

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

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No.4960/DEL/2004
[Assessment Year: 2001-02]**

M/s Lahmeyer International GmbH, C/o- Lahmeyer International (India) Private Limited, Intec House, 37, Institutional Area, Sector-44, Gurgaon-122002	ACIT, Circle-2(1), International Taxation, Drum Shaped Building, New Delhi
PAN-AAACL6802E	
Assessee	Revenue

**ITA No.5799/DEL/2010
[Assessment Year: 2002-03]**

Lahmeyer Holding GmbH (earlier known as Lahmeyer International GmbH), Friedberger Strasse 173 6118 Bad Vilbel, Deutschland Germany	DCIT, Circle-3(2), International Taxation, New Delhi
PAN-AAACL6802E	
Assessee	Revenue

**ITA No.1881/DEL/2007
[Assessment Year: 2003-04]**

M/s Lahmeyer International GmbH, C/o- Lahmeyer International (India) Private Limited, Intec House, 37, Institutional Area, Sector-44, Gurgaon-	ACIT, Circle-2(1), International Taxation, Drum Shaped Building, New Delhi
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122002	
PAN-AAACL6602E	
Assessee	Revenue

ITA No.2124 & 2125/DEL/2009
[Assessment Year: 2004-05 & 2005-06]

M/s Lahmeyer International GmbH,(now known as 'Lahmeyer Holding GmbH) C/o- Lahmeyer International (India) Private Limited, Intec House, 37, Institutional Area, Sector-44, Gurgaon-122002	ACIT, Circle-2(1), International Taxation, Drum Shaped Building, New Delhi
PAN-AAACL6602E	
Assessee	Revenue

Assessee by	Shri Satyen Sethi , Shri A. J. Panda & Gargi Sethee, Advocate
Revenue by	Shri G. K. Dhall, CIT-DR

Date of Hearing	11/07/2019
Date of Pronouncement	09/10/2019

ORDER

PER BENCH:

These appeals have been filed against the orders dated 08.09.2004, 20.09.2010, 19.12.2006, 10.01.2009 and 10.01.2009 passed by the CIT(A)-XXIX, New Delhi, for Assessment Years 2001-02, 2002-03, 2003-04, 2004-05 & 2005-06 respectively.

2. The grounds of appeal are reproduced as under:

ITA No.4960/Del/2004 A.Y.2001-02

1. *The learned Commissioner of Income Tax (Appeals)-XXIX has erred both on facts and in law in sustaining the incorrect application of the rule of 'Force of Attraction' in the Protocol to the Double Taxation Avoidance Agreement between India and Germany by the learned assessing officer thereby subjecting to tax the entire revenues earned by the appellant during the subject year at the rate of 20% under section 115A of the Income Tax Act, 1961.*
2. *The learned Commissioner of Income Tax (Appeals)-XXIX has erred both on facts and in law in sustaining the learned assessing officers's contention that the reimbursement of expenses at actuals received by the appellant is taxable as its income.*
3. *The learned Commissioner of Income Tax (Appeals)-XXIX, has erred both on facts and in law in upholding the levy of interest under Section 234A, Section 234B and Section 234C of the Income Tax Act, 1961.*

Grounds of appeal of ITA No.5799/Del/2010 A.Y.2002-03

"The Appellant respectfully submits that on the facts and circumstances of the case and in law, while passing the final assessment order under section 147 read with section 144C of the Income Tax Act, 1961 (Act'), the Deputy Director of Income Tax, Circle 3(2), International Taxation, New Delhi (hereinafter referred to as 'the learned Assessing Officer') has erred in:

1. *Initiating the re-assessment proceeding under section 147 of the Act for Assessment Year 2002-03, which is bad in law and liable to be quashed as per the provisions of the Act.*
2. *Without prejudice, taxing income earned by the Appellant under the contracts entered with the following customers by applying the rule of 'Force of attraction' envisaged under the provisions of Double Taxation Avoidance Agreement between India and Germany ('India- Germany Tax Treaty') and taxing the same at the rate of 20 percent (plus applicable surcharge and cess), as per provisions of section 44D read with section 115A of the Act, without appreciating the provisions of the Protocol to the India-Germany Tax Treaty and the fact that the following contracts are completely distinct and independent from the Permanent Establishment ('PE') constituted by the Appellant under its contract with Visakhapatnam Industrial Water Supply Company Limited and Jammu and Kashmir State Power Development Corporation - Baglihar Construction Services for Assessment Year 2002-03:*

- Madurai Power Corporation Pvt Ltd;
 - Andhra Pradesh Transmission Corporation;
PPN Power Generating Company Limited;
Power Grid Corporation of India;
Louis Berger India;
 - Jammu & Kashmir State Power Development Corporation - 600 MW
Sawalkote Power Project;
 - Jammu & Kashmir State Power Development Corporation - Baglihar
Hydro Power Project
3. *Levying interest under section 234A and 234B of the Act, which is incorrect.*
4. *Initiating penalty proceedings under section 271(1)(c) of the Act, which is inappropriate.”*

Grounds of appeal of ITA No.1881/Del/2007 A.Y. 2003-04

1. *That the learned Commissioner of Income Tax (Appeals) - XXIX [‘CIT (A)’] has erred both on facts and in law in sustaining the incorrect application of rule of ‘Force of Attraction’ in the Protocol to the Double Taxation Avoidance Agreement between India and Germany by the learned Assessing Officer, thereby subjecting to tax the entire revenue of Rs 112,394,374 earned by the appellant during the subject year at the rate of 20 percent under section 115A of the Income Tax Act, 1961 (‘Act’).*
2. *The learned CIT (A) has erred both on facts and in law in upholding the levy of interest under section 234A and 234B of the Act.*

Grounds of appeal of ITA No.2124/Del/2009 A.Y.2004-05

1. *On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) - XXIX [‘CIT (A)’] has erred in upholding the stand of the Deputy Director of Income-tax, Circle 1(2), International Taxation (‘hereinafter referred to as the Teamed assessing officer’) that the Appellant is not covered under section 44BBB of the Act, thereby taxing the revenues of Rs 16,814,835 earned by the Appellant from project with Jaiprakash Industries Limited (‘JIL’) during the subject year at the rate of 20 percent under section 115A read with section 44DA of the Income Tax Act, 1961 (‘Act.’).*
2. *On the facts and circumstances of the case and in law, the learned CIT (A) while holding that the amount [i.e. revenues of Rs 12,269,610 earned by Appellant during the subject year from contracts entered with Madurai Power Corporation Private Limited (‘MPCPL’), Andhra Pradesh Transmission*

Corporation ('APTC') and Vishakhapatnam Industrial Water Supply Company Limited ('VIWSCL') is to be taxed under Article 12 of the India-Germany Double Taxation Avoidance Agreement ('tax treaty'), has erred in not providing whether the said amount should be taxed under Article 12 (2) of the tax treaty @ 10 % or under Article 12(5) read with Article 7 of the tax treaty.

3. On the facts and circumstances of the case and in law, the learned CIT (A) has erred in not adjudicating on the applicability of the rule of 'Force of Attraction' provided in the Protocol to the tax treaty, on the basis of his conclusion that the Appellant is taxable under the provisions of Article 12. ('Royalties and Fees for Technical Services') of the tax treaty.

4. The learned CIT (A) has erred both on facts and in law in upholding the levy of interest under section 234A, 234B and 234D of the Act.

Grounds of appeal of ITA No.2125/Del/2009 A.Y. 2005-06

1. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) - XXIX ['CIT (A)'] has erred in upholding the stand of the Assistant Director of Income-tax, Circle 3(1), International Taxation ('hereinafter referred to as the 'learned assessing officer') that the Appellant is not covered under section 44BBB of the Act, thereby taxing the revenues of Rs 24,282,392 earned by the Appellant from project with Jaiprakash Industries Limited ('JIL') during the subject year at the rate of 20 percent under section 115A read with section 44DA of the Income Tax Act, 1961 ('Act.').

