ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 Agent Permanent Establishment and no income is attributable. We, therefore, dismiss the ground raised by the Revenue on this issue.

60. So far as ground of appeal No.3 by the Revenue is concerned, the same relates to determination of income from Teesta and Purulia projects on cash basis instead of mercantile basis.

61. After hearing both the sides, we find the AO applied section 44BBB in respect of onshore supplies and onshore services in computing the income on the basis of amount accrued. We find the ld.CIT(A) at para 5.3 of the order has discussed the issue and held that as per the provisions of

section 44BBB, it is a presumptive module. The relevant observation of the CIT(A) is at para 5.3 of his order. The ld. DR could not controvert the findings given by the ld.CIT(A). In our opinion, the ld.CIT(A) was fully justified in holding that while computing the presumptive income books of account are not required to be maintained. Therefore, what is received by the assessee during the year a fixed percentage of such receipt is deemed to be the income. In absence of any distinguishable features brought before us by the ld. DR in the findings given by the ld.CIT(A), we do not find any infirmity in the same. Accordingly, the same is upheld and the ground raised by the Revenue is dismissed.

62. The grounds raised by the assessee are as under:-

> ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 "1. That on the facts and in law the Commissioner of Income Tax (Appeals) erred in upholding that Mitsui India Private Limited (MIPL) constituted Dependent Agent Permanent Establishment (DAPE) of Mitsui & Co. Ltd.

Japan as per Article 5(7) of the Double Taxation Avoidance Agreement between India and Japan.

2. That without prejudice to the finding that Mitsui India Pvt. Ltd. Constituted Dependent Agent Permanent Establishment the CIT(A) erred in holding that 20% of the gross trading profit was attributable to the operations and functions carried out in India through MIPL as DAPE. 2.1 That without prejudice, in any view of the matter, on facts the quantum of 20% of the gross trading profit as attributable to the operations and functions of MIPL as DAPE in India is high and excessive.

3. That the CIT(A) erred in not considering appellant's contention in Ground No.3.1 to the effect that transaction between the appellant and MIPL being at arms length no further profit is attributable in view of Supreme Court judgement in DIT vs. Morgan Stanley & Co. Inc., 292 ITR 416(SC) and Mumbai High Court judgement in DIT vs. Set Satellite, 218 CTR 452.

4. That on the facts and in law orders of AO / CIT(A) are bad in law and void ab- initio.

The appellant prays for leave to add, alter and/or vary the ground(s) of appeal at any time during the pendency of the appeal or at the time of hearing"

> 63. So far as ground of appeal No.1 is concerned, we find the same is identical to ground of appeal No.1 in ITA No.4367/Del/2011. We have already decided the issue and the ground raised by the assessee has been allowed. Following similar reasonings, this ground of the assessee is allowed.
>
> 64. So far as the grounds No.2 and 2.1 raised by the assessee are concerned, after hearing both the sides, we find these grounds are identical to grounds No.2 and 2.1 in ITA No.4367/Del/2011 filed by the assessee. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, these grounds of the assessee are also allowed.

65. So far as the ground of appeal No.3 raised by the assessee is concerned, after hearing both the sides, we find this ground is identical to ground No.3 in ITA No.4367/Del/2011 filed by the assessee. We have already decided the issue and the ground raised by the assessee has been allowed. Following similar reasonings, this ground of the assessee is also allowed.

66. The grounds raised by the Revenue are as under:-

"1. On the facts and in the circumstances of the case the Ld CIT(A) has erred in holding that the off shore supplies in respect of 'Teesta' and 'Purilia' projects cannot be taxed @10% u/s 44BB of the IT Act.

2. On the facts and in the circumstances of the case the Ld CIT(A) has erred in holding that the profits than can be attributed to the PE of the assessee should be 20% and not 50% as determined by the AO.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the assessee's income from 'Teesta' and 'Purilia' projects should be taxed on cash basis instead of Mercantile basis.

4.The appellant craves to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal."

67. So far as ground of appeal No.1 is concerned, we find the same is identical to ground of appeal No.1 in ITA No.2801/Del/2011 filed by the Revenue. We have already decided the issue and the ground raised by the Revenue has been dismissed. Following similar reasonings, this ground of the Revenue is dismissed.

68. So far as the ground No.2 raised by the Revenue is concerned, after hearing both the sides, we find this ground is identical to ground of appeal No.2 in ITA Nos.2801,4329 & 4367/Del/2011 ITA Nos.794 & 795/Del/2012 decided the issue and the ground raised by the Revenue has been dismissed. Following similar reasonings, this ground of the Revenue is dismissed.

69. So far as the ground of appeal No.3 raised by the Revenue is concerned, after hearing both the sides, we find this ground is identical to ground No.3 in ITA No.4329/Del/2011 filed by the Revenue. We have already decided the issue and the ground raised by the Revenue has been dismissed. Following similar reasonings, this ground of the Revenue is dismissed.

70. In the result, all the three appeals filed by the Revenue are dismissed and the two appeals filed by the assessee are allowed.

Order pronounced in the open court on 07.01.2020.

Sd/- Sd/-

(KULDIP SINGH) (R.K. PANDA)
JUDICIAL MEMBER ACCOUNTANT MEMBER
Dated: 07th January, 2020

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi`