IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD ' A ' BENCH, HYDERABAD.

BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER AND
SHRI L. P. SAHU, ACCOUNTANT MEMBER

ITA No. & Asst. Year	Appellant	Respondent
610/Hyd/2014 2010-11	M/s. Caterpillar Global Mining Europe GMBH-India Project Office, Karimnagar. PAN AADCB4524A	Dy. Director of Income Tax, International Taxation-1, Hyderabad.
483/Hyd/2015 2011-12	-do-	Dy. Commissioner of Income Tax-1, International Taxation, Hyderabad.
2072/Hyd/2017 2014-15	M/s. Caterpillar Global Mining Europe GMBH-India Project Office, Godavarikhani, Peddapalli, Telangana. PAN AADCB4524A	-do-
1127/Hyd/2019 2016-17	-do-	Addl. Director of Income Tax-1, International Taxation, Hyderabad.
116/Hyd/2021 2017-18	-do-	-do-

Appellant By : Shri Ajit Korde, Adv.
Respondent By : Shri Rajendra Kumar (D.R.)

Date of Hearing : 10.03.2022.
Date of Pronouncement : .03.2022.

O R D E R

Per S.S. Godara, J.M. :

These assessee's five appeals arise against the DDIT-1, International Taxation, Hyderabad's assessment dt.28.12.2014 framed in furtherance to the Dispute Resolution Panel "DRP", Hyderabad's directions dt.26.12.2013 (Assessment Year 2010-11), the very Assessing Officer's assessment dt.20.2.2015 framed as per the DRP's directions dt.31.12.2014 (Assessment Year 2011-12), similar assessment dt.9.10.2017 (Assessment Year 2014-15) finalised in light of the DRP-1, Bangalore's direction in F. No.397/DRP-1/BNG/2017-18 dt.4.9.2017 (Assessment Year 2016-17), assessment dt.16.05.2019 made by the ADIT, International Taxation-1, Hyderabad dt.16.5.2019 in light of the DRP-1, Bangalore's direction dt.30.4.2019 in F.No. 59/DRP-1/BNG/2019-20 and ADIT, International Taxation-1, Hyderabad assessment dt.23.12.2020 consequent to DRP-1, Bangalore's direction in F. No. 51/DRP-1/BNG/2019-20 dt.18.11.2020 (Assessment year 2017-18), involving proceedings

u/s.143(3) r.w.s. 144C of the Income Tax Act, 1961 ('the Act'); respectively.

Heard both the parties. Case files perused.

2. We first come to the assessee's common substantive grounds in all these cases challenging correctness of the learned lower authorities' action taxing its income from off-shore supplies; involving varying sums; respectively. We deem it appropriate at this stage to reproduce the assessee's identical pleadings to this effect read as under:

" 2. On the fact and in the circumstances of the case, the Ld. A.O. has erred in law and in facts in alleging that the contracts with Singareni Colleries Company Limited are composite contracts and has been artificially divided into three agreements and the activities envisaged therein are interdependent and interconnected to each other.

3. On the fact and in the circumstances of the case, the Ld. A.O. has erred in attributing income from offshore supply contracts to the Indian PO disregarding the facts that these contracts were awarded by floating separate tenders.

4. On the fact and in the circumstances of the case, the Ld. A.O. has erred in law and in facts by holding that the existence of a Permanent Establishment is not confined to the services being rendered by the Project Office and has not

appreciated the fact that case of the Appellant was covered under Article 5(4)(e) of the Indo-German DTAA.

5. On the fact and in the circumstances of the case, the Ld. A.O. has erred in law by holding that Appellant constituted a PE and has a business connection in India before establishing Project Office in India.

6. On the fact and in the circumstances of the case, the Ld. A.O. has erred in alleging that the receipts from offshore supply of equipment / spares are taxable in India and disregarded the submission of the appellant that the risk and title to the goods have passed to SCCL outside India.

7. On the fact and in the circumstances of the case, the Ld. A.O. has erred in law in alleging tha the receipts from offshore supply of equipment / spares are taxable in India ignoring the factual submission and decision of the Hon'ble Supreme Court and other decisions relied upon by the appellant.

8. On the fact and in the circumstances of the case, the Ld. A.O. has erred in law by holding that offshore supply of equipment / spares is effectively connected with the PE of the appellant in India and therefore will be attributable to the PE for taxation in India.

Without prejudice, on the facts and in the circumstances of the case and in law, the Ld. A.O. has failed to appreciate the fact that the Project Office in India has no role with the supply of equipment / spares and accordingly, income from offshore supply of equipment / spares cannot be attributed to the Indian PO.