2. On the facts and circumstances of the case and in law, the learned CIT (A) while holding that the amount [i.e. revenues of Rs 3,452,865 earned by Appellant during the subject year from contracts entered with Andhra Pradesh Transmission Corporation ('APTC') is to be taxed under Article 12 of the India-Germany Double Taxation Avoidance Agreement ('tax treaty'), has erred in not providing whether the said amount should be taxed under Article 12 (2) of the tax treaty @ 10 % or under Article 12(5) read with Article 7 of the tax treaty.

3. On the facts and circumstances of the case and in law, the learned CIT (A) has erred in not adjudicating on the applicability of the rule of 'Force of Attraction' provided in the Protocol to the tax treaty, on the basis of his conclusion that the Appellant is taxable under the provisions of Article 12 ('Royalties and Fees for Technical Services') of the tax treaty.

4. The learned CIT (A) has erred both on facts and in law in upholding the levy of interest under section 234A, 234B and 234D of the Act.

3. We are taking up ITA No.4960/Del/2004, A.Y. 2001-02 as the lead case. Lahmeyer International GmbH (hereinafter referred to as "the Assessee"), a non-resident company incorporated in Germany, is an engineering consulting company that offers wide range of planning, designing and consulting services, etc. in relation to complex infrastructure projects in India. The Assessee has been rendering engineering consulting services mainly in relation to 10 power projects. The Assessee had executed/undertaken several contracts during the financial year April 1, 2000 to March 31, 2001, relevant to the present Assessment Year 2001-02. The details of the technical services fees received by the Assessee from execution of various projects during the present year (and offered to tax) was furnished along with the return of income filed by the Assessee. During the present assessment year, the Assessee earned total revenues (classified as fees for technical services ("FTS")) of Rs.91,447,305/- The same was offered to tax as under:

- Rs.62,970,914/- was offered to tax at the rate of 20 % on a gross basis under section 115A of the Income-tax Act, 1961, in respect of the contracts where a Permanent Establishment ("PE") was formed in India; and
- Rs.28,476,391/- was offered to tax at the rate of 10 per cent on a gross basis under Article 12 of the Double Taxation Avoidance Agreement between India and Germany ("Treaty"), in respect of the contracts where no PE was formed in India.

The Assessee constituted a PE in India under Phase II of the contract with Jammu and Kashmir State Power Development Corporation ("JKSPDC") by virtue of carrying out the work from a project office in India. Accordingly, revenues earned from JKSPDC-Phase-II were offered to tax at the rate of 20 % (gross basis), whereas revenue earned from all other projects were offered to tax at 10 percent (gross basis). After taking into account taxes withheld at source of Rs. 17,786,706/- the Assessee had claimed a refund of Rs.2,344,814/-. The return of income was processed under section 143(1)(a) of the Act on 08.12.2003 wherein the credit for tax deducted at source was granted for Rs.8,913,405/- as against Rs. 17,786,706/- claimed by the Assessee in the Return of Income. Consequently, after adjusting a refund of Rs.161,271/- due to the Assessee for earlier Assessment Year 2000-01, a demand of Rs.10,859,325/- was raised against the assessee by the Revenue. Subsequently, the return of income filed by the Assessee for the present Assessment Year came under scrutiny and notice dated 30.10.2003 under Section 143(2) of the Act was issued. During the course of assessment hearing on 17.11.2003, the Assessing Officer asked the Assessee to furnish the following information/documents:

- Details of reimbursement of expenses at actuals and why the same should not be included in the total income of the Assessee as FTS; and
- Copy of the contracts/agreements entered into by the Assessee, under which it had earned income during the present assessment year.

The Assessee filed submissions dated 10.12.2003 providing details of the reimbursement of expenses, highlighting the distinguishing facts and the legal provisions on which reliance was placed by the Assessee while contending non-taxability of reimbursement of expenses. As regards the contracts/agreements entered into by the Assessee under which it had earned income during the year, the Assessee submitted that it was in the process of collecting copy of the contracts and would furnish the same in due course during the assessment proceedings. The assessment order dated 24.12.2003 was passed under section 143(3) of the Act wherein the entire receipts of the Assessee during the present assessment year was subjected to tax at the rate of 20% by applying the principle of Force of Attraction under the Treaty; and the reimbursement of expenses received by the Assessee during the present assessment year was subjected to tax at the rate of 20%, as was done in earlier years. Thus, the Assessing Officer determined the Assessee's taxable income at Rs.91,788,012/- by including within the taxable income of the Assessee, a sum of Rs.340,707/- relating to reimbursement of expenses at actuals. The same was subjected to tax by the Assessing Officer at the rate of 20% and an additional tax and interest demand of Rs.4,701,670/- was raised against the assessee.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) dismissed the appeal of assessee.

5. As regards Ground No.1 relating to applying “Force of Attraction” (Foa) Rule, the Ld. AR relied on the decision in the case of Sumitomo Corpn. Vs. Dy. CIT [2008] 114 ITD 61, wherein it was clarified that “*Force of Attraction Rule differ from DTAA to DTAA*”. The Ld. AR also relied on the decision in the case DCIT Vs. Roxon OY [2007] 291 ITR (AT) 275 (Mum.) and Asst.DIT Vs. Clifford Chance (2013) 33 taxmann.com 200. The Ld. AR further submitted that Force of Attraction Rule under Indo-German Treaty, more specifically that of Article 7(1) provides that in case of PE, profits of the enterprise may be taxed in the other State only to the extent which is attributable to that particular PE. Article 7(2) elaborates that the PE is to be treated as separate and wholly independent of the enterprise of which it is PE and that the profits earned by other part of enterprise shall not be treated as attributable to PE. Thus, in principle Article 7(1) and 7(2) do not provide for “Force of Attraction Rule”. The Assessee gave details of payment to the Assessing Officer in respect of net of tax as under:

- *Clause 1.7.2 of agreement with Vishakhapatnam Industrial*
- *Clause 6.4 of agreement with Balaji Power Corp. Ltd.*
- *Clause 6.6 of agreement with AP Transmission Corp.*
- *Clause 5.4 of agreement with Utkal Alumina International*
- *Clause 4.5 of agreement with PNN Power Generating*
- *Payment terms of agreement with Louis Berger India.*
- *Clause 2.4.2 of agreement with JKSPDC-Sawalkote Project*

5.1. The Ld. AR submitted that since the tax is to be borne by the Indian entities, therefore, the rate of tax - 10% or 20% is of no consequences as far as the assessee is concerned. The Ld. AR submitted that four agreements, i.e., with Vishakhapatnam Industrial Water Supply Co. Ltd., AP Transmission Corp., Gujarat Infrastructure Development Board and JKSPDC-Sawalkote Project were with Government undertakings. In respect of these agreements, the Ld. AR submitted that it cannot be said that the agreements were to enable PE to evade tax. The Ld. AR relied upon the decision in the case of CIT v. Smt. Bani Roy Chowdhury & Ors (1981) 131 ITR 578 @ 588 (Cal). Thus, the Ld. AR submitted that there was no device to avoid tax in entering different agreements and also there cannot be any allegation of tax avoidance. The Ld. AR further submitted that the condition of involvement of PE was not met in the present case. There is no finding that 'Baglihar Project PE' was in any way involved in any other project across the Indian territories. Each agreement is different and was entered into with different parties. Thus, the involvement of PE cannot be presumed. Its involvement should be real/actual and cannot be superficial as held by the Assessing Officer. The Ld. AR further submitted that risks involved are different and none of the seven agreements had any underline motive, which has been carried out by the assessee at any stage. The Ld. AR submitted that Baglihar project was in respect of hydro-power and its PE cannot be said to be involved in projects in the field of water management or thermal power. Due to geographical reasons, Baglihar project PE located in Jammu & Kashmir could not be involved in other projects at far of places

throughout India. The Ld. AR tried to demonstrate that why Baglihar Project PE was not involved in other projects by giving example in respect of agreement with Vishakhapatnam Industrial Water Supply Co. Ltd (VIWSCL). The agreement with VIWSCL related to "water management", whereas, Baglihar Project related to "Hydropower". The project was located in Vishakhapatnam (AP) and key personnel as well as sub-consultant to be deputed to provide consultancy were agreed in advance and without the prior approval of VIWSCL personnel other than agreed could not have been deputed. Since the key personnel had already been decided and approved, therefore, it cannot be said that Baglihar Project PE was involved in rendering the services.