9. Without prejudice, assuming but not accepting that income from offshore supply of equipment / spares is

attributable to the business carried outby India PO in India, the Ld. A.O. has erred in alleging that an amount equal to 35% of the offshore supply was attributable to the domestic operations and that the profits from offshore supply was 50% of gross revenue of offshore supply, even though no part of the activity relating to offshore supply of equipment / spares was carried outby appellant's Project Office in India."

3. We next note during the course of hearing that all the later four assessment years also raise the very issue. Case records suggest that this tribunal's co-ordinate bench order in assessee's own case itself involving ITA No.1842/Hyd/2012 dt.28.04.2017 has already decided the very issue of taxability of its off-shore supplies against the department as under :

" 15. Having regard to the rival contentions and the material on record, the following questions emerge for adjudication:

(i) Whether all the three contracts are interlinked interdependent and indivisible and therefore whether they are to be considered as a single and a composite contract?

(ii) Whether there was a PE of the assessee in India before establishment of project office in India and if so, since when?

(i) What is the income attributable to activities in India?

16. To answer question No.(i) above, it is necessary to go through the nature of all the three contracts. The assessee has

filed paper books in 3 parts (A), (B) & (C). Part-A contains the basic documents such as the copy of the audited accounts of the assessee's Project Office, the tax audit report and the computation of total income for the AY 2009-10, while Part-B contains the submissions made by the assessee before the lower authorities and also the copies of the contracts and the DGMS approvals. Part-B of the paper book contains the copies of the SCCL tender document, bid documents and the TDS certificate and copies of the dispatch documents such as bills and invoices etc. Part-C of the paper book contains copies of the draft assessment order, the order of the DRP and the final assessment order and also copies of the invoices raised against the supply of equipments and corresponding bills. The assessee has also filed a paper book containing copies of various case law on which the assessee has placed reliance upon and also such case law which are taken support of by the AO and the CIT(A) to distinguish them from the facts of the case before us.

17. From the copy of the tender document floated by SCCL which is placed at Page 243 of the paper book, it is seen that a single tender document has been issued for the entire project as a turnkey project though the bids have been invited in 3 parts i.e. technical bid, commercial bid and price bid. Page 267 of the paper book is the letter of the SCCL dated 14.11.2005 (which is the part of the tender document) in which sealed bids are invited from technical and financial sound agencies with proven track record for introduction of 'Continuous Miner Technology' with 5 years maintenance contract for extraction of developed pillar at GDK-11A Incline, Ramagundam area of the SCCL and as per the general conditions of the contract and special conditions of contract included in the bid document, bids must be submitted in accordance with the instructions to bidders. The scope of the wok includes the design, supply, installation, commissioning and operation and maintenance thereafter for the period of 5 years on contract including initial warranty period and handing over of the equipment to SCCL for smooth and successful execution and operation of the project. The technical document of the tender starts from page 269 of the paper book and at page 279 is clause No.23

specifying the bidder responsibility as per which the relevant responsibilities are as under:

> *1) Shall conduct scientific site investigations, prepare study reports, obtain DGMS approval for the mining method/ technology and shall quote for these.*
>
> *2) Shall supply continuous Miner, shuttle cars, Multi Roof Bolter, Mobile feeder breaker J & complete electrical equipment as one package and shall quote for these in detail for each individual item.*
>
> *The bidder shall quote for 2 Nos. of shuttle cars/Coal Haulers with 15 Tonne pay/load capacity or 3 Nos. of shuttle cars with 10.0 Tonne pay load capacity. (To quote for both options).*
>
> *3) Shall operate and maintain the equipment with required spares and consumables for a period of 5 (five) years and to quote separately for spares and services on per tonne basis, year-wise.*
>
> *Note: The contract for supply, operation & maintenance of the equipment will come into force after the DGMS approvals for the scientific site investigations mining method/technology are obtained.*
>
> *4) a) Shall guaranty for an average production of 1350 Tonnes/day and 0.40 Million tonnes per year.*
>
> *b) The guaranteed production should commence within 4 months period from date of commissioning the equipment, after giving required training to SCCL personnel and preparation of panel for required standards for*

commissioning the actual depillaring operation of coal.

c) If the annual guaranteed production in any year falls below 4.00 LT / annum,) there will be penal charges equivalent to 1% of equipment cost for every fall of 1 % of guaranteed production up to a maximum fall of 20%.