5.2 As regards agreement with ICICI and Balaji Power Corporation Pvt. Ltd., the Ld. AR submitted that this agreement related to LSFO - fired internal combustion engine power plant located in Tamil Nadu. Services were to be rendered either at site or in 'Germany- home office of Lehmeier International'. Since services were to be performed either at site or home office in Germany, therefore, it cannot be said that Baglihar Project PE was involved in rendering the services. The Ld. AR further submitted that personnel to perform the services were agreed in advance and without the prior approval of ICICI - the lead arranger personnel other than agreed could not have been deputed.

5.3 As regards agreement with Andhra Pradesh Transmission Corporation Ltd. (APTRANSCO), the Ld. AR submitted that as per the agreement, the assessee was associated consultant. The main consultant was Nippon Koei Co. Ltd. and it was Nippon Koei Co. Ltd who was responsible to APTRANSCO for all the obligations. Moreover, the consultant was to provide the services in accordance with the terms of reference, minutes of negotiation, work schedule and assignment schedule contained in Appendix A, B & C of the agreement & personnel to be deputed to carry out the job was agreed in advance. The Ld. AR in respect of agreement with Utkal Alumina International Ltd. (UTKAL), submitted that assessee was to advise whether UTKAL itself should build, operate and own the power plant or outsource the same. The Ld. AR further submitted to provide the services, one meeting was to take place in Norway and in India. The same cannot constitute PE in India of the assessee.

5.4 As regards agreement with Gujarat Infrastructure Development Board Society (GIDBS), the Ld. AR submitted that the agreement related to the field of Public Transit System for the city of Ahmedabad. In contrast, Baglihar Project related to "Hydropower" and the same was located in Vishakhapatnam (AP). In agreement with GIDBS, the Assessee was associated consultant. The main consultant was "Louis Berger International Inc" and it was Louis Berger who was responsible to GIDBS for all the obligations. Besides the assessee, Dalai Consultants and Engineers Ltd, Balaji Rail-road Systems Ltd. and ICICI Ltd. were also the consultants. Personnel's who were to perform the

services were agreed in advance and without the prior approval of GIDBS personnel other than agreed could not have been deputed. The Ld. AR further submitted in respect of agreement with JKSPDC-Sawalkote Project, the same was for consultancy services only and the consultancy services were to be provided prior to signing of EPC. In contrast, under JKSPDC- Baglihar Project, the assessee was Engineer-in-charge for implementation of Hydropower Project including project management, hydropower design review and supervision of civil works. Thus, under JKSPDC-Sawalkote Project, the Assessee was to provide limited services. The services under phase I and phase II was to be performed in assessee's home office in Germany and the third phase was related to Assistance in Contract Negotiations - EPC contract. Since primarily the services were to be provided in Germany, therefore, it cannot be said that same staff as for Baglihar Project was deputed. Thus, the Ld. AR submitted that in any case, the contract was with State Govt. undertaking and as such, there was no tax avoidance.

5.5 The Ld. AR submitted that even the CIT(A) did not dispute the fact that different personnel were deputed/assigned to different projects. The Ld. AR submitted that both the conditions set out in Protocol 1(c) must co-exist as the word "and" signifies conjunction. The Ld. AR relied on the decision of Sahara India (Firm) (2008) 300 ITR 403 @ 409. The Ld. AR submitted that in A.Y. 2000-01, considering the similar submissions, the then Assessing Officer did not invoke force of attraction rule. The Ld. AR submitted Revenue cannot be allowed to take up the plea

based on Article 12(5). There is no finding that Baglihar project PE was in any way involved in other projects. Since such a plea requires factual investigation of involvement of Baglihar project PE with other projects, therefore, Revenue cannot be allowed to take up this plea. The Ld. AR relied upon the following decision:

- *ACIT vs. DHL Operations BV 13 SOT 581 @ 595-596 (MUM) (SB).*
- *Slocum Investment (P) Ltd. vs. DCIT 106 ITD 1 (Del)*
- *Escorts ltd vs. ACIT 104 ITD 427 (Del) - para 67-68 @ 486-489*
- *Dy. CIT v. Capital Gars Pvt. Ltd. (2007) 295 ITR (AT) 224 @ 236-237 (Del)*
- *Assam Company (India) Ltd. v. CIT (2002) 256 ITR 423 (Gau)*
- *Wilon Industries v. CIT (2003) 259 ITR 318 (Mad)*
- *Meghji girdhar (HUF) v. CIT (2012) 344 ITR 364 (MP)*

5.6 The Ld. AR without prejudice to the earlier submissions submitted that Article 12(5) provides for taxation of FTS as business profit where FTS is effectively connected to the PE. Article 12(5) adopts no force of attraction rules, for it requires carrying on of business through PE and "effective connection" between income by way of FTS and PE in India. There can be no presumption of involvement of PE. Effective connection does not envisage legal connection but something that is substantially or really connected. The Ld. AR relied upon the decision of *Sumitomo Corpn. v. DCIT (2008) 114 ITD 61* and *Worlev Parsons Services Pvt. Ltd. (2009) 312 ITR 273* wherein it was observed that PE should be engaged in royalty generating services or fee for technical service or at least, it should facilitate the performance of

such services. Onus is on Revenue to show that other projects were effectively connected to PE in respect of Baglihar project. The Ld. AR relied upon decision of ADIT v. Valentine Maritime (Mauritius) Ltd. (2011) 45 SOT 34(Mum)

5.7 As regards to applicability of Section 44D, the Ld. AR submitted that the question of applicability of section 44D does not arise because except for fee received in respect of Baglihar project, the fee received in respect of other agreements was taxable under Article 12 of DTAA. Since DTAA is more beneficial to the assessee, therefore, it would prevail. The Ld. AR submitted that the assessee opted to be taxed under DTAA and Section 44D would apply only, if FTS is held to be business income by virtue of "effective connection" under Article 12(5). In that case, Article 7 would apply and consequentially section 44D.

6. The Ld. DR submitted that it is an undisputed fact that the income is in the nature of FTS. There is business connection and income accrues and arises or deemed to accrue or arise in India. There is existence of Fixed Place PE under Art-5(1) in the form of *JKSPDC-BCS...*" & existence of Supervisory PE under Art-5(2)(i) in the form of *JKSPDC-BCS...*" The Ld. DR submitted that the nature of Business of the assessee remains unchanged. The assessee is engaged in providing technical consultancy services to various projects in India and is an engineering consulting company that offers wide range of planning, designing and consulting services etc. in relation to complex infrastructure projects. In India, the assessee has been rendering engineering

consultancy services mainly in relation to power projects. The Ld. DR has submitted the two chart as below:

1. Employment of Local Staff & Personnel -

Project	Reference
PPN, 25 th May98	280, 284[Supervision of subsidiary Sub-consultant]
MPCPL, 2 nd July 98	99,119[Supervision of subsidiary Sub-consultant]
APTC,15 th May 99	152,210, 218, 220-225,236,241-246,
Baglihar Stage-I, 17 th Aug 99	Cl.46, 442-443,445
Louis Berger, 2 nd Dec 99	318[Supervision of subsidiary Sub-consultant], 372
Sawalkote, 9 th Dec 00	388,414
PGCIL, 14 th Feb 01	p.88 r.w. App-H[02-03]; p.114[02-03];
VIWSCL, 6 th March 01	Appendix-C[p.82-86]
Baglihar Stage-II, 23 rd Nov 01	Appendix-A(2)
JIL, 18 th August 03	Details not there [p.80, 04-05]

2. Existence of Fixed Place of business in the form of Project Office/Site Office for various projects –

Project	Reference
PPN, 25 th May 98	285,
MPCPL, 2 nd	101,112,121

July 98	
APTC, 15 th May 99	Art-IV [p.134]248,129,134,152,206,218,220- 225,235,241-246
Baglihar Stage-I, 17 th Aug 99	Cl.47, Cl-2 of Appendix-B, 445 (Asst. Chief Res. Enggr.), 446
Louis Berger, 2 nd Dec 99	303, 320,378,379
Sawalkote, 9 th Dec 00	388,414
PGCIL, 14 th Feb 01	Cl.4.6 Resident Project Manager, Cl. 5.4 r.w. Appx-F [p.114,02-03]
VIWSCL, 6 th March 01	Appendix-F [p.92]
Baglihar Stage-II, 23 rd Nov 01	Appendix-B(4)
JIL, 18 th August 03	6[05-06], 80[04-05] Chief Design Engineer

6.1 The Ld. DR pointed out the contradictions such as for the same contract [JKSPDC- Baglihar, Phase-I] part of revenue was offered to tax @10% and rest @20%. The Ld. DR further submitted that the contract was artificially split at the convenience of the assessee as can be seen from the following table-

2000-01	2001-02	2002-03	2003-04	2004-05
<i>JKSPDC- Phase-I</i>	<i>JKSPDC- Phase-II</i>	<i>JKSPDC- Phase-I</i>	<i>JKSPDC- Phase-I</i>	

(BHP <i>Design</i> <i>Contract)</i> [@10% p.65 r.w.p.61 of PB 2001- 02]	(BHP) [PE] [@20% p.26 r.w.p.29 & 57,PB-1 of 2001- 02]	(BHP) [@10% p.7,PB of 2002-03]	(BHP) [@10% p.5,PB of 2002-03]	
JKSPDC- Phase-II (BCS) [PE][@20% p.65 r.w.p.61 of PB 2001- 02]		JKSPDC- Phase-II (BCS) [PE][@20% p.23 & 24 PB of 2002-03]	JKSPDC- Phase-II (BCS) [PE][@20% [p.5 r.w.p.25,PB of 2002-03]	JKSPDC- Phase-II (BCS) [PE][@20% [p.5,PB of 2002-03]
It may be noted that the assessee has entered into 3 contracts with JKSPDC i.e. Baglihar, Phase-I dt. 17-08-1999[A.Y.2000-01], Baglihar, Phase-II dt. 23-11-01[A.Y.2002-03] and Sawalkte dt. 09-12-2000[A.Y. 2001-02].				

6.2 The Ld. DR submitted that the nature of activities carried out i.e. Technical Consultancy Services/Engineering Consultancy Services/Civil Engineering Consultancy Services remained the same for all the contracts. However, on the one hand, such services were treated and accepted to be in the nature of supervisory services and existence of PE under Art 5(2)(i) was accepted for JKSPDC & VISWL while for others it is argued by the Ld. AR that the nature of services are merely consultancy and not supervisory in nature and thus, not covered under Art-5(2)(i). The nature of activities carried out i.e. Technical Consultancy

Services/Engineering Consultancy Services/Civil Engineering Consultancy Services remained the same for all the contracts. However, on the one hand whereas the assessee is arguing that no PE under Art-5(2)(i) can exist because it is not undertaking any construction or assembly itself yet, on the other hand, in order to prove its claim for presumptive taxation under section 44BBB in respect of the contract involving JIL, it claims to be involved in the business in civil construction or erection of plant and machinery or testing and commissioning thereof.

6.3 The Ld. DR further submitted that the assessee itself accepts that existence of PE under Art-5(1) r.w. Art-5(2)(i) on account of availability of fixed place of business in the form of 'Project Office'/ 'Site Office' at its disposal in respect of JKSPDC Baglihar & VIWSL, yet it is argued that similar 'Project Office'/'Site Office' in respect of other contracts does not constitute PE under Art-5(1). As per Appendix-A of the contract for Baglihar, Stage-II, it is only an extension of Stage-I and the employees of Stage-I shall be involved. Yet the assessee treats them as separate and independent projects.

6.4 The Ld. DR submitted that the rule of FOA uses the term 'business activities' and not 'terms of contract'. The former i.e. 'business activity' has a more general and wider connotation than the expression 'terms of contract' which is more particular and narrow. Moreover, use of the words 'same or similar' further expands the scope of the expression 'business activity'. Contracts involving the same or similar business activity can have varied

and different terms. What is to be established is whether the business activities are being carried on of the same or similar kind as those effected through that is permanent. It has already been accepted by the assessee that it is engaged in the business of providing engineering technology services to various clients in relation to complex infrastructure projects. The mere fact that the terms of contract are different or for that matter the parties or geographical locations are different are not material for deciding the applicability of the FOA rule.

6.5 Similarly, the rule of FOA does not mandate that the other contracts or business activities need to be “an extension” of the PE through which the FOA need to be effected. The three conditions that need to be satisfied as per the India-Germany DTAA & Protocol are-

- I. **business activities** of the same or similar kind as those effected through that permanent establishment;
- II. resorted to in order to **avoid** taxation in the Source State and
- III. the PE **in any way** was **involved**.

6.6 The Ld. DR submitted that as can be seen, the twin conditions proposed by the assessee i.e. there is need for being ‘an extension of the PE’ or to be ‘effected through the PE’ are neither mandated in the UN Model Convention nor in the Protocol to the India- German DTAA. In fact, this is an attempt to misinterpret the convention/provisions. and misguide the Hon’ble Bench. Coming back to the nature of “business activity” being

carried on by the assessee through its PE in respect of JKSPDC and other contracts, the assessee itself has accepted that the activities are 'same or similar' in nature.

- ✓ "LIG is engaged in providing **technical consultancy services** to various projects in India."
- ✓ "Under contracts entered with MPCPL, APTC, PPN, PGCI, Louis, JKSPDC-BHP & JKSPDC- Sawalkote, the assessee provided **engineering consultancy services.**"

6.7 As per the assessee's contention that the contracts have been carried out by independent teams under different contract managers and contract engineers, the Ld. DR submitted that this contention of the assessee is factually incorrect as can be seen from Annexure-A of the agreement. Moreover, in all contracts, there is provision of employing of local staff and the details of such staff were never produced before the lower authorities.

6.8 As per assessee's next contention that the PE is not involved in execution /performance of other contracts, the Ld. DR submitted that the PE is in the form of supervisory PE under Art. 5(2)(i) r.w. Art.5(1) of the DTAA. Hence, the involvement of the PE has to be examined with reference to the involvement of supervisory officials only. For this purpose, the Ld. DR submitted spreadsheet in respect of common personnel. The LD. DR gave ad details of each project & contract the details of which are as follows:

A. JKSPDC-

1. Baglihar Stage-I, 17th Aug, 1999

- ✓ EIC for Baglihar-I will supervise work & hold weekly review meeting with Client's Chief Engineer. [Art-47]
- ✓ Chief Resident Engineer will monitor the Civil Contractor's progress [cl.2.1, Apdx-A]
- ✓ Duration 64 man-months for expatriate staff [cl.1.2 & 3, Apdx-C & Annex-1]
- ✓ Duration of 323 man-months for Local staff [Annex-1-Breakdown of Costs]

2.Sawalkote, 9th Dec'2000

- Contract signed by Robert Laird, expat already working for Baglihar-I [p.384, 2001-02 r.w.p. 59 of PB-1, 2001-02]
- Dr. Jokiel expat already working for Baglihar-I is one of the witness[p.384, 2001-02 r.w.p. 59 of PB-1, 2001-02]
- Boris Lazaric, the other witness is the Project Manager of Baglihar-I and given his address as J&K[p.384, 2001-02 r.w.p. 59 of PB-1, 2001-02]
- The Consultant will nominate mostly the same staff as for Baglihar and Kishanganga projects. [Cl.1& 3.3 of Appendix-A]

3.Baglihar Stage-II, 23rd Nov'2001

- Signed by Boris Lazaric, Project Manager for Baglihar-I and witness to Sawalkote [POA by Management. p.384, 2001-02 r.w.p. 59 of PB-1, 2001-02 & Preamble to Baglihar-II]
- Continuation of Stage-I-
- *"Baglihar Hydropower Schemes has an ultimate installed capacity of 900 MW to be developed in 2 Stages. Stage-1 [refer to cl.1 of Apdx-A of Stage-I]of the Baglihar Project with an installed capacity of 450MW.. is currently under construction*

and LI being the appointed consulting engineer (Engineer-in-Charge)”. [cl.1 of Apdx-A of Stage-2]