If the guaranteed production falls below 3.0 LT/annum (i.e., 75% of the (guaranteed production) during the first year of operation, SCCL will have the right to reject the equipment. The supplier has to reimburse the complete cost of the equipment to SCCL".

18. At page 377 of the paper book is the commercial bid submitted by the assessee in response to the tender wherein the assessee agreed to take the responsibility and obligations for accomplishment of the contract in accordance with the provisions of the bidding document. At page 383 of the paper book, the preamble of the commercial bid read as under:

"COVER B - COMMERCIAL BID

for the

Introduction of Continuous Miner Technology with Five Year Maintenance Contract at GDK11A Incline Mine, RGM Area

PEAMBLE

The price offered by Bidder for the total "Scope of Supply" for the "Introduction of Continuous Miner Technology with Five Year Maintenance Contract at GDK11A Incline Mine, RGM Area" as per Singareni Collieries Company Limited Enquiry No. CRP.PD/01/80/Enq.425/2005 is divided into three (3) distinct contracts as follows .

1. Scientific Site Investigation and DGMS Approval.

2. Supply of Equipment.

3. Provision of Site Assistance Services, including:

• Five Year Strata Monitoring Program

• Site Assistance Services - Mobilization, Overseas Training, Site Assistance and Planning, Unpacking and Assembly of Equipment on Surface,"No Load" Commissioning on Surface, Transport of Equipment Underground and "Full Load" Commissioning Underground.

• Maintenance Services - Operation and Supervision on a USD/tone and INR/tone Basis

• Maintenance Services - Spare Parts on a USD/tone Basis

• Maintenance Services - Consumables on a USD/tone Basis

The full "Scope of Supply" for the above proposed contracts is detailed in "Cover A Technical Volume" of this Bid.

All contracts are signed simultaneously, however:

• Contract NO.1 above comes into force immediately upon signing the contract.

• Contracts NO.2 and No.3 come into force upon receipt of the DGMS Mining Method Approval".

19. At page 421 of the paper book is the specimen copy of the price bid submitted by the assessee in cover-C and in

accordance with this bid, the assessee has divided the whole contract into three different contracts and has also apportioned the payment accordingly. Further, from the Errata issued by SCCL which is placed at Page 362 to 376 of the paper book, we find that as per the original tender document, the contract for supply portion and maintenance of the equipment will come into force after DGMS approval for the scientific site investigation/mining method/technology is obtained but as per the amended document, there can be 3 separate contracts for (i) scientific site investigation (ii) supply of equipment and (iii) maintenance of spares and services and it has also been specified that these 3 contracts shall be signed only with single agency i.e. that the successful bidder who has submitted the original offer. In accordance with this proposal of the SCCL, the assessee has entered into 3 different contracts with SCCL. Contract No.1 is referred to as RC-222, while contract No.2 is referred to as RC-223, and contract No.3 is referred to as RC-224. RC-222 is placed at pages 70 to 102 of the paper book, while RC-223 is from pages 103 to 182 and RC-224 is from pages 183 to 237 of part-A of the paper book. From the contract RC-222, we find that clause D of the description part mentions that SCCL has agreed to enter into a contract for scientific site investigation and obtained DGMS approval with DBT i.e. the assessee herein on the terms and conditions mentioned in the contract. Document No.1 forming part of the contract gives the general conditions for the contract and clause1.1 thereof gives the definition and meaning of the terms used in the contract. Sub-clause defines "services" to mean scientific site investigation and obtain DGMS approval as in appendix 'C' to Appendix 'G'. The Appendix –C to the contract (at page two of the paper book part A) provides that prior to the introduction of continuous miner method equipment, it is necessary to obtain the approval of the DGMS for both the equipment and mining method proposed and for this purpose, the assessee shall complete the scientific site study within six months from the contract coming into force subject to the payments as per clause 6.1 and DGMS approval shall be received within three months thereafter as shown by appendix 'J' and in case the DGMS approval is delayed, both the parties shall review mutually for further necessary action. It is also mentioned that

the assessee shall monitor the mining method during the 5 year period, i.e. maintenance contract period. Clause 6.1 of the general conditions (at page 82 of the part A) specifies the contract price at USD 127,655.91 and also the mode and time of payment.