- *“Stage-2 benefits from the already existing structures of Stage-1” [refer to cl.1 of Apdx-A of Stage-I]*
- *“LI will appoint staff members who have already been involved in Stage-I”. [cl.2 of Apdx-A of Stage-2]*
- *“The EPC Contract for Stage-2 should be arranged in accordance to the existing EPC Contracts of Stage-1, either as a new separate contract package or as an addendum to the existing contract. The contract conditions should be similar to the existing ones.” [cl.3.3 of Apdx-A of Stage-2]*
- *“It goes without saying that the staff assisting PDC will be those who are involved in the ongoing Baglihar Project and thus are familiar with all aspects of the Project.” [cl.3.3 of Apdx-A of Stage-2]*
- *Same expats working for Baglihar-I as stated above and for Sawalkote as stated in p.60 Of PB-1 for 2001-02 i.e. Dr. Jokiel, Dr. Major, Dr. Schwarz, Pitz, Stable, Meschitz, Weber, Laird & Kissling. [cl.1 of Anex-B for Stage-II r.w. p. 59-60 of PB-1 for 2001-02]*

B. VIWSP, 6th March 2001-

- ✓ Common supervisory expats –
 - i. Hans Joachim Kiessling- Sawalkote [p.58-60, PB-1;01-02] & VIWSP [p.68-69; 2002-03]
 - ii. R. Laird – VIWSP [3.1, p.84, PB 2001-02], Baglihar-I, Baglihar-II & Sawalkote as discussed above.
- ✓ Office with Local staff at Hyderabad & Visakhapatnam [Apdx-F, p.92, PB 2001-02] same as in APTC [Sch-6,p.206 PB 2001-02]

C. APTC,15th May 1999-

- ✓ Office with Local staff at Hyderabad & Visakhapatnam [Sch-6, p.206 PB 2001-02] same as in VIWSP [Apdx-F, p.92, PB 2001-02]

D. PGCIL, 14th Feb 2001 [effective date-25th Jan 1999]-

- ✓ Appendix-C [p. 92-111] gives details of the personnel already present and working on other projects in India.

E. Jaiprakash Industries Ltd, 18th August 2003-

- Signed by Boris Lazaric, Project Manager for Baglihar-I and witness to Sawalkote [POA by Management, p.78 & 87 2004-05; p.384, 2001-02 r.w.p. 59 of PB-1, 2001-02 & Preamble to Baglihar-II]

The Ld. DR submitted that the above details represent only a snapshot of the common expat personnel and common premises used for the contracts undertaken in the source country. It may, however, be noted that in all contracts, there is provision of employing of local staff and the details of such staff was never produced before the lower authorities.

6.9 As regards to assessee's another claim i.e. other than the JKSPDC-BCS contract that the assessee does not maintain any site office or place of business in India, the Ld. DR submitted that the same is factually incorrect. To demonstrate, the Ld. DR submitted as under:

A. PPN [May 1998]-

- i. Provision of office space at Chennai & at the site [cl. 4.3, p.285]

- ii. Sub-consultant in the form of Indian subsidiary [cl.3.3 r.w. 1.5, p.284]
- iii. Provision for local staff & personnel [p.280]

B. Balaji [July 1998]-

- i. Location [cl.1.7 p.101]
- ii. Provision of site office and accommodation [cl.5.5, p.112]
- iii. Provision of local staff & personnel [cl.1.1(o), p.100]

C. APTC [May 1999]-

- i. Field Office at Hyderabad, Visakhapatnam and any other project site. [Art-1, p.129]
- ii. Establishment of 'Project Organization' at Hyderabad. [Art-IV, p.134]
- iii. Cost Estimate for Main Office at Hyderabad & Site Office at Visakhapatnam [Appendix-E, p.248; Appendix-D, Sch-6,7,8 p.206-208; Annex-7, p.220; Sch-3, p.242]
- iv. Provision of local staff & personnel [Appendix-E, p.248 Annex-3, p.210; Sch-6, p.218 & Annex-7, p.220]
- v. Page 152 states at point C about the office rental charges., house rental etc. Similarly at page 218 of APB,; page 221 of equipment cost for office and site office details besides the method of cost in the from pages 152-250 of APB

D. Baglihar-I [August 1999] –

- i. Accepted that it has a PE in the form of a Project Office for A.Y. 2000-01 & 2001-02 [i.e. before the signing of stage-II contact on Nov'2001]
- ii. Appendix-B, Clause-2 – Provision of accommodation & furnished office space etc.

- iii. Presence of Chief Resident Engineer [CRE] will monitor the Civil Contractor's progress on site. [p.109] Boris Lazaric is the Chief Resident Engineer [p.467-470 of 2010-11]
- iv. Provision for weekly review meetings with Client [cl.47]
- v. Employment of local staff& personnel [cl.46 r.w. Annex-1, p.442-446 of 2010-11]

E. Louis Berger [December 1999]-

- i. The Project Team shall work in Ahmedabad with home office time. [Art-6.1, p.303]
- ii. Employment of local staff & personnel [Appendix B at page 372 gives details of staff; page 378 of APB gives cost for office maintenance and local staff expenses etc; page 379 of APB states the details of office facilities expenses, equipments, vehicles expenses details etc.]

F. Sawalkote [December 2000]-

- i. The Consultant will nominate mostly the same staff as for Baglihar and Kishanganga projects. [Cl.1 of Appendix-A]
- ii. Baglihar -1 was already having PE in the form of Project Office.

G. VIWSCL [February 2001] –

- i. 'Office Space' at two places i.e. Visakhapatnam & Hyderabad [Appendix-F,p.92]
- ii. Employment of local staff & personnel [Appendix-C, p.82-91]

H. PGCIL[February 2001] –

- i. Presence of Resident Project Manager at all times. [Art.4.6, p. 81, 2002-03]

- ii. Provision of Office Space and Local staff & personnel
 [Appendix-F, p. 114, 2002-03]

I. Baglihar-II [November 2001]-

- i. *“LI will appoint staff members who have already been involved in Stage-I”*. [cl.2 r.w. 3.3 of Apdx-A of Stage-2]
- ii. Provision of office space [cl.4 of Appendix-B]
- iii. Client will provide personnel and such personnel shall take instructions only from the consultant [p.388 r.w.p.389]

J. JIL [August 2003]-

- i. Presence of Chief Design/Resident Engineer at all times.
 [Art.3.1, p. 80, & 87 2004-05]
- ii. Accommodation at Delhi [Art.2.3 p. 80, 2004-05]
- iii. Site at Omkareswar [Art.1.8 p. 79, 2004-05]

Details of payments & reimbursements [Annex-1] & details of personnel [Annex-2] not furnished.

6.10 The Ld. DR submitted that as regards the claim in relation to contracts with MPCPL, APTC, PPN, PGCI, Louis, JKSPDC- BHP & JKSPDC-Sawalkote projects, the physical presence of employees was less than a period of 6 months, hence in relation to the aforesaid contracts LIG did not constitute a PE under Art-5(2)(i) of the DTAA. The Ld. DR submitted that Art-5(2)(i) provides for the presence of employees. It does not distinguish between the Foreign or Local employees. As has been held by the Hon’ble Supreme Court in case of Azadi Bachao Andolan the terms used in the DTAA are to be interpreted on the basis of broad principles of general interpretation and not on a narrow or legalistic basis.

6.11 The Ld. DR submitted that all the projects are undertaken with the help of local staff and local personnel. Moreover, the staffs of one project are also involved in other projects. Hence, the claim of the assessee that the physical presence of employees was less than 180 days is factually incorrect. Moreover, the assessee artificially splits Baglihar-I project into BHP & BCS and claimed existence of PE as per its convenience. Similarly, Baglihar Phase-I & Phase-II contracts are treated as independent ones although it has been clearly specified in the contract for Baglihar, Phase-II that it will benefit from Stage-I and common personnel associated with Stage-I to be used. [Appendix-A(1),(2)& (4)]. There is existence of Fixed Place PE under Art-5[1] too in respect of all these projects. In addition, the assessee also uses the premises of its Indian subsidiary which is at its disposal for its business purposes.

6.12 As regards to the assessee's claim that the Assessing Officer & CIT(A)/DRP have not disputed the fact that the assessee does not satisfy the twin conditions prescribed under the Protocol to the India-Germany DTAA, the Ld. DR submitted that there is no dispute that the assessee has objected before the lower authorities against the application of FOA in its case. The Ld. DR submitted that both the authorities have held that rule of FOA is attracted in the case of the assessee. It is thus, fallacious to say that the lower authorities have not disputed the contentions of the assessee for in such a scenario, the rule of FOA would not have been applied or upheld or for that matter, the assessee would have been before the Tribunal on the same issue.

6.13 As regards the claim of the assessee that the assessee cannot be said to have resorted to an arrangement with a view to deliberately avoid tax in India, since most of the contracts are with Govt./semi Govt. undertakings and it can't be said that the agreements were entered to enable the assessee/PE to evade tax as the liability to pay tax was that of the client (131 ITR 578), the Ld. DR drew the attention of the Bench to the following portion of his written arguments:

- ✓ Complete misinterpretation of the provisions of Model UN Convention and the decision in the case of Roxon.

As per Assessee- “... profits from other transactions, to the extent such other transactions are of the same or similar kind and effected through the PE...”

As per UN Model Convention reproduced in Roxon [p.287] – “(c) other business activities carried on in that State of the same or similar kind as those effected through that permanent establishment.” The above difference between ‘transactions effected through the PE’ and ‘transactions of same or similar kind as effected through the PE’ becomes even more glaring when discussed in the Commentary as reproduced by the Hon’ble Tribunal as well as its own analysis. Commentary– “However..... establishment.” – “... Once a PE..... Article-7.”

- ✓ Moreover, there is no use of the term ‘deliberate’.
- ✓ It appears, the assessee understands and interprets the terms ‘evasion’ and ‘avoidance’ of tax as identical synonyms and inter-changeable. The reliance upon the case of Bani Roy

Choudhury will not be of any help as the same was in the context of 'evasion' of tax while the Protocol to the DTAA speaks about 'avoidance'. The Ld. DR pointed out that interpretation of treaties are different from that of statutory legislations. This has been reiterated in the case of Azadi Bachao Andolan where the Hon'ble Supreme Court had observed -

130. The principles adopted in interpretation of treaties are not the same as those in interpretation of a statutory legislation.

While commenting on the interpretation of a treaty imported into a municipal law, Francis Bennion observes:

"With indirect enactment, instead of the substantive legislation taking the well-known form of an Act of Parliament, it has the form of a treaty. In other words, the form and language found suitable for embodying an international agreement become, at the stroke of a pen, also the form and language of a municipal legislative instrument. It is rather like saying that, by Act of Parliament, a woman shall be aman. Inconveniences may ensue. One inconvenience is that the interpreter is likely to be required to cope with dis-organised composition instead of precision drafting. The drafting of treaties is notoriously sloppy usually for a very good reason. To get agreement, politic uncertainty is called for.

*- The interpretation of a treaty imported into municipal law by indirect enactment was described by Lord Wilberforce as being 'unconstrained by technical rules of English law, or by English legal precedent, but conducted on broad principles of general acceptance. This echoes the optimistic dictum of Lord Widgery, C.J. that **the words 'are to be given their general meaning, general to lawyer and layman alike ... the meaning of the diplomat rather than the lawyer'**. [Francis Bennion: *Statutory Interpretation*, p. 461 [Butterworths, 1992 (2nd Edn.)]. "(Emphasis supplied)*

6.14 The Ld. DR submitted that the clients are liable to deduct and pay the tax. However, it is the assessee which is obligated to declare and disclose its correct income and pay tax thereon. If such an obligation has not been cast upon the assessee, it had no necessity of filing its return of income too. As regards of avoidance of tax, he submitted that the Assessing Officer in Assessment Order has clearly brought out the differences in the rate of taxation with or without attribution to the PE. Fraudulent and wrong claim and availing a lower rate of taxation is as much tax avoidance since the assessee with its global presence and availability of technical support cannot claim that the same is on account of ignorance or wrong advice. What the DTAA and Protocol provide for is "Tax Avoidance" as distinct from the rigors of "Tax Evasion". The appeal to the Tribunal is exactly for the above reason i.e. taxation at a higher than declared rate.

6.15 As related to assessee's claim regarding applicability of Art. 12[5] and along with Art. 7 of DTAA – Effective Connection vs. Force of Attraction, the Ld. DR submitted that the assessee, itself offered to tax FTS from Baglihar (A.Y. 2000-01 to 2005-06) & VIWSCL (A.Y. 2002-03) @ 20% under Art-12[5] r.w. Art. 7 of the DTAA being effectively connected to the PE. Coming back to Art. 7 of the DTAA, clause-1 provides that only so much of the profits of the enterprise as is attributable to that PE can only be taxable in the other contracting state where such PE is situated. The Ld. DR further pointed out that the term or expression 'effectively connected' although present in Art. 12[5] is absent in Art. 7. This is so because the use of this term takes away the ambit of

taxation from Art. 12 and vests the same with Art. 7. Finally, the determination of the quantum of the profit attributable to the PE has to be determined on the basis of Protocol which provides for the FOA rule. The Ld. DR submitted in the context of the Ld. AR's argument that *"Revenue has to show that FTS earned from other projects are also effectively connected to Baglihar PE"* is fallacious as the same is not based on the proper appreciation of the DTAA & legal provisions. If the said contentions are accepted and the revenue proves that the other contracts are also 'effectively connected' to the Baglihar PE then the FOA rule becomes redundant as each such contract shall be taxed under Art-12[5] r.w. Art-7 of DTAA automatically. It may be noted that it is to alleviate the difficulties faced by source countries with reference to establishing the 'effective connection' mandate of OECD convention that the provision of FOA was made in the UN convention. This he submitted was amply explained by Tribunal in the case of HITT Holland Instituted of Traffic Technology B.V as under-

"As to whether the income attributable to the PE alone has to be taxed in the other country or any other income which accrues to the Non-Resident in the other country having no connection with the PE, can also be brought to tax in the other country, is also laid down in the various clauses of the DTAA between countries. Available Model Conventions differ in this regard. Some provide for taxing profits/income only to the extent that they are attributable to the PE, which is referred to as "No force of Attraction" principle. Some provide for taxing income/profits from direct transactions effected by the non-resident, provided the transactions are of the same or similar kind as that effected through the PE, which is referred to as "Limited Force of Attraction" principle. Some provide for taxing

profits/income from all transactions whether they are attributable to PE or not or whether they are of the same kind of transactions carried on by the PE or not, which is referred to as “Full Force of Attraction” principle. As to which principle is applicable in a given case depends on the clauses of the convention between two countries.”

**[HITT Holland Instituted of Traffic Technology B.V. v. DDIT (Kol.)(Trib.);
 ITA No. 574/Kol/2014, dt. 08.02.2017]**

Similar observations were also made by Arvid A. Skaar which are reproduced as under-

“The UN model treaty has suggested the concept of “Force of Attraction” to prevent the disturbing effects of the OECD “business connection test” by amending the tax treaty allocation rules so as to allow an existing PE to attract income that would not be attributable to such PE according to the arms length principle. Three limbs i.e. profit attributable to-

a. that PE

b. sales of goods and merchandise of the same or similar kind as those sold through the PE or

c. other business activities of the same or similar kind as those effected through the PE – This covers all business activities that are similar to the activities that are similar to the activity pursued through the PE.

Thus, the nature of the activity is decisive under this alternative.”

[PE-Erosion of a tax treaty principle – Arvid A Skaar, p.335-340]

6.16 The Ld. DR further submitted that the Ld. AR relied upon the decision of Hon’ble High Court and Tribunal in the case of Sumitomo Corporation to explain the concept of ‘effective connection’, however, it may be noted that Indo-Japan DTAA is not similar to Indo-German DTAA for this very concept of FOA. Hence, the decision in the case of Sumitomo doesn’t help the assessee in any manner. The Ld. DR also submitted that reliance

upon the case of Valentine (supra) will not have any advantage either as it has already been proved that the assessee has been artificially splitting the contracts.