20. The contracts 2 & 3 are to commence only after the approval of the DGMS, though the same are also signed on 21.11.2006 itself. It is also specified under clause 7 of the contract-II i.e. RC-223 that this contract shall come into force as per clause 34 of the general conditions of the contract-II specified in section 1 of this contract. Clause 34 of the contract reads as under:

> *"34. COMING INTO FORCE OF THE CONTRACT*
>
> *34.1 The contract shall come into force upon fulfilling all the following:*
>
> *(a) Signing of the contract by all the parties;*
>
> *(b) Receipt of all DGMS approvals under clause 3.1, 3.2, 3.3 of General Conditions.*
>
> *(c) Sanction from Govt. of India and RBI*
>
> *(d) Letter of indicative support for the Contract from a first class Indian Bank/Financial Institution as per Annexure IV.*
>
> *34.2 In the event the contract does not come into force within nine (9) months from the date of signing of the Contract, either party may withdraw from the contract without any obligation there under".*

21. Further, clause 3 of section-I of the contract-II, RC-223 provides that for the introduction of the Continuous Miner mining system in GDK-11A Mines of SCCL, DGMS approval for the mining method would be obtained by the SCCL and scientific investigation (scientific site investigation and obtaining DGMS approval) to be carried out for securing DGMS

approval would be part of a separate contract to be awarded by SCCL and ***that the results of scientific investigations will be the basis of design of mining method*** *(emphasis supplied by us) and also submission of application for DGMS approval for the mining method and also that the SCCL would put up the application with DGMS and the DBT shall provide necessary assistance for making application and obtaining DGMS approval. It was also provided in clause 3.4, that any addition/alteration of the equipment supplied, suggested by DGMS, while approving the equipment and any additional studies suggested by DGMS for obtaining Mining Method approval, during the course of implementation, shall be at DBT's cost. But if any additional equipment is required as per DGMS mining method approval, the cost of such equipment shall be borne by SCCL.*

22. Clause 6 thereof provides for inspection of the equipment by SCCL at manufacturers premises and also the right of the SCCL to reject the equipment if the goods fails to conform to the specifications. SCCL may reject them in writing mentioning the specific reason for rejection within 7 days from the date of inspection and thereafter the DBT shall either replace the goods rejected or make all the alterations necessary to meet the specifications, free of cost to SCCL.

23. Clause 7 thereof provides that DBT, before delivery, shall inspect and test the Equipments in its shop to ensure that the equipments have been fabricated/manufactured according to the standards and specifications under the contract and shall yield the standard performance and DBT shall also prepare factory inspection certificates summarizing the testing results as a component of the equipment required under clause 18 for payment.

24. As per clause 8, the DBT shall provide such packaging of goods as is necessary to prevent the goods from damage or deterioration during transport to their final destination and the packing shall be sufficient to withstand rough handling and well protected against water, damp, shock and rust.

25. As per clause-9 of the agreement, the DBT shall notify port consignee with copy to SCCL seven (7) calendar days

before shipment, by cable or fax, the Contract No, description of the goods, quantity, no. of packages, total gross weight, total volume in cubic meters and expected date of readiness for loading at Port of shipment together with details on total invoice value and any special requirements or attention to be paid during handling and storage. It shall also book shipping space in a Vessel on behalf of the SCCL and shall arrange the shipment of goods to reach their port of destination according to the time schedule mentioned in the contract. All costs of packaging, internal transportation, fees of forwarding agents, warehousing charges, port charges, dock and harbor dues and all other expenses as may be incurred for the purpose and up to the point of delivery of the goods on board the nominated ship shall be paid by the DBT and the DBT shall be liable for all expenses, including dead and extra freight, demurrage of vessels etc, arising from delay in shipment due to lack of shipping opportunities, or delay in providing documents, which are for any cause attributable to the DBT and it is also agreed that the risk of the goods shall remain with DBT until delivery has been effected free on board (FOB).

26. Clause 11 of the contract provides that SCCL shall take insurance cover for equipment on a full replacement cost basis from FOB, port of shipment, till the time the equipment is successfully commissioned underground at the Mine Site on the basis of shipping advice given by DBT as per Clause 10 of the agreement. It is further provided that SCCL shall take insurance cover in USD with DBT as the beneficiary for Spares on a full replacement cost basis from FOB, port of shipment to the Mine Site and these insurance costs shall be to the account of SCCL.

27. Clause 14 provides for warranty period, while clause 17 provides for passing of the risk and title to the goods to SCCL upon delivery effected FOB at the foreign port of shipment.

28. Clause 18 provides for price and payment for the equipment and it is agreed there under that all prices are FOB according to the INCOTERMS 2000, port of origin outside India and that the payment shall be made by SCCL to DBT outside India in USD as per the invoice raised by the DBT.