6.17 As regards to reliance upon order for A.Y. 2000-01 by the Ld. AR where Force of Attraction rule was not applied, the Ld. DR submitted that the assessee relied upon the Assessment Order for A.Y. 2000-01 where the Assessing Officer has not applied FOA principle. At the very outset, it is highlighted that the principles of 'res-judicata' is not strictly applicable to the proceedings under the IT Act. Moreover except for its reply dt. 24/12/02 the assessee could not furnish any evidence in support of its claim that the issue of FOA was examined by the Assessing Officer. No such questionnaire issued by the Assessing Officer was produced nor there is any discussion in the body of the assessment order accepting or rejecting the so-called reply on the basis of some 'telephonic conversation/query'. The reply of the assessee only talks about "telecom" and "intention". Hence, the submission by the assessee deserves to be rejected. Without prejudice to this, he submitted "perpetuation of an error is no heroism" as observed by the Hon'ble Supreme Court in the case of Distributor (Baroda) P. Ltd. and as reproduced by the ITAT in the case of CGG Veritas Services SA :-

"49. we would like to mention that principle of consistency does not operate against law. When a particular benefit is not conferred on the assessee by the statute and assessing officer allows such benefit the assessee cannot claim such benefit as a matter of right on the principle of consistency. In this regard it will be appropriate to refer to the decision of

Hon'ble Supreme Court in the case of **Distributor (Baroda) P. Ltd v Union of India 155 ITR 120 (SC)** their Lordship summarized their views at page 124 in following words:-

".....To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of justice Bronson in Pierce v. Delameter (A.M.Y. at page 18):" a judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors ".

In view of decision of Hon'ble Supreme Court it is clear that mistake committed earlier by the assessing officer in applying the correct law cannot be allowed to be perpetuated."

He accordingly submitted that the grounds raised by the assessee be dismissed.

7. We have heard both the parties and perused the relevant material on record. The contention of the assessee was that the force of attraction rule is not applicable to the assessee in view of article 7(1) of the treaty between India and Germany DTAA. The contention of the assessee was that as per protocol of the treaty, the force of attraction rule in this treaty restricts the application of the rule to a case where, the PE is involved in the transaction and the transaction is restored to avoid taxation in the source state and both these contentions needs to be satisfied so as to attract the rule. The PE constituted in India by the assessee under the contract with JKSPDC-Phase-2 was not involved in any other project executed in India during the relevant previous year. For supporting this statement, the assessee submitted various

contracts entered into by the assessee with different independent unrelated parties. Most of these contracting parties are government or semi government or private organisations. The assessee constitutes PE on account of undertaking supervisory activities as provided in article 5(2)(i) of the treaty in relation to construction of Hydro Power Projects at Baglihar in the state of Jammu & Kashmir. In respect of the balance contracts, based on specific contract requirements, the assessee's personnel either performed service at the client's location or at its home office in Germany, wherein the assessee provided contract-wise, the location wherein the activities were undertaken. The above fact as per the assessee clearly demonstrates that owing to geographical region, the PE on account of JKSPDC Phase-II projects (executed in the state of Jammu & Kashmir) could not play a part or be involved in any project in India. These contracts have been carried out by the assessee by using different teams at a given point of time. In this regard, the details of the project managers/project engineers who visited India in connection with the execution of different contracts clearly shows that distinct PE of technician were involved in the execution of various projects in India. The teams of the project managers/project engineers, in relation to various projects, visited India in connection with the execution of these projects at different points of time. The scope of work, liabilities and risk involved in each of the contracts are independent of those stated in the other contracts executed with the different parties. Owing to Reserve Bank of India's stipulation, a separate project office is to be set up for each independent project. Further, the funds of the project office are to be used only

to meet the expenses of the specific projects which has been approved and cannot be used for any other purpose in India. Therefore, the funds belonging to the project office can be used to fund or support only that project (i.e. in respect of which it has been set up) and cannot be used to fund any other projects in India. The assessee under various independent contracts entered into by it, was required to undertake specific activities as per the terms of each contracts. The activities undertaken by the assessee were independent of the others since their performance was not interlinked with each other. The location where the activities would be performed by the assessee in respect of the specific projects was dictated by the client's project site or as agreed with the clients and was undertaken outside India. Further, restriction on the activities which may be undertaken by project office is stipulated in the approval issued by the Government. Therefore, it cannot be said that the PE constituted in India by the assessee under Phase-II of the contracts with JKSPDC was involved in any way in the earning of income from technical services rendered by the assessee and other contracts in India. We find force in the contention of the assessee, that the PE constitute in India by the assessee under Phase-II of the contract with JKSPDC did not play any role or contributed in any manner to the execution of the other contracts or earning of FTS under other contracts and cannot thus be said to be involved with any other projects in India. Accordingly, FTS received by the assessee from rendering of technical services and other contracts cannot be said to be involved directly or indirectly in any manner to the PE constituted in India under the contract with JKSPDC-

Phase-II and are formed for the purpose of deliberate avoidance of tax. Therefore, we find merit in the argument of the Ld. AR that such income by way of FTS is to be subjected to tax @ 10% under article 12 of the treaty and cannot be subject to tax @ 20% as contemplated by the Assessing Officer. As per the Revenue's contention, it is undisputed fact that the income earned by the assessee was in the nature of FTS, there is business connection and income accrues and arises or deem to accrue and arise in India. The regional existence of place of PE and the article 5(1) in the form of JKSPDC-BCS as well as there is existence of supervisory PE under article 5(2)(i) in the form of JKSPDC-BCS was not established by the Revenue from any documentary evidence on record. Similarly, the nature of business of the assessee remains unchanged and the assessee is engaged in the business of providing consultancy services to various projects in India. The assessee is an engineering consultancy services that offers wide range of planning, designing and consultancy services etc. in relation to complex infrastructure projects in India. The assessee rendered engineering consultancy services mainly in relation to power projects.

7.1 From the perusal of the records and contradictory aspect pointed out by the Ld. DR, it can be seen that the PE in respect of JKSPDC-Baglihar Phase – II Project has rightly been offered to tax at 20% by the assessee as it is the only project which has PE. The Force of Attraction rule will not be applicable in other projects as the same do not constitute either PE or does not come under the

purview of the DTAA. The contradictions pointed out by the Revenue do not demonstrate that the other projects constitute PE. In fact, for applying force of attraction, there should be some common link to each of the contracts/projects such as the common expats, the common nature of the contract/projects, the commonality of the location, the common contracting parties etc. which are absent in the present case. Therefore, the applicability of rule of force of attraction does not apply in the present assessee's case. Thus, the treatment given by the assessee for offering tax @20% in one project and 10% in rest of the projects was rightly done. Hence, Ground No. 1 of the assessee's appeal in ITA No. 4960/DEL/2004 for A.Y. 2001-02 is allowed.

8. As regards ground No. 2 relating to taxability of reimbursement of expenses, the Ld. AR submitted that there is no finding that the reimbursement had any element of income or there was any markup. He submitted that the issue is covered by the decision in the case of CIT v. Siemens Aktiengesellschaft (2009) 310 ITR 320; Abbey Business Services (India) (P) Ltd. v. DCIT (2012) 53 SOT 401. The Ld. AR submitted are as per the contracts, the payer or the Indian entity is responsible to pay after deducting tax. Most of the contracts are with Govt./Govt. Enterprises. Hence, the assessee is not liable to tax and it can't be alleged that the agreements are entered to avoid tax. The Ld. AR further submitted that there are independent and identified key personnel for each project and any change of such personnel can only be done with client's approval. Once the key personnel are identified and their role has been assigned, it can't be said

that Baglihar PE is involved. Geographical locations are so different that it can't be said that personnel from Baglihar are coming and performing tasks in other projects. The Ld. AR further submitted that in several contracts, the assessee is a sub-contractor and hence not liable to the contract. In some contracts review of work is done at Germany and hence, it can't be said as PE in India is involved. The Assessing Officer has accepted that except for Baglihar there are not any other PEs in respect of any other contracts. Thus, the Ld. AR submitted that reimbursements are on cost-to cost basis and there is no element of profit. The Ld. AR relied upon the decision of Engineering Projects Ltd. (1993) 202 ITR 1014 (Del). The Ld. AR relied upon the following decisions:

- a) Sumitomo Corporation [114ITD 61,ITAT &43 Taxmann.com, HC, Delhi]-
- b) Clifford Chance [33 Taxmann.com 200, Mum SB]-
- c) Roxon OY [291ITR(AT)275, Mum]-
- d) Smt. Bani Roy Chowdhury & Others [131ITR 578, Kol]-
[Azadi Bachao Andolan (2003) 263 ITR 706 (SC), Nokia Networks (2013 (358) ITR 259),New Skies Satellite BV and Anr. (2016-TII-06-HC-DEL-INTL)
- e) GFA Anlagenbau GmbH [47taxmann.com 313 Hyd-Trib]-
- f) National Petroleum Construction Company[(2016) 383 ITR 648]-

9. The DR submitted that at the very outset, the contention of the assessee that it is not liable to tax is fallacious since the assessee itself, has accepted its liability and offered to tax the

income it has earned. The provision in the contract for the payment of contractual consideration after deduction of taxes in no way certifies or establishes that the assessee cannot avoid tax. The liability is on the assessee to offer to tax its true and correct income and prove the same, if needed. Moreover, simply because the other party to the contract is a Govt. Enterprise does not establish that the assessee has not or can't avoid tax. He submitted that the word used is 'avoid' and not 'evade'. The Ld. DR further submitted that the assessee has artificially split the Baglihar -I contract and that both Baglihar I & II uses the same personnel and are interconnected. Similarly, the fact that common expats personnel are involved in Baglihar, Sawalkote & other projects have already been reflected/established in the enclosed spreadsheet. Moreover, the spreadsheet reflects the association / involvement of expats only and do not include local personnel employed by the assessee. As long as the activities are same or similar and there are common personnel involved, whether the assessee is a sub-contractor or will attract the application of FOA. The Ld. DR pointed out that the personnel who are part of HO may be part of the some other project/field team. For example, Dr. Chongyang Du & Dr. Schwartzwere part of HO team for Sawalkote project while they were part of expat project team for Baglihar -II and Sutluj Jal Vidyut Nigam Contracts. Similarly, Hans Joachim Kiessling was a part of HO team for Sawalkote and part of field team for VIWSP while Dr. Sheng, Weber & Meschitz were part of Baglihar-II as well as part of field unit for Sawalkote. The Ld. DR pointed out that the contention of the assessee is not acceptable since, no where the

Assessing Officer has held or concluded that there are no PEs in respect of other contracts. Moreover, once the principles of FOA attracted, the existence of PE for other projects becomes academic only. Without prejudice to the above he submitted that as has been explained earlier, there are PEs for each projects both under Art-5(1) as well as 5(4) since the assessee extensively employs and uses local personnel and the threshold limit of 180 days cannot be computed on the basis of expat personnel only. Furthermore, the Indian subsidiary of the assessee also acts as PE. In addition to the above, since the existence of PE in respect of each project is evident from the contract document itself, the Hon'ble Tribunal is duty bound to consider the evidence in view of the decision of Hon'ble jurisdictional High Court in the case of Jan Sampark [275 ITR 273]. The Ld. DR accordingly submitted that the onus is on the assessee to prove that there is no element of profit in the reimbursements. Moreover, the assessee itself has included the reimbursements in its taxable income for A.Y. 2000-01. Without prejudice, it has been held by Hon'ble Supreme Court in the case of Sedco Forex International Inc.[2017 TII 38 SC INTL] 'reimbursements' can partake the nature of 'income'. The Ld. DR again reiterated that in the case of the assessee, the site, project or activity has continued for a period of more than the prescribed duration and the activities are being carried on with the help of expat as well as local employees. Accordingly, the above decision only re-confirms and strengthens the decision of the lower authorities.

10. We have heard both the parties and perused all the relevant material available on record. It can be seen that these expenses were actually incurred by the assessee and there is no element of income involved in these expenses. This has been demonstrated by the assessee during the Assessment Proceedings as well as before the CIT(A). But both the Revenue authorities have not taken cognizance of the same. Besides that, revenue could not point out that there is any element of income involved in the said expenses as well as could not demonstrate that there was any mark up to these expenses. Therefore, Ground No. 2 of the assessee's appeal in ITA No. 4960/DEL/2004 for A.Y. 2001-02 is allowed.

11. As regards Ground no. 3, interest u/s 234A, 234B & 234C, the Ld. AR submitted that same are not chargeable. It is settled law that interest is not chargeable where tax is deductible at source. The Ld. AR relied upon the decision of Hon'ble Supreme Court in the case of IAN Peter Morris v. Asst. CIT (2016) 389 ITR 501, rendered in the context of section 192 of the Act. The Ld. AR submitted that this ratio is applicable in the present case.

12. The Ld. DR relied upon the Assessment Order and the order of the CIT(A).

13. We have heard both the parties and perused all the relevant material available on record. Interest u/s 234B and 234C is not chargeable where tax is deductible at source. The reliance placed on GE Packaged Power Inc. (supra) is apt. Hence Ground No. 3 of

the assessee's appeal in ITA No. 4960/DEL/2004 for A.Y. 2001-02 is allowed.

14. Now we take up the other appeals. First, ITA No. 5799/DEL/2010 for A.Y. 2002-03. Ground No. 1 is not pressed, hence the same is dismissed.

15. As regards to Ground No. 2 is concerned, the same is identical to the Ground No. 1 of ITA No. 4960/Del/2004, hence the same findings are applicable as nothing contradictory was pointed out by the Ld. DR. Thus, Ground No. 2 is allowed.

16. As regards to Ground No. 3 is identical to the Ground No. 3 of ITA No. 4960/Del/2004, hence the same findings are applicable as nothing contradictory was pointed out by the Ld. DR. Thus, Ground No. 3 is allowed.

17. Now we take up ITA No. 1881/Del/2007 A.Y. 2003-04, Ground No. 1 is identical to the Ground No. 1 of ITA No. 4960/Del/2004, hence the same findings are applicable as nothing contradictory was pointed out by the Ld. DR. Thus, Ground No. 1 is allowed.

18. As regards to Ground No. 2 is identical to the Ground No. 3 of ITA No. 4960/Del/2004, hence the same findings are applicable as nothing contradictory was pointed out by the Ld. DR. Thus, Ground No. 2 is allowed.

19. Now we are taking up ITA No. 2124/Del/2009 for A.Y. 2004-05 and ITA No. 2125/Del/2009 for A.Y. 2005-06 as the grounds are identical. As regards to Ground No. 1, the Ld. AR's fairly conceded that the above ground is against the assessee. Hence Ground No. 1 of the assessee's appeal is dismissed.

20. As regards to Ground No. 2 and 3 are concerned the same are identical to that of Ground No. 1 of ITA No. 4960/Del/2004, hence the same findings are applicable as nothing contradictory was pointed out by the Ld. DR. Thus, Ground No. 2 and 3 are allowed.

21. As regards to Ground No. 4 is identical to the Ground No. 3 of ITA No. 4960/Del/2004, hence the same findings are applicable as nothing contradictory was pointed out by the Ld. DR. Thus, Ground No. 4 is allowed.

22. In result, ITA No. 4960/DEL/2004 for A.Y. 2001-02, ITA No. 5799/DEL/2010 for A.Y. 2002-03 and ITA No. 1881/DEL/2007 for A.Y. 2003-04 these three appeals filed by the assessee are allowed and ITA No. 2124/Del/2009 for A.Y. 2004-05 and ITA No. 2125/Del/2009 for A.Y. 2005-06 these two appeals filed by the assessee are partly allowed.

Order is pronounced in the open court on 9th October, 2019.

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 9th October, 2019.

RK/-

Copy forwarded to:

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

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

Asst. Registrar, ITAT, New Delhi