29. Under clause 20 of the agreement, the SCCL undertakes to provide all other equipments, materials and man power in quantities and quality as defined in Contract RC 224 dated 21.11.2006 for provision of services for introduction of Continuous Miner Technology at GDK11A Underground Mine required to achieve the Annual Guaranteed Production.

30. Clause 21 provides that in case any tax, duty and/or levy etc., is imposed or assessed in India on DBT or its Project Office under this contract, other than mentioned in clause 21.2 and the same is paid to the Govt. by the DBT, SCCL shall make reimbursement of the taxes/duties etc., so paid to DBT on making available the proof of payment of such taxes, duties and/or levies etc., along with the relevant copies of the Govt. order/Demand Notice/Intimation in Indian Rupees.

31. Further, as per the special conditions of the contract set out in Section-II of the Contract and clause 2 thereof, the DBT shall deliver the goods to the port of shipment as per the scope of supply and as per Clause 6 of the contract, DBT shall arrange, supervise and be solely responsible for the transportation of all the goods from the point of manufacture to the port of shipment and port of destination of the goods shall be at Chennai, India.

32. From the above terms of the contract, it is now to be assessed and analyzed as to whether all the three contracts are one composite and indivisible contract? A turnkey project itself indicates that it is composite contract which involves activities from the initial stage to the final stage. All the activities are either interlinked and interdependent or consequent to one another. The Hon'ble Supreme court in the case of Ishikawajima Harima (cited supra) was dealing with the case of a turnkey project by a consortium in which the scope of work of each of the constituent of consortium was specified. The role of the assessee therein was to develop, design, engineer and procure equipment, material and supplies, to erect and construct storage tanks of 5 MMTPA capacity, with potential expansion to 10 MMTPA capacity at the specified temperatures. Thus, the activities of the assesse involved both off-shore supply, offshore services and on shore supply and services. The contention of the revenue before the

Hon'ble Supreme Court was that the contract being a composite and integrated one, the assessee was liable to tax on the offshore supply and services also. The Hon'ble Supreme Court has held that A contract must be construed keeping in view the intention of the parties. Even in the case before us, though SCCL had issued a single tender document for whole of the project, the intention of the assessee to segregate the contract into three contracts was clear from the beginning. It negotiated with SCCL who ultimately agreed to execute three separate contracts with specific scope of work for each of the contracts and different time frames. Thus, the intention of the parties to have three different contracts is proved. In such circumstances, the findings of the authorities below, that all the three contracts are part of a single and composite contract are not sustainable. The question No.1 is accordingly answered in favour of the assesse. The consequential finding that in a composite contract, if there is a PE for one of the contracts, then the PE is there for all the contracts is also not sustainable. According to the revenue, the project office set up on 21.04.2008 is the PE even for the contracts I and II. This is not acceptable. The other ground on which the revenue is holding that the business income of the assessee under contract II is taxable in India is that there is a PE in India by virtue of Contract No.I. during which the technical employees of the assesse company visited India for a total period of 37 days over a span of six months. Article 5(2) of the DTAA between India and Germany defines Permanent Establishment and clause (i) thereof includes a building site or construction, installation or assembly project or supervisory activities in connection therewith , where such site, project or activities continue for a period exceeding six months. In the case before us, the activities under contract No.I did exceed six months. The contract was signed on 21.11.2006 while, DGMS approval was received on 18.10.2007 during which period the employees carried on the work of scientific site investigation and has also designed the mining method to be adopted for obtaining the optimum output as required under the contract. Thus, it can be said that there is a PE for contract I. the contracts II & III are to come into force only after approval of the DGMS is obtained. The results of the contract I are the basis for the design, manufacture and supply of the plant and equipment under contract II. The AO has not doubted the manufacture and delivery of the equipment

outside India. His basis for bringing to tax a part of the income under contract II is that the findings of contract I are the basis for the design of the equipment and therefore part of the income is attributable to activities in India. Even if there is a PE in India for the contracts I and II, only such income which is attributable to activities of the assessee in India is taxable. There is no dispute that the entire activity of designing, (albeit with the information gathered during evaluation of the site and finalization of the project report during contract I), manufacture and delivery of the equipment including the payment was made outside India. Therefore, even if there was a PE for contract II, it cannot be said that the PE of the assesse had any role to play in any of the above activities. The AO and DRP had relied upon some case law to hold that the income contract No. II is taxable in India. In the case of Ansaldo Energia SPA (cited supra) there is a specific finding by the department that the price of Contract No.1 was loaded to take in a portion of the contract price for contract No. II to IV and while discount was offered for contract Nos. II to IV, with regard to Contract No. I no discount was offered. Further, there is also a finding that the assessee therein, a foreign company, had set up a subsidiary company in India, namely ASPL, which was alter ego of the assesse and that ASPL was its PE in India as the site office was jointly occupied by assesse and ASPL. Therefore, this case is distinguishable from the facts of the case before us. In the case of Samsung Heavy Industries Co. Ltd, the issue before the tribunal was whether the project office set up by the assesse therein is a fixed place of business of the assessee in India to carry out wholly or partly the impugned contract in India within the meaning of art.5.1 of the DTAA and in the case Raytheon Company Vs. Deputy CIT, Reported in (2011) 142 TTJ (Del) 137, the question was the date from which the PE had come into existence and also whether the FTS and Royalty for supply of equipment and software embedded therein can be bifurcated. Therefore these two decisions are also not applicable to the facts of the case before us."

4. Learned CIT-DR vehemently contended that the concept of res judicata too is indeed alien to income tax proceedings as per Radhasoami Satsang Vs. CIT (1992) 193 ITR 321 (SC) wherein each and every assessment year involves its own facts and circumstances. He fails to pin-point any distinction vis-à-vis the assessee's taxability in Assessment Year 2009-10 and all the five impugned assessment years during the course of hearing. We thus adopt judicial consistency to accept the assessee's instant substantive ground Nos.2 to 9 (supra) in very terms. It further succeeds in its corresponding substantive grounds in Assessment Years 2010-11, 2011-12 and 2014-15; sole substantive grievance in Assessment Year 2016-17 as well as 2017-18; respectively. Its corresponding appeals ITA No.1127/Hyd/2019 and 116/Hyd/2021 in latter as many assessment years are accepted therefore.

5. We now advert to the assessee's identical second substantive grievance of customs duty expenses disallowance of Rs.1,32,61,917 each in Assessment Year

2010-11 and 2011-12; respectively. This identical corresponding ground in both years' appeals ITA Nos.610/Hyd/2014 and 483/Hyd/2015 reads as under :

> *" 10. On the facts and in the circumstances of the case, the Ld. A O has erred in disallowing the customs duty expense of Rs.13,261,917 claimed in the tax return for A.Y. 2011-12 alleging that the expenses is a prior period expense. Without prejudice to our claim of custom duty expense in A.Y. 2011-12, we pray before your honour to allow the claim of customs duty expenses in the A.Y. 2010-11 based on Ld. A.O. order for A.Y. 2011-12."*

We have given our thoughtful consideration to rival pleadings against and in support of the impugned customs duty disallowance.

6. Learned CIT-DR vehemently contended during the course of hearing that the lower authorities have rightly held that the impugned customs duty expenses are in the nature of prior period expenditure pertaining to earlier assessment years which are not allowable in the impugned assessment year as per mercantile system of accounting.

The assessee has strongly emphasized that the corresponding liability on account of customs duty has crystalized only in these twin relevant assessment years. Learned counsel invited our attention to page 3 in the assessment order dt.20.02.2015 for Assessment Year 2011-12 involving the corresponding vouchers between 31.08.2010 to 30.10.2011. We thus find prima facie merit in the assessee's argument indicating the impugned expenditure which have been crystallized much later in these assessment years and direct the Assessing Officer to verify the corresponding factual position and allow the same as per law in consequential proceedings. This identical later substantive ground in assessment years 2010-11 and 2011-12 is accepted for statistical purposes.

7. Learned counsel next invited our attention to the assessee's identical additional grounds in Assessment Years 2010-11 and 2011-12 that both these assessments are non-est since the Assessing Officer had finalized the

same without issuing the corresponding draft assessment order u/s. 144C(1) of the Act.

8. The Revenue has vehemently opposed admission of the assessee's instant additional substantive ground as a mere afterthought plea only. This tribunal's special bench decision All Cargo Global Logistics Ltd. vs. DCIT 137 ITD 287 (Mum-SB); after taking into consideration hon'ble apex court's landmark judgment in NTPC Limited Vs. CIT 229 ITR 383 (SC), holds that we tribunal can very well establish a pure legal plea raised for the first time in the 2nd appeal proceedings so as to determine correct tax liability of an assessee provided all the relevant facts are on record. We thus reject the Revenue's foregoing technical objection to admission of assessee's instant legal ground. The same is taken up for adjudication in succeeding paragraphs.

9. A combined perusal of both the case files suggests that the Assessing Officer has indeed passed his draft assessment orders dt.28.03.2013 and 14.03.2013;

respectively. This is coupled with the fact that the assessee had thereafter filed its statutory objections before the DRP which were decided on 26.12.2013 and 31.12.2014 followed by the corresponding final assessments herein dt.28.1.2014 and 20.02.2015 (supra).

10. When we highlighted the foregoing facts to the learned counsel, he vehemently contended that the impugned assessments deserve to be quashed the draft assessment herein amount to final assessment only since followed by issuance of 156 demand as well as initiation of penalty proceedings on the very date. Learned counsel quoted Zuari Cement Limited Vs. ACIT (A.P) in W.P. No.5557 / 2012 dt.21.02.2013 (A.P) as upheld in hon'ble apex court since Revenue's SLP stands dismissed, Vijay Television (P) Ltd. Vs. DRP (2014) 369 ITR 113 (Mad), SHL (India) Pvt. Ltd. Vs. DCIT (2021) 128 taxman.com 426 (Bom) and various other decisions that an assessment framed u/s 143(3) r.w.s. 144C of the Act without a draft assessment is not sustainable in law.

11. The Revenue has strongly supported the impugned assessments herein as correctly framed.

12. We have given our thoughtful consideration to rival pleadings and find no merit in assessee's instant additional substantive ground. There is hardly any dispute that we are dealing with an assessment framed under Chapter X of the Act in the nature of an anti tax avoidance provision. The Act itself specifies that chapter X is a " SPECIAL PROVISION RELATING TO AVOIDANCE OF TAX". It is further not an issue that this chapter comes into play in case the assessee enters into international transaction w.e.f. 1.4.2002. Suffice to say, the Transfer Pricing Officer (TPO) decides the corresponding reference made by the Assessing Officer u/s. 92CA(3) of the Act to determine arm's length price (ALP) in relation to the international transactions and sends a copy of his order to both the assessing authority as well as the tax payer concerned. It is at this stage that section 144C(1) of the Act comes into play reading as under :

[" 144C. (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation which is prejudicial to the interest of such assessee."]

Section 144C(1) of the Act herein envisages that the Assessing Officer shall "Not withstanding anything to the contrary contained in this Act", in the first instance, forward a draft of the proposed order of assessment i.e. a draft assessment order to the eligible assessee…… We thus observe that there would be hardly any denial to the fact that this section 144C(1) of the Act in issue contains a non-obstante clause having overriding effect over other provisions in the Act. We quote **Central Bank of India Vs. State of Kerala** (2009) 4 SCC 94 (SC) to this effect.

We also sought to know from both the parties as to whether the legislature has prescribed any draft assessment proforma or not. The reply received was in negative only. Learned counsel invited our attention to case law **Kalyan Kumar Ray Vs. CIT** 191 ITR 634 (SC) that an "assessment" is an integrated process not only involving

computation of total income but also determination of the tax. We find their lordships' decision deals with an instance of 143(3) assessment only in the nature of a general than a special provision alike chapter X before us containing a non-obstante clause in above terms. We also wish to quote the maxim "Generalia Specialibus Non Derogant" is a general provision does not prevail over a special provision.

13. We next deal with the assessee's other judicial precedents. It emerges that hon'ble jurisdictional high court (supra) has dealt with a final assessment dt.23.12.2011 and not a draft assessment which made their lordships to quash the former one as not confirming to the provisions in the Act. Case law Vijay Television (supra) had also arises on account of a final assessment dt.26.03.2013 followed by a corrigendum dt.15.4.2013 that the former order was a draft only. Hon'ble Bombay high court in **SHL (India) Pvt. Ltd. Vs. DCIT** (supra) holds that section 144C is a mandatory provisions which is hardly any issue. Hon'ble Delhi high court in JCB India Limited Vs. DCIT

(2017) 398 ITR 189 (Delhi) came across an assessment framed without any draft assessment order in second round proceedings. We thus hold that the foregoing judicial precedents hardly come to the assessee's rescue. We rather deem it appropriate to quote hon'ble jurisdictional high court's decision in **CIT Vs. B R Constructions** (1993) 202 ITR 222 as to what amounts to a binding precedent as follows :

" 37. The effect of binding precedents in India is that the decisions of the Supreme Court are binding on all the courts. Indeed, article 141 of the Constitution embodies the rule of precedent. All the subordinate courts are bound by the judgments of the High Court. A single judge of a High Court is bound by the judgment of another single judge and a fortiori judgments of Benches consisting of more judges than one. So also, a Division Bench of a High Court is bound by judgments of another Division Bench and Full . A single judge or Benches of High Courts cannot differ from the earlier judgments of co-ordinate jurisdiction merely because they hold a different view on the question of law for the reason that certainty and uniformity in the administration of justice are of paramount importance. But, if the earlier judgment is erroneous or adherence to the rule of precedents results in manifest injustice, differing from the earlier judgment will be permissible. When a Division Bench differs from the judgment of another Division Bench, it has to refer the case to a Full Bench. A single judge cannot differ from a decision of a Division Bench except when that decision or a judgment relied upon in that decision is overruled by a Full Bench or the Supreme Court, or when the law laid down by a Full Bench or the Supreme Court is inconsistent with the decision.

38. It may be noticed that precedent ceases to be a binding precedent -

(i) if it is reversed or overruled by a higher court,

(ii) when it is affirmed or reversed on a different ground,

(iii) when it is inconsistent with the earlier decisions of the same rank,

(iv) when it is sub silentio, and

(v) when it is rendered per incuriam.

39. In paragraph 578 at page 297 of Halsbury's Laws of England, Fourth Edition, the rule of per incuriam is stated as follows :

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decided which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

40. In Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court , the Supreme Court explained the expression "per incuriam" thus (at page 36 of 77 FJR) :

"The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when the Supreme Court has acted in ignorance of a pervious decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court."

42. As has been noticed above, a judgment can be said to be per incuriam if it is rendered in ignorance or forgetfulness of the provisions of a statute or a rule having statutory force or a binding authority. But, if the provision of the Act was noticed and considered before the conclusion arrived at, on the ground that it has erroneously reached the conclusion the judgment cannot be ignored as being per incuriam. In Salmond on Jurisprudence, Twelfth Edition, at page 151, the rule is sated as follows :

"The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force."

43. In Choudhry Brothers' case , as noticed above, the Division Bench treated the judgment in Ch. Atchaiah's case , as per incuriam on the ground that the earlier

Division Bench did not notice the significant changes the charging section 3 has undergone by the omission of the words "or the partners of the firm or the members of the association individually"-. In our view, this cannot be a ground to treat an earlier judgment as per incuriam. The change in the provisions of the Act was present in the mind of the court which decided Ch. Atchaiah's case . Merely because the conclusion arrived at on construing the provisions of the charging section under the old Act as well as under the new Act did not have the concurrence of the latter Bench, the earlier judgment cannot be called per incuriam.

44. Though a judgment rendered per incuriam can be ignored even by a lower court, yet it appears that such a course of action was not approved by the House of Lords in Cassell and Co. Ltd. v. Broome [1972] 1 All ER 801, wherein the House of Lords disapproved the judgment of the Court of Appeal treating an earlier judgment of the House of Lords as per incuriam. Lord Hailsham observed (at page 809) :

"It is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way." ”

We therefore are of the opinion in light of our foregoing detailed discussion that both the draft assessments herein dt.28.3.2013 and 14.3.2013 continue to hold the field as valid ones only as the latter notices would also in the nature of drafts only in light of 144C(1) of the Act. The assessee fails in its identical additional substantive ground raised in assessment year 2010-11 and 2011-12 ITA Nos.610/Hyd/2014 and 483/Hyd/2015; respectively. Both these appeals are partly allowed.

14. The assessee's latter substantive ground in Assessment Year 2014-15 in ITA No.207/Hyd/2017 regarding set off of brought forward losses is restored back to the Assessing Officer for his afresh factual verification in the very terms to be finalized within three effective opportunities of hearing. This appeal 2072/Hyd/2017 is partly allowed in above terms.

No other ground has been pressed before us.

15. These assessee's five appeals are partly allowed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 17th Mar., 2022.

Sd/-	Sd/-
(L.P. SAHU)	**(S.S. GODARA)**
Accountant Member	Judicial Member

Hyderabad, Dt. 17.03.2022.

* Reddy gp

Copy to :

1.	M/s. Caterpillar Global Mining Europe GMBH-India Project Office, Officers Transit Accommodation Building, Near GDK-5 Incline, Vittalnagar, Godavarikhani, Peddapalli, Telangana.
2.	DDIT / DCIT/ ADIT, International Taxation-1, Hyderabad.
3.	Pr. C I T, Hyderabad.
4.	DR, ITAT, Hyderabad.
5.	Guard File.

By Order

Sr. Pvt. Secretary, ITAT, Hyderabad.